

Supreme Court, U.S.
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In The
Supreme Court of the United States

PATRICK L. KAHAWAIOLAA, VIRGIL E. DAY, and SAMUEL
L. KEALOHA, JR., JOSIAH L. HOOHUI, and KA LAHUI
HAWAII

Petitioners,

v.

GALE A. NORTON,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether U. S. Department of the Interior regulations which preclude groups of indigenous Hawaiians from applying for recognition that they exist as Indian tribes, pursuant to 25 C.F.R, Part 83, violate the Equal Protection component of the Fifth Amendment of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices of the
Supreme Court of the United States:*

Your Petitioners, PATRICK L. KAHAWAIOLAA, *et al.*,
respectfully pray that a Writ of Certiorari issue to review the
decision of the United States Court of Appeals for the Ninth
Circuit in *Kahawaiolaa v. Norton*, CA. No. 02-17239 (9th Cir,
October 27, 2004).

CITATIONS OF REPORTS OF OPINIONS AND ORDERS

The opinion of the the Ninth Circuit Court of Appeals,
filed on October 27, 2004, is reported at *Kahawaiolaa v.
Norton*, 386 F.3d 1271 (9th Cir. 2004) and is reprinted at page
A-1 of the Appendix. The order of the District Court granting
Respondent’s motion to dismiss and denying Petitioners’
motion for summary judgment is reported at *Kahawaiolaa v.
Norton*, 222 F.Supp.2d 1213 (D.Haw. 2002) and is reprinted at
page A-22 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was filed and
entered on October 27, 2004. This Honorable Court has
discretionary jurisdiction to review cases in United States

Courts of Appeals by way of writ of certiorari as provided by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

25 C.F.R. § 83.1 Definitions.

As used in this part:

Continental United States means the contiguous 48 states and Alaska.

Indian group or *group* means any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.

25 C.F.R. § 83.2 Purpose.

The purpose of this part 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. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

25 C.F.R. § 83.3 Scope.

(a) This part applies only to those American Indian groups indigenous to the continental United States which are not

currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

STATEMENT OF THE CASE

On December 11, 2001, the individual Petitioners filed a complaint in the United States District Court for the District of Hawaii for declaratory and injunctive relief against respondent in her official capacity as Secretary of the Department of the Interior of the United States. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1346, 1361, 2201 and 2202. The complaint requests the Court to declare that "The provisions of 25 C.F.R. §§ 83.1 and 83.3 which preclude native Hawaiians from obtaining recognition as and (*sic*) Indian tribe are an unconstitutional racial discrimination in violation of the equal protection component of the Fifth Amendment of the United States Constitution."

On March 15, 2002, Respondent moved to dismiss the complaint on grounds that the complaint "raises political questions over which this court does not have jurisdiction" and that the "regulations Plaintiffs challenge are constitutionally valid exercises of legislative and executive powers."

On March 28, 2002, filed a counter-motion for summary judgment on the grounds that there were no genuine issues of material fact and Plaintiffs were entitled to judgment as a matter of law.

On May 23, 2002, Petitioners, including Petitioner, KA LAHUI HAWAII (hereafter "KA LAHUI"), filed an amended complaint for injunctive and declaratory relief, predicated jurisdiction as before. KA LAHUI, was alleged to be a group of indigenous Hawaiians, whose territory at the time of sustained contact was within the area now comprising the state of Hawaii, which desires to apply for federal recognition as an Indian tribe,

pursuant to 25 C.F.R., Part 83.

The amended complaint seeks a declaration that "the provisions of 25 C.F.R. §§ 83.1 and 83.3 which preclude indigenous Hawaiians from obtaining recognition as an Indian tribe are an unconstitutional racial discrimination in violation of the equal protection component of the Fifth Amendment of the United States Constitution."

On August 30, 2002, the district court granted the motion to dismiss on grounds that the complaint raises a political question. App., p. A-39. In a footnote, the district court concluded that even if the court had jurisdiction it would rule that the regulations do not violate the Fifth Amendment when reviewed under the rational basis test, relying largely on *Morton v. Mancari*, 417 U.S. 535 (1974). App., pp. 39-41, fn 14.

On appeal to the Ninth Circuit, the Court of Appeals affirmed. The Court of Appeals held that the political question doctrine did not prevent the district court from having jurisdiction of this case. App., p. A-10. On the merits, the court of appeals held that the discrimination in the rules against indigenous groups from Hawaii was not a racial classification and was, therefore, subject to review on the rational basis standard. App., p. A-13-4.

On applying the rational basis standard the Court of Appeals concluded that the regulations do not violate the equal protection component of the Fifth Amendment based on an historical analysis of differences between indigenous Hawaiians and indigenous peoples in the other 49 states. App., pp. 14-20.

Nevertheless, the court of appeals concluded:

we would have more confidence in the outcome if the Department of Interior had applied its expertise to parse through history and determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis.

It would have been equally rational, if perhaps not more so, for the Department to have decided to undertake that inquiry in the first instance.

App. p. 21.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The court of appeals has decided an important question of federal law that has not been, but should be, decided by this Court. The decision of the Court of Appeals below: 1) precludes existing indigenous Hawaiian groups from establishing that they exist as an Indian tribe in the manner established for groups indigenous to the other 49 states; 2) leaves the establishment of a governing entity for indigenous Hawaiians to Congress rather than to the indigenous Hawaiians themselves; 3) will affect the settlement of indigenous Hawaiian land claims; 4) justifies discrimination against indigenous Hawaiians on a non-racial basis while discrimination in favor of indigenous Hawaiians has been held by this Court to be based on race.

In *Rice v. Cayetano*, 528 U.S. 495 (2000) this Court held that a statute of the state of Hawaii limiting the right to vote for Trustees of the Office of Hawaiian Affairs to indigenous Hawaiians was a racial classification prohibited by the Fifteenth Amendment to the United States Constitution. Left undecided in that case were very important and difficult questions pertaining to the relationship between the United States of America and indigenous Hawaiians.

These questions were: whether Congress has determined that indigenous Hawaiians have a status like that of Indians in organized tribes; whether Congress may, and has, delegated authority to the state of Hawaii to preserve that status; and whether Congress may treat indigenous Hawaiians as it does Indian tribes. *Rice v. Cayetano*, *supra*, 528 U.S. at 518. The Court characterized these issues as "difficult terrain" citing the

opposing views set forth in Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95 (1998) and Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L. J. 537 (1996). *Rice v. Cayetano*, *supra*. 528 U.S. at p. 519.

A. The decision below precludes indigenous Hawaiian groups from establishing that they exist as an Indian tribe in the manner established for all other indigenous groups.

Petitioner, KA LAHUI is a group of indigenous Hawaiians who assert tribal sovereignty and believe that they could prove that they meet the criteria for federal recognition set forth in 25 C.F.R. § 83.7, given the opportunity. There are other groups of indigenous Hawaiians who claim tribal sovereignty, such as the Hou Hawaiians, *see* Benjamin, *supra*, at p. 580, 'Ohana Council a.k.a. The Provisional Government of the Independent Nation State of Hawaii, the State Council of Hawaiian Homestead Associations, and the Office of Hawaiian Affairs. *See* Benjamin, *supra*, at p. 578, fn. 173.

Nevertheless, Benjamin argues that indigenous Hawaiians "are not organized into any entity that can reasonably be called a tribe." Benjamin, *supra* at p. 574. It is uncertain how he came to this conclusion, however, as he goes on to say in the very next sentence that, "This raises the initial question of what attributes an Indian group must possess in order to qualify as a tribe." In the footnote to this comment, he notes:

Some commentators have suggested that such a question is problematic, both because indigenous groups should define themselves (rather than having a definition imposed from the outside by others) and because the organizational arrangements of indigenous peoples are too multifarious to admit of a single useful definition. The problem here is that the Indian Commerce Clause of the constitution refers to "Indian

Tribes" that, if taken for a racial or ethnic group, would be unconstitutional. Under these circumstances, the courts and Congress will need to utilize some definition of "Indian Tribes" as that term is used in the Indian Commerce Clause to determine whether a given law violates equal protection. Whether that definition allows for one or many kinds of tribes, and whether it is proposed by indigenous groups themselves or by the federal government, the definition itself must exist in order to allow for the assessment of programs under present case law (specifically *Mancari* and *Adarand*).

Benjamin, *supra* at p. 574, fn. 157 [citations omitted].

Benjamin goes on to suggest one possible definition of "Indian tribe" might be the criteria laid out in 25 C.F.R., Part 83. But he argues that indigenous Hawaiians taken as a whole cannot meet this standard, because there is no single group to which all indigenous Hawaiians admit allegiance. *Id.* at p. 575. He goes on to suggest that "One seemingly possible way to avoid the problem of the absence of a Native Hawaiian entity would be to posit a series of Native Hawaiian tribes rather than one mass tribe." He concludes that, "there is reason to doubt, though, whether any native Hawaiian entity would meet the constitutional minima for an 'Indian Tribe[.]'" *Id.*, at p. 580.

So basically, after all of his extensive research on the subject, Benjamin really does not know whether or not indigenous Hawaiians exist in tribal groups. If there is reason to doubt whether any indigenous Hawaiian group might meet any particular definition of an Indian tribe, then *a priori* it is also possible that one or more such groups *do* exist as an Indian tribe under one definition or another.

Although Petitioners assert that KA LAHUI does, indeed, meet the 25 C.F.R., §83.7 criteria and that they could prove it

if given the opportunity to go through the administrative process, the decision of the Court of Appeals below has denied them that opportunity. The decision of the Court of Appeals below has forever foreclosed the possibility of *any* indigenous Hawaiian group *ever* proving that it is, indeed, an Indian tribe under the administrative process laid out in 25 C.F.R., Part 83 and the criteria set forth in 25 C.F.R. §83.7.

B. The decision below deprives indigenous Hawaiians of the right of self-determination

Although the Court below concluded that it would be better for the question of tribal existence to be decided by the DOI "appl[y]ing its expertise to parse through history and determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis," App., at p. 21, the Court undertook that process itself and decided against allowing them the opportunity to do that. App., pp. 14-20. Under the decision of the Court of Appeals below, indigenous Hawaiians' only hope for recognition of their sovereignty is legislative action by Congress. App., p. 21.

There is, indeed, legislation which has been pending in Congress for many years that would *create* a governing entity to represent the interests of indigenous Hawaiians. Senate Bill 344; H.R. 655. This bill has taken many forms over the years. The latest version is found at 150 Cong. Rec. S8916 (2004). While the various versions differ in particulars, they all have several things in common.

First, they all contain Congressional Findings that, if true, demonstrate that indigenous Hawaiians do, indeed, meet the criteria of 25 C.F.R., § 83.7 and have already been recognized by Congress as an Indian tribe. Therefore, there is no need for a new bill to establish that this relationship exists. It has already been done. In that respect, the bill is superfluous.

For example, some of the findings in the present version of

the bill are as follows:

(5) pursuant to the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), the United States set aside 203,500 acres of land to address the conditions of Native Hawaiians in the Federal territory that later became the State of Hawaii;

(6) by setting aside 203,500 acres of land for Native Hawaiian homesteads and farms, the Hawaiian Homes Commission Act assists the members of the Native Hawaiian community in maintaining distinct native settlements throughout the State of Hawaii;

(10) The Hawaiian Home Lands and other ceded lands provide an important foundation for the ability of the Native Hawaiian community to maintain the practice of Native Hawaiian culture, language, and traditions, and for the survival and economic self-sufficiency of the Native Hawaiian people;

(11) Native Hawaiians continue to maintain other distinctly native areas in Hawaii;

(15) despite the overthrow of the government of the Kingdom of Hawaii, Native Hawaiians have continued to maintain their separate identity as a distinct native community through cultural, social, and political institutions, and to give expression to their rights as native people to self-determination, self-governance, and economic self-sufficiency;

(17) Native Hawaiians are actively engaged in Native Hawaiian cultural practices, traditional agricultural methods, fishing and subsistence practices, maintenance of cultural use areas and sacred sites, protection of burial sites, and the exercise of their traditional rights to gather medicinal plants and herbs, and food sources.

(22) the United States has continually recognized and reaffirmed that—

(A) Native Hawaiians have a cultural, historic, and land-based link to the aboriginal, indigenous, native people who exercised sovereignty over the Hawaiian Islands;

(B) Native Hawaiians have never relinquished their claims to sovereignty or their sovereign lands;

(C) the United States extends services to Native Hawaiians because of their unique status as the indigenous, native people of a once-sovereign nation with whom the United States has a political and legal relationship; and

(D) the special trust relationship of American Indians, Alaska Natives, and Native Hawaiians to the United States arises out of their status as aboriginal, indigenous native people of the United States;

S-344, § 2.

Second, instead of recognizing existing indigenous groups, all of the versions of this bill provide for a new "Native Hawaiian governing entity" to be created under procedures established in the bill. The current version provides for Respondent to appoint a nine member commission, *Id.* § 7(b), to prepare a roll of "the names of the adult members of the Native Hawaiian community who elect to participate in the reorganization of the Native Hawaiian governing entity and are certified to be Native Hawaiian as defined in section 3(8) by the Commission." S-344, §7(c)(1)(A). The people enumerated on this roll would then elect an interim governing council. *Id.*, § 7(c)(2)(A)(iii), which would hold a referendum to ratify organic governing documents, *Id.*, § 7(c)(2)(B)(iii)(I), which governing documents are required to contain provisions listed in 7(c)(4)(A)(i) through (vii) of the bill.

The third thing that all versions of this bill have in common is a definition of "Native Hawaiian" that has no blood quantum or tribal affiliation requirement. *Id.* §3(8), in stark contrast to

the definition of "Indian" in the Indian Reorganization Act, at 25 U.S.C. § 479.

According to the 2000 U.S. Census figures, there were 402,000 people in the United States claiming "Native Hawaiian" ancestry. Grieco, Elizabeth M., *The Native Hawaiian and Other Pacific Islander Population: 2000*, U.S.Census Bureau, Census 2000 Brief C2KBR/1-14 (2001), p. 8. Of this figure, 141,000 claimed only "Native Hawaiian" ancestry. *Id.* Thus, the number of potential members of the new Native Hawaiian governing entity is many times greater than the number of native Hawaiians who have been awarded homesteads (6,800 according to S-344, §2(7)), or the number of members of KA LAHUI (between 12,000 and 24,000 according to Benjamin, *supra*, at 578, fn 173), the State Council of Hawaiian Homes Associations (between 27,000 and 30,000, *Id.*), The Provisional Government of the Independent Nation State of Hawaii (7,000, *Id.*), or the Hou Hawaiians (300 *Id.*).

Obviously, in any plebiscite to ratify organic governing documents for the new "Native Hawaiian governing entity," the votes of the members of the existing indigenous Hawaiian groups will be completely drowned by the tsunami wave of one sixty-fourth-part Hawaiians, *see Rice v Cayetano, supra*, at p. 514, and Hawaiians with one ancestor in five hundred, *see Id.* at 526 [BREYER, J. concurring].

Instead of recognizing the sovereignty of the indigenous Hawaiian people as it actually exists, the bill ignores and supercedes all existing indigenous Hawaiian groups and imposes a new representative government upon them, in all likelihood against their will, contrary to the fundamental concept of sovereignty and self-determination.

C. The decision below will have a major impact on the resolution of indigenous Hawaiian land claims.

In the opinion below, the Court seemed to be concerned that, if indigenous Hawaiian groups were granted recognition

under 25 C.F.R., Part 83, they would somehow be getting double benefits. The Court said, "[A]s members of a newly recognized Indian tribe or tribes, native Hawaiians would be entitled to the special rights and privileges granted to native Hawaiians *and* to those accorded to American Indians." App., p. A-20.

The rights of American Indians under the Indian Reorganization Act and the Indian Self-Determination Act, that indigenous Hawaiians do not have is the right to hold title to their own lands and provide for their own welfare.

Under Sections 5(b) and 5(d) of the Hawaii Admission Act, 73 Stat 4, P.L. 86-3, the United States ceded nearly all of the public land in Hawaii to the State except for military bases, national parks and other land needed by the federal government. This was not consistent with the land grants given to the other states, which were given between 1 and 4 sections per township for school and other government purposes. *See Lassen v. Arizona Highway Dept.*, 385 U.S. 458, 463 (1967), fn 7.

In exchange for this extraordinary generosity on the part of the United States government, the State of Hawaii accepted the trust provisions in Section 5(f) of the Admission Act for the betterment of the condition of native Hawaiians and the compact to administer the Hawaiian Homes Commission Act, in Section 4. Eighty-four years after it was enacted and 46 years after the state agreed to administer HHCA, there are only 6,800 beneficiaries and their families living on Hawaiian Home Lands, while there are 18,000 still on the waiting list. S-344, §2(7).

Congress was very generous to native Hawaiians by setting aside 203,500 acres of land for homelands and imposing a trust on 1.4 million acres of public land and the income and proceeds therefrom, in part, for their benefit. Unfortunately, for native Hawaiians, in 1959, at the time of statehood, the policy of the United States government was termination of the federal-tribal

relationship. *See Canby, William C. Jr., American Indian Law*, West Group, (3rd ed. 1998), pp. 55-58.

By turning over their land to the state government, indigenous Hawaiians were effectively deprived of the benefit thereof. The state has managed to settle only 6,800 families of beneficiaries on the Home Lands. While 18,000 still remain on the waiting list, many others have died waiting or have not registered because of the futility of doing so.

If an indigenous Hawaiian group or groups could achieve recognition under Part 83, such group or groups would be in a position to negotiate with the State of Hawaii for the return of some of their land so that they could become self-sufficient and *not dependent* upon the state or federal government for their welfare. But the State does not want to negotiate with the existing indigenous Hawaiian groups.

The fourth thing that all versions of S-344 have in common is that they authorize and direct the new Native Hawaiian governing entity to represent "Native Hawaiians" in settling indigenous Hawaiian land claims. *See S-344, § 8(b)*.

Thus, the decision in this case may have an effect on the identity of parties to the negotiations for the resolution of these claims.

D. The decision of the Court below justifies discrimination against indigenous Hawaiians on a non-racial basis while discrimination in favor of indigenous Hawaiians has been held by this Court to be based on race

The decision of the Court below holds that discrimination against groups of indigenous Hawaiians is not racial discrimination and is therefore subject to rational basis review under the Equal Protection component of the Fifth Amendment.

In *Rice v. Cayetano, supra*, this Court held that discrimination *in favor* of indigenous Hawaiians was racial and therefore prohibited by the Fifteenth Amendment. Under an

Equal Protection challenge such discrimination would have been subject to a strict scrutiny standard. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, (1995)

This case is important because it presents the unique situation where discrimination against an ethnic group is reviewed under a more lenient standard than discrimination in their favor.

CONCLUSION

Because this case may have a profound effect on the fundamental relationship between the United States of America and the indigenous Hawaiian people, as shown by the foregoing argument and authorities, Petitioners respectfully request that this Honorable Court grant certiorari to review the judgment of the Court of Appeals. The indigenous Hawaiian people should not be denied the opportunity to at least make their case through the administrative process for sovereignty and the right of self-determination without a full review by this Court. This Court is their only hope against the political weight of 400,000 "Native Hawaiians" and the State of Hawaii.

Dated: Honolulu, Hawaii, January 25, 2005.

Respectfully submitted,
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