UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-1162

VALENTIN SOSKIN, BEI DEI HOWE, EVA ROSENTHAL, VATACHAGAN TATEVOSIAN, GINDA K. GELFAND, YAKOV GELFAND, DUBALE SHIBESHI and SARIN PERLMAN, on their own Behalf and on Behalf of All others Similarly Situated,	)
Plaintiffs-Appellants,	)
vs.	)
KAREN REINERTSON, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing,	)
Defendant-Appellee.	)
UNITED STATES OF AMERICA,	)
Intervenor.	)

PETITION FOR REHEARING

Pursuant to Fed. R. App. P. 35 and 40, plaintiffs respectfully petition for rehearing and rehearing *en banc* of the panel's divided opinion addressing a major constitutional issue of first impression among the federal courts nationwide. The decision, which is reported at 353 F.3d 1242 (Tab A), warrants panel or *en banc* rehearing because it is contrary to the considered views of the Supreme Court in *Graham v. Richardson*, 403 U.S. 365 (1971), and threatens fundamental equal protection principles.

The two-judge majority, over the dissent of Judge Henry, held that a state law expressly discriminating on the basis of alienage is subject only to minimal rational basis review under the Equal Protection Clause. The majority reasoned that a federal law permitting states to adopt alienage classifications should be construed to reduce the level of constitutional scrutiny governing state discrimination. That unprecedented result has never been adopted by any federal court and was held by the Supreme Court to raise grave constitutional doubts in directly analogous circumstances.

BACKGROUND

This case concerns a Colorado statute ("SB 03-176") that terminated the Medicaid coverage of approximately 3,500 longtime legal resident immigrants. 353 F.3d 1242 ("Op.") at 1244. Unless enjoined, Colorado will deny these "legal, tax-paying, and military-serving aliens," 353 F.3d 1265 ("Dissent") at 1265, the essential medical services they currently receive and need. Op. at 1246. Among those at imminent threat of Medicaid termination are victims of Alzheimer's disease, strokes and disabling injuries.

The Colorado law indisputably singles out immigrants for termination solely by operation of state law. Colorado acted voluntarily and was not under any federal compulsion or obligation to enact restrictions on immigrant Medicaid recipients. Op. at 1251. The only purpose of the Colorado law was to save the state money at a time of fiscal difficulty (which has significantly abated since the enactment of the statute and the initiation of this litigation). Op. at 1246; *see also* Dissent at 1272 (noting that measure would have reduced state's existing budget deficit by 0.67%).

Colorado does not dispute—and the majority opinion implicitly recognizes—that under established equal protection standards, Colorado's statute would ordinarily be subject to strict scrutiny and would be found unconstitutional. *See* Op. at 1248, 1250. The only question is whether the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), obviates that equal protection test by virtue of a provision that grants states the option to impose alienage classifications on Medicaid eligibility. Op. at 1248.

The majority answered this question in the affirmative. Its entire rationale appears in point II.A.4 of the opinion. *Id.* at 1254-57. Judge Henry dissented, emphasizing that the majority's "deft methodology . . . disregards the Supreme Court's mandate [to] apply strict scrutiny" to state alienage classifications and

"compromises this court's equal protection jurisprudence." Dissent at 1265.[1]

a. ARGUMENT

The majority held that a state statute discriminating on the basis of alienage should not be subject to strict scrutiny under the Equal Protection Clause because a federal statute purportedly authorized the discrimination. The opinion does not cite a single case affirmatively supporting its conclusion; nor could it, since neither the Supreme Court nor any court of appeals has ever held that a federal statute can reduce the equal protection standard applicable to legislation that a *state* chooses to enact. And the Supreme Court has never even hinted that such a result might be permissible. To the contrary, it has consistently warned that Congress cannot authorize the states to violate the Equal Protection Clause. In *Graham v. Richardson*, 403 U.S. 365 (1971), moreover, the Court found that principle squarely applicable in the very circumstances presented here. In the face of that ruling, the opinion seeks to distinguish *Graham* on grounds that are inapposite and adopts an analysis that undermines equal protection principles.

A. The Panel Misapprehended *Graham v. Richardson* and Misconstrued Federal Law.

In *Graham*, the Supreme Court held that a state welfare law imposing differential eligibility requirements on aliens was subject to strict scrutiny under the Equal Protection Clause and hence unconstitutional. *Id.* at 372, 376. The Court also held that such state laws unconstitutionally "encroach upon exclusive federal power." *Id.* at 380; *see also*

[1] Plaintiffs do not seek rehearing of the Court's limited injunction, solely under the Medicaid statute, imposing certain notice requirements on Colorado's implementation of SB 03-176.

Dissent at 1267-68.

Of critical significance here, *Graham* specifically considered whether the state law's equal protection failing could be cured by a federal statute that authorized – but did not require – the state's action. The Supreme Court expressly and unanimously found that a federal statute would present "serious constitutional questions" if it were to "authorize discriminatory treatment of aliens *at the option of the States*." *Id*. at 382 (emphasis added). First, such a statute would implicate the established and consistently reaffirmed principle that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Id.* (citing *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969)).[2] Second, "[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 [the] explicit constitutional requirement of uniformity." *Id*. Because of these constitutional concerns, the Supreme Court construed the federal law not to authorize the state discrimination. *Id.* at 382-83.

1. In its opinion, the majority dismissed the significance of *Graham*'s constitutional concerns, treating the analysis as mere dicta or as unconvincing because the Supreme Court did not squarely hold a federal statute authorizing state discrimination unconstitutional. Op. at 1256 (describing Court's invocation of uniformity principle as

[2] *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").

"dictum"); *id.* at 1254 (implying that *Graham* had not "tackle[d] the constitutional issue").

The Supreme Court's declarations of a serious constitutional problem were plainly not dicta. The constitutional concerns drove the Court's analysis of federal law and hence were necessary to the Court's resolution of the meaning of the federal statute. *Graham*, 403 U.S. at 382-83 ("*Since* 'statutes should be construed whenever possible so as to uphold their constitutionality,' we conclude that [the federal statute] does not authorize the Arizona . . . residency requirement." (emphasis added; citations omitted).

The majority further erred in finding that the significance of *Graham* should be diminished because the Court construed the federal statute rather than holding the state law "unconstitutional regardless of congressional authorization," Op. at 1254. That fails to acknowledge that in *Graham*, Arizona specifically argued that its state law was authorized by federal statute. In analyzing that defense, the Supreme Court identified two constitutional problems that such federal authorization would present and then assessed whether the federal law could be construed to avoid those constitutional problems. The majority conclusion that the federal statute could fairly be read *not* to present the constitutionally suspect authorization in no way diminishes the seriousness of its constitutional concern. Rather, it reflects the settled principle that courts should construe statutes to avoid constitutional problems.[3]

[3] Even if *Graham*'s findings were less authoritative, they would be of paramount significance because they are the considered views of the Supreme Court. *See*

More critically, the opinion also misperceives the significance of the Supreme Court's reliance on the principle that Congress cannot authorize the states to violate the Equal Protection Clause. *Graham*, 403 U.S. at 382. The majority dismisses the Court's statement as a "proposition [that] is almost tautological," asserting that the actual question is not whether Congress can authorize a violation but "what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens." Op. at 1254. The opinion then cites to Congress' broad power over immigration and the deferential standard of review applicable to federal legislation.

The majority implies that *Graham*'s invocation of the principle against federal authorization of state discrimination did not take into account either an actual express federal authorization or the deferential standard applicable to federal immigration legislation. Both of those assumptions are incorrect. First, in *Graham*, the state argued that federal law "actually authorized" the state discrimination. *Graham*, 403 U.S. at 380. Thus, when the Court interposed the constitutional problems that such a statute would present, it did so in response to Arizona's claim that the federal law actually permitted state discrimination, precisely the same claim as Colorado presents. Nowhere does *Graham* suggest that its constitutional concern would be abated by a "clearly expressed"

Pub. Serv. Co. of N.M. v. Gen. Elec. Co., 315 F.2d 306, 312 n.6 (10th Cir. 1963) ("Without exploring the intricate distinctions between dictum and language necessary to decision, we conclude that we must recognize the clear, direct, explicit, and unqualified statement of the Supreme Court."); *Johnson v. McKune*, 288 F.3d 1187, 1199 (10th Cir. 2002).

federal authorization. To the contrary, the purported authorization is the source of the constitutional problem.

Second, the *Graham* Court was fully cognizant of Congress' broad power over immigration and the deference due any such federal legislation. In fact, the Supreme Court specifically acknowledged the government's broad power over immigrants. *Id*. at 382. Nonetheless, in the very same sentence the Court reiterated that Congress does *not* have the power to authorize state violations of equal protection.[4] Thus, far from being distinguishable or "tautological," the *Graham* admonition is precisely on point and directly instructive because it specifically distinguished between the federal government's broad constitutional power over immigration and the *lack* of federal power to allow the states to discriminate on the basis of alienage.[5]

Finally, independent of the equal protection question, the *Graham* Court also found that a federal statute permitting states to discriminate against aliens at their option "would appear to contravene" the uniformity principle of the Naturalization Clause. *Id*. at 382. Yet, the majority in this case opined that "it is not at all clear" how the Naturalization Clause is implicated "when Congress

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[4] *See Graham*, 503 U.S. at 382 ("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.") (emphasis added).

[5] Nor was *Graham* unaware of the difference between a federal statute that might impose a uniform nationwide rule and one that allows a state option. *See* 503 U.S. at 383 n.14.

restricts welfare benefits to aliens on grounds that have no direct relationship to the naturalization process." Op. at 1256. [6] That reservation about the relevance of the naturalization provision is irreconcilable with the Supreme Court's conclusion that the provision is directly implicated by a federal welfare statute granting states permission to discriminate on the basis of alienage.[7]

2. The majority committed further error by failing to construe the federal statute at issue here to avoid constitutional problems. Plaintiffs do not dispute that PRWORA gives the states some discretion to set Medicaid eligibility standards for certain immigrants. However, the majority erred in construing that authorization as altering the equal protection scrutiny to which such state determinations are subject. Rather, PRWORA addressed the other ground on which *Graham* invalidated the state restriction in that case, namely unsanctioned interference with federal authority.

The Supreme Court invalidated the state laws at issue in *Graham* for two reasons: because they violated the Equal Protection Clause, *Graham,* 403 U.S. at 376 (part II of the opinion), *and* because they violated the principle of federal primacy over immigration matters in violation of federal law, *id.* at 380 (part III of the opinion). *See* Dissent at

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[6] The majority deems it "significant that [the Court] made no explicit mention of the Naturalization Clause" in *Mathews v. Diaz*, 426 U.S. 67 (1976). Op. at 1256. But *Mathews* twice cites specifically to the power of Congress and the President over "immigration and *naturalization*" and relies on authority that cites the Naturalization Clause specifically. 426 U.S. at 82, 82 n.17, 87 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893)).

[7] The majority also decided that a federal statute authorizing discrimination would not violate the Naturalization Clause. Op. at 1257. Plaintiffs dispute that conclusion but the Court need not and should not resolve that issue in this litigation given the dispositive Equal Protection Clause problems.

1267-68 (explaining "twin holdings" of *Graham*). *Graham* thus held that any state alienage restriction must clear "two distinct constitutional hurdles," strict scrutiny and federal preemption. *Id*. Absent federal authorization, any state alienage restriction, whether invidious or benign, would be preempted by the federal immigration power and hence impermissible. Plaintiffs freely admit that PRWORA had the effect of removing the preemption hurdle to the state alienage classifications it authorizes.

However, nothing in the federal legislation suggests that PRWORA had the further – and constitutionally suspect – effect of attempting to validate state discrimination that would otherwise violate equal protection. *See* Dissent at 1274-75; *cf*. *Saenz*, 526 U.S. at 509 (rejecting California's attempt to reduce equal protection scrutiny of state welfare residency requirements on the ground that they were authorized by PRWORA). Given the stark admonition in *Graham*, it is difficult to conceive that Congress would seek to achieve such a controversial result without a single explicit mention of that intent. In fact, the language of PRWORA points in precisely the opposite direction. PRWORA's introductory section, § 1601(7), invokes the standards of strict scrutiny and provides that state statutes adopted pursuant to PRWORA's authorization should be deemed to meet that high standard.[8] The use of that terminology evidences Congress' recognition that state statutes enacted under PRWORA's authority,

[8] PRWORA says that state restrictions should be deemed to constitute "the least restrictive means available for achieving" a "compelling governmental interest" in immigrant self-reliance. PRWORA § 1601(7); *see* Op. at 1245, 1257; Dissent at 1275.

though permissible as a matter of federal law, remain subject to strict scrutiny under the Equal Protection Clause. *See* Dissent at 1275.[9]

Because, as Judge Henry notes, the majority "conflated the twin holdings of *Graham*," Dissent at 1257, the majority missed the point of § 1601(7). The opinion states that "[f]or Congress to say that its statute would survive strict scrutiny is a far cry from Congress's stating that the statute *should be* subject to such scrutiny," and that "[w]e find no reason to believe that Congress wanted to impose on its statute a standard of review more stringent than what the Constitution requires." Op. at 1257 (emphasis in original). The point is not that Congress *imposed* strict scrutiny on its own statute through the enactment of § 1601(7). Rather it is that § 1601(7) confirms that Congress *understood* that strict scrutiny continues to apply to the *state's* decision to discriminate on the basis of alienage. Thus, the majority construed the statute as attempting to change the level of equal protection scrutiny, especially given the serious constitutional problems raised by such an interpretation.

B. The Panel's Analysis Undermines Equal Protection Principles.

1. The opinion imports the rational basis review applicable to *federal* immigration laws to *state* laws permitted by PRWORA on the ground that such state laws should be understood as "effectuat[ing] national policy" even though not required by federal law. *Id.* at 1255. This conclusion is fundamentally

[9] Thus a state statute would be permissible if it were narrowly tailored to satisfy a compelling state interest. *Cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("dispel[ling] the notion that strict scrutiny is 'strict in theory, but fatal in fact'" (citations omitted)).

inconsistent with the reason that federal and state alienage statutes are subject to different equal protection standards.

When the federal government imposes a mandatory policy affecting aliens, the law reflects a determination by Congress and the President that the requirement is necessary for the nation's immigration policy. Judicial deference to such a determination is entirely consistent with the federal government's plenary power over immigration and the deference due the political branches' judgments of what the national interest demands. *See Mathews*, 426 U.S. at 81-82 ("narrow standard of review . . . of decisions made by the Congress or the President in the area of immigration and naturalization."); *see also* Op. at 1250-51 (quoting *Mathews*).

In contrast, state discrimination against aliens presumptively serves no overriding national purpose. Thus, state laws classifying on the basis of alienage are subject to strict scrutiny because they single out a class of persons who "have no direct voice in the political processes," *Foley v. Connelie*, 435 U.S. 291, 294 (1978), and "historically have been disabled by the prejudice of the majority," *Toll v. Moreno*, 458 U.S. 1, 20 (1982) (Blackmun, J., concurring). *See also* Dissent at 1265-67. The Supreme Court has emphasized this critical distinction. *See Mathews,* 426 U.S. at 85 ("a division *by a State* of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business")

(emphasis added).

A federal statute like PRWORA that gives states an *option* to discriminate, and thus does not impose any national requirement one way or the other, does not reflect any overriding national interest in a particular state outcome. The national interest is, by definition, served equally well by any path the state chooses. Under those circumstances, there is simply no federal interest that can justify deviation from the foundational principle that when a *state* decides to discriminate on the basis of alienage it targets a class that is "a prime example of a 'discrete and insular' minority for whom … heightened judicial solicitude is appropriate." *Graham*, 403 U.S. at 372 (citations omitted).

In this case, the United States has candidly acknowledged that the PRWORA provision was "a compromise on a difficult public policy question," Brief of United States as Intervenor at 17, whereby Congress neither required nor prohibited states providing benefits to certain legal immigrants. *See also* Op. at 1251, 1255 (recognizing state choice). Colorado subsequently decided that legal resident aliens should be singled out for discriminatory disqualification from Medicaid. That state decision is not compelled by any national interest. It is ultimately a parochial decision motivated by fiscal concerns that discriminates against a discrete and insular minority and is not deserving of the deference afforded a federal mandatory rule relating to immigration policy.

The opinion relies on the fact that PRWORA, unlike the federal statute at issue in *Graham*, imposes limits on which immigrants the state has the option to terminate from

Medicaid. *Id*. at 1255. But that is a distinction without a difference. The critical inquiry is whether the discrimination is ultimately a product of state choice, not whether the state's purported authority is broad or narrow.

If a deferential standard were applied to state choices whenever a federal option existed, then the essential distinction between the constitutional standard governing federal as opposed to state action could be entirely negated. "Under this theory, there would be few if any limits to a state's ability to discriminate against legal immigrants once given the 'option.'" Dissent at 1275.

2. The opinion rests on a flawed analytic framework that could negate virtually any claim of invidious classification in a benefits program. The majority asserts that the discrimination at issue here can actually be viewed as the congressional creation of two separate Medicaid programs (one for citizens and one for immigrants), and that Colorado is discriminating only among immigrants in the immigrant-serving program "based on nonsuspect classifications such as work history or military service." Op. at 1255-56.

That assertion has no basis in fact and is directly contrary to the nature of the Medicaid program as established by federal statute. Neither PRWORA nor SB 03-176 creates separate Medicaid programs for citizens and immigrants.[10] Rather, PRWORA allows a state to impose certain alienage eligibility restrictions

[10] 42 U.S.C. § 1396a(a)(1) requires states to ensure uniform statewide administration of their Medicaid plans. *See Columbus v. Ours Garage and Wrecker Service, Inc.* 536 U.S. 424, 438 (2002).

in the *single* plan that governs the operation of its unitary statewide Medicaid program. *See* 8 U.S.C. §§ 1611, 1612. Moreover, Colorado did not, and cannot, claim that SB 03-176 reflects a decision to distinguish among individuals based on nonsuspect classifications. *See* Dissent at 1275 n.4 ("Clearly, the State recognizes that the entirety of the class is affected."). Instead, Colorado terminated all "optional" immigrants from its Medicaid program precisely because of their status as non-citizens.

The majority's attempt to recharacterize Colorado's program sets a dangerous precedent. Discrimination, by definition, involves treating one group differently from others. If Colorado's explicit and invidious restrictions can be characterized as establishing two programs and as inoffensively discriminating only *among* immigrants in the "alien-only" program, the same analysis could be used to view virtually any discrimination as inoffensive.

In adopting this two-program analysis the opinion tries to shoehorn Colorado's statute into the analysis of *Doe v. Comm'r of Transitional Assistance,* 773 N.E.2d 404 (Mass. 2002), a case that applied rational basis review to an entirely different type of state program. *See* Op. at 1256. In *Doe*, Massachusetts actually had two programs – the federally supported Temporary Assistance for Needy Families (TANF) program and a *separate* state-funded program open *only* to aliens who are not eligible for TANF. 773 N.E.2d at 407. The two programs were not hypothetical, but real. The plaintiffs challenged a six-month state residency requirement that applied to all recipients in the separate state program,

a non-invidious restriction very different than the one at issue here. *Id*. at 407-08.

In fact, *Doe* supports applying strict scrutiny to Colorado's statute. As *Doe* recognizes, *id*. at 411-12, in *Nyquist v. Mauclet* the Supreme Court rejected the argument that a state restriction discriminating among aliens (rather than between aliens and citizens) on the basis of their immigration status does not constitute suspect alienage discrimination. *Nyquist*, 432 U.S. 1, 9 (1977) (applying strict scrutiny to state statute differentiating between categories of legal residents on the ground that the statute was "directed at aliens and that only aliens are harmed by it.") *Doe* distinguishes *Nyquist* on the grounds that the Massachusetts "statute establishes a program open only to aliens, imposes a residency requirement on all who are qualified to apply for its benefits, and does not harm aliens by barring them from the benefits of the program." *Doe*, 773 N.E.2d. at 412. As the dissent explains, none of these conditions applies here. Dissent at 1271-72.

Moreover, *Aliessa v. Novello,* 754 N.E.2d 1085 (N.Y. 2001), is the decision most directly on point. *See* Op. at 1252 ("The parties' equal protection arguments in *Aliessa* mirrored those of the parties in this case ...."). In *Aliessa*, New York's highest court rejected the claim that a state classification excluding certain categories of immigrants from a state-funded program should be evaluated under a rational basis test because PRWORA authorized the exclusion. The court held that PRWORA afforded the state's alienage discrimination "no special insulation from strict scrutiny review," and emphasized that construing PRWORA

to diminish the level of equal protection scrutiny of state discrimination would be "directly in the teeth of *Graham*." *Aliessa*, 754 N.E.2d at 1098.

In sum, the opinion's failure to apply strict scrutiny to Colorado's statute is contrary to established equal protection jurisprudence, finds no support in the case law and undermines the constitutional protection for legal immigrants against state discrimination.

CONCLUSION

For the reasons and upon the authorities cited above, the petition for rehearing and rehearing *en banc* should be granted.