No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1997, the State of Montana, through its Fish, Wildlife and Parks Commission, promulgated a regulation that restricts big game hunting privileges on Indian Reservations to tribal members. Petitioner, Ms. Sandra Shook, a non-tribal member, was charged and convicted of violating the regulation. The questions presented are as follows:

1. Whether a state has the same "trust relationship" with American Indians as does the federal government.

2. Whether a state law that allows tribal members to hunt wildlife within the exterior boundaries of an Indian reservation while denying that same right to non-tribal members who own fee property within those boundaries creates a racial classification that must be subjected to "strict scrutiny" in accordance with this Court's holdings in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

3. Whether a state law that distinguishes between tribal and non-tribal members, where tribal membership is dependent on ancestry, creates a racial classification that must be subjected 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.

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PETITION FOR WRIT OF CERTIORARI

Ms. Sandra Shook hereby petitions this Court for a *writ of certiorari* to review the judgment of the Supreme Court of the State of Montana.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana from which review is sought is reported at 313 Mont. 347, ___ P.2d ___ (Mont. 2002) and is reproduced at App. 1. The opinion of the Supreme Court of the State of Montana denying Petitioner's Petition for Rehearing is reported at 2002 MT 347A, 2003 WL 347575 (Mont. 2003) and is reproduced at App. 27. The opinion of the Montana Twentieth Judicial District Court, Sanders County, is reported at 1999 Mont. Law 294 (Mont. 1999) and is reproduced at App. 22.

JURISDICTION

The judgment of the Supreme Court of the State of Montana was entered on December 30, 2002. App. 2. On January 13, 2003, Ms. Shook timely filed a Petition for Rehearing. App. 27. On February 11, 2003, the Supreme Court of the State of Montana denied Ms. Shook's Petition for Rehearing. App. 27. Pursuant to Supreme Court Rule 13.3, this Petition is filed timely within 90 days of the Supreme Court of the State of Montana's denial of Ms. Shook's Petition for Rehearing. Pursuant to 28 U.S.C.

§ 1257(a), this Court has jurisdiction to review the judgment of the Supreme Court of the State of Montana.

CONSTITUTIONAL PROVISION INVOLVED

This Petition involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REGULATORY PROVISION AT ISSUE

In 1997, Montana's Fish, Wildlife, & Parks Commission promulgated its Big Game Hunting Regulations, which provide, in pertinent part, that "[b]ig game hunting privileges on Indian Reservations are limited to tribal members only." App. 32.

STATEMENT OF THE CASE

Ms. Sandra Shook, a non-Indian, owns fee property located within the exterior boundaries of the Flathead Indian Reservation in northwestern Montana. On October 20, 1997, Ms. Shook purchased a Montana resident deer hunting license and tag in accordance with the Montana

Big Game Hunting Regulations. On November 16, 1997, while hunting within the exterior boundaries of the Flathead Indian Reservation on non-Indian fee property owned by a Mr. Robert Rawlins, Ms. Shook shot and tagged a white-tailed deer. Mr. Rawlins had granted Ms. Shook express permission to enter onto and to hunt on his land, which was in accordance with Montana Big Game Hunting Regulations.[1]

On the day that Ms. Shook shot and tagged the white-tailed deer, Montana's Fish and Game Commission charged Ms. Shook with hunting in a closed area in violation of Section 87-1-304 of the Montana Code, which provides the Commission the authority to fix hunting seasons and bag and possession limits. App. 3. The non-Indian fee property on which Ms. Shook was hunting was deemed a "closed area" under a 1997 Montana Big Game Hunting Regulation that restricts big game hunting privileges within the exterior boundaries of Indian reservations to tribal members.[2] App. 32. This regulation is applicable to all Indian reservations within the State of Montana.

Ms. Shook appeared before the Sanders County Justice Court of Montana and entered a guilty plea to the

[1] The 1997 Montana Big Game Hunting Regulations provide that hunters must have permission of the landowner, lessee, or his agent before hunting big game animals, including deer, on private property, regardless of whether the land is posted. App. 32.

[2] The 1997 Montana Big Game Hunting Regulation limiting big game hunting privileges on Indian Reservations to tribal members only remains valid and current under the 2003 Montana Hunting Regulations for Deer, Elk, and Antelope. App. 33.

offense of "violating rules and regulations of the Montana Fish and Game Commission," a misdemeanor, in violation of MCA § 87-1-304. App. 3. Ms. Shook reserved her right to a review of the adverse determination and filed a Notice of Appeal. App. 3. The matter was then presented for review to the Montana Twentieth Judicial District Court of Sanders County. App. 3. Ms. Shook filed a Motion to Dismiss challenging the authority of the Montana Fish and Game Commission to designate private property within the Flathead Indian Reservation as "closed" to hunting by non-tribal members. App. 23. Ms. Shook alleged, *inter alia*, that the regulation restricting big game hunting privileges on Indian reservations to only tribal members establishes a racial preference in violation of the Fourteenth Amendment to the United States Constitution. App. 23. The District Court denied Ms. Shook's Motion to Dismiss and found her guilty of the charged violation. App. 26. In ruling that the regulation did not violate the equal protection guarantee of the Fourteenth Amendment, the District Court held that it must adhere to federal court precedents that suggest that distinctions between Indians and non-Indians are based upon political classifications and not racial classifications. App. 23.

Ms. Shook subsequently pleaded guilty, admitting to killing a buck white-tail deer on non-Indian private property within the exterior boundaries of the Flathead Indian Reservation, while reserving her right to appeal. App. 17. Ms. Shook was sentenced to five days in the Sanders County Jail, which was suspended, ordered to pay a fine in the amount of $500.00, and ordered to forfeit all privileges to hunt in the State of Montana for a period of twenty-four months from the date of conviction. App. 18.

Ms. Shook then appealed the District Court's ruling to the Montana State Supreme Court.

On appeal, Ms. Shook again argued, *inter alia*, that the 1997 Big Game Hunting Regulation was unconstitutional under state and federal law. App. 5. Specifically, Ms. Shook asserted that the plain language of the regulation violates the Equal Protection Clause because it distinguishes between Indians and non-Indians on the basis of race. App. 5. Ms. Shook further argued that the regulation was an unlawful exercise of the powers of the Montana Fish and Game Commission. App. 10. The Montana State Supreme Court affirmed the District Court's ruling that the regulation closing all land within Indian reservations to big game hunting by non-tribal members was constitutional. App. 6. The Montana Supreme Court based its holding on this Court's ruling in *Morton v. Mancari*, 417 U.S. 535 (1974). App. 6. The Montana State Supreme Court held that the regulation, which distinguishes between persons based on tribal membership, was constitutional under equal protection requirements because the distinction is political rather than racial. App. 6. Consequently, the Montana State Supreme Court did not apply strict scrutiny, but decided instead that it need only address whether the regulation is tied rationally to the fulfillment of federal and state obligations toward Indians. App. 8. In doing so, the Montana Supreme Court determined that there was a rational basis for the challenged regulation and, thus, held that the 1997 Big Game Hunting Regulation did not deprive Ms. Shook of equal protection under the laws of the United States. App. 8.

REASONS FOR GRANTING THE PETITION

I. A DIRECT CONFLICT EXISTS BETWEEN THE DECISION OF THE MONTANA SUPREME COURT AND DECISIONS OF THIS COURT.

A. THE DECISION OF THE MONTANA SUPREME COURT, THAT MONTANA HAS A DUTY TO FULFILL THE UNIQUE FEDERAL OBLIGATION TOWARD INDIANS, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT.

In upholding Ms. Shook's conviction the Montana Supreme Court ruled:

> The State of Montana is required to follow [the fulfillment of the unique federal obligation toward Indians] by the express terms of both our own Constitution and the federal enabling act establishing Montana as a state. Specifically, following the Preamble to the Montana Constitution, Article I, the Compact With the United States, requires that the State abide by 'the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States.'

App. 7. The Montana Supreme Court also ruled that "Indian treaties are 'regarded as a part of the law of the state as much as the state's own laws and Constitution[,] [are] effective and binding on [the] state legislature[ ] . . . [and are] superior to the reserved powers of the state, including the police power.'" App. 7. Without any additional explanation, the Court reasoned that, "[c]onsequently, federal Indian law regarding the rights of Indians is binding on the state[ ]" and therefore Montana's regulation differentiating between

similarly situated persons based on tribal membership is essential to "the fulfillment of the unique federal, and consequently state, obligation toward Indians." App. 7.

The Montana Supreme Court's interpretation of the Montana Constitution, together with its holding regarding the application of Indian Treaties, is erroneous and results in the creation of a *de facto* trust relationship between Montana and the several Indian tribes within its borders. States do not have the same trust relationship with American Indians as does the federal government. Thus the equal protection analysis applied to state action differs significantly from that applied to federal legislation. *See*, Ralph W. Johnson and E. Susan Crystal, *Indians and Equal Protection*, 54 Wash. L. Rev. 587, 609 (1979).

The U.S. Constitution does not contain an explicit delineation of a trust relationship between the federal government and Indians, but it does grant powers to the federal government that have been held to authorize its role as a trustee. Most notably is the congressional power to regulate commerce with the Indian tribes, Art. I, § 8, cl. 3, and the presidential power to make treaties, Art. II, § 2, cl. 2. Additional support may be found in the congressional power to make regulations governing the territory belonging to the United States, Art IV, § 3, cl. 2. Based upon these provisions, this Court's first recognition of a trust relationship between the federal government and American Indians came with Chief Justice John Marshall's decision in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

Justice Marshall characterized Indian tribes as "domestic dependent nations" with a relation to the United States that "resembles that of a ward to his guardian."

Cherokee, 30 U.S. at 17. Fifty years later, this Court further evolved this relationship in upholding Congress's Major Crimes Act, which defined certain offenses committed by Indians as federal crimes:

> These Indian tribes are the wards of the nation. They are communities dependent on the United States, [ ] dependent for their political rights. *They owe no allegiance to the states, and receive from them no protection.* [ ] From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by [C]ongress, and by this [C]ourt, whenever the question has arisen.

United States v. Kagama, 118 U.S. 375, 384-385 (1886) (emphasis added); *see also*, *United States v. Sandoval*, 231 U.S. 28, 45-48 (1913) (The power to enact laws for the benefit and protection of Indian tribes rests with Congress). These decisions and their progeny set forth a clear distinction between American Indians' relationship with the federal government and their relationship with the separate states. More recently, in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, this Court again acknowledged that "[s]tates do not enjoy [the] same unique relationship with Indians" as does the federal government so that only Congress may enact legislation, "singling out tribal Indians." 439 U.S. 463, 501 (1979). Thus, although this Court has held that the federal government has a special "trust relationship" with Indian tribes, this Court has never reached that conclusion regarding the states.

Nor is any authority for such a relationship to be found in Montana's Constitution. Article I of the Montana Constitution, on which the Montana Supreme Court relied, does not provide Montana with the authority to fulfill the "unique federal obligation toward Indians."[3] App. 30. Moreover, it does not recognize a unique state obligation to the Indians that might create a trust relationship. App. 30. Article I of the Montana Constitution provides only that those lands held by Indians or Indian tribes remain under the "jurisdiction and control" of the United States. App. 30. This provision does not establish or mandate that Montana fulfill any unique obligation, state or federal, toward Indians. Furthermore, it demonstrates that any trust relationship with or obligation toward Indians is exclusively federal.

Nor do Indian treaties, specifically the Treaty with the Flatheads, provide Montana authority for entering into the same unique relationship with Indians into which the federal government has entered as a result of the U.S. Constitution and numerous treaties between the federal government and various tribes. App. 34. The Flathead Treaty, concluded at Hell Gate in the Bitter Root Valley of Montana on July 16, 1855, was ratified by the Senate on March 8, 1859, and signed by the President of the United States, James Buchanan, that same year. App. 35. Montana did not join the Union as the 41st state until 1889, well after the Flathead Treaty. Thus, the Flathead Treaty did not establish, nor could it even have contemplated, a

[3] Implicitly, because the "federal obligation toward Indians" is "unique," it may not be shared with the States.

trust relationship between the State of Montana and the several Indian tribes involved.

Moreover, the language of the Treaty does not provide the several Indian tribes with the exclusive right to hunt on all lands within the exterior boundaries of the reservation; hunting privileges were granted to all citizens of the Montana Territory:

> The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, *in common with citizens of the Territory*, and of erecting temporary buildings for curing; *together with the privilege of hunting*, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Flathead Treaty, Article III (emphasis added). App. 34-35. The language of the Treaty is clear and unambiguous. The only exclusive right reserved to the tribes is that of "taking fish in all the streams running through or bordering said reservation[.]" The privilege of the tribes to hunt within the exterior boundaries of the reservation is not exclusive. Instead the privilege of hunting reserved to the Indians is limited to land that is open and unclaimed; that is, lands not owned and occupied by private parties "under possessory rights or patent or otherwise appropriated to private ownership." *State v. Stasso*, 172 Mont. 242, 248, 563 P.2d 562, 565 (1977). Thus, although the Treaty does establish that Indians do reserve some hunting privileges within the reservation, those privileges are not exclusive.

As the foregoing demonstrates, neither the U.S. Constitution, nor the Montana Constitution, nor the Flathead Treaty establish a trust relationship between Montana and

American Indians so as to permit Montana to enact laws "singling out tribal Indians" in an unconstitutional manner. The Montana Supreme Court's creation of a *de facto* trust relationship between Montana and the several Indian tribes within its borders conflicts with the U.S. Constitution and the decisions of this Court. For these reasons this Petition should be granted.

B. THE DECISION OF THE MONTANA SUPREME COURT, THAT A STATE REGULATION ESTABLISHING A RACIAL CLASSIFICATION BASED ON TRIBAL MEMBERSHIP IS SUBJECT TO A RATIONAL BASIS REVIEW, IS IN DIRECT CONFLICT WITH *CROSON* AND *ADARAND*.

The Montana Supreme Court applied the rational basis standard of review to the challenged state hunting regulation:

> [W]e need only address whether the state regulation that prohibits non-tribal members from hunting big game on Indian reservations is rationally tied to the fulfillment of [Montana's] unique obligation toward Indians.

App. 8. The Montana Supreme Court applied this standard after determining that "federal Indian law regarding the rights of Indians is binding on the state[,]" and thus, the state must defer to this Court's decision in *Mancari*. App. 7. Adopting the reasoning of *Mancari*, the Montana Supreme Court held that Montana's classifications, based on tribal membership, are "constitutional under equal protection requirements because the distinction is political rather than racial[ ]" and that the classifications can then

be tied rationally to the "fulfillment of the unique obligation toward Indians." App. 6 (citing *Mancari*, 417 U.S. at 552-54). The ruling of the Montana Supreme Court is in conflict with decisions of this Court.

It is well established that when a state treats similarly situated persons differently because of their race, strict scrutiny must be applied. *See*, *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). In *Croson*, this Court held that racial preferences created by a state are subject to a heightened or strict level of scrutiny, which requires a demonstration of a compelling governmental interest, which is served by a narrowly tailored remedy. 488 U.S. at 492-97. In *Adarand*, this Court held that racial preferences, including those granted to Native Americans, must be analyzed under "strict scrutiny." 515 U.S. at 227. Furthermore, this Court held that all racial classifications imposed by any "governmental actor," including federal, state, or local, must be analyzed under "strict scrutiny." *Id.* In addition, *Adarand* expressly overruled *Metro Broadcasting Inc. v. F.C.C.*, 497 U.S. 1050 (1990), in part because its application of intermediate scrutiny to federal racial classifications was inconsistent with the "strict scrutiny" applied to state classifications compelled by the equal protection guarantee.[4] *Id.* at 233-35.

[4] There is considerable debate among commentators as to the extent that governmental agencies may discriminate in favor of Native Americans: Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996) (recognizing that *Adarand* creates an uneasy relationship between the special relationship of Congress and Indian tribes recognized in *Morton v. Mancari* and the frustration with racial classifications in *Adarand*);

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Montana's regulation burdens non-tribal members and thus represents a racial classification. That is, Montana bars hunting within the exterior boundaries of the Flathead Indian Reservation by a non-tribal member who seeks to hunt on non-Indian fee property that she owns or that is owned by another non-Indian. Because membership for each one of the eleven Indian tribes that reside on reservations in Montana requires a certain blood quantum, it is impossible for a non-Indian, that is, a person without the requisite degree of American Indian blood, to simply "apply" for and be granted membership with a tribe.[5] Consequently, to be recognized as a tribal member, a person must be classified as an American Indian, a racial classification expressly acknowledged by this Court. Therefore, because the challenged Montana's Big Game Hunting

L. Scott Could, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 718 (2001) (*Mancari's* overlay of race with status permits preferences that would not survive strict scrutiny under *Adarand*.); Frank Shockey, *"Invidious" American Indian Tribal Sovereignty:* Morton v. Mancari *Contra*, Adarand Constructors, Inc. v. Peña, Rice v. Cayetano, *and Other Recent Cases*, 25 Am. Indian L. Rev. 275 (2000/2001); Wayne R. Farnsworth, Note, *Bureau of Indian Affairs Hiring Preferences After* Adarand Constructors, Inc. v. Peña, 1996 B.Y.U. L. Rev. 503 (1996).

[5] The degree of blood quantum required for each tribe may be referenced through their respective constitutions and bylaws: Blackfeet Constitution & Bylaws, http://www.tribalresourcecenter.org/ccfolder/blackfeet_constandbylaws.htm; Crow Tribal Constitution, http://www.tribalresourcecenter.org/ccfolder/crow_const.htm; Salish and Kootenai Constitution and Bylaws, http://www.tribalresourcecenter.org/ccfolder/salishandkootenai_constandbylaws.htm; Fort Peck Comprehensive Code of Justice 2000, http://www.ftpeckcourts.org/CCOJ/Title004.htm; Constitution of the Fort Belknap Indian Community, www.tribalresourcecenter.org/ccfolder/fort_belknap_const.htm; Northern Cheyenne Tribe Constitution and Bylaws, http://www.mt.blm.gov/mcfo/cbm/eis/NCheyenneNarrativeReport/AppB.pdf.

Regulation establishes a racial classification, it must be subject to "strict scrutiny" under this Court's decisions in *Croson* and *Adarand*.

This conclusion is supported by the fact that *Croson* spoke expressly to the very limited authority of States to make racial distinctions, for whatever purpose:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions.

Croson, 488 U.S. at 490 (emphasis in original). Montana, however, does not assert that it is seeking to remediate past wrongs, only that is fulfilling its purported "unique obligation toward Indians." App. 8. Indeed, the Montana Supreme Court held that Montana and its Fish & Game Commission both "[have] a duty to regulate hunting by non-tribal members in a way that recognizes the Indian hunting privileges protected by federal law."[6] App. 8. In

[6] Montana may "recognize[ ] the Indian hunting privileges protected by federal law[ ]" without making the unconstitutional racial distinction utilized by the Montana hunting regulation challenged here. Indeed, the Montana Supreme Court expressly acknowledged that "there may be other means to conserve the big game wildlife" and regulate hunting by non-tribal members, notwithstanding the discriminating effects

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support of its holding, the Montana Supreme Court pointed to Article I of the Montana Constitution, which incorporates all provisions of the enabling act of Congress approved February 22, 1889, including:

> [T]he agreement and declaration that all lands owned or held by any Indian of Indian tribes shall remain under the absolute jurisdiction and control of the Congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

App. 7. According to the Montana Supreme Court, this provision gives Montana the authority to fulfill the unique federal obligation towards Indians. App. 7. The Montana State Enabling Act, however, does not afford Montana this unconstitutional power. The Enabling Act merely asserts that Indian tribal land is to remain under the jurisdiction of the United States, not the State of Montana. To hold otherwise conflicts directly with this Court's decision in *Croson* that the states do not possess the powers Congress enjoys under the Fourteenth Amendment where a racial classification is at issue. Unlike Congress, Montana has no constitutional obligation to advance the interests of American Indians as opposed to the interests of all its other citizens. Furthermore, as demonstrated above, Montana has no special trust relationship with American Indians that permits it to escape the standard of review compelled by *Croson* and *Adarand*.

of the challenged regulation. App. 9. However, because the Montana Supreme Court erroneously applied a rational basis test, it has allowed an unconstitutional racial distinction to permeate Montana law.

Accordingly, strict scrutiny should have been applied by the Montana Supreme Court to the challenged Montana regulation. The Montana Supreme Court's failure to do so is in conflict with this Court's decisions in *Adarand* and *Croson*. As a result, this Petition should be granted.

C. THE DECISION OF THE MONTANA SUPREME COURT, THAT A STATE CLASSIFICATION DISTINGUISHING BETWEEN TRIBAL AND NON-TRIBAL MEMBERS IS A POLITICAL CLASSIFICATION SUBJECT TO RATIONAL BASIS SCRUTINY, IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *RICE v. CAYETANO*.

The Montana Supreme Court relied on this Court's decision in *Mancari* in holding that "laws that distinguish between persons based on tribal membership have long been held constitutional under equal protection requirements because the distinction is political rather racial." App. 6 (citing *Mancari*, 417 U.S. at 552-54). The Montana Supreme Court further held that "laws that afford Indians special treatment are constitutional as long as those laws can be tied rationally to the fulfillment of the unique federal obligation towards Indians." App. 6. Concluding that the Montana Big Game Hunting Regulation barring non-tribal members from hunting upon private land within the exterior boundaries of a reservation creates a political, not racial, classification, the Montana Supreme Court found that the regulation was tied rationally to the "unique federal, and consequently state, obligation toward Indians." App. 7. The Montana Supreme Court's decision is in direct conflict with decisions of this Court limiting the

applicability of *Mancari* and applying strict scrutiny to all racial classifications, including American Indians.

Mancari was the first time in which this Court was confronted with an equal protection challenge to a law benefiting American Indians. In *Mancari*, this Court upheld legislation adopted by Congress that accords an employment preference for qualified Indians in the Bureau of Indian Affairs ("BIA") because the preference served the federal government's goal of promoting Indian self-government.[7] 417 U.S. at 541. To qualify for the employment preference, Indians were required to be members of a federally recognized tribe and possess one-fourth or more degree Indian blood. *Id.* at 553, n. 24. This Court held that "[t]he preference, as applied, [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." *Id.* at 554. However, this Court expressly noted that the decision in *Mancari* was confined solely to the employment of Indians in the BIA, an agency described as "*sui generis*." *Id.*

The limited reach of *Mancari* was recognized by this Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), wherein this Court addressed whether ancestry can be a proxy for race in determining racial classifications for equal protection grounds. In that case, a citizen of Hawaii brought an equal protection claim against state officials challenging a requirement that voting for trustees for the Office of Hawaiian Affairs was limited to those persons

[7] Specifically, the BIA was acting pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq*.

whose ancestry qualified them as either "Hawaiian" or "native Hawaiian." *Id.* at 499. Finding the voting requirement in violation of the Fifteenth Amendment, this Court held that the state, by using ancestry as a proxy for race, had created a race-based voting qualification. *Id.* at 514-15. Furthermore, this Court held "[t]o extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs." *Id.* at 522.

As in *Cayetano*, the challenged Montana hunting regulation uses ancestry as a proxy for race. To be able to hunt within the exterior boundaries of a reservation, even on non-Indian fee property, a person must be a tribal member. App. 32. To be a member of one of the eleven tribes and, thus to be able to hunt within the boundaries of one of the seven reservations in Montana, including the Flathead Indian Reservation, a person must possess at least a one-fourth blood quantum.[8] This requirement establishes a clear racial classification and racial purpose. Nonetheless, the Montana Supreme Court concluded:

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

App. 6 (quoting *Mancari*, 417 U.S. at 553-54). This Court rejected in *Cayetano* the very basis asserted by the Montana

[8] See *supra*, note 4.

Supreme Court that "[Montana's] preference is political rather than racial." 528 U.S. at 520-21. This Court held that Hawaii's legislation limiting voting rights to persons of defined ancestry "used ancestry as a racial definition and for a racial purpose." *Id.* at 515. This Court further recognized that "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Id.* at 516. Moreover, "'racial discrimination' is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" *Id.* at 515 (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)).

Furthermore, in declining an invitation to extend *Mancari* to a new and larger dimension, this Court in *Cayetano* explained that *Mancari* turned on quasi-sovereign authority relating to self-governance, which caused this Court to uphold "a federal provision giving employment preferences to persons of tribal ancestry." *Id.* at 518 (citing *Mancari*, 417 U.S. at 553-55). Distinguishing the facts of *Mancari* from those before it, this Court declared that the legislative preference in *Mancari* was "'designed to further Indian self-government.'" *Id.* at 520 (quoting *Mancari*, 417 U.S. at 555). As was the case in *Cayetano*, the Montana regulation at issue here does not relate to Indian self-governance.

Indeed, in order for the Montana Supreme Court to apply the *Mancari* rational basis test it was necessary for it to assume that Montana had the same "*sui generis*" relationship with Indian tribes as the BIA. But, Montana does not have the established trust relationship with the Indians as exists between the federal government and American Indians. Moreover, the ability of Ms. Shook to

hunt within the exterior boundaries of the Flathead Reservation on non-Indian fee property does not interfere with any tribal regulation or established treaty. In fact, this Court has already determined that tribal jurisdiction regarding hunting rights does not extend to non-Indian fee property within the exterior boundaries of a reservation. *See, Montana v. United States*, 450 U.S. 544 (1981). Further, "hunting [ ] on non-Indian fee land [does] not 'imperil the subsistence or welfare of [a] [t]ribe[,]'" nor threaten the political or economic security of a tribe. *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, 651 (2001); *see also, Montana*, 450 U.S. at 564-66.

Because, under *Cayetano*, the Montana hunting regulation is subject to strict scrutiny, the Montana Supreme Court erred when it applied a rational basis test. As this Court held in *Adarand*, all racial classifications, including those that affect American Indians, imposed by any government, federal or state, must be analyzed under strict scrutiny. 515 U.S. at 227. The Fourteenth Amendment "protect[s] persons, not groups[ ]" and "all governmental action based on race [ ] should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Id.* This Court further held:

> [T]hat whenever the government, [federal or state], treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.

Id. at 229-230. Thus, because Ms. Shook has been treated "unequally because of [ ] her race" by Montana's regulation denying her the right to hunt on non-Indian fee property, including her own property, within the exterior boundaries of the Flathead Indian Reservation, she "has suffered an

injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."

Thus, the Montana Supreme Court's decision is in direct conflict with decisions of this Court limiting the applicability of *Mancari* and applying strict scrutiny to all racial classifications, including those involving American Indians. For these reasons, this Petition should be granted.

II. THE DECISION OF THE MONTANA SUPREME COURT, THAT A GOVERNMENTAL PREFERENCE IN FAVOR OF TRIBAL MEMBERS IS SUBJECT TO A RATIONAL BASIS STANDARD OF REVIEW, IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT*.

In *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), the Ninth Circuit Court of Appeals held unconstitutional on equal protection grounds the Interior Board of Indian Appeals' ("IBIA") interpretation of the Reindeer Act of 1937, 25 U.S.C. § 500, *et seq.*, which prohibited non-Natives from herding reindeer in Alaska. The Ninth Circuit noted, notwithstanding *Mancari*, that there was doubt as to the appropriate constitutional standard of review to be applied.

The Ninth Circuit recognized that in *Adarand*, Justice Stevens dissented on several grounds, including that the majority would subject preferences for Native Americans to the same scrutiny as invidious discrimination against minorities. *See, Williams*, 115 F.3d at 665 (citing *Adarand*, 515 U.S. 244-45 (Stevens, J., dissenting)). The Ninth Circuit

surmised that "*Mancari's* days are numbered" if this Court's equal protection jurisprudence in *Adarand* controls. *Id.* Indeed, the Ninth Circuit, applying strict scrutiny under *Adarand*, held that the IBIA's interpretation raised "grave" constitutional questions under the Equal Protection Clause. *Id.* at 666. *But see, U.S. Air Tour Assoc., et al. v. Federal Aviation Admin., et al.*, 298 F.3d 997 (D.C. Cir. 2002) (applying *Mancari's* rational basis test to Indian preferences notwithstanding this Court's decision in *Adarand*).

In *Williams*, the Ninth Circuit further interpreted this Court's decision in *Mancari* "as shielding only those statutes that affect uniquely Indian interests." *Id.* at 665. The Ninth Circuit acknowledged that the preferences involved in *Mancari* directly promoted Indian interests in self-government, whereas in *Williams* the court was dealing, not with matters of tribal or Native self-regulation, but with federal regulation of conduct within Native country implicating Native interests. *Id.* (citing *United States v. Antelope*, 430 U.S. 641, 646 (1977)). The Ninth Circuit court noted:

> While *Mancari* did not have to confront the question of a naked preference for Indians unrelated to unique Indian concerns, [the] IBIA's interpretation of the Reindeer Act would force us to confront that very issue. According to [the] IBIA, the Reindeer Act provides a preference in an industry that is not uniquely native, whether the beneficiaries live in a remote native village on the Seward Peninsula or in downtown Anchorage.

Id. at 664. Applying a strict scrutiny standard and rejecting *Mancari*, the Ninth Circuit held that the IBIA's interpretation of the law denying non-Natives the same treatment

as Natives could not withstand the requirements of an equal protection analysis. *Id.* at 665-66. The Ninth Circuit reasoned that the IBIA's interpretation provided "a naked preference for Indians unrelated to unique Indian interests," because it involved a commercial industry "that is not uniquely native." The Ninth Circuit found that the preference "in no way related to native land, tribal or communal status or culture." *Id.* at 663.

Similar to *Williams*, this case involves a regulation that provides a blanket preference denying non-tribal members the same treatment as tribal members by prohibiting non-tribal members from hunting on their own land within the exterior boundaries of an Indian reservation. The Montana Supreme Court's explanation that this ban is an "entirely rational means to preserve wildlife populations for hunting by Indians[ ]" is erroneous. App. 8. Hunting is not a "uniquely Indian interest," such as tribal self-government, that warrants limited scrutiny under the *Mancari* analysis. The Indians of the Flathead Reservation do not possess an exclusive right to hunt on all lands within the exterior boundaries of the reservation. App. 34-35. Hunting does not threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribes of the Flathead Indian Reservation. Moreover, as this Court has noted, hunting by non-Indians on fee lands within a reservation does not necessarily imperil the welfare of a tribe. *See*, *Atkinson*, 532 U.S. at 651; *Montana*, 450 U.S. at 464-66.

Accordingly, just as the Ninth Circuit applied strict scrutiny in *Williams* to a blanket preference affecting non-Natives and an interest that is not uniquely Native, the Montana Supreme Court should have applied strict scrutiny in this case. Because a direct conflict exists between the

decisions of the Montana Supreme Court and the Ninth Circuit regarding the application of *Mancari* and *Adarand* to preferences affecting non-Natives or non-tribal members, this Petition should be granted.

CONCLUSION

For the foregoing reasons, Ms. Sandra Shook respectfully requests that this Court grant her Petition for *Writ of Certiorari*.

Respectfully submitted,

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No. 99-608

IN THE SUPREME COURT OF THE
STATE OF MONTANA

2002 MT 347

STATE OF MONTANA,

Plaintiff and Respondent,

v. (Filed Dec. 30, 2002)

SANDRA WHITE SHOOK,

Defendant and Appellant.

APPEAL FROM:

District Court of the Twentieth Judicial District,
In and for the County of Sanders,
The Honorable C. B. McNeil, Judge presiding.

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