No. 02-1658

In The

Supreme Court of the United States

SANDRA SHOOK,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

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

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Montana Supreme Court's decision properly uphold a state regulation prohibiting nontribal members from big game hunting on Indian reservations absent a state/tribal cooperative agreement administratively regulating the activity, as a reasonable measure for conserving big game species?

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case. Contrary to Supreme Court Rule 14(g), the statement fails to specify the stage in the proceedings, both in the court of first instance and on appeal, where the federal questions presented to be reviewed were raised. This is because she never raised the federal questions presented here to the state courts.

REASONS THE PETITION SHOULD BE DENIED

1. Petitioner raises claims and alleges facts in the Petition not raised or alleged in the Montana courts. Petitioner may not properly seek review here based on argument and facts not in the record on the ground that the Montana Supreme Court opinion is in conflict with a decision opinion of this Court on a matter of federal law.

2. The Montana Supreme Court correctly concluded that treaties with federally recognized tribes are binding through the Supremacy Clause on the States, and upheld a State regulation establishing a closed season for on reservation big game hunting for nontribal members to accommodate hunting rights of Montana tribes and to conserve big game species.

3. The regulation is a permissible classification based on superior federal treaty rights exempting from state regulatory authority tribal members hunting on their reservations, and therefore it does not violate the Equal

Protection Clause of the Fourteenth Amendment.

4. The decision of the Montana Supreme Court is in conflict neither with any decision of this Court nor with any decision of the court of last resort of another state nor with a decision of a United States Court of Appeals on a matter of federal law.

SUMMARY OF THE ARGUMENT

Petitioner Shook, a nonIndian, contests a Montana regulation closing the Flathead Indian Reservation in Montana to her for big game hunting. Although she alluded to federal law in her briefs below, she articulated primarily state constitutional and administrative law arguments. Procedurally, the petition should be denied because Petitioner failed to preserve any specific federal issues in the Montana courts. Petitioner for the first time here argues the regulation establishes an improper trust relationship between Montana and the tribes, and creates a racial classification violative of Petitioner's federal equal protection rights. Furthermore, in support of these arguments, she raises new facts never before put into the record.

Substantively, it is axiomatic that the federal treaty rights of tribes are binding on the states through the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2. Where a state classification is derived from or mandated by federally protected tribal rights, such a state classification is not a violation of federal equal protection rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658

(1979); *Puget Sound Gillnetters Association, et al. v. Donald Moos, et al.*, 92 Wn. 2d 939, 603 P.2d 819 (S.C. Wash. 1977) (implementing *Passenger Vessel*).

As to the two reservations on which the issue has been specifically litigated in Montana, the state is already required by federal case law to classify for regulatory purposes tribal versus nontribal members *Confederated Salish and Kootenai Tribes of Flathead Reservation v. K. L. Cool*, 750 F. Supp. 446 (1990) *"CSKT v. Cool"* (state may not regulate tribal members within reservation); *Montana v. United States*, 450 U.S. 544 (1981) (may not regulate tribal members on trust or tribal member owned lands).

The Montana Supreme Court correctly held that the challenged regulation is a reasonable and permissible political classification arising from the need to accommodate federally protected hunting rights of the tribes while protecting the big game resource. The regulation creates no benefit for any Indian, but rather extends its state regulatory authority only over nonmembers. Contrary to Petitioner's assertions that a state may not classify persons by tribal membership, Montana must, on a daily basis, classify its citizens by tribal membership to avoid interference with the federally-protected rights of tribal members. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (state may not assess cigarette sales tax on tribal members). The challenged regulation is a means of protecting the big game resource to the extent possible without adversely affecting the on reservation treaty rights of Montana's tribes and their members. *Antoine v. Washington*, 420 U.S. 194 (1975);

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1998).

Montana's decision to incorporate federal treaty rights into corresponding state law does not create or purport to create any trust relationship between the state and the tribes. The Montana Supreme Court ruling correctly held that regulation was a rational state classification of tribal versus nontribal members for on reservation activities, and based on the geographical component of tribal regulatory authority and political affiliation of tribal members.

Petitioner's authority is inapposite. The off reservation racial contracting preferences on which Petitioner relies are irrelevant to this case, involving only reservation conduct. The compelling reasons needed to justify certiorari are not present. The petition for certiorari should be denied.

ARGUMENT

I. THE FEDERAL ISSUES RAISED HERE WERE NOT ARGUED BELOW AND ARE NOT PROPERLY GROUNDS FOR GRANTING CERTIORARI.

Petitioner challenged below a regulation of the Montana Fish and Game Commission that closed Montana Indian reservations to big game hunting by nonmembers of the Tribes absent a cooperative state/tribal agreement regulating same. Petitioner, a nonIndian, was charged in State court with shooting a white-tailed deer on the Flathead Reservation in Western Montana. In support of her motion to dismiss the charges, she challenged the validity of the regulation closing the season as to nonmembers of the Tribes. Below, her arguments seem to have

been based on state administrative law, legislative intent, and state constitutional law. Her first set of articulated reasons in the Montana Supreme Court stated as grounds for dismissal that the challenged regulation:

> 1. . . . violates equal protection, 2. . . . serves no legitimate state interest, 3. . . . contradicts the express statute that request consent of private property owners, 4. . . . is outside the scope of the express purpose of the Commission, 5. the plain language of the statute is void of any express purpose to distinguish between tribal or nontribal member status, and, 6. the legislative history and Commission minutes do not express any justification for how the classification serves to meet the goals of the Commission.

(Shook Appellant's Br., S.C. Mont. at 12-13.)

In contrast to her arguments regarding the scope of legislative delegation to the Fish and Game Commission under state law, citing to *Emery v. State Department of Public Health*, 950 P.2d 764 (S.C. Mont. 1997), and equal protection rights of hunters under state law, the Petition presents for the first time the following questions: whether a state has the same trust relationship with the Tribes as does the federal government; whether strict scrutiny must be applied to the classification in the regulation under *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) and progeny; and whether, based on newly-presented factual allegations not in the record below, the classification establishes a racial classification because, according to new facts alleged herein, all tribal membership in Montana Tribes allegedly contains a significant and unwaivable blood quantum component. (Pet. at i.) Having failed to raise these federal law claims in state court, she

may not rely on them here. *See, e.g., Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam) (state court cannot be faulted for only analyzing state law issue where federal claim not raised before the state court).

Only the equal protection argument was made below by Petitioner's generic allegation that the regulation was an impermissible racial classification. The argument that the decision below *de facto* establishes the same trust relationship between Montana and its tribes as the federally recognized tribes have with the federal government is entirely new. Unsupported references to equal protection violations are not sufficiently specific to federal constitutional arguments to put the Respondent reasonably on notice of what, precisely, the Petitioner is arguing. This Court will not address arguments made to this Court for the first time. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995) (Court will not address Oklahoma's argument that the Hayden-Cartwright Act provided necessary express Congressional delegation for the State to tax reservation Indian because the argument was not made below). *Id.* at 456-457.

Similarly, Petitioner's new allegations of fact regarding unwaivable blood quantum requirements for tribal membership are not properly before the Court. (*See* Pet. at 13.) Petitioner offers new facts never made of record, or even alluded to below, including numerous bald allegations of law and fact regarding the Montana Tribal membership laws, citing to various internet sources as her authority. This information is not properly considered here. Not having raised these below, she is precluded from now raising them to this Court.

II. THE PETITION SHOULD BE DENIED BECAUSE THE MONTANA SUPREME COURT CORRECTLY CONCLUDED THAT TREATIES WITH FEDERALLY RECOGNIZED TRIBES ARE BINDING THROUGH THE SUPREMACY CLAUSE ON THE STATES, AND UPHELD A REASONABLE STATE REGULATION ESTABLISHING A CLOSED SEASON ON BIG GAME HUNTING FOR NON TRIBAL MEMBERS ON RESERVATIONS TO ACCOMMODATE THE RESERVED HUNTING RIGHTS OF MONTANA TRIBES AND TO CONSERVE BIG GAME SPECIES.

A. Treaty Rights of Federally Recognized Tribes and Their Members Are Binding Through the Supremacy Clause of the United States Constitution on the State of Montana. U.S. Const., art. VI, cl. 2.

The Montana Supreme Court has long correctly recognized the supremacy of federal law over Indian affairs. *State ex. rel. Nepstad v. Danielson*, 427 P.2d 689 (S.C. Mont. 1967); *State v. McClure*, 268 P.2d 629 (S.C. Mont. 1954); *State v. Stasso*, 563 P.2d 562 (S.C. Mont. 1977). It is an unremarkable proposition that the Tribes' treaty rights are federal rights and binding on the States.

> It is well-settled that the United States Congress may exercise its powers to circumscribe the exercise of state police power by virtue of the Supremacy Clause of the United States Constitution. U.S. Const., Art. VI, Clause 2; *Morris v. Jones*, 329 U.S. 545, 91 L.Ed. 488, 67 S. Ct. 451, 168 A.L.R. 656. A state statute may be effectively "pre-empted" by an act of Congress directly inconsistent with the state statute or by a clear expression of an intention to exclusively occupy a

> limited field encompassing the state statute. *Savage v. Jones*, 225 U.S. 501, 32 S. Ct. 715, 56 L. Ed. 1182; *Schwartz v. State of Texas*, 344 U.S. 199, 73 S. Ct. 232, 97 L. Ed. 231.

Nepstad, 427 P.2d at 691.

These fundamental principals are indisputable, and have been reaffirmed as recently as 1998. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1998). Nor have the rules for interpreting these treaties varied over time. ". . . . [T]reaties are to be interpreted liberally in favor of the Indians, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-676, 61 L. Ed. 2d 823, 99 S. Ct. 3055 (1979), and treaty ambiguities to be resolved in their favor. *Winters v. United States*, 207 U.S. 564, 576-577, 52 L. Ed. 340, 28 S. Ct. 207 (1908)." *Mille Lacs*, 526 at 195.

Petitioner's claim arose from the Flathead Indian Reservation. Its treaty history and legal effect is well established in federal and state law. In *State v. McClure*, 268 P.2d 629 (S.C. Mont. 1954), the State charged two member Indians with possessing an antelope killed during the state closed season, and defendants raised their rights under the 1855 Treaty of Hellgate in defense, arguing the Treaty created federally preemptive rights and the State was without jurisdiction to try them. In affirming that the State could not regulate their reserved treaty hunting rights, the Montana Supreme Court reviewed the history and meaning of the Treaty.

> This treaty was one of a group of eleven treaties negotiated with the Indian nations and tribes of the northwest between December 26, 1854, and July 16, 1855. Most of the treaties were with coast Indians of the territories of Washington and Oregon, and with those Indians the prime consideration was in protecting and reserving their fishing rights and grounds which provided their major food supply. However, the Flathead and other prairie Indian nations' primary interest was to protect and reserve their hunting rights and grounds which provided their major food and clothing. The form of the treaty, however, was almost identical in each instance. . . . The negotiations and proceedings and council held by Governor Stevens representing the President of the United States, and the Chiefs of the Flathead, Pend d'Oreille and Kootenai tribes, were held at Hell Gate in the Bitterroot Valley, Washington Territory, commencing July 7th and concluded July 16, 1855. This treaty with the Flathead Nation was ratified by the Senate of the United States March 8, 1859, and proclaimed by President James Buchanan April 18, 1859, 12 Stat. 975, 979. By this treaty the Flathead Indian Reservation was established and has continuously so existed under the direction of the superintendent thereof to this date. Such a treaty solemnly 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. Such a treaty is superior to the reserved powers of the state, including the police power. 63 C. J., Treaties, secs. 27, 28, 29, pp. 844, 845. Compare *State of Missouri v. Holland*, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984, and cases therein cited; *State v. Arthur*, 74 Idaho 251, 261 P.2d 135.

McClure, 268 P.2d 629, 631.

The regulation in issue permissibly classifies nonmembers as a distinct legal class for on reservation conduct. This is consistent with *Montana v. United States*, 450 U.S. 544 (1981), as well as *Confederated Salish and Kootenai Tribes of Flathead Reservation v. K.L. Cool*, 750 F. Supp. 446 (1990). Petitioner's goal is apparently to assure that nonmembers and members are treated alike with respect to on reservation activity. This Court has, however, already foreclosed that possibility. Montana does not have regulatory jurisdiction over tribal members hunting on their reservations, and so has protected the big game resources in the only way it can – by regulating nonmember conduct. *Confederated Salish and Kootenai Tribes of Flathead Reservation v. K.L. Cool*, 750 F. Supp. 446 (1990). *See United States v. Washington*, 626 F. Supp. 1405 (1981) (state regulation of tribal take enjoined – state may regulate nonmembers only); *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

As the Washington Supreme Court recently pointed out in one of the difficult cases involving state implementation of conservation regulations while respecting tribal treaty rights, "We wish to point out here the obvious correlative impact of the supremacy clause on state legislation. Any attempt to limit by statute or administrative regulation the effect of the treaties on the state fisheries cannot survive the superior force of federal law protecting the signatory tribes' right. . . . " *Puget Sound Gillnetters v. Moos, et al.*, 603 P.2d 819, 826 (S.C. Wash. 1977).

B. The Regulation in Issue Does Not Purport to Create a Trust Relationship, but Rather Only Acknowledges Federal Preemption of State Authority Over On Reservation Hunting Activities of Tribal Members.

Petitioner correctly notes that the United States Constitution does not impose on States the same trust relationship that the federal government has with tribes, and that Congressional authority under the Indian Commerce Clause is plenary and has no corollary in state authority. (Pet. at 6-7.) She then argues that the Montana Supreme Court's interpretation of the Montana Constitution is erroneous. The question of whether the court's interpretation of the Montana Constitution is correct is not a federal question before this Court. (Pet. at i.)

Montana concedes that the federal government has plenary authority over Indian affairs, and that the United States necessarily has a unique legal relationship with tribes. The court's decision however, does not purport to create a state/tribal trust relationship and the regulation creates no special rights for Indians.

Contrary to Petitioner's claim that the regulation results in "singling out tribal Indians," Pet. at. 11, the regulation in issue does not affect Indians at all – because federal law preempts state regulation of member hunting on reservations. *Montana v. United States* at 563, *CSKT v. Cool*, 750 F. Supp. at 451. While the extent of off reservation hunting rights varies among the Montana Tribes, *see State v. Horseman*, 866 P.2d 1110 (S.C. Mont. 1993), there is no question that tribal regulatory authority has a significant geographical component, and that state regulatory authority over on reservation hunting activities of members is generally preempted. *Menominee Tribe v.*

United States, 391 U.S. 404 (1968); *Cheyenne Arapahoe Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980).

Petitioner implicitly argues that because Montana is asserting regulatory authority only over nonmembers of the Tribes, this is tantamount to creating a trust relationship. The regulation, however, merely acknowledges that on reservations, tribal members are generally free of state hunting regulations, and consequently the State can further big game preservation only by restricting hunting by nonmembers. As the federal district court in Montana has noted:

> The Montana Supreme Court acknowledged this exclusive right of the Tribes to hunt and fish within the exterior boundaries of the Reservation in *State v. McClure*, 127 Mont. 534, 268 P.2d 629 (1954), and the Court of Appeals for the Ninth Circuit also recognized the importance of these particular treaty rights in *Bd. of Control of Flathead, et al. Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007, 108 S. Ct. 1732, 100 L. Ed. 2d 196 (1988), and in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977, 74 L. Ed. 2d 291, 103 S. Ct. 314 (1982).

Confederated Salish and Kootenai Tribes of Flathead Reservation v. K. L. Cool, 750 F. Supp. at 448 (1990).

Petitioner's argument fails to present the necessary compelling reasons for granting certiorari, and the Petition should be denied.

III. IT IS NOT A VIOLATION OF FEDERAL EQUAL PROTECTION LAW FOR A STATE TO CLASSIFY PERSONS BASED ON TRIBAL AFFILIATION AND TO BASE STATE REGULATORY DECISIONS ON WHETHER A PERSON IS A MEMBER OF A TRIBE OR LOCATED ON AN INDIAN RESERVATION, SO LONG AS THAT CLASSIFICATION AND REGULATION ARISE FROM AN ISSUE OF SPECIAL INDIAN CONCERN.

A. The Classification in Issue Is a Permissible Classification Relating to On Reservation Conduct and Compliments Federal Law Prohibiting Unauthorized Hunting on Indian Trust Lands (18 U.S.C. § 1165).

The regulation in issue simply closes the federally recognized Indian reservations in Montana to nonmembers' big game hunting unless there is a state/tribal cooperative agreement in effect to regulate it. Given the complexity and expense of litigation to resolve questions of hunting and fishing regulation on reservations in Montana, *see, e.g.*, *Montana v. United States*, 450 U.S. 544 (1981) (regarding jurisdiction on the Crow Reservation and the Big Horn River); *Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. K.L. Cool*, 750 F. Supp. 446 (1990) (Flathead Tribes assert exclusive hunting and fishing regulatory authority within reservation, Court rejects *Montana v. United States* as controlling, refers to Tribes' "exclusive" rights to regulate, urges continuation of state/tribal negotiations and stays case) this is a rational approach to the problem.

In *Mille Lacs*, this Court held that Indian reserved hunting rights do not eliminate the correlative rights of

states to regulate hunting so long as the state regulation does not violate the reserved rights of the tribes.

> As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 61 L. Ed. 2d 823, 99 S. Ct. 3055 (1979); *see also Antoine v. Washington*, 420 U.S. 194, 43 L. Ed. 2d 129, 95 S. Ct. 944 (1975). Rather, Indian treaty rights can coexist with state management of natural resources. Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making. U.S. Const., Art. VI, cl. 2. *See, e.g., Missouri v. Holland*, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920); *Kleppe v. New Mexico*, 426 U.S. 529, 49 L. Ed. 2d 34, 96 S. Ct. 2285 (1976); *United States v. Winans*, 198 U.S. at 382-384; *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 23 L. Ed. 846 (1876). *See also Menominee Tribe v. United States*, *supra*, at 411, n.12.

Mille Lacs, 526 U.S. at 204.

Petitioner's reliance on the preemptive reach of Congressional action, and the difficulty in determining in each instance whether Congress has, in fact, preempted state regulation involving Indians, is irrelevant. *Compare New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 344-45 (1983) (state regulation of nonIndian hunters preempted) with *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 64 (1994) (state taxation of sales to nonIndians not preempted by Indian trader statutes). When Congress establishes a reservation, implied tribal hunting rights are included. *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968).

The Montana Tribes unquestionably have some reserved hunting rights and regulatory authority, although the scope and extent of the different tribes' rights vary greatly, *e.g.*, *United States v. Peterson*, 121 F. Supp. 2d 1309, 317-21 (D. Mont. 2000) (Blackfeet reserved rights in the ceded strip of Glacier National Park clearly reserved by Treaty but later clearly Congressionally abrogated); *Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. K.L. Cool*, 750 F. Supp. 446 (D. Mont. 1990) (referring to exclusive hunting and fishing rights of Stevens Treaty Tribes). The State has by regulation continued to assert its authority over non tribal members and the regulation was properly upheld in *State ex rel. Nepstad v. Danielson*, 427 P.2d 689, 692-93 (S.C. Mont. 1967), where the court examined the relationship between federal laws prohibiting non tribal hunting on trust lands, and state conservation needs. As the federal statute prohibited only unauthorized hunting on trust land, the court found the regulation a permissible exercise of state authority and not preempted by 18 U.S.C. § 1165.

The states with Indian reservations within their borders must exercise their sovereignty ever mindful of potential litigation that might derail an otherwise perfect regulatory scheme because of interference with any one of a plethora of federally-protected tribal rights. *See, e.g.*, *Puget Sound Gillnetters Ass'n v. Moos*, 603 P.2d 819 (S.C. Wash. 1977). States can, and in many cases must, in areas

of special Indian concern, such as on reservation activities, classify persons by their Indian status, *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1998); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *Flynt v. California Gambling Commission*, 104 Cal. App. 4th 1125 (2002), *rev. denied*, 2003 Cal. LEXIS 2123 (Cal., Apr. 9, 2003); *Puget Sound Gillnetters*, at 824-25; *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Calif. 2002).

B. State Classifications Based on Political Affiliation Are Permissible and Subject Only to the Rational Basis Test When Applied to an Area of Unique Indian Interest. The Challenged Regulation Is, However, Sufficiently Narrowly-Tailored to Pass a More Stringent Test as Well.

When regulating hunting in coordination with tribal rights, states must classify persons on the basis of whether they are members of the class with the reserved rights. *State ex rel. Nepstad v. Danielson*, 427 P.2d 689 (S.C. Mont. 1967). Such classifications are mandated for states to comply with complex regulatory choices affecting allocation of take and preservation of species where regulatory authority must be shared with Tribes whose reserved rights survive statehood and reservation creation. *Northwest Gillnetters Association, et al. v. Gordon Sandison, et al.*, 628 P.2d 800, 802 (S.C. Wash. 1981). In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court held classification based on tribal membership is permissible and sometimes mandated based on "peculiar semi-sovereign and constitutionally recognized status of Indians." *See Passenger Vessel*, 443 U.S. at 684; *Puget*

Sound Gillnetters Association, et al. v. Donald Moos, et al., 603 P.2d at 824-25 (upholding state regulations classifying fishermen and allocating take). There is no question that as a matter of federal law, Montana's jurisdiction over hunters depends on the location of the hunting and the tribal membership of the hunter. Because of the state's inability to regulate big game predation by Indians on reservations, it has taken a conservation measure to protect the big game by simply putting all reservations off limits to nonmembers in the absence of a cooperative agreement assuring a reasonable take. The Montana Supreme Court upheld this approach in *State ex. rel. Nepstad v. Danielson*, 427 P.2d 689 (S.C. Mont. 1967). It was properly upheld again below.

The Montana Supreme Court's opinion below noted the rule from *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974) that, where relating to the special relationship between the federal government and the tribes, classifications based on tribal membership were permissible classifications that, when relating to special issues of Indian concern, were reviewed under the rational basis test. Pet. App. 6-7. The Court opined, "Consequently, federal Indian law regarding the rights of Indians is binding on the state. Therefore, the state equal protection guarantee under Article II, Section 4, 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. Montana has, based in part on controlling federal law and in part on Montana constitutional and statutory law, permissibly incorporated into state law the rule of *Morton v. Mancari*, 417 U.S. 535 (1974), that classifications based on membership in federally recognized tribes

are to be upheld when they are related to the special federal and state obligations to tribal members, here, arising from the reserved hunting rights of the Tribes. The Court itself noted the parameters that assure the narrow tailoring of the rule: that the area is one of special Indian concern and that the regulation be rationally related to the fulfillment of federal obligations to Tribes and their members. *Id.* As thus stated, it comports with federal equal protection law.

IV. THE DECISION BELOW IS NOT CONTRARY TO ANY DECISION OF THIS COURT.

The Court decision below does not conflict with any relevant decision of this Court. This Court, has repeatedly reaffirmed the rule of *Mancari*, where special Indian interests are concerned. Petitioner cites numerous cases involving off reservation employment or contractor preferences for racial groups as authority for the proposition that this on reservation classification is improper. None of these cases involving racial preferences are apposite. *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), both involved categorical racial preferences to state or city contracting awards. Both were found to be subject to strict scrutiny and insufficiently narrowly-tailored to remedy a past specific harm to survive that exacting test. Neither, of course, is relevant to the question herein, which involves not the grant of a special state privilege to a racial group, but rather a hunting regulation applied only to on reservation conduct of the only class of individuals the state unquestionably has jurisdiction over for

on reservation activities: nonmembers. Such regulation is fully consistent with this Court's relevant opinions.

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997), *cert. den. sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998), is not to the contrary. So long as reasonably tied to issues historically related to Indian status or culture, the classifications of enrolled tribal members based on their enrollment is political, not racial, and thus not subject to strict scrutiny under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200. Indeed, *Babbitt* fully supports the result below.

> Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *United States v. Antelope*, 430 U.S. 641, 646, 51 L. Ed. 2d 701, 97 S. Ct. 1395 (1977). As "a separate people," Indians have a right to expect some special protection for their land, political institutions (whether tribes or native villages), and culture.

Babbitt, 115 F.3d at 664. There, the basis for the challenge was that the reindeer industry was foreign to Alaska Indians, and therefore not an area of special Indian concern. There is no doubt, however, that hunting big game on established Indian reservations is an area of special Indian concern, as all of Montana's Indians have on reservation rights to regulate at least their members on trust lands. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Thus, even under the more restrictive scrutiny *Babbitt* would call for, the challenged regulation would

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pass. Nor is *Rice v. Cayetano*, 528 U.S. 495 (2000) relevant, as that case involved both voting rights and native Hawaiians with no trust relationship or treaty with the United States.

CONCLUSION

Petitioner has presented no compelling argument justifying the grant of certiorari. The petition for writ of certiorari should be denied.

Respectfully submitted,

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