No. 09-949

In the Supreme Court of the United States

JOYCE K. MATSUO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Employees Pay Comparability Act of 1990, 5 U.S.C. 5301 *et seq.*, violates the fundamental right to travel or principles of equal protection.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 58a-66a) is reported at 586 F.3d 1180. The opinions of the district court (Pet. App. 1a-29a, 30a-57a) are reported at 416 F. Supp. 2d 982 and 532 F. Supp. 2d 1238.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2009. The petition for a writ of certiorari was filed on February 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. No. 101-509, Tit. V, § 529, 104 Stat. 1427 (5 U.S.C. 5301 *et seq.*), to establish a general program of supplemental location-

based pay for federal employees. Under that "locality pay" program, an employee's base General Schedule rate of pay is supplemented with a payment that varies according to the disparity between federal and non-federal wages in the employee's local pay area.[*] The exact percentage for each area is set by the President each year after considering the views and recommendations of the Federal Salary Council. 5 U.S.C. 5304(d) and (e). Locality pay is subject to federal income tax and is deemed "part of basic pay for purposes of retirement." 5 U.S.C. 5304(c)(2).

As originally enacted, FEPCA authorized locality pay only for federal employees in the "continental United States," a term defined to exclude Alaska, Hawaii, and federal territories and possessions. See 5 U.S.C. 5304(f)(1)(A); 5 U.S.C. 5701(6) (definition of "continental United States"). Since 1948, federal employees in Alaska, Hawaii, and federal territories and possessions have received cost-of-living allowance (COLA) benefits to offset the high cost of living associated with those locations. See Exec. Order No. 10,000, 13 Fed. Reg. 5455 (1948); 5 U.S.C. 5941(a). Unlike locality pay, COLA benefits are not subject to federal income tax, 26 U.S.C. 912(2), nor are they included in the calculation of employees' retirement benefits.

In October 2009, Congress amended FEPCA to provide that, after a phase-in period, federal employees in Alaska and Hawaii will receive locality pay instead of

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[*] The locality pay program affects only "General Schedule" (*i.e.*, white-collar) federal employees. Employees subject to the Federal Wage System do not receive locality pay or other cost-of-living allowances. Compare 5 U.S.C. 5104 (typical General-Schedule employee duties), with 5 U.S.C. 5342(a)(2) (employees covered by Federal Wage System).

COLA benefits. Pet. App. 66a n.9; see Non-Foreign Area Retirement Equity Assurance Act of 2009 (2009 Amendment), Pub. L. No. 111-84, Tit. XIX, Subtit. B, § 1912, 123 Stat. 2619.

2. Petitioners, a group of federal employees, brought this action in 2005 in the District of Hawaii on behalf of two classes: (1) all current and former federal employees who work, or have worked, in Alaska or Hawaii without receiving locality pay, and (2) all federal employees who live in the continental United States and could not take a federal job in Alaska or Hawaii without losing locality pay. Pet. App. 60a; see *id.* at 2a-3a. Petitioners alleged that the statutory exclusion of Alaska and Hawaii employees from the locality pay system constituted an unconstitutional restriction on the fundamental right to travel, as well as a violation of equal protection and substantive due process principles. *Id.* at 2a. In addition, petitioners asserted a right to recover back pay and other damages based on the exclusion of COLA benefits from the computation of federal retirement annuities. *Id.* at 2a-3a. The district court dismissed plaintiffs' claims for money damages and back pay for lack of jurisdiction, *id.* at 19a-21a, and it granted summary judgment for the government on the merits of the constitutional claims, *id.* at 30a-57a.

3. The court of appeals affirmed. Pet. App. 58a-66a. The court explained that, as to employees in Alaska and Hawaii, the FEPCA's limitation of locality pay to the continental United States did not implicate the constitutional right to travel. The court observed that "[t]he Act imposes no travel penalty on them; if anything it imposes a penalty for staying put. In fact, the Act encourages these employees to travel by providing superior pay in the 48 contiguous states." *Id.* at 61a-62a.

As to the employees residing in the continental United States, the court of appeals acknowledged that "traveling would arguably trigger a penalty" because they "would lose locality pay if they moved to Alaska or Hawaii and continued to work for the federal government." Pet. App. 62a. The court recognized that "there is, of course, no constitutional right to federal employment wherever one chooses to live," and that "[n]othing prevents [petitioners] from taking a locality-paying private-sector job." *Id.* at 62a n.4. For those reasons, the court observed, it was "not clear that these plaintiffs are suffering a cognizable injury at all." *Ibid.*

Nonetheless, the court of appeals analyzed and rejected petitioners' right-to-travel claim on the merits, explaining that "not everything that deters travel burdens the fundamental right to travel." Pet. App. 62a-63a. Because FEPCA did not "prevent[] citizens from entering or leaving" a State; treat persons temporarily present in a State as "'unfriendly aliens' rather than as 'welcome visitors'"; "discriminat[e] against citizens of other states who elect to become permanent residents" of a State; or purport to authorize States to violate one of those strictures, the court of appeals reasoned, "the Act doesn't violate the right to travel" as that right was described by this Court in *Saenz* v. *Roe*, 526 U.S. 489 (1999). Pet. App. 63a (quoting *Saenz*, 526 U.S. at 500).

The court of appeals next rejected petitioners' argument that the right to travel extends beyond *Saenz* to guarantee the right to be "provided with the same federal benefits after moving as before." Pet. App. 63a. That contention, the court explained, is foreclosed by this Court's decision in *Califano* v. *Torres*, 435 U.S. 1 (1978) (per curiam), which found no violation of the right to travel when a resident of Connecticut lost his social-

security benefits because he moved to Puerto Rico. Pet. App. 64a. If the Constitution required Congress to ensure nationwide uniformity in the distribution of federal benefits, the court noted, "choices Congress makes every day—where to build a military base, how much to allocate a state in highway funds, whether to provide a tax credit for this or that disaster area—would trigger strict scrutiny." *Id.* at 65a.

Finally, the court of appeals addressed petitioners' contention that FEPCA's exclusion of employees in Alaska and Hawaii lacked a rational basis. Pet. App. 65a-66a. Noting that petitioners had abandoned their equal protection claim by failing to raise it on appeal, *id.* at 66a n.8, the court observed that there is no "free-floating requirement that all congressional action be rational," and it explained that "federal employees can have no judicially enforceable interest in pay at a particular rate," *id.* at 66a. In any event, the court reasoned, "the Act clearly satisfies rational-basis scrutiny for the reasons stated by the district court." *Id.* at 66a n.8; see *id.* at 50a-56a.

In a footnote, the court of appeals observed that, while the case was pending, Congress had amended FEPCA to extend locality pay to federal employees in Alaska and Hawaii. Pet. App. 66a n.9. The court did not consider whether that amendment mooted the case.

ARGUMENT

The court of appeals correctly held that the statutory program of locality pay for federal employees in the continental United States does not violate the fundamental right to interstate travel. Its decision does not conflict with any decision of this Court or any other court of appeals. In addition, because Congress has recently

amended the statute to eliminate the feature of the locality-pay program to which petitioners object, this case presents no issue of prospective importance. Further review is not warranted.

1. According to petitioners (Pet. i-ii), this case presents the question whether Congress may discriminate between federal employees in different States in the allocation of federal pay and benefits. As the court of appeals noted, however, Congress has now eliminated the disparity of which petitioners complain by enacting legislation to extend the locality-pay program to Alaska and Hawaii. Pet. App. 66a n.9. After a phase-in period, federal employees in Alaska and Hawaii will receive locality pay instead of COLA benefits in the same manner as employees in the continental United States. See 2009 Amendment § 1914, 123 Stat. 2621 (prescribing schedule under which the transition to locality pay will be fully effective by calendar year 2012).

That amendment grants petitioners the very relief that they seek in this litigation. At the time of the complaint, FEPCA provided that "each General Schedule position (excluding any outside the continental United States, as defined in section 5701(6)) shall be included with a pay locality." 5 U.S.C. 5304(f)(1)(A). Petitioners brought this action to challenge the constitutionality of the "continental United States" limitation. The 2009 Amendment repeals that limitation and provides that "each General Schedule position *in the United States*, as defined under section 5921(4), * * * shall be included within a pay locality." 2009 Amendment § 1912(a)(1), 123 Stat. 2619 (emphasis added); see 5 U.S.C. 5921(4) ("'United States,' when used in a geographical sense, means the several States and the District of Columbia.").

Nothing more remains of petitioners' claims. Although petitioners originally sought damages and back pay, the district court dismissed those claims for lack of jurisdiction, Pet. App. 19a-21a, and an appeal of that aspect of its decision was dismissed, 191 Fed. Appx. 961 (Fed. Cir. 2006). Once the transition to locality pay is fully implemented in 2012, petitioners will have no further personal stake in the resolution of the constitutional claims they assert, and their remaining claims will become moot. Because the 2009 Amendment deprives this case of any prospective significance, this Court's review is not warranted.

2. On the merits, the court of appeals correctly held that Congress's discretionary choice to provide a particular form of supplemental compensation for federal employees in certain States rather than others does not violate the Constitution.

Petitioners do not contend that the decision below conflicts with the decision of any other court of appeals. Instead, they contend (Pet. 12-21) that the court below erred in refusing to extend the constitutional right to travel recognized by this Court in *Saenz* v. *Roe*, 526 U.S. 489 (1999), to prohibit Congress from discriminating among States in the allocation of federal benefits.

That question is not presented by this case. Petitioners brought this action not as private citizens aggrieved by the distribution of public benefits but as federal employees dissatisfied with their compensation. The distinction is material because the employment relationship is consensual: petitioners are free to leave federal employment if the pay and benefits they receive are unsatisfactory. And by the same token, nothing in the Constitution requires Congress to guarantee that federal employment will be available to petitioners on the same

terms everywhere in the country. As the court of appeals observed, there is "no constitutional right to federal employment wherever one chooses to live." Pet. App. 62a n.4; cf. *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 313 (1976) (per curiam). In the absence of invidious discrimination on the basis of race or other suspect class—which petitioners do not allege here—it is Congress's prerogative to determine whether attracting and retaining a suitable federal workforce in Alaska and Hawaii requires more, less, or the same pay and benefits as required in California, Virginia, or Guam. The right to interstate travel has no bearing on that question.

3. In any event, the court of appeals also correctly held that petitioners' right-to-travel claim fails on its own terms. Petitioners do not dispute (Pet. 18) that their claim is unlike anything recognized by this Court in *Saenz*. See 526 U.S. at 500 (discussing the recognized components of the right to travel). Instead, they contend (Pet. 14) that the constitutional right to travel should be extended to bar Congress from "singling out citizens for denial of benefits exclusively because of the state in which they reside."

As the court of appeals recognized, that argument is foreclosed by this Court's decision in *Califano* v. *Torres*, 435 U.S. 1 (1978) (per curiam). The plaintiff in that case, who lost his Social Security benefits upon moving to Puerto Rico from Connecticut, brought suit challenging the exclusion of residents of Puerto Rico from the Social Security program as a violation of the constitutional right to travel. *Id.* at 2-3. This Court rejected that claim, explaining that the "right to travel" does not imply that a citizen who receives federal benefits by virtue of his residence in one state is entitled to keep those

benefits upon moving to another. *Id.* at 4. The same principle forecloses petitioners' claim here. As the court of appeals explained, "*Torres* teaches that the right to travel permits the federal government to put new migrants to a state or territory on the same footing as that of long-established citizens. That is all that would occur should [petitioners] move from the 48 contiguous states to Alaska or Hawaii." Pet. App. 65a.

Petitioners attempt (Pet. 19) to distinguish *Torres* on the ground that the case involved travel to Puerto Rico, a federal territory rather than a State. But as the court of appeals noted in rejecting that distinction, the Court in *Torres* expressly assumed "that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union." Pet. App. 64a n.7 (quoting *Torres*, 435 U.S. at 4 n.6).

4. Finally, petitioners argue (Pet. 21-25) that FEPCA's exclusion of Alaska and Hawaii from the locality pay program violates the equal protection component of the Fifth Amendment. Petitioners forfeited that claim by failing to present it to the court of appeals. Pet. App. 66a n.8 (noting petitioners' failure to preserve their equal protection claim); see *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Although petitioners now contend that they did raise an equal protection argument in the court of appeals, their appellate briefs pressed no equal protection argument distinct from their right-to-travel claim. Instead, petitioners argued that FEPCA failed rational-basis scrutiny under what they referred to as "the most relaxed standard of review applied in any of the Su-

preme Court['s] right-to-travel cases." Pet. C.A. Br. 49. That is the argument that the court of appeals addressed and rejected, explaining that there is no "free-floating" rational basis constraint on Congress's decisions regarding federal pay. Pet. App. 66a. "Without a right to government employment in the first place, which plaintiffs don't argue exists, federal employees can have no judicially enforceable interest in pay at a particular rate." *Ibid.*

In any event, as the court of appeals noted, FEPCA "clearly satisfies rational-basis scrutiny." Pet. App. 66a n.8. By the time FEPCA was enacted in 1990, government employees in Alaska and Hawaii had already been receiving tax-free COLAs under the COLA program for more than four decades. As the district court explained, "Congress rationally could have decided [that] employees who received this tax free allowance did not also need to receive locality pay." *Id.* at 54a. In addition, Congress "rationally may have determined locality pay was not needed in [Alaska and Hawaii] to recruit and retain employees." *Id.* at 56a. Either of those justifications would be sufficient by itself to satisfy the requirements of rational-basis review; together they leave no doubt that Congress acted well within its constitutional authority. See *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (plaintiffs "attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it'") (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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