

Supreme Court of the United States.

Randy ROBERTS, Petitioner,

v.

Jeff HAGENER, Director, Montana Department of Fish, Wildlife and Parks; Victor Workman, Tim Mulligan, Steve Doherty, John Brenden, and Shane Colton, Commissioners, Montana Fish, Wildlife and Parks Commission; Montana Department of Fish, Wildlife and Parks; Montana Fish, Wildlife and Parks Commission; Brian A. Schweitzer, Governor, State of Montana; and the State of Montana, Respondents.

No. 08-519.

October 16, 2008.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Petition for Writ of Certiorari

J. Scott Detamore, Counsel of Record, William Perry Pendley, Mountain States, Legal Foundation, 2596 South Lewis Way, Lakewood, Colorado 80227, (303) 292-2021, Attorneys for Petitioner.

QUESTION PRESENTED

Whether, notwithstanding the decision of this Court in *Morton v. Mancari*, 417 U.S. 535 (1974), the Fourteenth Amendment's Equal Protection Clause requires that strict judicial scrutiny be applied to any legislation or regulation of a State or its political subdivisions that treats American Indians or American Indian tribal members either preferentially or discriminatorily, without express delegation of such authority from Congress?

*II LIST OF PARTIES AND RULE 29.6 DISCLOSURE

The caption lists all the parties. Petitioner Roberts is an individual and not a corporation. Therefore, no corporate disclosure statement is required under Supreme Court Rule 29.6.

*iii TABLE OF CONTENTS

QUESTION PRESENTED ... i

LIST OF PARTIES AND RULE 29.6 DISCLOSURE ... ii

OPINIONS BELOW ... 1

JURISDICTION ... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ... 2

STATEMENT OF THE CASE ... 4

REASONS FOR GRANTING THE PETITION ... 7

I. *MANCARI'S* POLITICAL-RACIAL DISTINCTION IS A SAFE HARBOR FOR RACE-BASED ACTS BY STATES AND THEIR SUBDIVISIONS ... 7

A. *MANCARI'S* POLITICAL-RACIAL DISTINCTION HAS BEEN WRONGLY INTERPRETED AS THE CORE OF *MANCARI* ... 7

B. *MANCARI* IS GROUNDED IN CONGRESS'S PLENARY POWER OVER INDIANS AND ITS UNIQUE RELATIONSHIP WITH THEM ... 9

1. *Mancari's* Holding, as to Congress and Its Powers, Is Grounded in History and the Constitution ... 10

*iv 2. *Mancari's* Dictum Is Without Factual Basis ... 14

3. *Mancari's* Dictum Does Not Survive *Adarand* ... 16

II. *MANCARI* PROVIDES NO SAFE HARBOR FOR THE STATE OF MONTANA ... 18

A. THE STATE OF MONTANA LACKS CONGRESS'S POWER OVER AND ITS UNIQUE RE-

LATIONSHIP WITH AMERICAN INDIANS OR THEIR TRIBES ... 18

B. THE STATE OF MONTANA MISTAKENLY BELIEVES THAT IT STANDS IN THE SHOES OF CONGRESS ... 22

CONCLUSION ... 24

APPENDIX

Roberts v. Hagener, No. 07-35197, Memorandum (9th Cir. July 18, 2008) ... App. 1

Roberts v. Hagener, No. 05-153, Order (D.Mont. Aug. 4, 2006) ... App. 4

Roberts v. Hagener, No. 05-153, Order (D.Mont. Feb. 2, 2007) ... App. 18

Roberts v. Hagener, No. 05-153, Judgment in a Civil Case (D.Mont. Feb. 2, 2007) ... App. 21

U.S. Const. art. I, sec. 8, cl. 3, The Indian Commerce Clause ... App. 23

*v U.S. Const. art. II, sec. 2, cl. 2, The Treaty Clause ... App. 23

U.S. Const. amend. XIV, sec. 1, The Equal Protection Clause ... App. 23

Montana Deer, Elk and Antelope Hunting Regulations 2008 ... App. 23

25 U.S.C. § 479 ... App. 24

44 BIA Manual 335, 3.1 (1974) ... App. 24

25 C.F.R. § 5.1 ... App. 25

***vi** TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) ... *passim*

City of Richmond v. J.A. Croson Co., 488 U.S. 469

(1989) ... 18, 21, 22, 25

Koshland v. Helvering, 298 U.S. 441 (1936) ... 15

Montana v. United States, 450 U.S. 544 (1981) ... 19, 20

Morton v. Mancari, 417 U.S. 535 (1974) ... *passim*

Roberts v. Hagener, No. 05-153, slip op. (D.Mont. Aug. 4, 2006) ... 1, 6

Roberts v. Hagener, No. 05-153, slip op. (D.Mont. Feb. 2, 2007) ... 1, 6

Roberts v. Hagener, No. 07-35197, slip op. (9th Cir. July 18, 2008) ... 1, 6, 20

State of Montana v. Shook, 67 P.3d 863 (2002), *cert. den.*, 540 U.S. 815 (2003) ... 23, 24

University of California Regents v. Bakke, 438 U.S. 265 (1978) ... 17

Washington v. Confederated Bands and Tribes of the Yakima Indian Reservation, 439 U.S. 463 (1978) ... 19

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997) ... 17

***vii** Constitutional Provisions

U.S. Const. art. I, sec. 8, cl. 3, The Indian Commerce Clause ... 2, 8, 9, 11, 20

U.S. Const. art. II, sec. 2, cl. 2, The Treaty Clause ... 2, 9, 11, 20

U.S. Const. amend. XIV, sec. 1, The Equal Protection Clause ... 2, 5, 14

Statutes

28 U.S.C. § 1254(1) ... 2

28 U.S.C. § 1291 ... 1

28 U.S.C. § 1331 ... 1

Indian Reorganization Act of 1934, Act of June 18, 1934, c. 576, § 19, 48 Stat. 988 (codified as [25 U.S.C. § 479](#)) ... 3, 10, 14

[Mont. Code Ann. § 2-8-111\(1\)](#) ... 22

[Mont. Code Ann. § 18-1-110](#) ... 23

[Mont. Code Ann. § 20-25-421\(2\)\(c\)\(i\)](#) ... 22

Regulations

[25 C.F.R. § 5.1 \(43 FR 2393, Jan. 17, 1978\)](#) ... 4, 16

44 BIA Manual 335, 3.1 (1974) ... 3, 4, 15

Montana Deer, Elk and Antelope Hunting Regulations 2008; available at <http://fwp.mt.gov/hunting/regulations.html> ... 4, 21, 22

*viii Rules

[Fed. R. Civ. P. 12\(b\)\(6\)](#) ... 1

*1 Randy Roberts hereby petitions this Court for a writ of certiorari to review the opinion of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The U.S. District Court for the District of Montana granted the State of Montana's [Rule 12\(b\)\(6\)](#) Motion to Dismiss for failure to state a claim on which relief can be granted and converted the motion to one for summary judgment. *Roberts v. Hagerer*, No. 05-153, slip op. (D.Mont. Aug. 4, 2006) (App. 4). The District Court then entered summary judgment for Montana, dismissing Mr. Roberts' claims. *Roberts v. Hagerer*, No. 05-153, slip op. (D.Mont. Feb. 2, 2007) (App. 18). Mr. Roberts appealed and the Ninth Circuit affirmed the District Court's decision. *Roberts v. Hagerer*, No. 07-35197, slip op. (9th Cir. July 18, 2008) (App. 1).

JURISDICTION

The District Court had jurisdiction over Roberts'

claims pursuant to [28 U.S.C. § 1331](#). The Ninth Circuit had jurisdiction to review the District Court's final judgment pursuant to [28 U.S.C. § 1291](#). Pursuant to Supreme Court Rule 13, Mr. Roberts filed this Petition timely, that is, within 90 days of the entry of *2 final judgment, thereby invoking the jurisdiction of this Court pursuant to [28 U.S.C. § 1254\(1\)](#).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Congress shall have the Power ... To regulate Commerce ... with the Indian Tribes;...

[U.S. Const. art. I, sec. 8, cl. 3](#), The Indian Commerce Clause (App. 23).

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; ...

[U.S. Const. art. II, sec. 2, cl. 2](#), The Treaty Clause (App. 23).

[N]or [shall any State] deny any person within its jurisdiction the equal protection of the laws.

[U.S. Const. amend. XIV, sec. 1](#), The Equal Protection Clause (App. 23).

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction; and all persons who are descendents of such members who were, on June 1, 1934 residing within the present boundaries of any Indian reservation; *3 and shall further include all other persons of one-half or more Indian blood. For purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

Section 19 of the Indian Reorganization Act of 1934, Act of June 18, 1934, c. 576, § 19, 48 Stat. 988 (now codified as [25 U.S.C. § 479](#)) (App. 24).

An Indian has preference in appointment in the Bureau [of Indian Affairs]. To be eligible for preference in appointment, promotion, and training, an

individual must be one-fourth or more degree Indian blood and be a member of a federally recognized tribe. It is the policy for promotional consideration that where two or more candidates who met the established qualification requirements are available for filling a vacancy, if one of them is an Indian he shall be given preference in filling the vacancy....

44 BIA Manual 335, 3.1 (1974) (App. 24-25).

For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs, a preference will be extended to persons of Indian descent who are:

- (a) Members of any recognized Indian tribe now under Federal Jurisdiction;
- (b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;
- *4 (c) All others of one-half or more Indian blood of tribes indigenous to the United States;

25 C.F.R. § 5.1 (43 FR 2393, Jan. 17, 1978; replacing 44 BIA Manual 335, 3.1) (App. 25).

Only tribal members are allowed to hunt big game on Indian Reservations, unless otherwise provided for by agreements between the State of Montana and Tribal Government.

Montana Deer, Elk and Antelope Hunting Regulations 2008, p. 20; available at <http://fwp.mt.gov/hunting/regulations.html> (App. 23-24).^[FN1]

FN1. The subject of Roberts' suit was the 2005 Montana regulation, which is identical to the 2008 regulation. The regulation defines neither "tribal members" nor "Indian Reservations."

STATEMENT OF THE CASE

There are seven Indian reservations within the State of Montana. Montana has in place now, as it has for more than 40 years, a hunting regulation that provides, "only [Indian] tribal members are allowed to hunt big game on Indian Reservations...."^[FN2] Included in the description of "Indian Reserva-

tions" are non-Indian-owned fee lands - allotted pursuant to the General Allotment Act - that lie within the exterior *5 boundaries of Indian reservations. As a result, any Indian tribal member in the United States may hunt big game on non-Indian-owned fee lands within any of Montana's Indian reservations, but the non-Indian owners of that land may not hunt big game there and may not grant permission to other non-Indians to hunt there.

FN2. Montana Deer, Elk and Antelope Hunting Regulations 2008, p. 20; available at <http://fwp.mt.gov/hunting/regulations.html> (App. 23-24).

Randy Roberts' mother, a non-Indian and non-tribal member, owns allotted fee land on the Crow Reservation in Montana. Randy Roberts, also neither an Indian nor a tribal member, desires to hunt big game on his mother's fee land but may not do so because of Montana's hunting regulation.

Mr. Roberts filed suit in Montana federal District Court alleging that Montana's hunting regulation of non-Indian-owned fee lands within Montana Indian reservations preferred all Indian tribal members in the United States to him, thus violating his right to equal protection of the law under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.^[FN3] He also alleged that this odious classification requires the court to apply "strict scrutiny" in determining its constitutionality. Nevertheless, in response to the State of Montana's Motion to Dismiss, the District Court held that the proper standard of judicial review was "rational basis" because the term "tribal members" was a political classification not based on race, national origin, *6 ancestry, bloodline or descent, despite that tribal membership requires proof of such immutable characteristics.^[FN4] In so ruling, the District Court relied upon this Court's decision in *Morton v. Mancari*.^[FN5]

FN3. U.S. Const. amend. XIV, sec. 1 (App. 23).

FN4. *Roberts v. Hagener*, No. 05-153, slip op. (D.Mont. Aug. 4, 2006) (App. 4).

FN5. 417 U.S. 535 (1974).

The District Court then converted Montana's Motion to Dismiss to one for summary judgment^[FN6] and addressed whether Montana possessed a rational basis for the classification contained in its hunting regulation. The District Court ruled in favor of Montana, holding that the regulation - allowing only American Indian tribal members throughout the United States to hunt on non-Indian-owned fee lands within Montana Indian reservations, including land owned by Mr. Roberts' mother - met the rational basis test and was constitutional.^[FN7]

FN6. *Roberts v. Hagener*, No. 05-153, slip op. (D.Mont. Aug. 4, 2006) (App. 4).

FN7. *Roberts v. Hagener*, No. 05-153, slip op. (D.Mont. Feb. 2, 2007) (App. 18).

Subsequently, the Ninth Circuit, without the requested oral argument, in an unpublished two-page Memorandum Opinion, affirmed the District Court's holding.^[FN8] Relying solely on the political-racial distinction in *Mancari*, the Ninth Circuit declared that Montana's hunting preference for all "tribal members" in *7 the United States was a political, not racial, classification, subject only to rational basis scrutiny. In fact, the Ninth Circuit did not even discuss the foundational core of this Court's holding in *Mancari* - that Congress's constitutional and plenary powers and its historical and unique trust relationship with American Indian tribes are the sources of Congress's powers to deal with American Indians specially. Nor did the Ninth Circuit discuss whether States have either these powers or this relationship or whether Congress has delegated any such powers to the States.

FN8. *Roberts v. Hagener*, No. 07-35197, slip op. (9th Cir. July 18, 2008) (App. 1).

REASONS FOR GRANTING THE PETITION

I. MANCARI'S POLITICAL-RACIAL DISTINC-

TION IS A SAFE HARBOR FOR RACE-BASED ACTS BY STATES AND THEIR SUBDIVISIONS.

A. MANCARI'S POLITICAL-RACIAL DISTINCTION HAS BEEN WRONGLY INTERPRETED AS THE CORE OF MANCARI.

Since 1974, this Court's decision in *Morton v. Mancari*^[FN9] has served as the basis for equal protection review by federal courts of State legislation that prefers Indian tribal members to non-Indians, including the Ninth Circuit here. Unfortunately, the "political-racial" distinction of *Mancari* has caused grievous *8 misunderstanding of and gross confusion over the foundational core of *Mancari*.

FN9. 417 U.S. 535 (1974).

The finding of *Mancari* that Congress may sometimes deal specially with American Indians is grounded, foremost and fundamentally, in Congress's extra-constitutional plenary power over Indian tribes, the Constitution's Indian Commerce Clause,^[FN10] and Congress's historical and special trust relationship with Indian tribes. Over time, these elements may arguably have created a quasi-political relationship between the federal government and tribal members, which may explain *Mancari*'s use, albeit unnecessarily, of the political/racial distinction. Unfortunately, federal courts have ignored that States, unlike Congress, have no plenary power over, no constitutional powers concerning, and no special trust relationship with Indian tribes. Instead, federal courts have focused wrongly on *Mancari*'s political-racial distinction. The result is holdings, like that of the Ninth Circuit here, that State legislation or regulation preferring or discriminating against tribal members is subject to rational basis review.

FN10. U.S. Const. art. I, sec. 8, cl. 3 (App. 23).

Mr. Roberts presents this Court with an opportunity to make explicit that the political-racial distinction

employed in *Mancari* is not the basis for this Court's holding there, that *Mancari* has no application at all to the actions of States or their political subdivisions, and that the 34-year history of using *9 *Mancari* to sustain racial preferences by States must end.

B. MANCARI IS GROUNDED IN CONGRESS'S PLENARY POWER OVER INDIANS AND ITS UNIQUE RELATIONSHIP WITH THEM.

Mancari is grounded in: (1) the plenary power of Congress over Indian tribes, derived from the Indian Commerce Clause^[FN11] as well as extra-constitutional considerations; and (2) the unique status of Indian tribes and their relationship to the United States, derived from historical relationships and a series of treaties pursuant to the Treaty Clause,^[FN12] all of which place Congress in a guardian-ward status as to Indian tribes and their members. Therefore, under *Mancari*, whether federal legislation preferring Indians over non-Indians is “political” or “racial” is irrelevant. Moreover, even if possibly relevant for acts of Congress, such a distinction is not relevant at all to actions by States or their political subdivisions.

FN11. U.S. Const. art. I, sec. 8, cl. 3 (App. 23).

FN12. U.S. Const. art. II, sec. 2, cl. 2 (App. 23).

*10 1. *Mancari*'s Holding, as to Congress and Its Powers, Is Grounded in History and the Constitution.

In *Mancari*, a non-Indian challenged the constitutionality of Congress's inclusion, in the Indian Reorganization Act of 1934, of a hiring preference for American Indians who sought employment with the federal Bureau of Indian Affairs (BIA). Congress's purpose, in so doing, was simple:

[T]o give Indians a greater participation in their own *self-government*; to further the Government's *trust obligation* toward Indian tribes; and to reduce the negative effect of having non-Indians adminis-

ter matters that affect the *Indian tribal life*.^[FN13]

FN13. *Mancari*, 417 U.S. at 541-42 (emphasis added).

Thus, “[t]he overriding purpose [of the Act] ... was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically,”^[FN14] and thereby “strengthen tribal government...”^[FN15] Therefore, Congress's authority to adopt the preference:

FN14. *Id.* at 542.

FN15. *Id.* at 543.

[T]urns on the *unique legal status of Indian tribes* under *federal law* and upon the *plenary power of Congress*, based on a history of *treaties* and the assumption of *11 a “*guardian-ward*” status to legislate on behalf of federally recognized tribes.^[FN16]

FN16. *Id.* at 551 (emphasis added).

Specifically, *Mancari* recognized that the Indian Commerce Clause,^[FN17] in giving Congress the power to “regulate Commerce with the Indian tribes [.] ... singles out Indians as a proper subject for separate legislation [by Congress].”^[FN18] Similarly, the Treaty Clause^[FN19] authorized Congress to “deal with Indian tribes.”^[FN20] Finally, Congress's special relationship with Indian tribes was grounded, not just in the Constitution, but also was “derived from historical relationships” between the United States government and American Indians and the “solemn commitment of the Government toward Indians [.]”^[FN21]

FN17. U.S. Const. art. I, sec. 8, cl. 3 (App. 23).

FN18. *Mancari*, 417 U.S. at 552.

FN19. U.S. Const. art. II, sec. 2, cl. 2 (App. 23).

FN20. *Mancari*, 417 U.S. at 552.

FN21. *Id.*

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless, and dependent people; needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation *12 and to prepare the Indians to take their place as independent, qualified members of the modern body politic.^[FN22]

FN22. *Id.*

Therefore, the conflict between Congress's special treatment of American Indians - by enacting a hiring preference for the BIA - and the Constitution's equal protection guarantee is resolved by recognizing Congress's special and unique relationship with American Indians:

As long as the special treatment [of American Indians] can be tied rationally to the *fulfillment of Congress' unique obligation toward Indians*, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to *further Indian self-government*, we cannot say Congress' classification violates due process.^[FN23]

FN23. *Id.* at 555 (emphasis added).

Mancari should have left it there. But the Court, quite unnecessarily, added this dictum:

[T]his preference does not constitute "racial discrimination." It is not even a racial preference.... The preference, as applied, is granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities.... Here the preference is reasonably and legitimately *13 related to a legitimate, nonracially based goal.^[FN24]

FN24. *Id.* at 553-54.

Worse yet, the Court inserted more dictum via this footnote:

The preference is not directed toward 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 totally political rather than racial in nature.^[FN25]

FN25. *Id.* at 554.

It is little wonder, therefore, that federal courts, in seeking to sustain any special treatment accorded American Indians by States or their political subdivisions, have used the seemingly safe harbor provided by *Mancari's* political-racial distinction. Yet that safe harbor is an illusion. *Mancari* is not grounded on such a clearly unconstitutional distinction - it is beyond dispute that tribal membership is based on race, ancestry, or descent - but instead upon Congress's unique historical trust relationship and its plenary and constitutional powers over Indians. Thus, the question Mr. Roberts presents is not whether *Mancari* was decided correctly - for these purposes here it was - but instead whether *Mancari* provides safe harbor, free from application of strict *14 scrutiny under the Fourteenth Amendment's Equal Protection Clause,^[FN26] to States or their political subdivisions when they grant racial preferences to or discriminate against American Indians.

FN26. U.S. Const. amend. XIV, sec. 1 (App. 23).

2. *Mancari's* Dictum Is Without Factual Basis.

Ironically, the Indian Reorganization Act of 1934, which *Mancari* construed, does not afford a preference to "members" of "federally recognized tribes"; instead, it defines "Indian" to require either Indian blood quantum or descent from Indians, regardless of tribal membership:

The term "Indian" as used in this Act shall include

all persons of *Indian descent* who are members of any recognized Indian tribe now under federal jurisdiction; and all persons who are *descendents of such members* who were, on June 1, 1934, residing with the present boundaries of any Indian reservation; and shall further include *all other persons of one-half or more Indian blood.*^[FN27]

FN27. Indian Reorganization Act of 1934, Act of June 18, 1934, c. 576, § 19, 48 Stat. 988 (now codified as 25 U.S.C. § 479) (App. 24) (emphasis added).

Thus, *Mancari's* dictum is based, not on Congress's statutory definition, but on the erroneous and illegal *15 regulation implementing the Indian preference, which even so, included an element of race:

An *Indian* has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an *individual must be one-fourth or more degree Indian blood and be a member of a federally recognized tribe.* It is the policy for promotional consideration that where two or more candidates who met the established qualification requirements are available for filling a vacancy, if one of them is an *Indian* he shall be given preference in filling the vacancy.^[FN28]

FN28. *Mancari*, 417 U.S. at 554, n. 24, citing 44 BIA Manual 335, 3.1 (*see* App. 26) (emphasis added).

It is little wonder that, just three years after *Mancari* was decided, the BIA recognized that it could not alter the express definition adopted by Congress,^[FN29] as it had in its 1974 regulation, and changed that regulation, to mirror the statute:

FN29. *Koshland v. Helvering*, 298 U.S. 441, 447 (1936) (“[W]here ... the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation.”).

For purposes of making appointments to vacancies

in all positions in the Bureau of Indian Affairs a preference will be extended to persons of *Indian descent* who are:

(a) Members of any recognized Indian tribe now under Federal Jurisdiction;

*16 (b) *Descendants of such members* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

(c) *All others of one-half or more Indian blood of tribes indigenous to the United States....*^[FN30]

FN30. 25 C.F.R. § 5.1 (43 FR 2393, Jan. 17, 1978) (App. 25) (emphasis added).

Therefore, because there is no factual basis for the political-racial distinction set forth in *Mancari's* dictum, federal courts considering the constitutionality of preferential or discriminatory treatment of Indian tribes or their members, pursuant to legislation or regulation adopted by States and their political subdivisions, may not rely upon *Mancari's* dictum.

3. *Mancari's* Dictum Does Not Survive *Adarand*.

In *Adarand*, this Court held that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”^[FN31] Furthermore, “whenever the government treats *17 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.”^[FN32] Finally:

FN31. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995). Justice O'Connor repeats Justice Powell's “defense of this conclusion”: “When [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely

tailored to serve a compelling governmental interest.” *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J.) (footnote omitted).

FN32. *Adarand*, 515 U.S. at 230.

[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[FN33]

FN33. *Id.* at 227.

Thus, *Mancari*'s political-racial distinction is not only unnecessary dictum that lacks a factual basis, but it is also patently inconsistent with *Adarand*. Therefore, any post-*Adarand* analysis of *Mancari* concerning Indian preferences must ask whether Congress's plenary powers over, and unique relationship with, American Indians provide Congress a compelling interest - that of advancing Indian self-government - and whether Congress has pursued that interest in the most narrowly tailored manner possible.^[FN34] But whether *Mancari*, in that narrow context, survives *Adarand* is not the issue now before this Court. Instead, the only issue that Mr. Roberts presents is whether States may utilize *Mancari*'s *18 political-racial distinction as a safe harbor to shield themselves from a federal court's use of strict scrutiny to consider the constitutionality of legislation or regulation that prefers or discriminates against tribal members.

FN34. *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997).

II. MANCARI PROVIDES NO SAFE HARBOR FOR THE STATE OF MONTANA.

In an *Adarand* world of race neutrality, *Mancari* provides no safe harbor for race-conscious State legislation or regulation by the mere incantation of the magical phrase, “tribal member.” Instead, a re-

viewing federal court must apply *Adarand* or its predecessor, *Croson*.^[FN35]

FN35. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

A. THE STATE OF MONTANA LACKS CONGRESS'S POWER OVER AND ITS UNIQUE RELATIONSHIP WITH AMERICAN INDIANS OR THEIR TRIBES.

Congress's authority to deal in a different fashion with Indian tribes and their members is based upon its plenary and constitutional powers over Indians as well as its historical and unique trust relationship with American Indians. States, on the other hand, have neither such authority nor any such relationship. In fact, this Court has held that States may stand in the shoes of the federal government *19 regarding American Indians only when Congress expressly delegates certain of its power to the State: It is settled that “the unique legal status of Indian tribes under federal law” permits *the Federal Government* to enact legislation singling out tribal Indians, legislation that might *otherwise be constitutionally offensive*. *Morton v. Mancari*, 417 U.S. 535, 551-52. *States do not enjoy this same unique relationship* with Indians, but Chapter 36 is not simply another state law. It was *enacted in response to a federal measure explicitly designed to readjust the allocation of [State and federal] jurisdiction over Indians*.^[FN36]

FN36. *Washington v. Confederated Bands and Tribes of the Yakima Indian Reservation*, 439 U.S. 463, 500-501 (1978) (emphasis added).

There is no such express delegation here, nor does Montana claim any. Montana's justification for the preference it provides all tribal members throughout the Nation is that it is honoring treaty hunting rights on Montana reservations, rights which differ among the seven reservations. Obviously, that claim has no merit. First, this Court has held that those hunting rights, if they exist, can

“only extend to land on which the Tribe exercises ‘absolute and undisturbed use and occupation.’”[FN37] Second, as this Court also recognized, “the quantity of such land was substantially reduced by the allotment and alienation *20 of tribal lands[,]”[FN38] including non-Indian-owned fee lands such as those that Mr. Roberts seeks to use for hunting. Third, if Montana's purpose were to protect Crow treaty hunting rights, for example, Montana would have limited hunting on non-Indian-owned fee lands within the Crow Reservation to members of the Crow Tribe.

FN37. *Montana v. United States*, 450 U.S. 544, 558-59 (1981).

FN38. *Id.* at 559.

Unfortunately, the Ninth Circuit issued only a two-page, unpublished Memorandum Opinion that relies solely on *Mancari*'s dictum (“classifications based on membership in federally recognized Indian tribe are political, rather than racial, and thus subject to rational basis review.”)[FN39] Thus, the Ninth Circuit never addressed the fundamental question raised by the State of Montana's assertions and Mr. Roberts' argument: whether Montana may lay claim to the same constitutional and historical bases as does Congress for a relationship with Indian tribes and their members to permit adoption of racial preferences that “further Indian self government.”[FN40]

FN39. *Roberts v. Hagener*, No. 07-35197, slip op. (9th Cir. July 18, 2008) (App. 2).

FN40. *Mancari*, 417 U.S. at 555.

Had the Ninth Circuit addressed this question, this Court's holding in *Mancari* would have compelled an answer of “No.” Only Congress has a Treaty Power; only Congress is empowered by the Indian Commerce Clause,[FN41] and only Congress has plenary *21 authority over Indians. Therefore, only Congress has the unique trust relationship of guardian and ward with American Indian Tribes that per-

mits it, for certain, limited purposes, to grant American Indians preferential treatment. Because the State of Montana has neither these powers nor this relationship, it may not rely on *Mancari* to demand that federal courts utilize rational basis scrutiny of either preferential or discriminatory treatment of American Indians or tribal members.

FN41. U.S. Const. art. I, sec. 8, cl. 3 (App. 23).

Denied use of *Mancari*, the Ninth Circuit must apply, and the State of Montana must satisfy, “strict scrutiny” to justify its use of racial preferences, as required by *Adarand* and *Croson*. Robbed of its pretense that it stands in the shoes of Congress vis-à-vis American Indians, Montana provides no compelling governmental interest for its racial classification. Below, the only interest asserted by Montana was one of administrative convenience, which, as this Court held in *Croson*, is not compelling.[FN42] Moreover, the State of Montana's hunting regulation[FN43] fails narrow tailoring because it includes all persons who are tribal members in the entire United States, irrespective of whether they reside in Montana or are members of *22 Montana tribes. This regulation transparently includes all Indians as a discrete racial group.

FN42. *Croson*, 488 U.S. at 472 (“[A]dministrative convenience [...] ... standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny.”).

FN43. Montana Deer, Elk and Antelope Hunting Regulations 2008, p. 20; available at <http://fwp.mt.gov/hunting/regulations.html> (App. 23-24).

This Court should grant this Petition, reverse the Ninth Circuit's holding that States and their political subdivision may use *Mancari* to shield their adoption of raced-based legislation or regulation from the application of “strict scrutiny,” and remand this

case for a ruling as to whether the State of Montana's regulation comports with *Adarand* and *Croson*.

B. THE STATE OF MONTANA MISTAKENLY BELIEVES THAT IT STANDS IN THE SHOES OF CONGRESS.

The State of Montana's big game hunting regulations^[FN44] are not its only foray into the enactment of legislation that provides preferences to American Indians as a discreet racial group; it has a host of such laws.^[FN45] Furthermore, the Montana Legislature is *23 not alone in its view that there is no constitutional bar to its ability to utilize racial classifications regarding American Indians.

FN44. *Id.*

FN45. For example, the State of Montana provides free college tuition for “persons of one-fourth Indian blood or more who have been bona fide residents of Montana for at least one year prior to enrollment in the Montana university system.” [Mont. Code Ann. § 20-25-421\(2\)\(c\)\(i\)](#). It provides that “a state agency that operates within an Indian reservation shall give a preference in hiring for employment with the state agency to an *Indian* resident of the reservation.” [Mont. Code Ann. § 2-8-111\(1\)](#) (emphasis added). Finally, Montana provides that, “any contract awarded by a state agency for a state construction project within the exterior boundaries of an Indian reservation ... must provide that a preference in hiring for positions of employment be given to *Indian* residents of the reservation.” [Mont. Code Ann. § 18-1-110](#) (emphasis added).

In *State of Montana v. Shook*,^[FN46] the Montana Supreme Court considered the constitutionality, under the Montana Constitution, of the very hunting regulation presented here. That Court, relying on *Mancari*, held that the Montana Legislature has the

same powers to single out Indians or tribal members as does Congress because it believed that States are bound to carry out Congress's unique obligations to Indians:

FN46. [67 P.3d 863 \(2002\)](#), *cert. den.*, [540 U.S. 815 \(2003\)](#).

[F]ederal Indian law regarding the rights of *Indians* is binding on the state. Therefore, the state equal protection guarantee ... must allow for state classifications based on tribal membership if those classifications can rationally be related to the *fulfillment of the unique federal, and consequent state*, obligation toward *Indians*.^[FN47]

FN47. *Id.* at 866 (emphasis added).

Therefore, the Montana Supreme Court held that Montana may make racial distinctions not only with respect to tribal membership, but also with respect to the discrete racial class that is American Indian, subject only to rational basis review, because federal *24 law provides States with Congress's unique relationship with American Indians:

[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*.^[FN48]

FN48. *Id.* at 867 (emphasis added).

This abuse and misuse of this Court's holding in *Mancari* will end only with a ruling from this Court as to the meaning of *Mancari* and its inapplicability to States and their political subdivisions. Therefore, this Court should grant this Petition for Writ of Certiorari.

CONCLUSION

This Court should grant this Petition for Writ of Certiorari to clarify that *Mancari* does not rely on the political-racial distinction for its application to federal legislation, but rather relies on Congress's

plenary and constitutional powers over Indians as well as its historical and unique trust relationship with American Indians. More importantly, this Court should also grant this Petition to make explicit that in no event may States or their political subdivisions rely on *Mancari's* political-racial distinction to justify *25 legislation or regulation that singles out American Indians or tribal members for preferential or discriminatory treatment. Finally, this Court should grant this Petition to hold that all such State legislation and regulation is subject to strict scrutiny as provided for in *Croson* and *Adarand*.

Roberts v. Hager
2008 WL 4656893 (U.S.)

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