No. 03-359

IN THE

# Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2263; ROSE REED; and INEZ MARQUEZ,
*Petitioners*,

v.

THE UNITED STATES OF AMERICA; JAMES G. ROCHE, in his official capacity as Secretary of the Air Force; CHUGACH MANAGEMENT SERVICES, INC.; and CHUGACH MANAGEMENT SERVICES JOINT VENTURE,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents Chugach Management Services, Inc. and Chugach Management Services Joint Venture respectfully oppose the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, on the following grounds.

## REASONS FOR DENYING THE PETITION

### 1. The Petition Presents A Purely Facial Challenge And Seeks A Purely Facial And Hypothetical Resolution.

Petitioners acknowledge that their challenge is a purely facial challenge and that they seek a purely facial and hypothetical resolution. *See* Petition at 8 ("The § 8014 preference on its face grants preferential treatment to Native American contractors . . . ."; The court of appeals nevertheless upheld the facially race-based preference . . . .").[1] In doing so, Petitioners disregard two key principles of constitutional adjudication that refute their bald claim of entitlement to facial and nonfact-based review and determination. The Court of Appeals well articulated the first principle, that persons attacking a statute as unconstitutional must show that the statute is unconstitutional as to *them*:[2]

> Although the Kirtland § 8014(3) contract was awarded to a firm wholly owned by federally recognized Indian tribes, plaintiffs want us to decide that the provision is unconstitutional because, in FY 2000, it authorized preferences not only for Indian tribes but also for firms owned by Native Americans who were not tribal members and who owned no more then 51 percent of the firm. Plaintiffs thus want to expand this case well beyond its factual context. Prudence, as reflected in a longstanding rule of constitutional adjudication, counsels

[1] Petitioners suggest that "the court below . . . read the Act as creating a racial preference." Petition at 6. That suggestion is simply wrong. Quite the contrary, the Court of Appeals found that § 8014(3) allowed for its application to federally recognized Indian tribes and was applied constitutionally in that manner. *Am. Fed'n of Gov't Employees v. United States*, 330 F.3d 513, 518-19 & 523 (D.C. Cir. 2003), Appendix to Petition ("Pet. App.") at 5a-6a & 13a.

[2] In this case, Petitioners could not show that the statute was unconstitutional as to anyone in any actual circumstance.



> otherwise. The Supreme Court summarized the rule in *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960): "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." The Court reiterated the point in *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973): "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."

*Am. Fed'n of Gov't Employees*, 330 F.3d at 518, Pet. App. at 5a-6a.[3]

The second principle, consistent with the first but which the Court of Appeals found it unnecessary to apply, is that a court's responsibility is to construe a statute so as to find it constitutional or to avoid the constitutional issue altogether. *See American Foreign Service Ass'n v. Garfinkle*, 490 U.S. 153, 161 (1989); *United States v. Rumely*, 345 U.S. 41, 45 (1953). The District Court acknowledged this responsibility. *See Am. Fed'n of Gov't Employees v. United States*, 195 F. Supp.2d 4, 17-18 n.6 (D.D.C. 2002).

Petitioners, however, eschew these principles of constitutional adjudication, constitutional narrowing and constitutional construction. Contrary to the unsupported departure from firm tenets of constitutional adjudication that Petitioners

[3] In *Raines*, citing *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885), this Court reiterated other constitutional cautions including that courts are "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.'" *Raines*, 362 U.S. at 21.

seek, the Court of Appeals correctly followed the path this Court established. *See Raines*, 362 U.S. at 26:

> the . . . Court seems . . . to have recognized . . . that the statute, if applicable only to this class of cases, would unquestionably be valid legislation under that Amendment. We think that under the rules we have stated, that court then should have gone no further and should have upheld the Act as applied in the present action . . . .[4]

**2. There Is No Ongoing Controversy. The Petition Seeks A Purely Advisory Opinion As To Past Events And Decisions.**

As the Court of Appeals correctly noted, Fiscal Year 2000 § 8014 was a one-year-only, and now is a lapsed, statute. Thus, the circumstances of the case are incapable of repetition. Petitioners ask this Court, nevertheless, to reach back in time to adjudicate this dead statute on its face. That is, Petitioners ask the Court to render an advisory opinion that can have no palpable, actual effect on this law. Petitioners offer no support for this request.

Furthermore, because § 8014 never has been, and never will be, applied in an unconstitutional manner (*see* Point 3 below), Petitioners' request is wholly attenuated from, and cannot result in a determination of, a real constitutional

[4] Even in the area of First Amendment rights, where the Court sparingly has noticed a narrow exception to this rule, the exception would not operate to strike down statutes as a whole as Petitioners seek, but rather only partially to excise wholly unconstitutional applications not susceptible to a limiting construction. *See Broadrick*, 413 U.S. at 612-14. This First Amendment exception does not apply here. Even, however, if the Court were inclined to create a new exception comparable to that found in First Amendment cases, § 8014(3) would survive intact as it is susceptible to a limiting, constitutional construction, as the District Court found (but which the Court of Appeals did not deem necessary to reach). *See Am. Fed'n of Gov't Employees*, 195 F.Supp.2d at 17-19 & n. 6; *Am. Fed'n of Gov't Employees*, 330 F.3d at 517-18, Pet. App. at 4a-5a.



dilemma. Likewise, there is no prospect that § 8014 will be applied in a manner that actually will impair a person's constitutional rights, whether that person be party to this suit or not. *See Raines*, 362 U.S. at 22. Without a live statute or an ongoing prospect for controversy, there is no cause for Supreme Court review.

Nor can Petitioners point to any other controversy outside the instant one that would be resolved by Court review of this case. Petitioners do not cite, and neither the courts below nor the parties cited, any other statute or controversy raising a similar issue. Thus, this case does not present any broader reasons for Supreme Court review.

Rather, as Petitioners forthrightly confirm, they seek not a present-day or forward-looking decision, but rather to revisit a past decision. They ask the Court to take this case as an "opportunity to clarify that *Mancari* is confined to legislation dealing with federally recognized Indian tribes as sovereign entities or with matters that affect uniquely Indian interests." Petition at 8, referring to *Morton v. Mancari*, 417 U.S. 535 (1974). That is not a proper grounds for *certiorari*, but even were it proper grounds, the request does not arise from, and is unnecessary to, this case. The Court of Appeals did not engage in, or even suggest, a contrary reading or application of *Mancari*. *See Am. Fed'n of Gov't Employees*, 330 F.3d at 520-21, Pet. App. at 9a-11a, including the following:

> Whatever the significance of the *Mancari* dictum—the Court said the case would be "more difficult," not that the blanket exemption would be unconstitutional—the question before us is not in the "difficult" category. The critical consideration is Congress' power to regulate commerce "with the Indian tribes."

Nor did the Court of Appeals' actual holding depart from *Mancari*:

> We therefore hold that the preference in § 8014(3), by promoting the economic development of federally recognized Indian tribes (and thus their members), is rationally related to a legitimate legislative purpose and thus constitutional.

*Am. Fed'n of Gov't Employees*, 330 F.3d at 522-23, Pet. App. at 13a.

### 3. The Government Applied § 8014 Constitutionally.

A key tenet in constitutional adjudication of laws of this nature is that their review is *as applied*, in concrete factual circumstances. *See Mancari*, 417 U.S. at 554: "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ." Beyond the facial challenge to the statute, the petition does not challenge the Government's application of § 8014. Nor, because of FY 2000 § 8014(3)'s expiration and deliberate clarification in later years (*see* below), is there any realistic prospect that the Government ever would or could apply § 8014(3) unconstitutionally. In fact, the Government did apply § 8014 constitutionally, in its one and only application, to tribal organizations. *See Am. Fed'n of Gov't Employees*, 330 F.3d at 518-19 & 523, Pet. App. at 5a-8a & 3a.[5] In the words of *Mancari*, § 8014 "as applied, is . . . to

[5] The United States has recognized the tribal status and the tribal eligibility of Alaska Natives since they came within the jurisdiction of the United States. *See* Treaty of Cession with Russia of March 30, 1867, 15 Stat. 539, 1867 WL 7659 (TIA), by which the United States acquired Alaska. Art. III of the Treaty provides (emphasis added):

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years, but if they should prefer to remain in the ceded territory, they, *with the exception of uncivilized native tribes*, shall be admitted to the enjoyment of all rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. *The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.*



Indians . . . as members of quasi-sovereign tribal entities." 417 U.S. at 554.[6]

*Rice v. Cayetano*, 528 U.S. 495 (2000), does not vitiate the Court of Appeals' (and the District Court's) focus on the one, constitutional application of § 8014 to a legitimate tribal organization. In *Rice*, the statute at issue had not been applied constitutionally and was not susceptible to a constitutional application. *See id.* at 519; & at 524-25 (Breyer, J., concurring). Here, in contrast, the statute was both constitutionally applied and open to a constitutional construction. Thus, *Rice* does not negate the Court of Appeals' analysis: because the Government awarded the Kirtland contract to a tribal organization under a statute applicable to tribal organizations, the rational basis test applied.

An important distinction as well is that the statute challenged in *Rice* directly contravened the fundamental right to vote specifically protected by the Fifteenth Amendment, while § 8014 directly encouraged and advanced commercial activity authorized by the Indian Commerce Clause of the

[6] The petition gives only grudging acknowledgment to almost two centuries of established case law upholding legislation applicable to Indian tribes. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (Marshall, C.J.): The United States-Indian relationship is "perhaps unlike that of any two people in existence [and is] marked by peculiar and cardinal distinctions which exist nowhere else." Petitioners state, "[S]ome political preferences for Native American tribes may be permissible despite their racial component . . . ." Petition at 7. Notwithstanding this dismissive recognition, Petitioners do not cite any case in which such legislation has been found unconstitutional as race based. The absence of such cases in Petitioners' papers, both in this court and below, evidences the fact that there is no such decision.

Constitution, U.S. Const. art. I, § 8, cl. 3. *See Am. Fed'n of Gov't Employees*, 330 F.3d at 522-23, Pet. App. at 13a.

Additionally, subsequent legislative history on Fiscal Year 2001 § 8014, accompanying a clarification of § 8014(3) in response to Petitioners' suit, confirms both the statute's constitutionality and the correctness of the Court of Appeals' decision:

> MR. STEVENS. . . . The exception for a private contractor that is a Native American-owned entity is an exercise of the authority that has been vested in the Congress by the U.S. Constitution in Article I, Section 8, Clause 3, often referred to as the Indian Commerce Clause. . . . [T]his is by no means the only Federal legislation that recognizes the special status of Native Americans in commercial transactions with the Federal Government which is based upon the trust relationship the United States has with its indigenous, aboriginal people. . . .
>
> It has come to my attention that a lawsuit has been filed challenging the Native American exception in section 8014 as a racially-based preference that is unconstitutional. That challenge is simply inconsistent with the well-established body of Federal Indian law and numerous rulings of the U.S. Supreme Court. The Native American exception contained in section 8014 is intended to advance the Federal Government's interest in promoting self-sufficiency and the economic development of Native American communities. It does so not on the basis of race, but rather, based upon the unique political and legal status that the aboriginal, indigenous, native people of America have had under our Constitution since the founding of this nation. It is a valid exercise of Congress' authority under the Indian commerce clause. While I believe that the provision is clear, we propose adoption of the amendment before us today to further clarify that the exception for Native American-owned entities in section 8014 is based on a political classification, not a racial classification.
>
> Because my colleague was Chairman of the Subcommittee on Defense Appropriations in 1990 and involved in the drafting of section 8014, I would like to know whether my understanding of the purpose and intent of section 8014 is consistent with the original purpose and intent, and whether the amendment before us today is consistent with the original intent of section 8014.
>
> MR. INOUYE. My Chairman is correct in his understanding. . . .
>
> As the U.S. Supreme Court has made clear, time and again, the political and legal relationship that this nation has had with the indigenous, aboriginal, native people of America is the basis upon which the Congress can constitutionally enact legislation that is designed to address the special conditions of Native Americans. In exchange for the cession of over 500 million acres of land by the native people of America, the United States has entered into a trust relationship with Native Americans. Treaties, the highest law of our land, were originally the primary instrument for the expression of this relationship. Today, Federal laws like section 8014, are the means by which the United States carries out its trust responsibilities and the Federal policy of self-determination and economic self-sufficiency.
>
> I thank my Chairman for proposing this clarifying amendment which I believe is fully consistent with the original purpose and intent of section 8014.

Cong. Rec. S5019 (June 13, 2000).[7] *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969)

[7] The amendment itself substituted tribal and organizational references for, and excised, "Native American ownership" in § 8014(3). *See* Cong. Rec. S4961 (June 12, 2000).

(footnote omitted) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). *See also Board of County Comm'rs v. Seber*, 318 U.S. 705, 710-11 & n.10 (1943) (relying in part on the "subsequent congressional history" in applying Indian legislation).[8]

### 4. There Is No Dispute Between Or Among Circuits For This Court To Resolve.

There is no varying decision, from any court, creating a dispute for this Court to resolve. *See* footnote 6 above. Petitioners rely, instead, on some hypothesizing, nonessential language of the Ninth Circuit in *Williams v. Babbitt*, 115 F.3d 657 (9th Cir.), *cert. denied*, 523 U.S. 1117 (1997), but there is nothing material to that decision that conflicts with the Court of Appeals' decision in this case. *See Am. Fed'n of Gov't*

[8] Petitioners decry an alleged overall lack of legislative support for § 8014, but both the Government and the private Respondents supplied massive amounts of legislative material in support of the program reflected in § 8014. The Court of Appeals referred to some, but by no means all, of this material. *See Am. Fed'n of Gov't Employees*, 330 F.3d at 522, Pet. App. at 13a:

> It was therefore entirely proper for the district court to examine legislative material, generated in other contexts, showing the need for economic development of federally recognized tribes in Alaska. *Am. Fed'n of Gov't Employees*, 195 F.Supp.2d at 23. The United States has marshalled still more authorities to the same effect but we seen no need to go into them. . . . Plaintiffs do not really dispute the material. They say that it cannot be considered, a claim we have just rejected. We therefore hold that the preference in § 8014(3), by promoting the economic development of federally recognized Indian tribes (and thus their members), is rationally related to a legitimate legislative purpose and thus constitutional. . . .

*See also Am. Fed'n of Gov't Employees*, 195 F.Supp.2d at 18-19 & 23.



*Employees*, 330 F.3d at 521, Pet. App. at 11. First, while the Ninth Circuit expressed its "constitutional doubts" about the agency interpretation, the court saw "no reason to unnecessarily resolve them when a less constitutionally troubling construction is readily available." *Id.* at 666. In that respect, the Ninth Circuit in *Williams* and the District of Columbia Circuit in the instant case are in harmony, not in disagreement. Second, at issue in *Williams* was an agency interpretation of the Reindeer Industry Act of 1937 that created an absolute prohibition on non-Native entry into the Alaska reindeer industry, where the Act said nothing about non-Native participation, let alone barred non-Natives altogether. In addition, the Act was not susceptible to tribal application and had not been applied in a manner that furthered tribal self-determination. *Id.* at 659. In this case, by contrast, the statute was applied so as not to create anything absolute, let alone an absolute prohibition, and was applied constitutionally and in conformity with its terms and intent. Third, § 8014(3) as enacted and applied directly furthers Indian tribal self-determination, which has as its "'overriding goal' . . . encouraging tribal self-sufficiency and economic development," *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (citation omitted), the goal that § 8014(3) promotes. *See Am. Fed'n of Gov't Employees*, 330 F.3d at 522, Pet. App. at 12a. The same was not said about the agency interpretation of the Reindeer Industry Act at issue in *Williams*. Thus nothing essential factually or legally in *Williams*, when set against the decision below, results in a conflict between circuits requiring resolution by this Court in this case. *See* Supreme Court Rule 10(a).

**5. The Petition Overlooks The Special Constitutional Status Of Native Americans And The Government's Special Trust Responsibilities To Native Americans.**

The petition, proceeding in a contextual vacuum, omits two principles applicable to Native Americans that do not apply to other minorities and that support the Court of Appeals' decision. First, Native Americans occupy a discrete, special constitutional status in the Indian Commerce Clause of the Constitution. *See Mancari*, 417 U.S. at 551-52; *Am. Fed'n of Gov't Employees*, 330 F.3d at 521-22, Pet. App. at 11a-12a; *United States v. Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (*en banc*) (Scalia, J.).

Second, the Government has a special trust responsibility to Native Americans. *See Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001): "The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship. . . . The federal government-Indian trust relationship dates back over a century." *See also Mancari*, 417 U.S. at 551 (referencing as one of the decisional standards the United States' "assumption of a 'guardian-ward status'" toward Indian tribes); *id.* at 552, *quoting Board of County Comm'rs v. Seber*, 318 U.S. at 715:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.



Petitioners cite (and in the lower courts cited) no case overriding the express constitutional position of Native Americans or disclaiming the Government's special responsibility to Native Americans. And, as noted above, petitioners cite no case declaring legislation premised on these two grounds and directed toward Indian advancement to be unconstitutionally race based. Rather, as ages of undiminished cases have held, the special status of Native Americans rebuts the notion that Indian legislation is race based. *See United States v. Antelope*, 430 U.S. 641, 646 (1977):

> Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation . . . But the principles of *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" . . . .

## CONCLUSION

For the foregoing reasons and the reasons set forth in the decision of the Court of Appeals, the petition should be denied.

Respectfully submitted,

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