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## Commonwealth of Massachusetts Supreme Judicial court brief and record appendix for the plaintiff on reserve and report from the single justice, Finch, et al. v. Commonwealth Health Insurance Connector Authority, et al., No. SJC-10748 (filed September 2010)

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss.

No. SJC-10748

DOROTHY ANN FINCH, ROXANNE S. PRINCE  
and JANE DOES NOS. 1-2,  
the names of Jane Doe being fictitious,  
Individually and on Behalf of  
All Similarly Situated Persons

vs.

COMMONWEALTH HEALTH INSURANCE  
CONNECTOR AUTHORITY, and  
JON KINGSDALE, in his official capacity as  
the executive director of COMMONWEALTH  
HEALTH INSURANCE CONNECTOR AUTHORITY  
and COMMONWEALTH OF MASSACHUSETTS

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BRIEF AND RECORD APPENDIX FOR THE PLAINTIFF  
ON RESERVE AND REPORT FROM THE SINGLE JUSTICE

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**ISSUES PRESENTED**

(1) Whether arts. 1 and 10 of the Massachusetts Declaration of Rights, as amended by art. 106, protect against discrimination on the basis of legal alienage.

(2) Whether § 31(a), a state law that facially discriminates against non-citizens, should be subject to strict scrutiny under the Declaration of Rights.

**STATEMENT OF THE CASE**

The plaintiffs filed their complaint with a Single Justice of the Supreme Judicial Court (Cordy, J.) on February 25, 2010. The plaintiffs requested that the Supreme Judicial Court exercise original jurisdiction over the case pursuant to Mass. Gen. Laws ch. 214, § 1 (2010), on the grounds that it was a matter clearly affecting the public interest, raising questions of law that involve no genuine issues of material fact.

The Single Justice reserved and reported four questions to the full Court on July 9, 2010 and ordered the parties to develop and file an agreed statement of facts. The case was docketed in this Court on July 16, 2010.



decline such insurance); are ineligible for MassHealth, Medicare, or the state's child health insurance program; and have household incomes up to 300 percent of the Federal Poverty Level (FPL). Provencal, 456 Mass. at 508; R.A-111-12: Stip. ¶¶3-5, 10.<sup>2</sup>

Defendant Commonwealth Health Insurance Connector Authority (the Connector) administers Commonwealth Care. R.A-112: Stip. ¶6. The Legislature charged the Connector with "facilitat[ing] the availability, choice and adoption of private health insurance plans to eligible individuals and groups." Mass. Gen. Laws ch. 176Q, §2(a); R.A-112: Stip. ¶6. To satisfy that duty, the Connector sets and provides premium assistance for Commonwealth Care members. R.A-111: Stip. ¶3. Commonwealth Care's funding comes from the Commonwealth Care Trust Fund (CCTF), which receives

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<sup>2</sup> Although Mass. Gen. Laws ch. 118H, § 3(a) imposes a six month durational residency requirement for Commonwealth Care, and does not limit eligibility to residents nineteen and over, the Commonwealth Care program guide ignores the durational residency requirement while restricting eligibility to individuals 19 and older. See R.A-136: Stip. Exh. B1 at 3. Neither the durational residency requirement nor the age limit is relevant to the case and will not be noted below. R.A-114: Stip. ¶10.

money from a variety of state sources, including the state's General Funds, which in turn receives partial federal reimbursement. R.A-120-21, 127: Stip. ¶¶22, 23, 39.

On August 7, 2009, the Legislature enacted St. 2009, c. 65, § 31(a), which states that individuals eligible for Commonwealth Care

shall not include persons who cannot receive federally-funded benefits under sections 401, 402 and 403 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, as amended, for fiscal year 2010.

R.A-115-16: Stip. ¶13. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), cited in § 31(a), is an Act of Congress that denies federal funds for specific federal benefits to certain categories of legal aliens. R.A-116, 130: Stip. ¶¶15, 47. Due to PRWORA, between 2006 and the enactment of § 31(a) in 2009, the State received no federal money for providing Commonwealth Care to the plaintiffs. R.A-130: Stip. ¶47.

As a result of § 31(a), the Connector terminated approximately 29,000 legal aliens from Commonwealth Care. R.A-117-18: Stip. ¶16. Since then, approximately 14,000 additional legal

aliens have been denied access to the program due to § 31(a).<sup>3</sup> R.A-118: Stip. ¶17. The plaintiffs fall within the category of residents who are legal aliens and are barred from receiving Commonwealth Care due to § 31(a). R.A-5: Compl. ¶11.<sup>4</sup>

#### **SUMMARY OF ARGUMENT**

Article 106 of the Amendments to the Massachusetts Constitution prohibits discrimination based on alienage. Like the plaintiffs, all legal resident non-citizens -- aliens -- have a national origin outside the United States. Discrimination

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<sup>3</sup> Because St. 2009, c. 65, was an appropriations act, its outside sections, including § 31, expired at the end of FY 2010. Section 136 of the FY 2011 General Appropriations Act, St. 2010, c. 131 (approved June 30, 2010), essentially reenacted all relevant provisions of § 31. R.A-118-20: Stip. ¶¶18-19. Hereinafter all references to § 31 will also apply to § 136.

<sup>4</sup> The plaintiffs were either enrolled in Commonwealth Care prior to § 31(a) or would have been eligible for it but for § 31(a). As such, the plaintiffs are residents of the Commonwealth who either hold green cards or are living under color of law. The State has treated such persons as legal aliens. See R.A-120: Stip. ¶20; R.A-260-61: Stip. Exh. B1 at 3-4. See also Aliessa ex rel. Fayad v. Novello, 96 N.Y.2d 418, 422 (2001) (explaining that green card holders and persons permanently residing in the United States under color of law are "legal aliens").

against legal aliens necessarily and exclusively falls on those whose national origin is outside the United States, and on no one whose national origin is within the United States. Such laws amount to national origin discrimination, just as laws that necessarily and exclusively burden non-white individuals, however phrased, amount to racial discrimination. (Pp. 7-12)

In addition to art. 106's textual protections against national origin discrimination, the general equal protection provisions of arts. 1 and 10 of the Massachusetts Constitution prohibit discrimination against legal aliens. Legal aliens are a prime example of a suspect class. They are a discrete and insular minority without representation in the political process. They have been subjected to a long history of purposeful unequal treatment. State laws that discriminate against legal aliens warrant strict scrutiny. (Pp. 12-21)

The State's decision to exclude a class of legal immigrants from Commonwealth Care should be subject to strict scrutiny. Section 31(a) plainly discriminates against legal aliens without any sanction by federal law. Federal law is indifferent to whether the State includes the plaintiffs in Commonwealth Care, as it

did in 2006, or whether it excludes the plaintiffs, as it did in 2009. Section 31(a) must therefore be subject to strict scrutiny and not the deferential rational basis test applied to laws conforming to federal immigration policy. (Pp. 21-49)

### ARGUMENT

**I. The prohibition against discrimination on the basis of "national origin" in art. 106 of the Amendments to the Massachusetts Constitution encompasses discrimination against legal aliens.**

The first question report by the Single Justice is:

1) Does the protection against discrimination on the basis of "national origin," as enumerated in art. 106 of the Amendments to the Massachusetts Constitution, include protection against discrimination on the basis of alienage, i.e. one's immigration status?

The answer is yes. This Court's references to national origin and alienage make the inclusion clear.

Article 106 of the Amendments, commonly known as the Equal Rights Amendment, amends art. 1 of the Declaration of Rights to provide that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Constitutional language is to be interpreted "as the Constitution of a State and not as a statute or an

ordinary piece of legislation." Cohen v. Attorney General, 357 Mass. 564, 571 (1970), quoting Tax Comm'r v. Putnam, 227 Mass. 522, 524 (1917). As the Court further quoted:

It is to be interpreted in the light of the conditions under which it and its several parts were framed, the ends which it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy. . . . It is a statement of general principles and not a specification of details.

Cohen, 357 Mass at. 571.

Immigration status differs from national origin only in the narrowest technical sense. "[T]he term 'national origin' . . . on its face refers to the country where a person was born or, more broadly, the country from which his or her ancestors came . . . ."

Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).

Unlike citizens, who may be born inside or outside the United States, all aliens, without exception, have a national origin outside the United States. Thus discrimination against legal aliens necessarily and exclusively affects legal residents whose national origin is outside the United States, while sparing everyone whose national origin is within the United States. Such laws amount to national origin discrimination, just as laws that burden only non-

white persons amount to racial discrimination, even though some non-white persons may be unaffected. See Nyquist v. Mauclet, 432 U.S. 1, 9 (1977) (in alienage discrimination, “[t]he fact that the statute is not an absolute bar does not mean that it does not discriminate against the class”).<sup>5</sup> Taking it as a statement of general principles, in view of the evils it was intended to remedy, art. 106 must apply to discrimination against non-citizens as a subset of those whose national origin is outside the United States.

The United States Supreme Court has long held that the Fourteenth Amendment requires strict scrutiny of state laws that discriminate on the basis of alienage or national origin. See Nyquist, 432 U.S. at 7; Graham v. Richardson, 403 U.S. 365, 372 (1971). The relationship between discrimination based on alienage and national origin was explained by Justice Rehnquist, while dissenting on another issue, in Trimble v. Gordon:

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<sup>5</sup> Doe v. Commissioner of Transitional Assistance distinguished Nyquist on the basis that only the protected class (aliens) was eligible for the state program at issue in Doe. 437 Mass. 521, 529 (2002). For a fuller discussion, see *infra* pp. 28-37.

If race was an invalid sorting tool where blacks were concerned, it followed logically that it should not be valid where other races were concerned either. A logical, though not inexorable, next step, was the extension of the protection to prohibit classifications resting on national origin. . . . In cases involving alienage, [the Court] has concluded that such classifications are 'suspect' because, though not necessarily involving race or national origin, they are enough like the latter to warrant similar treatment.

430 U.S. 762, 780-81 (1977) (Rehnquist, J., dissenting) (citations omitted; emphasis added). As Justice Rehnquist recognized, alienage discrimination substantially overlaps with national origin discrimination and demands the same scrutiny. Id.<sup>6</sup>

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<sup>6</sup> It is true that the Supreme Court has read the statutory prohibition against national origin discrimination in Title VII not to apply to alienage discrimination. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). However, that case turned on Congressional intent rather than the Constitution. Id. at 89. See Cohen v. Attorney General, 357 Mass. 564, 571 (1970) (constitutional language more general than statutory). The Court's analysis was heavily influenced by the fact that Congress had exercised its plenary authority over immigration by excluding non-citizens from federal employment, and could not have intended Title VII to bar such conduct. Espinoza, 414 U.S. at 89-91. By contrast, Massachusetts has no authority to regulate immigration. See Sugarman v. Dougall, 413 U.S. 634, 641-43 (1973) (applying strict scrutiny to state law barring public employment of non-citizens).

Justice Douglas's dissent in Espinoza, persuasive in the context of that decision, is compelling here:

This Court also noted the connection between alienage and national origin not long after the adoption of the Equal Rights Amendment. In Commonwealth v. King, this Court stated:

[t]he classifications set forth in art. 106 . . . with the exception of sex, are within the extensive protection of the Fourteenth Amendment to the United States Constitution and are subjected to the strictest judicial scrutiny.

374 Mass. 5, 21 (1977), citing the protection of aliens in the Graham case as one example. In Opinion of the Justices to the Senate, the Court reasoned that, by enumerating the protected classes of "sex, race, color, creed or national origin," "the people of Massachusetts have expressed their intention" that the same strict scrutiny standard applied in Graham and other Supreme Court cases should be applied to gender. 373 Mass. 883, 886-87 (1977). By invoking Graham,

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Alienage results from one condition only: being born outside the United States. Those born within the country are citizens from birth. It could not be more clear that [the defendants'] policy of excluding aliens is de facto a policy of preferring those who were born in this country.

Espinoza, 414 U.S. at 96.

this Court included alienage-based discrimination among the classifications protected by art. 106.<sup>7</sup>

To do justice to the intent and purpose of art. 106, the "national origin" clause must be read to prohibit discrimination on the basis of alienage. The answer to the Single Justice's first question is yes.

**II. The general contours of equal protection in the Massachusetts Constitution prohibit discrimination against legal aliens.**

The Single Justice's second question is:

2) If the answer to question one is negative, does any other provision of the Massachusetts Constitution provide special protection against discrimination on the

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<sup>7</sup> The exact quote of this Court was:

With the exception of sex, [the art. 106] classifications have long been afforded extensive protection under the Fourteenth Amendment to the Constitution of the United States. Race, color, and national origin have been designated suspect classifications and as such have been subject to the strictest judicial scrutiny. Governmental action which apportions benefits or burdens according to such suspect categorizations is constitutionally permissible only if it furthers a demonstrably compelling interest and limits its impact as narrowly as possible consistent with the legitimate purpose served. See, e.g., Graham v. Richardson, 403 U.S. 365 (1971) (alienage).

. . .

Opinion of the Justices to the Senate, 373 Mass. 883, 886 (1977).

basis of alienage beyond the general contours of equal protection?

The answer to question one is affirmative.

Nonetheless, the general contours of equal protection also prohibit discrimination based on alienage. The plaintiffs take "the general contours of equal protection" to include the now well-established principle that under the Declaration of Rights courts must apply strict scrutiny to laws that discriminate against "discrete and insular minorities." The plaintiffs are clearly members of a discrete and insular minority: legal immigrants and non-citizens. Their claims must therefore be judged under a strict scrutiny standard. The plaintiffs turn to this argument in the following section.<sup>8</sup>

**III. State classifications based on alienage should be subject to strict scrutiny under arts. 1 and 10 of the Declaration of Rights.**

The third question reported is:

3) If the answers to question one and to question two are negative, should a State classification based on alienage be subjected to a "rational basis" standard of review under the Massachusetts Constitution to determine whether there is a rational relationship between the disparity of

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<sup>8</sup> The Court need not consider here whether provisions of the Constitution other than arts. 1 and 10 protect against discrimination based on alienage.

treatment between citizens and aliens and some legitimate government purpose?

The answers to questions one and two are yes.

However, even if the answers were no, a state classification based on alienage must be subjected to strict scrutiny under well-established standards of equal protection law because it targets a discrete and insular minority.

- A. The Equal Protection Clause of the Federal Constitution requires strict scrutiny of state laws that discriminate against aliens because aliens are a discrete and insular minority.

"In matters concerning aliens, the Massachusetts Declaration of Rights has been interpreted to provide a right to the equal protection of the laws, coextensive with the Federal right." Doe v. Commissioner of Transitional Assistance, 437 Mass. 521, 525 (2002). "It is the general rule that State laws that discriminate against legal immigrants in the distribution of economic benefits are subject to strict scrutiny." Id. at 525-26, citing Graham v. Richardson, 403 U.S. 365, 375-76 (1971).<sup>9,10</sup>

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<sup>9</sup> Doe stated that strict scrutiny is inapplicable when state discrimination is compelled by federal law. 437 Mass. at 526. The plaintiffs demonstrate in Section IV, *infra*, that Doe's exception does not apply here,

In the seminal case of Graham, the Supreme Court held that the Federal Constitution requires that alienage-based discrimination receive the same protection as discrimination based on nationality or race:

It has long been settled, and it is not disputed here, that the term "person" in [the Fourteenth Amendment] 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. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). . . . [T]he 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"

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because federal law neither compels nor forbids the state policy underlying this case. Other exceptions to strict scrutiny are also not relevant here. See, e.g., Toll v. Moreno, 458 U.S. 1, 12 n.17 (1982) (political functions); Plyler v. Doe, 457 U.S. 202 (1982) (undocumented immigrants); LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005) (non-immigrant aliens); Barge-Wagener Const. Co. v. Morales, 263 Ga. 190 (1993) (non-residents of state). Because strict scrutiny is required in the general case, the answer to the Single Justice's third question is no.

<sup>10</sup> Massachusetts courts have repeatedly applied the federal standard of strict scrutiny to state discrimination against legal aliens. See, e.g., Commonwealth v. Chou, 433 Mass. 229, 237 n.6 (2001); Murphy v. Comm'r of Dept. of Indus. Accidents, 415 Mass. 218, 227 n.16 (1993); Commonwealth v. Acen, 396 Mass. 472, 481 (1986).

minority (see United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate.

403 U.S. at 371-72 (internal citations omitted).

Since Graham, the Supreme Court has repeatedly reaffirmed that state laws discriminating on the basis of alienage are subject to strict scrutiny. See, e.g., Bernal v. Fainter, 467 U.S. 216, 219-20 & n.5 (1984) (applying strict scrutiny to statute requiring notaries public to be U.S. citizens); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (same, civil engineers); In re Griffiths, 413 U.S. 717, 721 (1973) (same, attorneys); Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (same, civil servants). State courts have reached similar conclusions under their constitutions. See Ehrlich v. Perez, 394 Md. 691, 730-31 (Md. 2006) (state Declaration of Rights provides protections for aliens coextensive with the Fourteenth Amendment).

Graham's rule was "deemed necessary since aliens -- pending their eligibility for citizenship -- have no direct voice in the political processes." Foley v. Connelie, 435 U.S. 291, 294 (1978). "From its inception, our Nation welcomed and drew strength

from the immigration of aliens." Griffiths, 413 U.S. at 719.

Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

Id. at 722.<sup>11</sup>

Justice Blackmun, concurring in Toll v. Moreno, further explained the policy underlying Graham:

By labeling aliens a "'discrete and insular' minority," the [Graham] Court did something more than provide a historical description of their political standing. That label also reflected the Court's considered conclusion that for most legislative purposes there simply are no meaningful differences between resident aliens and citizens, so that aliens and citizens are "persons similarly circumstanced" who must "be treated alike." At the same time, both common experience and the unhappy history reflected in our cases, demonstrate that aliens often have been the victims of irrational discrimination. . . . If anything, the fact that aliens constitutionally may be -- and generally

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<sup>11</sup> Ironically, the plaintiffs are subject to taxation for the very benefits they are denied. Chapter 58 created a system of mandates and subsidies, including Commonwealth Care, and requires all residents, including the plaintiffs, to purchase health insurance, pay a penalty, or demonstrate that credible health insurance is unaffordable. R.A-113: Stip. ¶¶8-9; R.A-149: Exh. C. The plaintiffs' exclusion from Commonwealth Care does not excuse them from the mandate to have health insurance. R.A-130: Stip. ¶49.

are -- formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage.

458 U.S. at 20-23 (Blackmun, J., concurring) (internal citations and quotations omitted).

B. This Court should reaffirm that state laws that discriminate against legal aliens are subject to strict scrutiny.

Under the tradition of equal protection championed by the Declaration of Rights, as well as the sound reasoning in analogous federal cases, strict scrutiny must be applied under Massachusetts law to state discrimination against legal aliens.

Massachusetts is not, of course, bound by federal precedent in interpreting its own Constitution.

Planned Parenthood League of Mass., Inc. v. Attorney General, 424 Mass. 586, 590 (1997). In the equal protection context, "the Federal decisions may reflect a standard of review less restrictive than that required by the Massachusetts Declaration of Rights." Zayre Corp. v. Attorney General, 372 Mass. 423, 433 n.22 (1977). The plaintiffs are not aware of any cases applying a more deferential standard of review under the Declaration of Rights than is required by federal law. See, e.g., Doe, 437 Mass. at 525-26

(under both constitutions, general rule is that state laws that discriminate against legal immigrants are subject to strict scrutiny); Soares v. Gotham Ink of New England, Inc., 32 Mass. App. Ct. 921, 923 (1992) ("Classifications that have been recognized under Federal and State law as suspect are alienage, race, and national ancestry"). See also Commonwealth v. King, 374 Mass. 5, 21 (1974) ("The classifications set forth in art. 106 . . . , with the exception of sex, are within the extensive protection of the Fourteenth Amendment . . . and are subjected to the strictest judicial scrutiny," citing Graham, (protecting alienage) and Oyama v. California, 332 U.S. 633, 646 (1948) (protecting national origin)).

Suspect classes are not limited to those defined in art. 106; a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." LaCava v. Lucander, 58 Mass. App. Ct. 527, 532 (2003), quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976). See also Neff v. Commissioner of Dept. of Indus.

Accidents, 421 Mass. 70, 87-88 (1995) (O'Connor, J., dissenting, regarding issue not reached by majority), quoting Soares, 32 Mass. App. Ct. at 923. Suspect classes include those "based on race, religion, national origin or similar characteristics." Neff, 421 Mass. at 88 (O'Conner, J., dissenting) (emphasis added).

Legal aliens are a prime example of a suspect class. They have no representation in the political process. Hampton v. Mow Sun Wong, 426 U.S. 88, 102 & n.22 (1976) (political exclusion of non-citizens buttresses finding of discrete and insular minority, shows they suffer special disabilities). They "are often handicapped by a lack of familiarity with our language and customs." Id. at 102. They have been subjected to a long history of purposeful unequal treatment, as demonstrated by the many cases striking down laws discriminating against them.<sup>12</sup> Sadly, such discrimination continues all-too-frequently today.<sup>13</sup>

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<sup>12</sup> See, e.g., Bernal v. Fainter, 467 U.S. 216, 225-26 (1984) (striking down state discrimination in qualifications for notaries public); Nyquist v. Mauclet, 432 U.S. 1, 11-12 (1977) (same, financial assistance for higher education); In re Griffiths, 413 U.S. 717, 729 (1973) (same, attorneys); Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (same, civil

The Declaration of Rights is, without exaggeration, the last bastion for people like the plaintiffs. From the Quock Walker cases challenging slavery in 1783, to Goodridge v. Dep't of Public Health, 440 Mass. 309 (2003), Massachusetts courts have led the way in protecting individual rights. This case presents a clear occasion for reaffirming our courts' preeminent role. This Court should hold that strict scrutiny applies to state discrimination on the basis of alienage under the Massachusetts Declaration of Rights.

**IV. Section 31(a)'s exclusion of legal aliens from Commonwealth Care requires strict scrutiny.**

The Fourth Question reported is:

4) If the answer to either question one or to question two is affirmative, what level of judicial scrutiny should be applied to

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servants); Truax v. Raich, 239 U.S. 33, 42-43 (1915) (same, private employment); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (same, laundry permits). See also, e.g., Aliessa ex rel. Fayad v. Novello, 96 N.Y.2d 418, 435-36 (2001) (same, medical assistance); Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249, 251 (Fla. 1987) (same, business agent license); Raffaelli v. Committee of Bar Examiners, 7 Cal.3d 288, 302 (1972) (same, admission to practice law).

<sup>13</sup> Alejandro Portes & Rubén G. Rumbaut, *A Portrait of Immigrant America*, University Of California Press (Berkeley), 346-48 (3d ed. 2006) (discussing the continuation of xenophobia, nativism and anti-immigrant sentiment in the twenty-first century).

the classification contained in § 31(a), especially in light of the character of the Commonwealth Care program and the nature of its funding mechanisms?

The answer is "strict scrutiny." Likewise, if, as the plaintiffs contend in response to question three, classifications that discriminate based on alienage are also subject to strict scrutiny under arts. 1 and 10, § 31(a) must be subject to strict scrutiny regardless of the answers to questions one or two. Whether the protection for aliens derives from the "national origin" clause of art. 106 or the general equal protection provisions of arts. 1 and 10, § 31(a) is subject to strict scrutiny because it discriminates against legal aliens,<sup>14</sup> access to a state-created program and is not compelled by, closely related to, or sanctioned by any federal law or policy.

A. Section 31(a) plainly discriminates on the basis of alienage.

In enacting § 31(a) the State deprived one and only one class of otherwise eligible residents --

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<sup>14</sup> There can be no claim that § 31(a) discriminates on the basis of illegal alienage. By its terms, § 31(a) does not limit its exclusion to illegal aliens. Moreover, prior to § 31(a), individuals had to demonstrate that they were citizens or legal immigrants as defined by the defendants. See supra note 4.

legal aliens -- access to Commonwealth Care because, in the Connector's words, they did not "meet the immigration and citizenship requirements of Commonwealth Care." R.A-117-18: Stip. ¶¶ 16-17; R.A-163-74: Stip. Exhs. E-F. Section 31(a) affected no citizens. Indeed, even after § 31(a), Commonwealth Care remained available to citizens who were similarly situated to the legal aliens affected by § 31(a) in that the Commonwealth did not receive federal support for their health care premiums. R.A-73: Ans. Am. Compl. ¶32.

The fact that not all legal aliens are harmed by § 31(a) does not mean that the discrimination here was not based on alienage. In Nyquist v. Mauclet, 432 U.S. 1 (1977), the Supreme Court analyzed under the Fourteenth Amendment's Equal Protection Clause a New York statute that barred some, but not all, aliens from receiving state assistance for higher education. In finding that the statute discriminated on the basis of alienage, the Court stated: "[t]he important points are that [the state statute] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." Id. at 9.

Other cases have affirmed this basic principle: a state statute that harms only aliens discriminates on the basis of alienage even if it does not harm all aliens. See, e.g., Graham v. Richardson, 403 U.S. 365, 374-76 (1969) (state laws that bar some but not all legal aliens from welfare benefits violate the Federal Equal Protection Clause); Ehrlich v. Perez, 394 Md. 691, 719 (2006) ("Statutory discrimination within the larger class of legal resident aliens, providing benefits to some aliens, but not to others, is nonetheless a classification based on alienage"); Barranikova v. Town of Greenwich, 229 Conn. 664, 687-88 (1994) (law that affects only sponsored aliens discriminates against aliens under Fourteenth Amendment).<sup>15</sup>

That § 31(a) works its exclusion by referencing a federal statute (PRWORA)<sup>16</sup> rather than by using the

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<sup>15</sup> In Mathews v. Diaz, 426 U.S. 67 (1976), the Supreme Court stated that a different analysis should apply to federal statutes. As discussed below, Mathews does not apply when reviewing state statutes not compelled by or conforming to federal law. See *infra* pp. 25, 34.

<sup>16</sup> Section 31(a) denies Commonwealth Care to "persons who cannot receive federally-funded benefits under sections 401, 402 and 403 of [PRWORA]."

terms "alienage," "immigration," or "non-citizen," does not change the analysis. As the Supreme Court has recognized, Congress has plenary powers over immigration and naturalization, Mathews v. Diaz, 426 U.S. 67, 79-80 (1976), and may draw distinctions among aliens that states cannot draw.<sup>17</sup> When states independently single out a class of legal aliens for legal detriments, their actions are properly viewed as discrimination on the basis of alienage and therefore are generally subject to strict scrutiny.<sup>18,19</sup> Accordingly, courts reviewing state statutes that incorporate or rely upon PRWORA have generally found

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<sup>17</sup> See, e.g., Mathews, 426 U.S. at 85; City of Chicago v. Shalala, 189 F.3d 598, 605 (7th Cir. 1999) ("The States enjoy no power with respect to the classification of aliens. This power is committed to the political branches of the Federal Government") (cites and internal quotes omitted).

<sup>18</sup> Strict scrutiny may not apply when states regulate with respect to their political functions. *Supra* note 9. Also, state actions that are compelled by or closely related to an act of Congress may be subject to the rational basis test. See *infra* p. 28-29.

<sup>19</sup> See, e.g., Kiev v. Glickman, 991 F.Supp. 1090, 1094 (D.Minn. 1998) ("State alienage classifications . . . are generally subject to strict scrutiny").

that the statute discriminates on the basis of alienage.<sup>20</sup>

This Court's opinion in Doe v. Commissioner of Transitional Assistance, 437 Mass. 521 (2002), is consistent with that conclusion. In Doe, this Court upheld a six-month residency requirement for a state cash assistance program available only to qualified aliens.<sup>21</sup> In concluding that the rational basis test applied, Doe made clear that the issue before it was "a State law that does not discriminate between citizens and aliens, but includes a residency requirement for the only class of individuals eligible to participate in the program it establishes, qualified aliens." 437 Mass. at 529. The United States Court of Appeals for the Tenth Circuit adopted Doe's reasoning on this point in finding that a state law repealing legal aliens' access to Medicaid did not

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<sup>20</sup> See, e.g., Ehrlich, 394 Md. at 730-31; Aliessa ex rel Fayad v. Novello, 96 N.Y.2d 418, 435-36 (2001).

<sup>21</sup> PRWORA divides aliens into two classes: qualified and unqualified, 8 U.S.C. § 1641, and prohibits federal financial support for certain means-tested benefits for unqualified aliens and even for some qualified aliens. Id. at § 1613. The distinction between qualified and unqualified aliens is not germane here.

discriminate on the basis of alienage. Soskin v. Reinertson, 353 F.3d 1242, 1255-56 (10th Cir. 2004).<sup>22</sup>

Commonwealth Care, in sharp contrast to the cash assistance program at issue in Doe, or the state law at issue in Soskin, was not established solely to assist aliens.<sup>23</sup> Rather, the Legislature created Commonwealth Care as a "key feature" of Massachusetts' landmark health insurance reform law, Chapter 58. R.A-111: Stip. ¶2. Prior to § 31(a), eligibility depended on a few simple criteria: the individual had to be an uninsured resident of the Commonwealth with a household income up to 300 percent of the FPL who was ineligible for (and did not receive an incentive to decline) employer-sponsored or other public health

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<sup>22</sup> Khrapunskiy v. Doar, 12 N.Y.3d 478 (2009), is not apposite. The court there found that New York's failure to provide any supplemental assistance to aliens above that available under federal law did not discriminate because there simply was no state statute that provided additional benefits. Id. at 488-89.

<sup>23</sup> Unlike Doe, the focus here is on discrimination between aliens and citizens, not between classes of aliens. The constitutionality of the Commonwealth Bridge program, established by St. 2009, ch. 65, § 31(b), a program less generous than Commonwealth Care which was available only to legal aliens who had previously received Commonwealth Care but had that care terminated due to § 31(a), is not now before the Court. R.A-115-16, 117-18, 124, 125: Stip. ¶¶13-14, 16, 31, 35; R.A-160-74, 190-91: Stip. Exhs. D-F and H.

insurance programs. R.A-114: Stip. ¶10. Thus, until § 31(a), Commonwealth Care effectively ensured that health benefits were available to all legal residents of the Commonwealth who were deemed otherwise unable to access or afford health insurance.

Moreover, in contrast to the law at issue in Doe, § 31(a) did not narrow the eligibility for a program specifically tailored to aid aliens. To the contrary, § 31(a) denied legal aliens, and no others, access to a broad state benefits program to which they had previously been eligible, even though similarly situated citizens remain eligible for the program's benefits. As a result, § 31(a) plainly discriminates on the basis of alienage.

B. Section 31(a) is subject to strict scrutiny because Commonwealth Care is a state program and federal law is wholly indifferent as to whether legal aliens are eligible for Commonwealth Care.

1. Commonwealth Care is a unique state program whose terms are set exclusively by state, not federal, law.

In light of the great deference granted to Congress when it regulates immigration and naturalization, state laws that implement federal immigration policies, or are enacted to conform to such policies, are generally subject to rational basis

review, even if they discriminate on the basis of alienage. See DeCanas v. Bica, 424 U.S. 351, 361 (1976); Doe, 437 Mass. at 526-27. Section 31(a), however, is not such a law. Nor is it closely connected to any federal law, despite its reference to PRWORA. To the contrary, § 31(a) restricts eligibility for a state-created program without any prompting by the federal government and despite the federal government's total indifference to legal aliens' eligibility for Commonwealth Care. See *infra* pp. 38-41.

In essence, § 31(a)'s reference to PRWORA is simply a shorthand way of identifying a class that the state legislature, in a budget bill, chose to exclude. Thus, § 31(a) is markedly different from the statute at issue in Doe, which, in the wake of Congress' decision in PRWORA to deny federal benefits to certain classes of aliens, amended a program whose enabling state law was expressly contingent on federal funding. See Doe, 437 Mass. at 523 & n.4.<sup>24</sup>

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<sup>24</sup> For the same reason, this case is easily distinguished from Soskin, 353 F.3d at 1244, 1255-56, and Cid v. South Dakota Dept. of Social Services, 598 N.W.2d 887, 892 (S.D. 1999), both of which upheld denials of state benefits pursuant to laws enacted to

To appreciate why § 31(a) raises very different questions than those in Doe, it is important to note two separate, but related points: first, Commonwealth Care does not implement federal law.<sup>25</sup> In contrast to the TAFDC program before the Court in Doe, which implemented the federal welfare program, Doe, 437 Mass. at 522-23, Commonwealth Care is a unique state program established as part of the state's landmark health insurance reform law. Commonwealth Care's terms and eligibility criteria are set solely by the Commonwealth. Second, § 31(a) was enacted wholly at the State's own initiative and discretion and not in response to any change in federal law. Federal law never required the State to exclude legal aliens from Commonwealth Care. To the contrary, federal law explicitly permitted the state to provide Commonwealth

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conform to PRWORA. See also Khrapunskiy, 12 N.Y.3d at 488-89 (rejecting equal protection claim to state's failure to provide supplemental benefits because state had no supplemental program).

<sup>25</sup> Ironically, the health insurance exchanges that the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1312(f), 1411, 124 Stat. 119, 183-84, 224-26 (2010), requires to be operating by 2014, bear a similarity to the Connector and will provide coverage for tax paying, lawfully residing aliens who are not Medicaid eligible. Id.

Care benefits to plaintiffs. See 8 U.S.C. § 1621(d). Each point will be considered in turn.

Commonwealth Care was and is an integral part of Chapter 58, whose goal is "reducing uninsurance in the commonwealth." Mass. Gen. Laws ch. 118H, § 2. Under Chapter 58 all legal residents of Massachusetts, including those excluded by § 31(a), R.A-113: Stip. ¶9, are required to "obtain and maintain" health insurance, seek a waiver from the Connector or an exemption on their tax returns, or pay a tax penalty. Mass. Gen. Laws ch. 111M, § 2(a)-(b); R.A-149-59: Stip. Exh. C. To help low and middle-income residents comply with that requirement, Chapter 58 established Commonwealth Care, which, until § 31(a), was available to all legal residents who were otherwise ineligible for insurance (including MassHealth) and had household incomes up to 300 percent of the FPL. R.A-114: Stip. ¶10; Mass. Gen. Laws ch. 118H, § 4.

The substance and structure of Commonwealth Care differ significantly from those of MassHealth, the State's Medicaid program, which was

established pursuant to and in conformity with the provisions of Title XIX, a program of medical assistance . . . . Medicaid benefits shall be available to all persons eligible for financial assistance under the

provisions of chapter one hundred and eighteen and Title IV of the Social Security Act.

Mass. Gen. Laws ch. 118E, § 9. First, federal law lays the groundwork for MassHealth eligibility. As the State's Medicaid program, MassHealth is required by federal law to provide, at a minimum, certain mandatory benefits to federally-specified categorical populations. Id. at § 9A. Likewise, MassHealth tracks federal law in covering federally-defined populations.<sup>26</sup> As a result, to be eligible for MassHealth, individuals must fall within one of several complex categories (e.g., disabled, pregnant, etc.). See 42 U.S.C. 1396-1396a; Mass. Gen. Laws ch. 118E, §§ 9-9A.; 130 Mass. Code Regs. §§ 515.002, 519.001-013; R.A-176-90: Stip. Exh. G.

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<sup>26</sup> The State may expand the scope and coverage of MassHealth beyond the federally-mandated minimum categories, but within limits set by the federal government. 42 U.S.C. § 1396 et seq. In addition, under § 1115 of the Social Security Act, 42 U.S.C. § 1315, the State may receive federal funds for coverage and programs not otherwise eligible for reimbursement under Medicaid. R.A-125-26: Stip. ¶36. As noted *infra*, Massachusetts receives partial federal reimbursement for some of Commonwealth Care's premiums pursuant to a § 1115 demonstration. R.A-128: Stip. ¶¶40-41.

Commonwealth Care, in contrast, was created by the State, R.A-111: Stip. ¶2, and was not designed to conform to Federal Medicaid law. Rather, established to ensure that all legal residents of the state can afford and attain health insurance, Commonwealth Care lacked any of the complex demographic qualifications that characterize MassHealth (at least, prior to § 31(a)). Mass. Gen. Laws ch. 118H, § 3(a); 956 Mass. Code Regs. §3.04; id. at § 3.09(1). Moreover, individuals who are eligible for MassHealth are, by that very fact, ineligible for Commonwealth Care.<sup>27</sup> R.A-114: Stip. ¶10; Mass. Gen. Laws ch. 118H, § 3(a)(3); 956 Mass. Code Regs. §§ 3.04, 3.09(1)(b).

Commonwealth Care is also distinguishable from MassHealth in its governance and financing. Chapter 58 established the Connector, Mass. Gen. Laws ch. 176Q, § 2, an independent state agency "not subject to the supervision and control of any other" state office or agency. Id. at § 2(a); R.A-112: Stip. ¶6. The Connector administers Commonwealth Care and operates

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<sup>27</sup> Some residents who are eligible only for limited, emergency care under MassHealth Limited are eligible for Commonwealth Care. 956 Mass. Code Regs. § 3.09(1)(b).

it in consultation with the Office of Medicaid and other state agencies. Mass. Gen. Laws ch. 118H, § 2.

The Connector is governed by a Board whose purpose is to "to facilitate the purchase of health care insurance products through the connector at an affordable price by eligible individuals, groups and commonwealth care health insurance plan enrollees" and to "determine each applicant's eligibility for purchasing insurance offered by the connector, including eligibility for premium assistance payments." Id. at ch. 176Q, §§ 3(a), (b). The Board is obligated to establish eligibility criteria, develop a standard application form for eligible individuals, and determine an applicant's eligibility, a task it delegates to MassHealth. Id. at § 3(a)(13), (14); 956 Mass. Code Regs. § 3.05.

The Connector also serves as the regulator and sponsor of the health insurance marketplace established by Chapter 58, for which it receives an administrative fee. Mass. Gen. Laws ch. 176Q, § 3(f). In particular, the Connector decides what health plans must cover in order to meet Chapter 58's requirements, approves plans, and operates an exchange that individuals and employers can use to shop for health

insurance.<sup>28</sup> Mass. Gen. Laws ch. 176Q, § 3(a). The Connector does not regulate or administer MassHealth.

Most importantly, Chapter 58 established a unique funding stream for Commonwealth Care, the CCTF. R.A-120-21: Stip. ¶22. This Fund is supported by “fair share” contributions paid by employers whose workers lack health insurance, Mass. Gen. Laws ch. 149, § 188; “free rider” surcharges assessed to employers, Id. at ch. 118G, § 18B, when their workers require uncompensated care; transfers from the Health Safety Net Trust Fund, Id. at § 36; and taxes assessed from uninsured residents, Id. at ch. 111M, § 2. R.A-121: Stip. ¶23. In addition, a portion of the cigarette excise tax instituted by Mass. Gen. Laws ch. 64C, § 6, is dedicated to the CCTF. R.A-121: Stip. ¶23 & n.5.<sup>29</sup>

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<sup>28</sup> See Commonwealth Connector, About the Health Connector, [https://www.mahealthconnector.org/portal/site/connector/menuitem.dc4d8f38fdd4b4535734db47e6468a0c?fiShown=default](https://www.mahealthconnector.org/portal/site/connector/menuitem/dc4d8f38fdd4b4535734db47e6468a0c?fiShown=default) (last visited Aug. 17, 2010).

<sup>29</sup> These funding sources make no exception for § 31(a)’s exclusion of aliens who are ineligible under PRWORA to receive federally-funded means-tested benefits. For example, there is nothing in the language of the statutes establishing the free rider surcharge or employer fair share provisions (just as there is nothing in the language of Chapter 58’s individual insurance requirement) exempting employers whose employees are no longer subject to Commonwealth

These funds are dedicated to Commonwealth Care, not MassHealth.

In addition to these unique, state-based revenues, Commonwealth Care receives appropriations from the State's General Fund, R.A-122-23: Stip. ¶26, which includes federal funds pursuant to a § 1115 demonstration (the demonstration). R.A-126-27: Stip. ¶37.<sup>30</sup> While the latter provides a significant source of revenue, it does not transform Commonwealth Care into a federal program. To the contrary, Commonwealth Care was created by state statutes that are independent of the federal government's continuation

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Care. R.A-121: Stip. ¶24. Moreover, transfers from the General Fund were placed into the CCTF based on the legislature's assumption that Chapter 58 would reduce uninsurance in the state, thereby reducing the need to support safety net hospitals. R.A-125-27: Stip. ¶¶36-39; R.A-224-26: Stip. Exh. I at ¶¶45-46; see also Stephanie Anthony, Robert W. Seifert & Jean C. Sullivan, The MassHealth Waiver: 2009-2011 . . . and Beyond, Center for Health Law and Economics, University of Massachusetts Medical School, at ii, 5, <http://www.massmedicaid.org/~media/MMPI/Files/MassHealth%20Waiver%202009%20to%202011%20and%20Beyond.pdf>.

<sup>30</sup> Mass. Gen. Laws ch. 118H, § 5 provides that the executive director of the Connector shall close enrollment if funds in the CCTF are insufficient "to meet the projected costs of enrolling new individuals." The Executive Director has never done so. R.A-121-22: Stip. ¶25. To the contrary, despite § 31(a), the Connector has continued to enroll new members. R.A-111-12: Stip. ¶5.

of the demonstration. Mass. Gen. Laws ch. 118H, §§ 1-6. Moreover, the demonstration has never provided federal support for the premiums of everyone enrolled in Commonwealth Care nor for all of its benefits. R.A-128: Stip. ¶42; R.A-73: Ans. ¶32. The State alone determines the breadth of Commonwealth Care's services and eligibility.

Federal funding under the demonstration treats Commonwealth Care as distinct from MassHealth. For example, the demonstration included a new funding mechanism, the Safety Net Care Pool (SNCP), which provides the sole source of federal funds for Commonwealth Care. R.A-127-28: Stip. ¶¶37, 39-40; R.A-224-26: Exh. I at ¶¶45, 48.<sup>31</sup> In contrast to MassHealth, under the demonstration's overall requirement of budget neutrality, the SNCP is subject to a three-year cap in combined state and federal funds. R.A-126-27: Stip. ¶37; R.A-194, 225-26: Exh. I at p. 2 & ¶46. There is absolutely no language in the demonstration that supports § 31(a)'s exclusion of

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<sup>31</sup> The demonstration creating the SNCP was first approved in July 2006 for a period until December 22, 2008. R.A-127: Stip. ¶39. It has since been approved until June 30, 2011. Id.

legal aliens for whose health insurance the State cannot receive any reimbursement due PRWORA. Indeed, from 2006 until August 2009, while the demonstration was in effect, legal aliens who were ineligible for federal benefits under PRWORA were eligible for and enrolled in Commonwealth Care.

2. Federal law neither compelled nor encouraged the enactment of § 31(a).

Section 31(a) is subject to strict scrutiny under the Declaration of Rights because the change it wrought in Commonwealth Care's eligibility was not required by federal law, nor was it implemented to conform state law to federal law. In sharp contrast to the TAFDC program discussed in Doe, which was enacted shortly after PRWORA in response to the changes demanded by PRWORA,<sup>32</sup> see Doe, 437 Mass. at 523, Commonwealth Care was established approximately

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<sup>32</sup> Because PRWORA eliminated federal financial support for certain categories of legal aliens while providing coverage for other categories of legal aliens, states were effectively compelled by PRWORA to revise their welfare and Medicaid laws to continue to receive federal funds for their welfare and Medicaid programs. See Michael J. Wishnie, Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism, 76 N.Y.U. L. REV. 493, 514 (2001).

10 years after PRWORA was enacted.<sup>33</sup> Accordingly, the Commonwealth decided to provide near universal health care coverage and thus understood, from Commonwealth Care's inception, that its premium assistance payments for certain legal aliens would not receive federal financial support. Nevertheless, until the summer of 2009, the State provided Commonwealth Care benefits to approximately 29,000 legal aliens who were excluded from the program due to § 31(a). R.A-117-18: Stip. ¶16.

Federal law remained, in all pertinent senses, identical in July 2009, when § 31(a) was enacted, to what it had been in 2006 when Commonwealth Care was created. There are no provisions in PRWORA which preclude the State from including all legal aliens in Commonwealth Care. To the contrary, PROWRA explicitly permits the states to provide benefits to individuals who are not entitled to federal benefits. 8 U.S.C. § 1621(d). Moreover, the Federal Department of Health and Human Services approved the demonstration in 2006, and again in 2008, R.A-126: Stip. ¶39, even though at

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<sup>33</sup> This critical fact also distinguishes the instant case from many of the other post-PRWORA cases that have upheld state laws. See *supra* note 24.

both times Commonwealth Care was available to all legal residents, including those not eligible for federal benefits under PRWORA. R.A-128: Stip. ¶42. Although § 31(a) excludes from Commonwealth Care aliens for whose insurance the State cannot receive reimbursement, federal law neither required nor prompted that decision.

In cases in which federal law did not compel or prompt a state to discriminate against legal aliens, courts have consistently applied strict scrutiny.<sup>34</sup> Moreover, nothing in Doe, which analyzed a state statute enacted shortly after PRWORA to establish a program to help aliens otherwise excluded from the federal government's cash assistance program, is to the contrary. The Doe Court emphasized that its conclusions stemmed from the fact that the issue

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<sup>34</sup> See, e.g., Nyquist v. Mauclet, 432 U.S. 1, 7-12 (1977) (applying strict scrutiny to a state law limiting access to tuition benefits based on immigration status because it was not sufficiently tied to federal policy); Ehrlich v. Perez, 394 Md. 691, 726 (2006) (applying strict scrutiny to state's termination of medical assistance benefits for legal immigrants because PRWORA left the states with "unbridled discretion" in the treatment of some immigrants); Aliessa ex rel. Fayad v. Novello, 96 N.Y.2d 418, 435-36 (2001) (applying strict scrutiny because PRWORA "does not impose a uniform immigration rule for States to follow" (emphasis in original)).

before it was a durational residency requirement for a program that helped only aliens in response to PRWORA. 437 Mass. at 534. In contrast, § 31(a) was not enacted in response to PRWORA, and it discriminates only against a protected class. Both Doe's holding and reasoning require that § 31(a) be subject to strict scrutiny.

3. PRWORA does not preclude applying strict scrutiny to a state law challenge of § 31(a).

PRWORA does not -- and cannot -- grant states the power to discriminate against legal aliens with respect to state benefit programs.<sup>35</sup> PRWORA clearly leaves states with broad discretion to provide more generous benefits to legal aliens than the federal government mandates for its own programs. 8 U.S.C. § 1621(d). Although the federal government only pays for benefits for certain legal aliens under PRWORA, 8 U.S.C. § 1611(a), Congress permits states to provide

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<sup>35</sup> A contrary reading of PRWORA, that construed it to authorize a state to discriminate in ways that would otherwise violate the Fourteenth Amendment, would raise grave constitutional questions. See Saenz v. Roe, 526 U.S. 489, 507 (1999) ("we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment"); see also Wishnie, *supra* note 32.

health benefits with their own money to all legal aliens. 8 U.S.C. § 1621(d).

Nor does 8 U.S.C. § 1601(7) apply to the instant case.<sup>36</sup> Although the meaning of that provision is not entirely clear, it appears to attempt to dictate a court's outcome when it scrutinizes state laws that mimic PRWORA's distinctions between aliens.<sup>37</sup> The few

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<sup>36</sup> The statute states:

With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such 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.

8 U.S.C. § 1601(7).

<sup>37</sup> By stating that state laws that incorporate PRWORA's own distinctions will be found to have used the "least restrictive alternative" to "achieve a compelling state interest", 8 U.S.C. § 1601(7) appears to presume that the standard of review that will be applied to such laws is strict scrutiny. Thus even if 8 U.S.C. § 1601(7) applied to the instant case (and for the reasons stated *infra* it does not), it would not alter the conclusion to question four. Strict scrutiny would still be the standard of review. However, the Court would be forced to rely on Congress' conclusions as to results of that review. It is for this reason, that 8 U.S.C. § 1601(7) appears to tell courts how they must rule in constitutional cases, that the

judicial opinions that have discussed the provision, however, have questioned its constitutionality even as applied to federal constitutional claims. For example, in Aliessa, 96 N.Y.2d at 432 n.14, the New York Court of Appeals cited the Supreme Court's decisions in Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 365-66 (2001) and City of Boerne v. Flores, 521 U.S. 507, 519 (1997) in rejecting the applicability of 8 U.S.C. § 1601(7) by stating: "[g]iven our system of separation of powers, a lawmaking body may not legislatively declare that a statute meets constitutional criteria." See also Soskin, 353 F.3d at 1275 (Henry, J., dissenting) (rejecting 8 U.S.C. § 1601(7), stating that "in our constitutional structure it is for the courts to 'say what the law is,' Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803)"). No reported case has upheld the constitutionality of 8 U.S.C. § 1601(7) or relied upon it for its conclusion.

This Court, however, need not decide the constitutionality of 8 U.S.C. § 1601(7) because it

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statute's constitutionality is questionable. See *infra* p. 43

does not apply to the state constitutional claims now before the Court. At most, the statute instructs courts regarding federal constitutional claims. It is silent as to state law claims, and for good reason: if it applied to state claims, it would undermine the discretion that PRWORA leaves with the states and conflict with fundamental principles of federalism.

A finding that § 1601(7) applied to state claims would presume that Congress attempted to insulate state legislatures from the requirements of their own constitutions and from review by their own state courts.<sup>38</sup> This reading of § 1601(7) would mark an unprecedented federal interference in the relationship between a state's legislature, its constitution, and its courts. See Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government,

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<sup>38</sup> Such an interpretation would read § 1601(7) as saying that state courts would have to find that state laws that follow PRWORA's classifications in discriminating against legal aliens in state programs satisfy strict scrutiny even if the court found that the law was enacted as a result of the most blatant, invidious legislative intent, and even if the state statute expressly stated that the fulfillment of bigotry was the state's only goal. This outlandish possibility demonstrates why § 1601(7) cannot be read to preclude judicial review of state constitutional claims.

and the character of those who exercise government authority, a State defines itself as a sovereign"). As the Supreme Court has oft stated, when Congress seeks to limit a state's sovereignty, it must do so with clear and unmistakable language. See Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 543-44 (2001) (without explicit statutory language a federal tolling statute should not apply against states because Congress should not be presumed to intend to meddle in the sovereign functions of a state); Gregory, 501 U.S. at 460-61 ("Through the structure of its government . . . a State defines itself as a sovereign. . . . This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers . . ."). Lacking a clear statement, § 1601(7) should be read as it most naturally suggests: to provide a rule of construction applicable to federal claims against state laws that follow PRWORA's classifications in deciding the eligibility of aliens. Section 1601(7) says nothing about state constitutional claims and hence is inapplicable to them. As long as the State has the constitutional power to provide benefits for aliens, a power that the General Court exercised when it

established Commonwealth Care, that power must be exercised in accordance with the principles laid forth in the Massachusetts Constitution and Declaration of Rights, and be subject to the standard of review that state courts, and not Congress, determines is required by the State's Constitution.

- C. If strict scrutiny is not applied, this Court should apply a heightened rational basis test because § 31(a) constitutes class-based discrimination with regard to an important interest.

For the reasons set forth above, strict scrutiny should be applied in reviewing § 31(a)'s discrimination against legal aliens. However, if this Court were to conclude that strict scrutiny is inapplicable, that does not mean the court's review should be "toothless." Murphy v. Comm'r of Dept. of Indus. Accidents, 415 Mass. 218, 232-33 (1993), citing Mathews v. Lucas, 427 U.S. 495, 510 (1976). For example, although the Doe Court applied a rational basis test, it also analyzed the context in which the supplemental program was enacted. 437 Mass. at 534. Unlike § 31(a), the statute at issue in Doe was intended to provide benefits to those who would otherwise be ineligible for public assistance and was therefore deemed to have a "clearly noninvidious

intent.” Id. at 534. As a result, a holding that the Doe statute was unconstitutional would have been detrimental to some of the aliens who benefited from its enactment. Id. Here, on the other hand, § 31(a) only harms the protected class. Aliens do not benefit at all from the statute. In cases in which a statute harms only a vulnerable class, even if that class is not one recognized as warranting strict scrutiny, or even if the interest at issue is not one that is fundamental, the Supreme Court has applied the rational basis test with extra care. For example, in Plyer v. Doe, 457 U.S. 202, 220-23 (1982), the Supreme Court recognized that illegal aliens (as opposed to the legal aliens affected by § 31(a)) are not a protected class and that education is not a fundamental right. Nevertheless, the Court found that a state law barring illegal aliens from public education failed the rational basis test. Id. at 229-230. See also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985) (zoning ordinance fails rational basis test because of “irrational prejudice against the mentally retarded”).

This Court has also applied an enhanced rational basis test when the State’s action implicates an

important interest, especially where the state statute may have had an invidious intent or impact. See, e.g., Goodridge v. Dep't of Public Health, 440 Mass. 309, 330-42 (2003) (applying enhanced rational basis test and striking down law prohibiting same sex couples from obtaining marriage licenses, based on the importance of marriage); see also Commonwealth v. Arment, 412 Mass. 55, 62-63 (1992) (state law distinguishing between classes of inmates fails rational basis test); Lawrence Friedman, Ordinary and Enhanced Rational Basis Review, 69 ALB. L. REV. 415, 416 (2006) ("the Massachusetts Supreme Judicial Court has long applied at least two kinds of rational basis scrutiny to government action: ordinary, deferential rational basis scrutiny in the mine run of cases, and an enhanced rational basis scrutiny when the government action in question implicates or restricts certain important personal interests").

If the Court does not apply strict scrutiny here, a heightened rational basis test should be used because of the importance of the interest at stake: health care. Although the Commonwealth has not recognized a fundamental right to health insurance, and that question is not now before the Court, health

care reform in the Commonwealth sought to provide "affordable, quality, accountable health care" and "to expand access to health care for Massachusetts residents." Chapter 58 of the Acts of 2006, Preamble. In enacting Chapter 58, the legislature recognized the importance of health care for Massachusetts residents. Section 31(a) leaves the plaintiffs, who are otherwise still subject to Chapter 58's requirement to obtain health care or seek an exemption, without access to the affordable care promised and provided by the State to all other similarly situated individuals. The exclusion of one and only one vulnerable class of legal residents from the health care coverage Chapter 58 offers certainly warrants meaningful judicial review.

#### **CONCLUSION**

For the reasons stated above, the plaintiffs request that the Court provide the following answers to the Single Justice's questions:

- (1) Yes, art. 106 includes protection on the basis of alienage.
- (2) The Court need not consider whether other constitutional provisions provide protection

beyond art. 106 and the general contours of equal protection.

- (3) No, the standard of review generally applicable to state discrimination on the basis of alienage is not rational basis review, but strict scrutiny.
- (4) The standard of review applicable to the classification in § 31(a) is strict scrutiny.

Respectfully submitted,

DOROTHY ANN FINCH et al.,  
Individually and on Behalf of  
All Similarly Situated Persons,

By their attorneys,

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September 3, 2010

**Rule 16(k) Certification of Compliance**

I, Lorianne Sainsbury-Wong, do hereby certify pursuant to Mass.R.App.P. 16(k) that this brief, to the best of my knowledge, conforms to the requirements contained in the Massachusetts Rules of Appellate Procedure relative to the filing of briefs.

September 3, 2010

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Lorianne Sainsbury-Wong

**Certificate of Service**

I, Lorianne Sainsbury-Wong, certify that on this day, I caused two copies of the foregoing Brief for Plaintiffs-Appellants, together with attachments and Appendix, to be served on counsel of record for the Defendants-Appellees, as follows:

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