No. 04-1041

In the Supreme Court of the United States

PATRICK L. KAHAWAIOLAA, ET AL., PETITIONERS

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the exclusion of Hawaii from the territorial scope of regulations governing acknowledgment of Indian Tribes by the Secretary of the Interior, 25 C.F.R. Pt. 83, violates the equal protection component of the Fifth Amendment's Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 386 F.3d 1271. The opinion of the district court (Pet. App. A22-A41) is reported at 222 F. Supp. 2d 1213.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2004. The petition for a writ of certiorari was filed on January 25, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1934, Congress enacted the Indian Reorganization Act (IRA or Act), 25 U.S.C. 461 *et seq.*, in direct response to the findings of the *Meriam Report* commis-

sioned by the federal government. See Lewis Meriam et al., Institute for Government Research, *The Problem of Indian Administration* (1928) (*Meriam Report*). The *Meriam Report* exhaustively documented and analyzed the effects of previous Indian policies, including in particular the policy under the General Allotment Act, ch. 119, 24 Stat. 388, of allotting tracts of reservation lands to individual tribal members, which faciliated alienation of the land to non-Indians and the breakup of the tribal structure. The *Meriam Report* recommended that the government fashion a more decentralized Indian policy focused on the tribal unit. The purpose of the IRA was to halt the allotment policy and "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974); see *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 436 (1989) (opinion of Stevens, J.) (recognizing that the IRA was passed specifically to address the failed allotment policy and to remedy the loss of over 90 million acres of Indian land).[1]

There were no reservations and no allotment system in the Territory of Hawaii, and the IRA was not made applicable to native Hawaiian groups. The IRA, in contrast, did apply to native Alaskan groups. The Act defined the term "Indian" to:

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[1] The Act ended the practice of dividing reservation lands into individual allotments, 25 U.S.C. 461; prohibited further alienation of Indian lands and interests except with respect to consolidation of tribal lands, 25 U.S.C. 464; established loans for economic development of tribes, 25 U.S.C. 470; and empowered Tribes to reorganize and adopt a constitution and bylaws, employ legal counsel, exert control over tribal lands, and negotiate with federal, state, and local governments, 25 U.S.C. 476.

> include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [to] further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

25 U.S.C. 479. The term "tribe" as used in the Act "refer[s] to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Ibid.*

The benefits of the IRA were made available only to Indian Tribes recognized by the federal government (and to certain descendants of the members of such Tribes). See 25 U.S.C. 476(a)(2), 477, 479; Pet. App. A3. To organize as an Indian Tribe under the IRA, for instance, a Tribe's bylaws and constitution were required to be approved by the Secretary of the Interior. 25 U.S.C. 476. In the early 1970s, Congress passed a series of additional statutes that likewise conditioned an Indian Tribe's eligibility for various benefits on federal tribal recognition. See, *e.g.*, 25 U.S.C. 450b(e) (definition of Indian Tribe for purposes of Indian Self-Determination and Education Assistance Act (ISDEA), 25 U.S.C. 450-450n); 25 U.S.C. 1452(c) (definition of Indian Tribe for purposes of Indian Financing Act of 1974).

Although the IRA and subsequent statutes conditioned tribal eligibility on federal recognition, no legislation spoke directly to the question of how to determine which groups were federally recognized. Before the late 1970s, the Department of the Interior made decisions to acknowledge tribal status on an essentially *ad hoc* basis.

See 43 Fed. Reg. 39,361 (1978); see also Felix S. Cohen, *Handbook of Federal Indian Law* 268-272 (1942). By the mid-1970s, however, the Department concluded that the "recent increase in the number of [acknowledgment] requests before Interior necessitates the development of procedures to enable that a uniform and objective approach be taken to their evaluation." 42 Fed. Reg. 30,647 (1977).

In 1978, accordingly, the Department, acting pursuant to its general authority over "the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. 2; see 25 U.S.C. 9; 43 U.S.C. 1457, promulgated regulations establishing a process for acknowledging that certain groups exist as Indian tribes. See 42 Fed. Reg. at 30,647; 43 Fed. Reg. at 23,743; *id.* at 39,361. Those regulations were revised in 1994, see 59 *id.* 9280, and they are now codified at 25 C.F.R. Pt. 83. The purpose of the regulations

> is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.

25 C.F.R. 83.2; see 25 C.F.R. 83.12(a).

Since their inception in 1978, the regulations have excluded native groups in Hawaii from eligibility to petition for federal acknowledgment. The acknowledgment regulations are applicable "only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department." 25 C.F.R. 83.3(a); see 43 Fed. Reg. at 39,362. The regulations in turn define "Continental United States" as the "contiguous 48 states and Alaska." 25 C.F.R. 83.1.

2. On May 23, 2002, petitioners filed an amended complaint alleging that they are individual native Hawaiians and a native Hawaiian group, and that they wish to apply for federal recognition as an Indian Tribe pursuant to 25 C.F.R. Part 83. Petitioners contended that their exclusion from the regulations constitutes impermissible racial discrimination in violation of the equal protection component of the Fifth Amendment. Pet. 3; Pet. App. A5.

The district court granted the Secretary's motion to dismiss. Pet. App. A22-A41. The court first held that the complaint raised a nonjusticiable political question because it asked the court "to supplant Congress' decision not to deal with Native Hawaiians as an Indian tribe." *Id.* at A38-A39. In the alternative, the court ruled in favor of the Secretary on the merits, holding that the acknowledgment regulations do not violate the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at A39-A40 n.14. The court applied the rational basis standard, and found that, "[b]ecause Congress has not entered into a government-to-government relationship with Native Hawaiians, it is entirely rational for the Secretary to exclude Hawaii

from the scope of the acknowledgment regulations." *Ibid.*

3. The court of appeals affirmed as to the merits. Pet. App. A1-A21.[2] The court concluded that, because "the formal relationship between the United States and American Indian tribes has been political, rather than race-based," petitioners' equal protection challenge should be reviewed under the rational basis test. *Id.* at A11. The court observed that the IRA—the "origin of the acknowledgment regulations"—did not include any native Hawaiian group, and although Alaska and Hawaii were both territories in 1934, only Alaska was specifically included. *Id.* at A15-A16. The court noted that there were no reservations in Hawaii and that Congress in the IRA and other statutes "has evidenced an intent to treat Hawaiian natives differently from other indigenous groups." *Id.* at A16-A17.

The court further explained that "the history of the indigenous Hawaiians, who were once subject to a government that was treated as a co-equal sovereign alongside the United States," is "fundamentally different from that of indigenous groups and federally recognized Indian tribes in the continental United States." Pet. App. A19. The court also found it significant that Congress has distinguished between native Hawaiians and

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[2] The court disagreed with the district court's conclusion that the case presents a nonjusticiable political question. Pet. App. A7-A10. The court of appeals reasoned that a political question would be presented if petitioners had sought to compel tribal recognition of native Hawaiians. *Id.* at A7-A8. The court determined, however, that petitioners did not demand federal recognition of native Hawaiians, but instead sought to invalidate regulations barring them from applying for recognition based on the same criteria that apply to indigenous groups in other States. *Id.* at A10.

Indian Tribes in a number of statutes. *Id.* at A19-A20. In light of the "unique history of Hawaii" and "the historical restrictions of the acknowledgment process to continental American Indian tribes," the court held that the acknowledgment regulations rationally exclude native Hawaiian groups from their scope. *Id.* at A20.

ARGUMENT

Petitioners renew their contention (Pet. 13-14) that the exclusion of native groups in Hawaii from eligibility to petition for federal acknowledgment as an Indian Tribe under Department of the Interior regulations violates the equal protection component of the Fifth Amendment's Due Process Clause. The court of appeals correctly rejected that claim, and the court's decision does not conflict with any decision of this Court or another court of appeals. Further review therefore is not warranted.

Petitioners argue (Pet. 13-14) that this Court's decision in *Rice* v. *Cayetano*, 528 U.S. 495 (2000), establishes that the exclusion of native groups in Hawaii from eligibility for federal recognition constitutes impermissible race-based discrimination and that the exclusion therefore should be subject to strict scrutiny. *Rice* involved a voting scheme under Hawaii law that limited eligibility to vote for trustees of a certain state agency to descendants of persons who had inhabited the Hawaiian Islands in 1778. The Court concluded that the Hawaii law used ancestry as a proxy for race, and that the ancestry requirement constituted a racial definition and was intended to serve a racial purpose. *Id.* at 514-515. The Court therefore held that the voting classification discriminated on the basis of race in violation of the Fifteenth Amendment. *Id.* at 514-522.

As the court of appeals explained below, nothing in *Rice* casts doubt on the validity of the acknowledgment regulations at issue in this case. Pet. App. A12-A14. To the contrary, *Rice* specifically distinguished and reaffirmed this Court's decisions upholding classifications concerning Indian Tribes under federal law as political rather than racial in nature. See *Rice*, 528 U.S. at 519-520. The Court explained in *Rice* that, in *Morton* v. *Mancari*, 417 U.S. 535 (1974), it had upheld a hiring preference in the Bureau of Indian Affairs for members of federally recognized Indian Tribes. Unlike the voting scheme at issue in *Rice*, which used ancestry as a proxy for race, the hiring preference in *Mancari* was "political rather than racial" because it was "not directed towards a 'racial' group consisting of 'Indians'" but towards "members of 'federally recognized tribes.'" *Rice*, 528 U.S. at 519-520 (quoting *Mancari*, 417 U.S. at 553 n.24).

Under *Rice* and *Mancari*, accordingly, the "recognition of Indian tribes remains a political, rather than racial determination." Pet. App. A14. It follows that the rules governing eligibility for federal tribal recognition, including the regulations at issue in this case, do not establish racial classifications. Those rules instead fall squarely within the rubric of "federal regulation of Indian affairs," which is "not based upon impermissible classifications" but "is rooted in the unique status of Indians as a 'a separate people' with their own political institutions." *United States* v. *Antelope*, 430 U.S. 641, 646 (1977) (quoting *Mancari*, 417 U.S. at 553 n.24); *ibid.* ("Federal regulation of Indian tribes * * * is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'") (quoting *Mancari*, 417 U.S. at 553 n.24); see *Washington* v. *Washington State Commercial Pas-*

senger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979); *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 85-90 (1977); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-480 (1976); *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976). [3]

Because the exclusion of native groups in Hawaii from eligibility for federal tribal recognition under Interior Department regulations does not constitute invidious race-based discrimination, the court of appeals correctly applied rational basis review. See *Mancari*, 417 U.S. at 553-555 (upholding hiring preference for members of federally-recognized Tribes on rational basis review); *Weeks*, 430 U.S. at 85-90 (applying rational basis standard in upholding judgment distribution to federally recognized Tribes); *Narragansett Indian Tribe* v. *National Indian Gaming Comm'n*, 158 F.3d 1335, 1339-1341 (D.C. Cir. 1998) (applying rational basis review and rejecting Tribe's challenge to its exclusion from the benefits accorded other Tribes by the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*); *United States* v. *Nuesca*, 945 F.2d 254, 257-258 (9th Cir. 1991) (applying rational basis standard and rejecting equal protection challenge brought by native Hawaiians based on differ-

[3] In *Rice*, moreover, this Court emphasized that the voting scheme at issue did not involve elections affecting the internal affairs of an Indian Tribe, but instead involved elections for a state agency responsible for administering state law and obligations. 528 U.S. at 520. The Court thus determined that, "[t]o extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs." *Id.* at 522. The rules concerning federal recognition of Indian Tribes, by contrast, uniquely concern administration of the United States' distinctive government-to-government relationship with Indian Tribes.

ential treatment with respect to hunting rights as compared to Alaskan natives). There is no warrant for reviewing the court of appeals' application of rational basis review in this case. Indeed, petitioners do not contend that they can prevail under the rational basis standard.

In any event, the court of appeals correctly held that the exclusion of native Hawaiian groups satisfies the rational basis test in view of the origin of the acknowledgment regulations, the unique history of Hawaii and its relationship to the United States, and the historical limitation of the acknowledgment process to continental Indian Tribes. Pet. App. A15-A20; see 42 U.S.C. 11701(1) (finding by Congress that "[n]ative Hawaiians comprise a distinct and unique indigenous people"). The history of native Hawaiians is "fundamentally different from that of * * * Indian tribes in the continental United States," Pet. App. A19, and the distinction is reflected in Congress's enactments.

Two of the foundational Acts of Congress establishing current federal Indian policy, the IRA and ISDEA, exclude native Hawaiians from their scope. And while Congress has enacted legislation establishing a government-to-government relationship with specific Indian tribes,[4] Congress has enacted no such legislation providing that native Hawaiians or any group of native Hawaiians constitute an Indian tribe. When Congress

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[4] See, *e.g.*, 25 U.S.C. 1300j-1 (extending "[f]ederal recognition" and statutes of "general application to Indians and Indian tribes" to the Pokagon Band of Potawatomi Indians); 25 U.S.C. 1300k-2 (same, Little Traverse Bay Band of Odawa Indians and the Little River Band of Ottawa Indians); 25 U.S.C. 1758 (same, Mashantucket Pequot Tribe); 25 U.S. C. 1300*l* (restoring federal relationship with Auburn Indian Tribe); 25 U.S.C. 1300m (same, Paskenta Band of Nomlaki Indians of California); 25 U.S.C. 1300n (same, Graton Rancheria of California).

has established discrete programs for native Hawaiians, it has done so based solely on their status as native Hawaiians, taking care to refer to native Hawaiians as a group distinct from Indian Tribes or Indians.[5] Consistent with the understanding that native Hawaiian groups do not constitute Indian Tribes, legislation has been proposed in recent years that would create a process for establishing a government-to-government relationship with a native Hawaiian governing body. See Pet. 8-9; see, *e.g.*, H.R. 374, 109th Cong., 1st Sess. § 1 (2005); S. 147, 109th Cong., 1st Sess. § 1 (2005). Congress, however, has yet to recognize native Hawaiians as an Indian Tribe or otherwise establish a government-to-government relationship with them. In these circumstances, it is fully rational for the Secretary of the Interior to exclude native groups in Hawaii from petitioning for acknowledgment as an Indian Tribe under the acknowledgment regulations.[6]

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[5] Some legislation pertains only to native Hawaiians. *E.g.*, Native Hawaiian Health Care Act of 1988, 42 U.S.C. 11701 *et seq.*; Native Hawaiian Education Act, 20 U.S.C. 7901 *et seq.* Other legislation pertains to both native Hawaiians and Indian Tribes. Where Congress has made legislation applicable to both Indian Tribes and native Hawaiians, Congress has taken care to define them separately. See, *e.g.*, American Indian, Alaska Native, and Native Hawaiian Culture and Arts Development Act, 20 U.S.C. 4402 (separate definitions for Indian tribe and native Hawaiian); Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001(6), (7), (10), (11) and (12) (same); Native American Programs Act of 1974, 42 U.S.C. 2992c (separate definitions for "Indian tribe," Native Hawaiian, and "Native American Pacific Islander").

[6] Petitioners suggest (Pet. 8) that native Hawaiian groups should not be forced to rely on legislative action by Congress to establish a government-to-government relationship with the United States. The power to recognize Indian Tribes, however, is essentially committed to the political Branches. As this Court has explained, the "Constitution

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2005

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grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court has] consistently described as 'plenary and exclusive.'" *United States* v. *Lara*, 541 U.S. 193, 200 (2004); see *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866). Accordingly, petitioners should direct to Congress, rather than the courts, their concerns with the substance of proposed legislation that would provide a process for recognizing a governing entity for native Hawaiians. See Pet. 8-11.