No. 02-1658

In The

Supreme Court of the United States

SANDRA SHOOK,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF *AMICUS CURIAE* OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

The Confederated Salish and Kootenai Tribes note that the QUESTIONS PRESENTED in the Petition (Pet. at i) are based upon misstatements of fact and law and restyle them as follows:

1. Is a Montana state hunting regulation that prohibits all persons who are not enrolled members of an Indian tribe, Indian and non-Indian alike, from hunting on that Tribe's Indian Reservation based upon a political or a racial classification?

2. Is big game hunting under Montana law a privilege, the regulation of which is subject to a rational basis test, or a right, the regulation of which is subject to strict scrutiny?

LIST OF PARTIES

Petitioner: Ms. Sandra Shook was Defendant in the District Court of the Twentieth Judicial District of the State of Montana, in and for the County of Sanders, and Appellant before the Supreme Court of the State of Montana.

Respondent: The State of Montana was Plaintiff in the District Court of the Twentieth Judicial District of the State of Montana, in and for the County of Sanders, and Respondent before the Supreme Court of the State of Montana.

Amicus Curiae: The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana. The Confederated Salish and Kootenai Tribes were not a party at the District Court of the Twentieth Judicial District of the State of Montana, in and for the County of Sanders, but were Amicus Curiae before the Supreme Court of the State of Montana.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTERESTS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES[1]

1. The Controversy

Petitioner Shook intentionally violated a long-standing State of Montana big game hunting regulation that prohibits all persons who are not enrolled members of a particular Indian tribe from hunting big game on that Tribes' Indian Reservation. Shook, who does not claim membership in any Indian tribe, knowingly violated that rational state regulation on the Flathead Indian Reservation, the homeland of the amicus Confederated Salish and Kootenai Tribes ("CSKT"). Pet. App. 3,15.[2] As applied, the Montana regulation prohibits all persons who are not enrolled members of the CSKT from hunting big game on the Flathead Indian Reservation. The state regulation is based on a political distinction: membership in the CSKT. The regulation simply prohibits "hunting by non-tribal members on reservations." Pet. App. 8. Petitioner, who is not an Indian, was treated identically to Indians enrolled in other tribes and to non-Indians who illegally hunt big game under Montana law on the Flathead Indian Reservation.

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[1] Letters from counsel for both parties consenting to this amicus brief are appended to this brief. No counsel for any party authored any part of this brief. No person or entity other than the amicus Tribes made any monetary contribution to the preparation and submission of this brief.

[2] The Petition shall be referred to as "Pet." and the Appendix to the Petition shall be referred to as "Pet. App."

2. The Confederated Salish and Kootenai Tribes

The CSKT are a federally-recognized confederation of American Indian tribes organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §461, et seq. ("IRA"). The Salish and Kootenai people have inhabited western Montana from time immemorial. On July 16, 1855 the CSKT and the United States, acting through Territorial Governor Issac I. Stevens, executed the Treaty of Hellgate, 12 Stat. 975. That Treaty reserved to the CSKT the 1.25 million acre Flathead Indian Reservation as an exclusive Tribal homeland and ceded to the United States millions of acres of CSKT aboriginal territory.

Two issues of federal Indian law are central to this Petition. First, under Article III of the Hellgate Treaty, the CSKT reserved in perpetuity certain hunting and fishing rights and privileges on and off of the Reservation. The Tribes expressly reserved the exclusive right to fish in all streams running through and bordering the Reservation, as well as off-reservation fishing privileges. The Tribes by implication also reserved the right to hunt within the Reservation, as well as the expressly reserved privilege to hunt off of the Reservation. Pet. App. 34.

The second significant federal Indian law issue is the political status of Tribal membership. Prior to the IRA, CSKT enrollment criteria were not codified. Under the CSKT Constitution, approved by the Secretary of Interior under the IRA in 1935, the Tribal government codified enrollment standards. CSKT enrollment criteria have varied over time. For example, for extensive periods of time there was no requirement for any particular blood quantum. Enrollment by adoption into the CSKT has always been an option. Of two persons who are identical

lineal descendants of one person, one may be an enrolled member and the other not. Although the fundamental issue of the Petition is whether membership in an Indian tribe is a race or blood quantum issue, Petitioner failed to establish *any* record on this issue regarding the CSKT or any other tribe in Montana.

3. Relations Between Montana and the CSKT

The State of Montana did not exist at the time of the Hellgate Treaty, is not a signatory to the Treaty, but is nevertheless bound to uphold it under the Supremacy Clause of the U.S. Const. art. VI, cl. 2. Montana has no trust or fiduciary relationship with the CSKT akin to that incumbent on the United States. However, as a matter of Montana and federal law, Montana is under a solemn obligation to follow federal law when state action has the potential to impact federal Treaty-reserved interests.

The CSKT and the State of Montana interact on a government-to-government basis, reaching accommodation when possible and in accordance with federal law. Regulation of hunting and fishing on the Flathead Indian Reservation is one of the issues over which Montana and the CSKT have achieved a lasting resolution; a resolution that is consistent with federal, Montana and CSKT law. *See* Pet. App. 11-13. One manifestation of that resolution is represented by the Montana big game hunting regulation that Shook intentionally violated. That regulation parallels and complements a similar long-standing CSKT law, which is not of record in this matter. Application of both the CSKT and the Montana hunting regulations is based on the political status of the person to be regulated, i.e.,

whether the person to be regulated is an enrolled member of the CSKT.

REASONS TO DENY CERTIORARI

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE MONTANA SUPREME COURT AND THE DECISIONS OF THIS COURT

A. THE MONTANA SUPREME COURT DECISION IS IN HARMONY WITH DECISIONS OF THIS COURT HOLDING THAT MEMBERSHIP IN AN INDIAN TRIBE IS A POLITICAL, NOT RACIAL, CLASSIFICATION

When boiled down to the basics, Petitioner argues that a state hunting regulation that treats enrolled members of an Indian tribe differently from all persons who are not enrolled members is race-based and therefore violates the Equal Protection Clause of the 14th Amendment of the United States Constitution. Her challenge is based on a faulty foundation.

It is settled law that membership in an Indian tribe constitutes a political, not racial, classification. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court evaluated a similar challenge to federal Indian preference hiring practices and found that:

> Literally 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. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code [four-volume Title 25, entitled "Indians"] would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.
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> * * *
>
> Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference.

Morton at 552-553.[3]

The *Morton* Court concluded that preferential treatment is aimed at "Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id.* at 554. In other words, it is a political, not racial, classification. Under *Morton*, the proper analysis of the challenged Montana regulation is to inquire whether the treatment is "reasonably and directly related to a legitimate, nonracially based goal." *Id.* at 554. The Montana

[3] Congressional treatment of Tribes as political entities is codified in numerous other Titles of the United States Code as well. *See*, for example, 7 U.S.C. §136u (Tribal enforcement of pesticide control), 7 U.S.C. §5930 (agriculture), 12 U.S.C. §1715z-13(a) (housing), 16 U.S.C. §3372(a)(1) (federal enforcement of Tribal hunting and fishing laws), 18 U.S.C. §1151 ("Indian Country" defined), 18 U.S.C. §1165 (federal offense to violate Tribal hunting and fishing laws), 26 U.S.C. §38(b)(10) (employment credits), 28 U.S.C. §§1353, 1360 and 1362 (Federal Court jurisdiction over various Indian issues), 30 U.S.C. §1235(k) (treating Tribes as states for coal mining activities), 33 U.S.C. §1377 (treating Tribes as states under the Clean Water Act), 42 U.S.C. §1996 (religious freedom), 42 U.S.C. §7601(d) (treating Tribes as states under the Clean Air Act) and 43 U.S.C. §1712 (public land management).

Supreme Court (*Shook*) applied this "rational basis" test and identified several legitimate State interests that the regulation serves, including protection of harvestable herds (Pet. App. 8), compliance with Montana's law and Constitution (*Id.*), and deference to the settlement of *Confederated Salish and Kootenai Tribes v. State of Montana*, 750 F.Supp. 446, 451 (D. Mont. 1990) (enjoining the application of Montana's fishing regulations on portions of the Flathead Reservation). Pet. App. 12-13.

This Court affirmed the *Morton* political analysis in a criminal law context in *United States v. Antelope*, 430 U.S. 641 (1977), a due process and equal protection case arising under the 5th Amendment. In *Antelope*, an Indian was tried criminally under 18 U.S.C. §1153, a statute that only applies to Indians. The analogous state criminal statute did not provide as harsh a penalty as did the federal statute. An Indian defendant challenged his conviction under the federal law, claiming that a non-Indian charged with precisely the same offense would have received a lighter penalty and therefore he was the victim of impermissible invidious racial discrimination. *Id.* at 644. This Court disagreed, finding that:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.
>
> * * *

> Legislation with respect to these 'unique aggregations' has repeatedly been sustained by this Court against claims of unlawful racial discrimination.

Id. at 645 (footnote omitted). As with *Morton*, the *Antelope* Court concluded that differential treatment of Indians and non-Indians "is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Id.* at 646.[4]

Morton and *Antelope* are Indian law cases. Each expressly found a law like Montana's hunting regulation to be based on a permissible political classification and therefore reviewable under a "rational basis" test. Petitioner invites this Court to ignore the law of the case and look instead to several equal protection cases that do not arise in an Indian law context.

For example, Petitioner asserts that *Rice v. Cayetano*, 528 U.S. 495 (2000), a 15th Amendment voting rights case, should control here. *Rice* found that a Hawaii state statute that treated "native Hawaiians" differently from other people for certain voting purposes violated the 15th Amendment of the Constitution by creating an impermissible race-based voting class. *Id.* at 517. Hawaii sought protection under the *Morton* political classification, but

[4] The political nature of being an Indian and of Tribal membership is nowhere clearer than in *Nofire v. United States*, 164 U.S. 657 (1897), where a person with no genetic connection to any tribe was treated under Cherokee tribal law and federal criminal law as an Indian because he satisfied the requirements for tribal membership and was therefore legally an Indian.

the *Rice* Court declined to "extend the limited exception [*of Mancari*] to a new and larger dimension." *Id.* at 520. The Court clearly distinguished the historical and legal relationship of the United States and Indian Tribes as governments from its relationship with Hawaiians who lack federally recognized governmental status. In so doing, it focused on Tribal political status and treaty rights. *Rice* at 519-520. Quoting *Morton*, the *Rice* Court expressly reaffirmed the political classification of Indian tribes, noting that "the Court found it important that the preference was not directed towards a racial group consisting of Indians, but rather only to members of federally recognized tribes . . . the preference [was] political rather than racial in nature." *Id.* at 519-520 (citations and quotations omitted). That is the case here, too. If Ms. Shook were enrolled in the CSKT, she would not be prosecuted by Montana. If she were enrolled in another tribe, she would receive the same treatment she received as a non-Indian.

Rice, the very case Petitioner relies on in her attempt to overrule *Morton*, actually confirms that *Morton* is the law of this case. Therefore, the Montana regulation is subject only to a reasonable and rational basis test, not strict scrutiny. *Rice* at 520. That is the standard of review the *Shook* Court employed. Pet. App. 6, 8.

Petitioner also relies upon *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), another case that does not involve Indian law, to implicitly overrule the *Morton* and *Antelope* decisions. The only substantive discussion of the special field of Indian law in *Adarand* occurs in the dissent of Justices Stevens and Ginsburg, where the Justices, citing *Morton*, note that the Federal Government has provided politically-based preference to Indians since the early part of the 19th century. *Adarand* at 244, note 3.

This Court has been loath to find its decisions overruled *sub silentio*. *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (1999). Notably, neither *Adarand* nor *Rice* expressly do so.

While *Adarand* does not overrule *Morton* and *Antelope*, it is instructive on several points. First, it counsels adherence to the doctrine of *stare decisis*. Deviation from *stare decisis* requires "special justification" and is "not a mechanical formula of adherence to the latest decision." *Adarand* at 231. *Stare decisis* applies here because all federal-tribal and all state-tribal relationships are based upon the long-standing decisions of this Court, reaching back to *Worcester v. Georgia*, 31 U.S. 515 (1832) (Tribes as distinct political entities) and forward to *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207-208 (1999) (treaty rights survive statehood and state laws must accommodate them). Furthermore, as discussed in *Morton*, supra, much of the United States Code is based upon the special political status of Indians manifest in the decisions of this Court. The more recent decisions in *Adarand* and *Rice* either affirm or are silent on the last two hundred years of this specialized Indian jurisprudence and legislation. Similarly, Petitioner's reliance on *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (a case that never discusses *Morton*) to implicitly overrule *Morton* on the standard of review fails for two reasons; *stare decisis*, and the principle that overruling by implication is disfavored.

Second, *Adarand* makes clear that a thorough exposition of the facts is essential for a "strict scrutiny" analysis. *Id.* at 236. Petitioner has built *no* factual record on the issue critical to her claim – tribal enrollment standards. Instead, she went to trial on a set of stipulated facts (Pet.

App. 3) that did not address enrollment criteria of the CSKT or any other Tribe in the United States. As a result, this case is not properly before the Court.

In an effort to create a record for this Court after the trial and appeal, Petitioner asserts that "membership for each one of the eleven Indian tribes that reside on reservations in Montana requires a certain blood quantum." Pet. 13. She asserts this without citation to the record of this case, for no such record exists.[5] In an effort to fabricate a record on the alleged racial nature of tribal enrollment, Petitioner asks this Court to visit the web site "for each tribe." Pet. 13, note 5. She then lists sites for six Tribal governments. However, there are seven federally-recognized Tribal governments in Montana with seven different sets of enrollment criteria, all of which have changed over time. Each Tribe treats enrollment differently. The point is, Petitioner simply failed to develop a record to support her claim. She asks for strict scrutiny, but failed to provide any actual evidence for any court to scrutinize. Accordingly, she has failed to satisfy the requirements of Rule 14.1.(f) and (g) of the Rules of the United States Supreme Court.

[5] A quick review of *Tribal Government Today, Politics on Montana Indian Reservations*, Revised Edition, University of Colorado Press (1998), demonstrates that there are many more than eleven Tribes represented in Montana and there are seven federally-recognized tribal governments.

B. PETITIONER MISAPPREHENDS THE CONSTITUTIONAL STATUS OF A HUNTING PRIVILEGE UNDER MONTANA LAW

Unspoken in Petitioner's claim is the erroneous presumption that hunting big game under Montana law is a Constitutionally-protected right and therefore any regulation that treats her differently from other persons must be subject to strict scrutiny. This Court has held differently. In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), nonresident big game hunters challenged a Montana big game hunting regulation that gave residents of Montana preferential treatment over nonresidents. Treatment under that regulation was based on one single fact, the political distinction between Montana residents and nonresidents. There, as in the instant case, petitioners argued that the Montana regulation violated the Due Process clause of the 14th Amendment of the U.S. Constitution and was therefore subject to a "strict scrutiny" analysis. *Id.* at 373.

The *Baldwin* Court found that there was no Constitutional right to hunt under Montana law. Rather, hunting under Montana law is " 'no more than a chance to engage temporarily in a recreational activity in a sister state' and was 'not fundamental.' Thus, it was not protected as a privilege and an immunity under the Constitution's art. IV, § 2." *Id.* at 377. The Court identified the legitimate State interests the regulation served, including securing funding for wildlife management (*Id.* at 374, note 9, 376), wildlife conservation and management (*Id.* at 377), limiting harvest (*Id.*), and concluded that strict scrutiny was not justified. Instead, "[r]ationality is sufficient." *Id.* at 391. These State interests rationally justify disparate treatment of hunting privileges under Montana law based

on the political status of the hunter. The *Baldwin* Court concluded that "the State's efforts [are] rational, and not invidious, and therefore not violative of the Equal Protection Clause." *Id.* at 389.

Baldwin also notes that Montana's big game hunting regulations must take into consideration subjects not expressly written into State law. "The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence." *Id.* at 386; *see also*, Pet. App. 12.

The Montana Supreme Court has long recognized that the Hellgate Treaty is one of the "federally protected interests" acknowledged in *Baldwin*. In *State v. McClure*, 127 Mont. 534, 539-540, 268 P.2d 629, 631 (1954), the Montana Supreme Court found that the Hellgate Treaty:

> [S]olemnly entered into is a contract between two independent nations, in this case, the United States of America and the Flathead Nation, and such a treaty is regarded as a part of the law of the state as much as the state's own laws and Constitution and is effective and binding on state legislatures.

The *Shook* Court noted that the Montana regulation at issue here was crafted to take into consideration Indian treaty rights. Pet. App. 7. As this Court recently confirmed in *Mille Lacs*, supra, treaty-reserved hunting and fishing rights survive, even off-Reservation, in spite of intervening statehood, and state law must accommodate them as a matter of federal law. The *Shook* Court is in line with *Mille Lacs*.

C. THE MONTANA SUPREME COURT PROPERLY UPHELD ITS SOLEMN OBLIGATION TO FOLLOW FEDERAL LAW

Petitioner has fabricated a rule the *Shook* Court did not write. The fabrication has two parts. First, she claims that the *Shook* Court improperly created a "*de facto* trust relationship between Montana and the several Indian tribes" (Pet. at 7), and concludes that Montana has "the same 'trust relationship' with American Indians as does the federal government." Pet. at i. This, Petitioner argues, constitutes a conflict between decisions of the Montana and United States Supreme Court worthy of resolution by this Court. Pet. at 6. Notably, however, Petitioner does not and cannot cite to any such holding in the *Shook* decision, for none exists. Even the case Petitioner relies on for this fabricated argument, *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979), refutes it, noting that "classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and States . . . we find the argument that such classifications are 'suspect' an untenable one." (Citations omitted). Second, Petitioner asserts that her manufactured conflict justifies a different equal protection analysis for the Montana hunting regulation than would be applicable under *Morton* Pet. 7. Notably, however, Petitioner cites no judicial or legislative authority for this part of the fabrication either.

What the Montana Supreme Court actually did was find that the "State of Montana is required to follow this federal precedent [*Morton* and *Antelope*] by the express terms of both our own Constitution and the federal enabling

act establishing Montana as a state." Pet. App. 7. From there the *Shook* Court concluded that:

> [F]ederal Indian law regarding the rights of Indians is binding on the state. Therefore, the state equal protection guarantee under Article II, Section 4 [of the Montana Constitution], must allow for state classifications based on *tribal membership* if those classifications can rationally be tied to the fulfillment of the unique federal, and consequent state, obligation toward Indians.

Pet. App. 7 (emphasis added).

Rather than conflicting with this Court, the *Shook* Court properly upheld the supremacy of federal law, a necessity under the Supremacy Clause of the United States Constitution. The *Shook* Court correctly concluded that it was obligated to adhere to federal law when dealing with Indian issues. This is consistent with *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), another case addressing limitations on state authority over treaty-reserved rights. The *Arizona* Court concluded that "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." *Id.* at 571. That is exactly what the *Shook* Court did. This does not constitute the creation of a *de facto* trust relationship. Consequently, because there is no conflict between the United States Supreme Court and the Montana Supreme Court on this point there is no basis for review by this Court.

II. THERE IS NO CONFLICT BETWEEN THE MONTANA SUPREME COURT DECISION AND THE NINTH CIRCUIT COURT OF APPEALS DECISION IN *WILLIAMS v. BABBITT*

Petitioner claims that the *Shook* decision is in conflict with *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998). Pet. 21-24. *Williams* involved a *Chevron* analysis of an agency interpretation of the Reindeer Industry Act, 25 U.S.C. §500.[6] As interpreted, Alaska Natives, rather than persons who may simply have been born in Alaska, were afforded preference in raising reindeer as a commercial crop. Even though the Act did not explicitly limit the right to Natives, it appears that a combination of factual and procedural constraints and federal regulations resulted in an effective Native monopoly over commercial production of the introduced species. *Id.* at 659, 660-661. Non-Natives challenged the Act as violative of their equal protection rights. *Id.* at 659.

Far from constituting a conflict between the courts, *Williams* distinguished treatment of Alaska Natives under the Reindeer Act from treatment of Indian treaty-reserved hunting and fishing rights, finding that, "[u]nlike raising livestock, however, hunting and fishing wild game is an integral and time-honored part of native subsistence culture." *Id.* at 664. *Accord*, *Mille Lacs,* supra. Supporting the *Morton* political treatment of Indians, the *Williams* Court provided numerous examples of Congressional treatment of Indians as a political, not racial, classification. *Id.* at 664,

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[6] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (deference to agency interpretation of statutes and regulations).

footnote 6. There is no conflict between the *Shook* decision and *Williams*.

CONCLUSION

The Montana Supreme Court decision is not in conflict with the decisions of this Court or of a United States Court of Appeals. The Writ of Certiorari should be denied.

Respectfully submitted,

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