No. 03-359

In the

Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.,

Petitioners,

v.

UNITED STATES, et al.

Respondents.

On Petition for Writ of Certiorari to the United States Supreme Court for the District of Columbia Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the preference for Native Americans in section 8014 of the Department of Defense Appropriations Act, which is neither restricted to Indian tribes, nor related to uniquely Indian interests, subject to rational basis review under *Morton v. Mancari*, 417 U.S. 535 (1974), or strict scrutiny under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioners. Consent to file this brief was obtained from all parties and has been lodged with the Clerk of this Court.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California, for the purpose of engaging in matters affecting the public interest. PLF has participated in numerous cases involving discrimination on the basis of race including *Rice v. Cayetano*, 528 U.S. 495 (2000), *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995), *University of California v. Bakke*, 438 U.S. 265 (1978), *U.S. Air Tour Association v. F.A.A.*, 298 F.3d 997 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1783 (2003); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), and *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). PLF considers this case to be of special significance in that it impacts every state and federal preference for Native Americans.

STATEMENT OF THE CASE

In January, 1999, Congress passed the Defense Appropriations Act for Fiscal Year 2000. Buried among its various provisions for pay, retirement, training, and maintenance of our armed forces, section 8014 of the act grants a preference for civil contracting firms owned by Native Americans. Defense Appropriations Act for FY 2000, Pub. L. No. 106-79, § 8014, 113 Stat 1212 (1999), provided that none of the appropriation funds could be used to "out source" jobs

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

unless the Department conducted a long and complicated cost-benefit analysis. But the Department could forego the analysis if it granted the contracts to firms with at least 51% Native American ownership.

Pursuant to this section, Kirtland Air Force Base in Albuquerque, New Mexico, notified Congress that it would be engaging in a cost-benefit analysis to determine if it was advisable to out source various base maintenance operations. Shortly after the required notifications were published, Chugach Management Services (CMS), Joint Venture, notified the base of its interest in the contract. CMS is a joint venture of Chugach Management Services, Inc., and Alutiiq Management Services, both of which are owned by federally recognized tribes. Because the majority of CMS is owned by Native Americans, the firm qualified for the section 8014 preference. Invoking that preference, the Air Force skipped the cost-benefit analysis and awarded the 523 million dollar contract to CMS. The contract is for one year, with nine one-year options to renew. As a result of the conversion, over 240 civil engineers lost their jobs.

The former employees and their unions filed an action against the Department of Defense, the Secretary of the Air Force, and CMS in the United States District Court for the District of Columbia. This facial challenge to section 8014 claimed that it violated the equal protection component of the Fifth Amendment. On cross-motions for summary judgment, the trial court applied the rational basis review standard of *Morton v. Mancari*, 417 U.S. 535 (1974), and found no equal protection violation. The district court determined that classifications involving Native Americans are always political rather than racial and applied the lower standard of review set out in *Mancari*. *American Federation of Government Employees v. United States*, 195 F. Supp. 2d 4, 20 (D.C. Cir. 2002).

Petitioners' facial challenge fared no better in the United States Court of Appeals for the District of Columbia. Finding that the corporation receiving the contract was owned by a federally recognized tribe, the court refused to analyze the constitutionality of the language permitting the preference for corporations with 51% Native American ownership. *American Federation of Government Employees v. United States*, 330 F.3d 513, 518 (D.C. Cir. 2003). The court then found "tribal economic development" to be a sufficient justification for the preference and upheld the decision of the lower court.

Petitioners now seek review of the decision of the District of Columbia Circuit Court's ruling that a preference for Native Americans, neither dependent on tribal status nor related to uniquely Indian interests, need only satisfy the rational basis standard of review under the Equal Protection Clause.

SUMMARY OF ARGUMENT

At present, there is considerable confusion as to the correct standard of review for constitutional challenges to government preferences for Native Americans under the Equal Protection Clause. Though *Mancari* analyzed certain preferences aimed at tribes and relating to "uniquely Indian interests" under rational basis, more recent case law suggests that preferences based on racial classifications should be analyzed under strict scrutiny.

The confusion over the standard of review has led to a direct conflict among the federal courts of appeals. The District of Columbia Circuit Court has determined that Congress need not limit a preference to tribes or tribal members to qualify for *Mancari*'s lower rational basis standard. Conversely, the Ninth Circuit Court determined that strict scrutiny is the correct standard unless the preference is related to uniquely Indian interests and limited to tribes or tribal members. *See Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997); *Dawavandewa v. Salt River Project Agric. Improvement & Power District*, 154 F.3d

1117 (9th Cir. 1998). Moreover, the circuit courts conflict over whether economic assistance to tribes is a sufficient constitutional justification for a preference that is not limited to tribal members. Thus, it is altogether unclear how a federal court should analyze a preference for Native Americans. Identical sets of facts will result in contradictory outcomes depending on the circuit in which the case is filed. This Court should therefore grant the Petition for Writ of Certiorari and announce the proper standard of review for cases involving government preferences for Native Americans.

ARGUMENT

I

THE PROPER STANDARD OF REVIEW FOR NATIVE AMERICAN PREFERENCES IS AN IMPORTANT FEDERAL QUESTION

This case presents the Court with an important issue in need of immediate judicial resolution. The number of government preferences for individuals and groups claiming "Native American" or "Indian" status is increasing. *See* Clay R. Smith, *"Indian" Status: Let a Thousand Flowers Bloom*, 46 Mar. Advocate 18 (2003) (noting that at least 160 federal programs offer race-based preferences and, particularly in the area of public contracting, Congress has expressed a desire to extend preferences to all "Native Americans" including American Indians, Eskimos, Aleuts, or Native Hawiians). Additionally, Congress is now considering legislation that would grant Native Hawaiians federal recognition, giving them the same status as federally recognized Indian tribes. *See* Native Hawaiian Recognition Act of 2003, S. 344, 108th Cong. (1st Sess. 2003). Thus, as government preferences continue to increase for Indian tribes and individual Indians, and with the number of federally recognized tribes on the rise, it is imperative that this Court determine whether and to what extent *Mancari* exempts these preferences from the

heightened scrutiny that otherwise applies to racial classifications.

Furthermore, as Indian tribes enter the mainstream of economic and political life, competing with Americans of every background and ethnicity for employment, contracting opportunities, and other government benefits, it is ever more crucial that the constitutional standard for challenges to tribal preferences be certain. In fiscal year 2001, tribal gaming revenue nationwide was $12.7 billion dollars. *National Indian Gaming Association*, Library and Resource Center, www.indiangaming.org/library/ index.html. With this newfound wealth, Indian tribes are now able to influence policy through political campaign contributions and are able to lobby directly for more government preferences. *See* Don Hilgendorf, *Tribes Have Become Players in Sacramento*, L.A. Times (Sept. 27, 2003) (noting that tribes spent 6.6 million dollars in the recent California recall election, making them the largest donors in the race). In many states, tribes and their associated interest groups have spent considerable resources promoting referenda on tribal gaming. *See* Center for Responsive Politics, Background: Indian Gaming, *available at* http://www.opensecrets.org/industries/background.asp?Ind=G6550. Tribes have also directed lobbying efforts at attaining preferential treatment in other areas such as education, health care, and public contracting. *See* Hilgendorf, *supra*. As one commentator noted, "Indian gaming participants are learning the savvy techniques involved in the game of politics and power." Tobi Edward Longwitz, *Indian Gaming: Making a New Bet on the Legislative and Executive Branches After IGRA's Judicial Bust*, 7 Gaming L. Rev. 197, 201 (2003).

Tribes now enjoy government preferences that are aimed solely at granting economic benefits, rather than promoting any unique Indian interest, as was the case in *Mancari*. Now that Indian tribes wield significant political power, it is likely that legislation granting preferences to Indian tribes will increase.

See Smith, *supra* (noting Congress' willingness to grant more government preferences for "Indians and "Native Americans"). Therefore it is crucial that the federal courts have a uniform standard of review for evaluating the constitutionality of such preferences.

The decisions of this Court in both *Adarand* and *Rice* have created great uncertainty as to the constitutional limitations on government preferences for both tribes and unaffiliated Native Americans. It is unclear whether preferences for Native Americans that do not require tribal membership are subject only to rational basis review under *Mancari* or heightened scrutiny under *Adarand*. It is also unclear whether preferences to Indian tribes that are aimed solely at benefitting tribes economically must only withstand rational basis review. Thus, parties litigating equal protection challenges to these preferences are likely to face different standards of review and suffer the uncertainty of inconsistent verdicts depending on the forum.

Although the government contract in this case was awarded to a tribe, the section 8014 preference did not require tribal membership. Instead, the provision only required that a firm be owned, in part, by Native Americans. Therefore, this case provides the perfect vehicle for addressing the limitations on *Mancari* both as it relates to preferences for individuals who are not members of federally recognized tribes, and as it relates to government preferences that do not serve any uniquely Indian interest.

In *Mancari*, this Court upheld employment preferences at the Bureau of Indian Affairs (BIA) for members of federally recognized tribes. Noting that Congress has constitutional authority to regulate commerce with tribes, the Court held that the preference was granted "not to a discrete racial group," but to "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." 417

U.S. at 554. The Court was also careful to note that the case was limited to the authority of the BIA, an agency described as "sui generis." *Id.* In fact, the Court explicitly refused to address "the more difficult question" of blanket exemptions or preferences unrelated to Indian self-government. *Id.* Although the preference at issue in *Mancari* did require that applicants possess a certain quantum of Indian blood, the *Mancari* Court did not focus on this fact. Instead, the Court characterized the preference as political rather than racial because individuals were also required to be members of federally recognized tribes. *Id.* & n.24. Based on this distinction, the Court applied rational basis review and upheld the preference as "reasonably and directly related to a legitimate, nonracially based goal." *Id.*

The characterization of the *Mancari* preference as political rather than racial has undergone increasing criticism from academic scholars and members of this Court. *See* Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 Harv. L. Rev. 1754, 1761-62 (1997) (noting that the Mancari Court refused to consider the fact that "race, as measured by blood quantum, was a but-for requirement of eligibility for the preference"); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 713 (2001). There is a substantial question as to whether preferences for Native Americans are subject only to rational basis review under *Mancari* even if the preferences lack a "political" component limiting the reach to members of federally recognized tribes. For instance, in one dissenting opinion, Justices Stevens and Ginsberg have suggested that the *Mancari* rational basis analysis should apply regardless of whether a tribal affiliation exists. *See Rice v. Cayetano*, 528 U.S. at 535 (Stevens, J., dissenting).

It is also unclear what portion of the *Mancari* analysis, if any, survives after this Court's ruling in *Adarand*. In *Adarand*, this Court made three points clear. First, "racial

classifications [are] constitutionally suspect.'" 515 U.S. at 223 (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). Second, "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." *Adarand*, 515 U.S. at 224 (citing *City of Richmond v. Croson*, 488 U.S. 469, 494 (1989) (plurality opinion)). Third, "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The Court concluded that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are *narrowly tailored measures that further compelling government interests*." *Adarand*, 515 U.S. at 227 (emphasis added). The Court recently reaffirmed this standard of review for racial classifications in *Grutter v. Bollinger*, 123 S. Ct. 2325, 2337 (2003), and *Gratz v. Bollinger*, 123 S. Ct. 2411, 2427 (2003).

Since this Court's decision in *Adarand*, there has been much debate over its effect on Native American, tribal, and nontribal government preferences. Some scholars contend that *Adarand* does apply to preferences for Native Americans. *See* Wayne R. Farnsworth, *Bureau of Indian Affairs Hiring Preferences After Adarand Constructors, Inc. v. Pena*, 1996 B.Y.U. L. Rev. 503, 522-25 (1996) (noting that government preferences without a tribal membership component would fail under *Adarand*); William Bradford, *"With a Very Great Blame in Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 Am. Ind. L. Rev. 1, 131 (2002-03) (noting that "*Adarand* and *Rice* are harbingers of judicial retreat to a stricter standard of scrutiny of remedial legislation benefitting Indians"); Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale. L.J. 537, 567 (1996) (arguing that

Adarand and *Croson* have "changed the constitutional landscape" for Native American preferences). While they acknowledge that some preferences may be sufficiently narrowly tailored to survive strict scrutiny, they conclude that preferences not dependent upon tribal status would fail under *Adarand*. *See* Farnsworth, *supra*, at 522-25. Another scholar contends that Congress' constitutional power to regulate commerce with Indian tribes permits all racial classifications benefitting Native Americans, regardless of tribal affiliation, and therefore *Adarand*'s strict scrutiny standard of review would not apply to such preferences. *See* Carole Goldberg, *American Indians and Preferential Treatment*, 49 UCLA L. Rev. 943, 970 (2002); Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. Rev. 169, 174-175 (1991).

This Court's most recent decision discussing *Mancari* implies that there are constitutional limitations on government's power to create racial preferences favoring Native Americans. In *Rice v. Cayetano*, this Court analyzed the constitutionality of a Hawaiian statute allowing only descendants of indigenous Hawaiians to vote for certain offices. While the case was ultimately decided on Fifteenth Amendment grounds, this Court addressed *Mancari*, confining it to matters of quasi-sovereign authority relating to self-governance. 528 U.S. at 520. Although the Court distinguished Native Hawaiians from American Indians, it implied that there are constitutional limitations on Congress' power over Indian tribes.

> Hawaii would extend the limited exception of *Mancari* to a new and larger dimension. The State contends that "one of the very purposes of OHA—and the challenged voting provision is—to afford Hawaiians a measure of self-governance," and so it fits the model of *Mancari*. It does not follow from *Mancari*, however, that Congress may authorize a State to establish a voting scheme that

> limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.

Rice, 528 U.S. at 520.

Thus, even if the Court had analyzed the provision as a tribal preference, it would still have failed as a violation of the Fifteenth Amendment. If the Fifteenth Amendment may limit Congress' constitutional power to regulate commerce with tribes, then other constitutional provisions probably also apply, including the equal protection component of the Fifth Amendment. *See* Gould, *supra,* at 740. *But see* Goldberg, *American Indians and Preferential Treatment*, 49 UCLA L. Rev. at 967-68 (arguing that preferences for Native Americans may be prohibited under the Fifteenth Amendment, but such preferences are permitted under the equal protection component of the Fifth Amendment because the latter is less specific about racial classifications than the former).

It is unclear whether *Mancari* is limited to preferences for tribes or tribal members. If *Mancari* permits "racial" preferences, then its viability is certainly in jeopardy after this Court's decision in *Adarand*. Now that Congress is considering increasing the number of federally recognized tribes, as well as the preferences benefitting these tribes, it is likely that the number of equal protection challenges to these preferences will increase. In order to avoid more conflicting decisions in the federal courts, it is imperative that this Court announce the correct standard of review for these constitutional challenges.

II

THE DISTRICT OF COLUMBIA CIRCUIT'S APPLICATION OF *MANCARI* CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT

The District of Columbia Circuit and the Ninth Circuit directly conflict in their application of *Mancari* when the racial

classification at issue is aimed at assisting Indians economically, rather than furthering some uniquely Indian interest such as self-government. While the District of Columbia Circuit Court has applied *Mancari* to economic preferences unrelated to unique Indian interests, the Ninth Circuit has held that *Mancari* does not apply to such preferences.

In *Williams v. Babbitt*, 115 F.3d 657, the Ninth Circuit refused to uphold an interpretation of the Reindeer Industry Act which limited the sale of Alaskan reindeer to nonnatives. Characterizing the limitation as a "naked preference for Indians unrelated to unique Indian concerns," the court held that *Mancari* did not apply. The court held that preferences for Native Americans should not be analyzed under *Mancari* unless the "[l]egislation that relates to Indian land, tribal status, self-government or culture . . . [and is therefore] 'rooted in the unique status of Indians as "a separate people" with their own political institutions.'" 115 F.3d at 664 (quoting *United States v. Antelope*, 430 U.S. 641 (1977)). The court was quick to note that while *Mancari* cited several cases as examples of permissible "special treatment" for Indians, each of the cases dealt with regulating activities in the immediate vicinity of Indian land. *Id.* at 664-65 (citing *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

Finding that the preference was not designed to promote any unique Indian interest because its only effect was to benefit Native Americans economically, the court refused to apply *Mancari*'s rational basis test. Rather, the court determined that strict scrutiny should apply, noting that after *Adarand*, "*Mancari's* days are numbered." *Williams*, 113 F.3d at 665.

The Ninth Circuit expressly stated that the classification would fail under *Adarand* for lack of narrow tailoring.

> Assuming that Congress has a compelling interest in assisting natives economically, the [Interior Board of

> Indian Appeals'] interpretation precludes any chance of defending the Reindeer Act as narrowly tailored to serve that interest. A complete race-based ban is the broadest possible remedy. Unlike a subsidy, set-aside or even a quota, an absolute ban deprives the disfavored racial group of all opportunity to participate thus placing a tremendous burden on innocent third parties. This makes the remedy almost by definition not narrowly tailored.

Id. at 665-66.

Even though the court ultimately avoided the "difficult constitutional questions," posed by the case and adopted instead a "less constitutionally troubling construction" of the Act, *Williams* shows the court's intent to apply strict scrutiny to classifications unrelated to unique Indian interests. *Id.* at 666.

In *Dawavandewa*, the Ninth Circuit refused to extend *Mancari* to another preference that was not linked to unique tribal interests. The court analyzed whether the Navajo tribe could require employers located on their land to give employment preferences to members of the Navajo tribe over members of other tribes. The appellate court confined the *Mancari* rational basis test to issues of tribal self-governance and noted that "[p]referential employment of Navajo Indians on a privately owned facility, while certainly helpful to the tribe's employment problems, has little to do with increasing the tribe's capacity for self-governance." *Dawavandewa*, 154 F.3d at 1123.

District court opinions from courts within the Ninth Circuit also demonstrate a judicial trend towards limiting *Mancari* to preferences involving tribal self government. These courts have applied *Adarand*'s strict scrutiny analysis in evaluating equal protection challenges to government preferences, where the preference is unrelated to a unique Indian interest. For example, in *Tafoya v. City of Albuquerque*,

751 F. Supp. 1527 (D.N.M. 1990), a district court in the Ninth Circuit found that a licensing ordinance limiting the sale of goods to New Mexico residents who were members of the Navajo Nation or of a federally recognized Indian tribe, was unconstitutional on state and federal equal protection grounds. The ordinance was designed to "preserve, protect and promote the educational, cultural and artistic interest" and the city contended that the preference was constitutionally permissible under *Mancari*. The court disagreed, holding that the city had "no particularized interest in furthering Indian interests [which were] comparable to that of the Bureau of Indian Affairs, an agency created by the United States Congress to advance its constitutional rights with respect to Indians." 751 F. Supp at 1530. Applying strict scrutiny to the racial classification, the court found the ordinance unconstitutional.

In another district court case, the court refused to extend *Mancari* to permit borough preferences in hiring for members of federally recognized tribes. *Malabed v. North Slope Borough*, 42 F. Supp. 2d. 927, 937 (D. Alaska 1999). Citing to *Williams*, the district court noted that

> [t]he Ninth Circuit interprets *Mancari* "as shielding only those statutes that affect uniquely Indian interests." This interpretation is consistent with long-recognized principles. [The Borough] employment preference is in no way related to Native land or tribal or cultural affairs. Public employment with [the Borough] is not part of some uniquely Indian interest, or time-honored, tribal tradition. *Mancari*'s rationale would seem inapplicable here.

Id. at 937-38. Citing to *Williams*, the district court held that *Mancari* does not apply to preferences unrelated to unique Indian interests, regardless of whether the preference is characterized as political rather than racial. *Id.* at 938. The district court evaluated the hiring preference under *Adarand*'s

strict scrutiny test and found that the preference was not narrowly tailored to further any compelling state interest. *Id.*

On appeal, the Ninth Circuit found that the *Malabed* hiring preference violated the Equal Protection Clause of the Alaska Constitution and, therefore, the court did not reach the federal constitutional claims. *Malabed v. North Slope Borough*, 335 F.3d 864, 867 n.2 (9th Cir. 2003). The appellate court did note, however, that *Mancari*'s reach is limited.

> Relying on *Morton v. Mancari*, the Borough argues that statutes enacted for the benefit of tribal members do not violate *any* federal or state antidiscrimination law . . . . This argument puts more weight on *Mancari* than it can bear. *Mancari* held only that when Congress acts to fulfill its unique trust responsibilities towards Indian tribe, such legislation is not based on a suspect classification.

335 F.3d at 868 n.5 (citation omitted).

Decisions of district courts within the Ninth Circuit and the opinions of the appellate court itself illustrate a reluctance to extend *Mancari* to government preferences aimed solely at benefitting tribes economically. This interpretation of *Mancari* directly conflicts with the lower court's decision in this case. The District of Columbia Circuit Court upheld the section 8014 racial classification because it served the "important federal interest" of "tribal economic development." *American Federation of Government Employees*, 330 F.3d at 522. But the Ninth Circuit decisions hold that economic development is not a unique Indian interest and, therefore, classifications based on this premise are not exempted from heightened scrutiny.

Given this conflict, the appropriate constitutional standard of review is unclear. In order to avoid further conflict in the federal courts, it is crucial that this Court announce the correct standard of review for constitutional challenges to government preferences benefitting Native Americans.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: October, 2003.

Respectfully submitted,

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