No. ___

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.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the preference for Native American contractors in §8014 of the Department of Defense Appropriations Act, which is neither restricted to Indian tribes nor is related to uniquely Indian interests, may nevertheless be upheld as a tribal preference subject to rational basis review under *Morton v. Mancari*, 417 U.S. 535 (1971) on the grounds that it could be applied to Indian tribes or members of Indian tribes?

Whether the preference for Native American contractors in §8014 of the Department of Defense Appropriations Act is narrowly tailored to serve a compelling interest and is consistent with the Equal Protection guarantee of the Fifth Amendment?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding in the court of appeals.

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The American Federation American Federation of Government Employees, AFL-CIO, ("AFGE"), AFGE Local 2263, Rose Reed, and Inez Marquez, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 330 F.3d 513. The opinion of the district court (App., *infra*, 15a), granting summary judgment to

respondents, is reported at 195 F.Supp.2d 4. An opinion of the district court, denying defendants' motion to dismiss and plaintiffs' motion for preliminary injunction, is reported at 104 F.Supp.2d 58 (June 30, 2000).

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2003. This petition for a writ of certiorari was filed on September 4, 2003, within 90 days of the date of the entry of judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law." The Defense Appropriations Act for FY 2000, § 8014, Pub. L. 106-79, provides, in pertinent part, that:

> None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that, on or after the date of the enactment of this act, is performed by more than 10 Department of Defense civilian employees until a most efficient and cost-effective organization analysis is completed on such activity or function and certification of the analysis is made to the Committees on Appropriations of the House of Representatives and the Senate: *Provided,* That this section and subsections (a), (b) and (c) of 10 U.S.C. 2461[1] shall not apply to a commercial or industrial type function of the Department of Defense that (1) is included on the procurement list established pursuant to section 2 of the . . . Javits-Wagner-O'Day Act; (2) is planned to be converted to performance by a qualified non-profit agency for the blind or a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act, or (3) is planned to be converted to performance by a qualified firm under 51 percent Native American ownership.

[1] 10 U.S.C. §2461(a) requires that the Secretary of Defense (1) notify Congress when undertaking to study a federal function performed by federal civilian employees for possible performance by a private contractor; (2) provide Congress a summary of the cost comparison between federal civilian and contractor performance showing that contractor performance will result in cost savings to the government; and (3) certify to Congress that the government's calculation of the in-house cost of performance is based upon the most-efficient and cost effective organization for performance by the federal workforce.

STATEMENT OF THE CASE

1. Statement of Facts

The 377th Civil Engineering Group ("CEG") at Kirtland Air Force Base ("AFB") in Albuquerque, New Mexico, performed a variety of base maintenance functions, including interior electrical work, electronics, plumbing, painting, carpentry, HVAC (heating, ventilation and air conditioning), landscaping and grounds, metal shop, procurement and construction. On December 9, 1998, Kirtland AFB notified Congress of its intent to undertake an Office of Management and Budget ("OMB") Circular No. A-76 [2] cost comparison study of the 377th CEG, which was expected to impact 236

[2] OMB Circular A-76 establishes procedures for identifying the cost of the government's performance of commercial activities and comparing that to contractor performance. *OMB Circular No. A-76, §§1 and 5.* This cost-comparison process consists of six steps: (1) the development of a performance work statement ("PWS"); (2) a study to determine the government's Most Efficient Organization ("MEO"); (3) the development of an in-house Government cost estimate; (4) issuance of the Request for Proposals or Invitation for Bids; (5) the comparison of the in-house bid against a proposed contract; and (6) the administrative appeals process. *OMB Circular A-76 Revised Supplemental Handbook, Ch.3(A)(3).* A commercial contractor must beat the in-house bid by 10% in order to be awarded the contract. *Id.*

civilian positions. But shortly after initiating the team effort to develop the "most efficient organization," which comprises the basis of the government's bid to retain the work in-house, Kirtland abruptly suspended the A-76 study when certain Alaska Native firms responded to an A-76 notice by directing Kirtland's attention to the § 8014 preference. Specifically, Chugach Alaska Corporation, responding from its corporate office in Arlington, Virginia, touted its "very special preference status enacted in the Legislation" as being "of considerable benefit" to Air Force officials, who could thereby contract the work directly to Chugach without undertaking the often lengthy process of competing the work between in-house and contractor performance.

Thereafter, Kirtland AFB sought and obtained approval to forego the A-76 study and directly convert the work performed by the employees in the 377th CEG to a Native American contractor under § 8014. Kirtland then subsequently awarded a contract for the performance of the Civil Engineering (CE) functions to Chugach Management Services, Joint Venture on July 14, 2000. The contract covers a base period of one year with nine one-year options to renew and has an award value of $523,000,000 not including an additional award fee pool worth approximately $16,666,350.00. Upon the direct conversion of its work to Chugach Management Services, Joint Venture, the 377th CEG was inactivated. Approximately 242 federal CE positions were eliminated as a result, including those occupied by petitioners Inez Marquez and Rose Reed and other federal employees within the bargaining unit represented by AFGE.

Chugach Management Services, Joint Venture is a partnership between Chugach Management Services Inc. ("CMSI") and Alutiiq Management Services, LLC ("Alutiiq LLC") CMSI was originally incorporated under the Alaska Corporations Code as Chugach Engineering Services, Inc. Its Articles of Incorporation define its corporate purpose as

providing engineering services and engaging in any lawful business or endeavor permitted under the laws of the State of Alaska. They do not require that CMSI's powers or activities conform to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.* CMSI is authorized to issue 100,000 shares of common stock without restriction. Membership on CMSI's Board of Directors is not restricted to shareholders or to individuals who are Alaskan Natives. Dusty Kaser, acting president of Chugach Alaska Corporation during the time that the Kirtland contract was under consideration, became the Chief Executive Officer of Alutiiq LLC in January 2000. Richard Hobbs, CMSI's contracting agent on the Kirtland contract, became the Chief Operating Officer for Alutiiq LLC in September 2000. Neither Kaser nor Hobbs is an Alaska Native. At the time that the Kirtland contract was awarded, the corporate office of Alutiiq LLC was staffed by five or six individuals none of whom, to the knowledge of its Chief Operating Officer, was Alaskan Native.

2. Proceedings Below

On May 1, 2000, petitioners filed a complaint in the United States District Court for the District of Columbia seeking an order declaring that the Native-American exemption in § 8014 violated the equal protection guarantee of the Fifth Amendment and enjoining the Department of Air Force from awarding a contract or renewing any existing contracts authorized under that statutory race-based preference. On May 3, 2000, the district court granted a motion filed by Chugach Management Services, Inc. and Chugach Management Services Joint Venture to intervene in the matter.

In a memorandum opinion issued on June 30, 2000, supplemented by an order dated July 5, 2000, the court denied plaintiffs' request for preliminary relief and dismissed claims brought by AFGE Local 153 challenging a similar §8014 direct conversion at MacDill Air Force Base. Upon the close

of discovery, the parties submitted cross motions for summary judgment. On March 29, 2002, the district court issued an order finding that the individual and AFGE plaintiffs had standing to bring their claims, but, otherwise denying plaintiffs' motion for summary judgment and granting defendants' and intervenor-defendants' motions for summary judgment. On April 25, 2002, plaintiffs filed a timely notice of appeal. On June 6, 2003, the United States Court of Appeals for the D.C. Circuit issued an opinion affirming the decision of the district court. This Petition for *Writ of Certiorari* follows.

REASONS FOR GRANTING THE PETITION

The Defense Department Appropriations Act grants a preference to Native American contractors that is defined in racial terms. The words of the statute state the preference in racial terms. And, the court below, declining the government's suggestion that the preference be more narrowly construed, read the Act as creating a racial preference. (App. 7a-8a) Racial preferences in government contracting are subject to strict scrutiny and may be sustained only if they are narrowly tailored to serve a compelling interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995).

The court below declined to subject the Native American preference in the Defense Appropriations Act to strict scrutiny and, instead, applied the more lenient rational basis test. The court did so on the grounds that the firm which benefited from the racial preference in this case was affiliated with a Native-Alaskan corporation and, that the preference, therefore, warranted the less searching scrutiny reserved for tribal preferences under *Morton v. Mancari*, 417 U.S. 535 (1974). It came to this conclusion despite the absence of any legislative record or history to suggest, much less confirm, that Congress intended that the § 8014 exemption from competition be restricted to Indian tribes or that it otherwise sought to address uniquely Indian interests.

This Court has consistently distinguished between "preference[s] . . . directed towards a 'racial' group consisting of 'Indians' " and "preference[s] . . . to members of 'federally recognized' tribes" in subjecting the latter to rational basis review. *Morton v. Mancari*, 417 U.S. at 553, n. 24; *Rice v. Cayetano*, 528 U.S. 495, 519-520 (2000). It has done so on the theory that a tribal "preference [is] political rather than racial in nature," *Mancari*, 417 U.S. at 553-554, even though a tribal "classification ha[s] a racial component." *Rice v. Cayetano*, 528 U.S. at 519.

In upholding the Native-American preference at issue here, the court of appeals flipped the *Mancari* principle—that congressionally enacted tribal preferences are permissible despite the fact that there is a necessarily racial component in the definition of a tribal group—to reach the untenable position that Congress may enact a constitutionally invalid racial preference for Native-Americans as long as Indian tribes or tribal members qualify as beneficiaries.

As the opinion of the court below demonstrates, the risk of confusion in this area is substantial. While some political preferences for Native American tribes may be permissible despite their racial component, an otherwise impermissible racial preference for Native Americans is not rendered permissible by the fact that it may benefit a tribal organization. The decision below further reflects the critical consequence of error insofar as it shields a patently racial preference from strict scrutiny. This case provides an opportunity for the Court to clarify this area of the law by defining the circumstances in which a Native American preference is "political rather than racial in nature." *Mancari*, 417 U.S. at 553-554.

1. No racial group, including Native Americans, enjoys an elevated status in the eyes of the law. *See Adarand*, 515 U.S. at 239 ("In the eyes of government, we are just one race here." (J. Scalia, concurring in part, and concurring in the

judgment)). The §8014 preference on its face grants preferential treatment to Native American contractors without regard to their status as members of federally recognized Indian tribes or to whether the legislation affects uniquely Indian interests.[3] Likewise, there is no legislative record from which to glean congressional intent to restrict the special exemption from competitive procurement requirements to federally recognized Indian tribes.

The court of appeals nevertheless upheld the facially race-based preference at issue here as permissible under the rational basis standard prescribed by *Morton v. Mancari*. In so doing, it stretched *Mancari's* careful designation of certain Indian preferences as "political" rather than racial beyond the constitutional breaking point. By resolving the question presented in this case, the Court has 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.

a. In *Morton v. Mancari*, the Court rejected an equal protection challenge to a hiring preference for Indians in the Bureau of Indian Affairs. 417 U.S. at 537. In upholding the preference, the Court characterized it as political, rather than racial, because "it applies only to members of 'federally recognized' tribes [which] operates to exclude many individuals who are racially to be classified as 'Indians.'" *Id.* at 553, n. 24. The Court found that it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." 417 U.S. at 554. Thus, the Court ruled that its constitutionality would have to be adjudged in the context of the "unique legal status of Indian *tribes* under federal law." *Id.* at 551 (emphasis added) ("[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations"). Consequently, the Court went on to apply the rational basis standard of review in assessing whether the preference was consistent with the Equal Protection guarantee of the Fifth Amendment.

[3] The preference first appeared in the Defense Appropriations Act of 1990. *See* Defense Appropriations Act, Pub.L. 101-165, § 9036. Prior to that, and beginning in 1985, the Appropriations Acts contained only language to the effect that no activity being performed by more than 10 people could be carried out until an MEO cost analysis was completed. *See* Department of Defense Appropriations Act of 1986, Pub.L 99-190, § 8089 (Dec. 19, 1985); Department of Defense Appropriations Act of 1987, Pub.L 99-500, § 9078 (Oct. 18, 1986); Department of Defense Appropriations Act for 1988, Pub.L 100-202, § 8074 (Dec. 22, 1987); Department of Defense Appropriations Act for 1989, Pub.L 100-463, § 8061 (Oct. 1, 1988).

However, in *Morton v. Mancari*, the Court did *not* transform, by judicial fiat, a statutory preference for "Native-Americans" from a racial to a political category, as the court of appeals did here. On the contrary, the Court took pains to acknowledge that it was *not* facing "the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations." 417 U.S. at 554.

By contrast, the Native American preference in §8014 is *precisely* the type of blanket exemption that the Court refrained from approving in *Morton v. Mancari*. For example, it cannot be read to "exclude many individuals who are racially to be classified as 'Indians.'" *Id.* at 553, n. 24. Nor is it limited to "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. There is no evidence that Congress enacted this measure to fulfill its unique trust obligations to Indian tribes or to enhance greater participation by Native-Americans in their own self-government. *Id.* at

541-542. Absent any of the qualifying limitations inherent in the provision before the Court in *Morton v. Mancari*, that decision simply does not control the analysis as to the constitutionality of the §8014 preference at issue here.

b. In *Rice v. Cayetano*, this Court explicitly recognized the limited nature of the *Mancari* doctrine. 528 U.S. at 518-522. There, a Hawaiian citizen challenged a Hawaii Constitution restriction limiting voting for trustees of a state agency devoted solely to administering programs designed for the benefit of native Hawaiians and descendents of inhabitants of the Hawaiian Islands in 1778. The individual challenged the restriction as a violation of the 15th Amendment. Among the defenses offered by the state of Hawaii was that the differential voting scheme was permissible under *Morton v. Mancari*. 528 U.S. at 518.[4] Recognizing congressional authority to enact legislation "dedicated to the [ ] circumstances and needs of Indian tribes," the Court at the same time emphasized that the *Mancari* decision was "confined to the authority of the BIA, an agency described as '*sui generis*'." *Rice v. Cayetano*, 528 U.S. at 520.

Although *Rice v. Cayetano* involved a 15th Amendment challenge, the Court's view of the limited scope of *Mancari*—and its patent hostility toward the type of bootstrapping from that decision advocated by Hawaii—is certainly instructive here. It is also noteworthy that in *Rice v.*

[4] Addressing that claim, the Court first characterized *Mancari* and its predecessors as holding that "various tribes retained some elements of quasi-sovereign authority, . . . [that] relates to self-governance." *Rice v. Cayetano*, 528 U.S. at 518. But it went on to say that sustaining Hawaii's restrictions under *Mancari* would require that the Court "accept some beginning premises not yet established" in caselaw. *Id.* Among these was whether native Hawaiians have the status of organized Indian tribes and whether Congress could in any event delegate its authority to the state. *Id.* Even so, the Court categorically rejected the premise that Congress could in any event authorize a State to create a voting scheme that excluded citizens on the basis of race. *Id.* at 519.

Cayetano this Court rebuffed the government's attempt to characterize the elections as tribal even though the programs at issue were administered solely for native Hawaiians. 528 U.S. at 520. By contrast, the court of appeals here looked only at how the Native American preference had been applied by the Kirtland AFB officials—and erroneously concluded that it had been applied to Indian tribes or members of Indian tribes in this case—in characterizing the preference as tribal in order to apply the relaxed standard enunciated in *Morton v. Mancari* rather than the strict scrutiny in *Adarand*.

2. After *Adarand*, it is untenable to presume that any statutory racial classification, even a Native-American one, is shielded from strict scrutiny. Indeed, the Small Business Act provision under review in that case mandated preferential treatment for identified minorities, including "Native-American." *Adarand*, 515 U.S. at 207. Holding the entire provision subject to strict scrutiny, the Court did not segregate out "Native-American" from the other racial categories in order to apply rational basis review. On the contrary, the Court reiterated that "'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'" *Adarand*, 515 U.S. at 222 *quoting City of Richmond v. J.A. Croson*, 488 U.S. 469, 493-494 (1989) (Richmond's unconstitutional set-aside provision also included Native-American reference).

Consequently, as a racial classification appearing on the face of the statute, the § 8014 Native American preference should have automatically triggered the strict scrutiny that is necessary for determining whether its passage was motivated by an illegitimate purpose, such as " 'simple racial politics.' " *Shaw v. Reno*, 509 U.S. 630, 642 (1993) *quoting City of Richmond v. J.A. Croson Co.*, 488 U.S. at 493.

Instead, the D.C. Circuit erroneously employed the rational basis review reserved for federal legislation that is directed at

unique Indian interests under *Morton v. Mancari*, 417 U.S. 535. The resulting application of a highly deferential standard of review to a naked legislative preference for Native Americans, enacted without *any* indication that Congress was exercising its power to deal with Indian tribes as sovereign entities, demonstrates the need for this Court's intervention.

The line between tribal and racial classifications is not easily distinguishable, as the Court acknowledged in *Rice v. Cayetano*, 520 U.S. at 519, when it recognized that permissible federal Indian legislation has a "racial component." This does not mean, however, as the court of appeals believed here, that federal legislation directed at Native Americans is constitutionally permissible because it might also encompass members of Indian tribes. By addressing the questions raised in this case, the Court has an opportunity to clarify the distinction between valid tribal preferences under *Morton v. Mancari* and constitutionally suspect race-based preferences for Native-Americans under *Adarand*.

3. The courts of appeals have taken widely contrary approaches in addressing Indian preferences in light of *Adarand*. The divergence is readily reflected in the opinion of the D.C. Circuit in this case and that of the Ninth Circuit in *Williams v. Babbitt*, 115 F.3d 657, 664-665 (9th Cir.), *cert. denied sub nom. Kawarek Reindeer Herders Assoc. v. Williams*, 523 U.S. 1117 (1997).

In this case, the D.C. Circuit applied *Morton v. Mancari* to a broad contracting preference for Native Americans - enacted without regard to their status as members of federally recognized Indian tribes or to whether the legislation affects uniquely Indian interests. This approach fundamentally and significantly differs from that of the Ninth Circuit in *Williams v. Babbitt*. The issue there involved a Bureau of Indian Affairs interpretation of the Reindeer Industry Act of 1937 prohibiting non-native Alaskans from importing reindeer. The non-native herders appealed on equal protection grounds.

Although ultimately finding that the agency was wrong in interpreting the Act as restricting non-native participation, the Ninth Circuit clearly did so to avoid the grave constitutional difficulty, especially apparent in light of *Adarand*, posed by a broad construction of *Morton v. Mancari* that might render such a preference constitutionally permissible. *Williams v. Babbitt*, 115 F.3d at 663-666. Looking at this Court's decisions permitting special treatment for Indians, the Ninth Circuit recognized that they all "dealt with life in the immediate vicinity of Indian land." It further found, however, that even if *Mancari* is not necessarily confined to statutes involving the treatment of Indians on Indian lands, it should nevertheless be read "as shielding only those statutes that affect uniquely Indian interests." *Id.* at 665.

By granting *certiorari* now, the Court can provide much needed resolution and guidance to the lower courts on the constitutional scope of *Mancari's* "political classification" analysis and reconcile any confusion between that decision and the judicial hostility toward racial preferences reflected in *Adarand*.

4. Addressing the constitutional question posed by the racial preference at issue here provides the Court with a singular opportunity to clarify the confines of its ruling in *Morton v. Mancari* without calling into question the extensive array of constitutionally permissible Indian legislation. Specifically, the § 8014 preference which gave rise to this action was applied in a limited number of instances before Congress amended the provision in response to this litigation.[5] Thus, while a determination that it fails the strict

[5] This case arose in the context of the award of a ten-year contract to Chugach Management Services, Joint Venture—which petitioners have never conceded qualifies as an "Indian tribe"—to perform base maintenance work at Kirtland AFB without conducting the required cost-comparison between in-house and contractor performance. The resulting direct conversion pursuant to §8014(3) of Pub.L. 106-79 culminated in the

scrutiny test under *Adarand* will provide meaningful relief to the petitioners, such a holding need not threaten the legitimacy of ongoing legislation that was in fact enacted by Congress to fulfill its unique trust obligations to Indian tribes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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elimination of federal jobs performed by federal employees including the individual plaintiffs and members of American Federation of Government Employees ("AFGE"), Local 2263. Petitioners continue to seek an opportunity to compete for the work that was denied them by virtue of the unconstitutional Native American preference in §8014(3). That Congress amended §8014(3) in subsequent appropriations acts to read "under 51% ownership by an Indian tribe, as defined in 25 U.S.C. 450b(e), or a Native Hawaiian organization, as defined in 15 U.S.C. 647(a)(15)" does not afford petitioners the remedy that they seek and therefore does not moot petitioners' claims for relief.

APPENDICES