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

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

I. THE ISSUES PRESENTED BY MS. SHOOK ARE PROPERLY BEFORE THIS COURT.

A. THE MONTANA SUPREME COURT'S DECISION ESTABLISHED A *DE FACTO* "TRUST RELATIONSHIP" BETWEEN MONTANA AND INDIAN TRIBES.

Montana argues that whether it has the same "trust relationship" with American Indians as does the federal government is an "entirely new" issue and, thus, is not properly before this Court. Resp. 6. This argument ignores, however, that the holding of the Montana Supreme Court established a *de facto* "trust relationship" between Montana and the several Indian tribes within its borders. Pet. App. 7. That holding and the constitutional issue that it raises are now properly before this Court as grounds for granting *certiorari*. *See*, *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-186 (1945) (there is no need to inquire how and when a question presented was raised when such question appears to have been decided by a state court of last resort); *see also*, Pet. 5, 6-11.

The Montana hunting regulation in question 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. Pet. 2. The Montana Supreme Court held that this regulation, which differentiates between similarly situated persons based on their race, is essential to "the fulfillment of the unique federal, *and consequently state, obligation* toward Indians." Pet. App. 7. (emphasis added). Thus, the holding of the Montana Supreme Court established a *de facto* "trust relationship" between Montana and the several Indian tribes within its borders, which holding is in direct conflict with decisions of this Court.

"States do not enjoy [the] same unique relationship with Indians" as does the federal government. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979). Moreover, only Congress may enact legislation "singling out tribal Indians." *Id.*; *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). Furthermore, although this Court has held that a special trust relationship exists between the federal government and Indian tribes, this Court has never reached that conclusion regarding the states.

Accordingly, the decision of the Montana Supreme Court that Montana has a duty to fulfill "the unique federal, and consequently state, obligation towards Indians," thereby establishing a *de facto* "trust relationship" between Montana and the several Indian tribes within its borders, creates a proper issue for the exercise of *certiorari* jurisdiction by this Court under 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of *certiorari* where the validity . . . [ ] *of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution*, treaties, or laws of the United States[.]

(Emphasis added).

B. THE MONTANA HUNTING REGULATION CREATES A RACIAL CLASSIFICATION THAT IS SUBJECT TO "STRICT SCRUTINY."

Montana argues that whether "strict scrutiny" must be applied to the Montana hunting regulation in determining its constitutionality is an issue raised for the first time and, therefore, is not properly before this Court. Resp. 5. Montana also argues that "[u]nsupported references to

equal protection violations are not sufficiently specific to federal constitutional arguments to put [Montana] reasonably on notice of what [ ] the Petitioner is arguing." Resp. 6. Montana's arguments are disingenuous.

Whether "strict scrutiny" or the less stringent rational basis standard of review must be applied to the Montana hunting regulation was considered and disposed of by the Montana Supreme Court after Ms. Shook properly presented that issue to that court. Pet. 5, 8. In fact, Montana itself, relying on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), argued below that "state or federal laws classifying individuals based on their membership in tribal governments are political classifications, not racial classifications, and are thus not subject to strict scrutiny, but are only subject to the rational basis test." Brief of Respondent at 15, *State v. Shook*, 313 Mont. 347, __ P.2d __ (Mont. 2002) (No. 99-608). In adopting Montana's argument, the Montana Supreme Court held that "federal Indian law" is binding on the states, which required Montana to defer to this Court's decision in *Mancari*. Pet. App. 7. Thus, because the Montana Supreme Court considered and disposed of Ms. Shook's federal constitutional claim, "[t]here can be no question as to [its] proper presentation" before this Court. *Raley v. Ohio*, 360 U.S. 423, 436-437 (1959); *see also, Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (an issue is properly before this Court if the state court reached and decided it).

In ruling against Ms. Shook, the Montana Supreme Court relied on the equal protection analysis of this Court in *Mancari* and *United States v. Antelope*, 430 U.S. 641 (1977). Pet. App. 6. Although these cases involved the equal protection component of the Due Process Clause of the Fifth Amendment, it has long been settled that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *see also*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995). Similarly, the equal protection provisions of the United

States Constitution and the Montana Constitution are afforded equivalent analysis. *See*, *Emery v. State of Montana*, 580 P.2d 445, 449 (1978). Because the Montana Supreme Court's treatment of the equal protection issue was guided almost entirely by "decisions of this Court" and because "the [Montana Supreme Court] relied to the extent it did on federal grounds[,] [this Court is] require[d] to reach the merits." *Oregon v. Kennedy*, 456 U.S, 667, 671 (1982). Moreover, Montana had sufficient notice that, in resolving Ms. Shook's case, the Montana Supreme Court would be required to apply the equal protection guarantees of the United States Constitution.[1]

Montana, without providing any authority, also argues that Ms. Shook's contentions involving "unwaivable blood quantum requirements for tribal membership" are not properly before this Court. Resp. 6. Montana's argument is without merit. Ms. Shook contended that the Montana hunting regulation created a racial classification, not a political classification, in part because it distinguished between tribal and non-tribal members, a distinction prefaced on a requisite degree of American Indian blood. Pet. 13, 18.

The distinction between a racial and political classification was the very issue addressed and decided by the Montana Supreme Court. Pet. App. 4-8. Although the Montana Supreme Court, relying on this Court's decision in *Mancari*, ruled that the Montana hunting regulation created a political, not racial, classification, implicit in that ruling is that tribal membership requires a certain

[1] The equal protection requirements of the United States and Montana Constitutions were raised and addressed on numerous occasions below by both parties. *See,* Defendant's Motion to Dismiss at 7, *State v. Shook*, D.C. Mont. (No. 98-08); Defendant's Reply Brief at 3-11, D.C. Mont. (No. 98-08); Brief of Appellant at 12, 24, 27, *State v. Shook*, 313 Mont. 347, __ P.2d __ (Mont. 2002) (No. 99-608); Brief of Respondent at 15, *Shook* (No. 99-608). *See also*, Pet. App. 4-10, 23-24.

blood quantum. Pet. App. 4-8. Moreover, it is well known throughout the Montana judicial system that membership in the Confederated Salish and Kootenai Tribes requires a certain blood quantum. *See*, *e.g.*, *Geiger v. Pierce*, 758 P.2d 279, 282 (Mont. 1988) (concurring opinion) ("[t]he Tribal Council of the Confederated Salish and Kootenai Tribes establishes the criteria for enrollment in said Tribe based on a quantum of Indian blood as determined by said Tribal Council"); Pet. App. 23. Thus, whether the blood quantum requirements of tribal membership render Montana's hunting regulation a racial, not a political, classification subject to strict scrutiny is properly before this Court and a proper ground for granting *certiorari*.[2]

II. MONTANA AND *AMICUS* ATTEMPT TO CONFUSE THE ISSUES.

A. THE TREATY DOES NOT PROVIDE TRIBAL MEMBERS THE EXCLUSIVE RIGHT TO HUNT WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION.

Montana's argument that Ms. Shook's Petition should be denied because treaty rights of federally recognized tribes and their members are binding on the states through the Supremacy Clause of the United States Constitution is a "red herring." Resp. 7. Ms. Shook does

[2] Both Montana and *Amicus* criticize Ms. Shook for failing to introduce specific evidence of the blood quantum requirements for tribal membership on the Flathead Reservation. Resp. 6; *Amicus* 2-3. However, neither Montana nor *Amicus* expressly disputes the fact that tribal membership requires a certain blood quantum. *Id.* Their failure to dispute this fact is not surprising considering that the Constitution of the Confederated Salish and Kootenai Tribes expressly sets forth that membership in its Tribe is dependent on a specific blood quantum. *See*, Reply App. 1-2.

not contest whether treaty rights are federal rights and therefore binding on the states. Rather, Ms. Shook argues that no Indian treaty, including the Treaty with the Flathead Indians, creates a "unique relationship" between Montana and Indian tribes so as to establish a trust relationship like that between the federal government and American Indians. Pet. 9-11.

In fact, the Flathead Treaty of 1855 did not establish, nor could it even have contemplated, a trust relationship between Montana and the several Indian tribes involved for the simple reason that the State of Montana did not exist in 1855. Pet. 9-11. Furthermore, the Treaty does not reserve for tribal members the exclusive right to hunt on non-Indian fee land within the exterior boundaries of the Flathead Reservation. Pet. 10. Nor does the Treaty require Montana to accommodate any hunting privileges reserved to the Indians to the exclusion of non-tribal members who own non-Indian fee land within the exterior boundaries of the Flathead Reservation. Pet. 10. The Treaty reserves only the privilege of the tribes to hunt within the exterior boundaries of the reservation on lands not owned and occupied by private parties "under possessory rights or patent or otherwise appropriated to private ownership." *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977).

B. THE MONTANA HUNTING REGULATION RESTRICTS HUNTING ON PRIVATELY OWNED NON-INDIAN FEE LAND.

Montana's attempt to analogize the racial classification based on tribal membership created by the Montana hunting regulation to federal law prohibiting unauthorized hunting on Indian trust lands under 18 U.S.C. § 1165 is disingenuous. Resp. 13, 15. The Montana regulation, which limits big game hunting privileges on Indian Reservations to tribal members, denies non-tribal members who own fee property within the exterior boundaries of a reservation the ability to hunt because of their race. The unconstitutionally regulated conduct that Ms. Shook

contests does not occur on the reservation, but instead occurs on privately owned non-Indian fee land within the reservation's exterior boundaries. Privately owned non-Indian fee land is not Indian trust land nor is it reservation land, even though it may be within the exterior boundaries of a reservation. *See*, *Stasso*, 563 P.2d at 565.

Moreover, 18 U.S.C. § 1165 does not apply to privately owned fee land within a reservation such as the land at issue in this case. That statute provides that "[w]hoever, without lawful authority of permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe" is guilty of criminal conduct. 18 U.S.C. § 1165. This statute, which applies only to tribal lands, creates a federal crime of trespass. In fact, Montana conceded below that "[c]learly, no tribal lands within the statutory definition are in issue [in Ms. Shook's case]" and that "[18 U.S.C. § 1165] has nothing to do with the case below or on appeal." Brief of Respondent at 21, *Shook* (No. 99-608).

C. MS. SHOOK DOES NOT ARGUE THAT HUNTING IS A CONSTITUTIONALLY PROTECTED RIGHT.

Amicus argues that Ms. Shook presumes that "hunting big game under Montana law is a Constitutionally protected right." *Amicus* 11. This argument is another "red herring." Ms. Shook's contention that the Montana hunting regulation must be subjected to "strict scrutiny" equal protection analysis is not premised on Montana's alleged denial of a fundamental right, but rather on Montana's use of a suspect classification, *i.e.*, race. Pet. 13-14, 20, 23. Indeed, from "the outset [Ms. Shook] noted that [the Montana hunting regulation] established a suspect class subject to strict scrutiny review." Brief of Appellant at 25, *Shook* (No. 99-608). Moreover, Montana acknowledged that "Shook does not appear to argue that hunting is a

fundamental right[.]" Brief of Respondent at 18, *Shook* (No. 99-608).

III. THE MONTANA SUPREME COURT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND THE NINTH CIRCUIT.

A. THE DECISION OF THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH *CROSON* AND *ADARAND*.

The Montana Supreme Court held that the Montana hunting regulation and the classifications it created are "constitutional under equal protection requirements because the distinction is political rather than racial." Pet. App. 5. Consequently, the Montana Supreme Court subjected the regulation to rational basis review instead of the heightened "strict scrutiny" standard. Pet. App. 6-7. However, 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, 492-97 (1989); *Adarand*, 515 U.S. 200, 227. Montana's hunting regulation treats non-tribal member owners of non-Indian fee land differently from similarly situated tribal members of the Flathead Tribe, which Tribe determines membership based on a quantum of Indian blood. *See, e.g., Geiger*, 758 P.2d at 282 (*concurring opinion*). Accordingly, the Montana hunting regulation creates a racial classification that must be scrutinized strictly. *See, Croson*, 488 U.S. at 490; *Adarand*, 515 U.S. at 227; Pet. 11-16.

B. THE DECISION OF THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH *RICE v. CAYETANO*.

That *Rice v. Cayetano*, 528 U.S. 495 (2000), involved voting rights and Native Hawaiians does not render it

irrelevant to Ms. Shook's case. Resp. 20; *Amicus* 7. In *Cayetano*, this Court recognized the limited reach of *Mancari* because it turned on the issue of tribal self-governance and the unique nature of the Bureau of Indian Affairs ("BIA"). *Cayetano*, 528 U.S. at 518. Thus, in order for the Montana Supreme Court to adhere properly to *Mancari*, it would have had to assume that Montana has the same "*sui generis*" relationship with Indian tribes as does Congress and the BIA. This is not the case. Montana does not have a "trust relationship" with American Indians. Moreover, Ms. Shook's ability to hunt on non-Indian fee land does not interfere with any tribal regulation or established treaty, nor with tribal self-governance. *See*, *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, 651 (2001); *Montana v. United States*, 450 U.S. 544, 564-66 (1981). Accordingly, the Montana Supreme Court's decision is in direct conflict with this Court's decision in *Cayetano*.

C. THE DECISION OF THE MONTANA SUPREME COURT IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *WILLIAMS v. BABBITT*.

In *Williams v. Babbitt*, the Ninth Circuit Court of Appeals, applying strict scrutiny under the guidance of this Court's decision in *Adarand*, determined that the Interior Board of Indian Appeals' interpretation of the Reindeer Act of 1937, 25 U.S.C. § 500, *et seq.*, raised "grave" constitutional concerns under equal protection guarantees. 115 F.3d 657, 665-66 (9th Cir. 1997). Furthermore, the Ninth Circuit held that this Court's decision in *Mancari* could constitutionally "shield[ ] only those statutes that affect uniquely Indian interests." *Id.* at 665. Montana's and *Amicus*' argument that the decision of the Montana Supreme Court is not in conflict with *Williams* rests on their erroneous view that hunting big game on Indian reservations is an area of special Indian concern. Resp. 19; *Amicus* 15.

This case does not involve either "uniquely Indian interests" or "special Indian concerns," such as tribal self-government, that warrant a lesser standard of review such as that applied in *Mancari*. Instead, this case involves a blanket preference for Indians unrelated to "uniquely Indian interests." *See, Williams*, 115 F.3d at 663-66. As applied to Ms. Shook, the Montana hunting regulation does not affect reservation land, but rather only non-Indian fee land. In addition, the Indians of the Flathead Reservation do not possess an exclusive right to hunt on all lands within the exterior boundaries of the reservation. Pet. App. 34-35. Moreover, this Court has already held that "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.*, 532 U.S. at 651; *see also, Montana*, 450 U.S. at 564-66. Accordingly, the Montana Supreme Court should have applied a "strict scrutiny" equal protection analysis and found that the Montana hunting regulation was not "shielded" by this Court's decision in *Mancari*.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition.

Respectfully submitted,

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CONSTITUTION AND BYLAWS

Part 1

Constitution

Of the Confederated Salish and Kootenai Tribes

Of the Flathead Reservation, as Amended

* * *

Article II

Membership

* * *

Section 2. Present Membership. Membership in the Tribes on and after the date of the adoption of this amendment shall consist of all living persons whose names appear on the per capita roll of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, as prepared for the per capita distribution as shown on the per capita roll paid in February 1959 together with all children of such members, born too late to be included on such per capita roll and prior to the effective date of this section who possess one-fourth (1/4) or more Salish or Kootenai Blood or both and are born to a member of the Confederated Tribes of the Flathead Indian Reservation. Subject to review by the Secretary of the Interior, the Tribal Council shall make any necessary corrections in this 1959 membership roll so that no one eligible for membership under prior constitutional provisions shall be excluded therefrom.

Section 3. Future Membership. Future membership may be regulated from time to time by ordinance of the Confederated Tribes subject to review by the Secretary of the Interior. Until and unless an ordinance is adopted any person shall be enrolled as a member who shall (a) apply,

or have application made on his behalf, establishing eligibility under this provision; (b) show that he is a natural child of a member of the Confederated Tribes; (c) that he possesses one-quarter (1/4) degree or more blood of the Salish and Kootenai Tribes or both, of the Flathead Indian Reservation, Montana; (d) is not enrolled on some other reservation.

Section 4. Adoption. The Tribal Council shall have the power to enact and promulgate ordinances, subject to review by the Secretary of the Interior, governing the adoption of persons as members of the Confederated Salish and Kootenai Tribes.

Section 5. Loss of Membership. Membership in the Confederated Tribes may be lost (1) by resignation in writing to the Tribal Council; (2) by enrollment of the member with another Indian tribe; (3) by establishing a legal residence in a foreign country; (4) upon proof of lack of eligibility for enrollment, or fraud in obtaining enrollment, with due notice and opportunity to be heard and defend before the Tribal Council, subject to appeal to the Secretary of the Interior, whose decision shall be confined to the record made in such proceeding which, if supported by substantial evidence, shall be binding.

Section 6. Definitions. Wherever the term "Indian Blood" shall have been used herein or in tribal ordinances, unless the context shall require a different meaning, it shall be determined to mean the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation.

* * *