07-35197

No. ~~07-35196-7~~

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDY V. ROBERTS,

Plaintiff-Appellant,

v.

JEFF HAGENER, Director, Montana Department of Fish, Wildlife & Parks; VICTOR WORKMAN, TIM MULLIGAN, STEVE DOHERTY, JOHN BRENDEN, and SHANE COLTON, Commissioners, Montana Fish, Wildlife & Parks Commission; MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; MONTANA FISH, WILDLIFE & PARKS COMMISSION; BRIAN A. SCHWEITZER, Governor, State of Montana; and the STATE OF MONTANA,

Defendant-Appellees,

On Appeal from the United States District Court
for the District of Montana, Civil Action No. CV-05-153-BLG-RFC
The Honorable Richard F. Cebull

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

No party to this case is a "non-governmental corporate party;" therefore, no corporate disclosure statement is warranted. Fed. R. App. P. 26.1.

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

This appeal raises an issue relating to State discrimination based on ancestry resulting in the State of Montana making illegal Plaintiff's right to pursue his livelihood. Appellant believes that with such an issue at stake, oral argument would be most beneficial to this Court's understanding.

STATEMENT OF JURISDICTION

Jurisdiction in the District Court was predicated upon 28 U.S.C. §§ 1331 and 1343 because the matter in controversy arose under the laws and Constitution of the United States, including, but not limited to, the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d, *et seq.*).

The District Court entered Orders on August 4, 2006, and February 2, 2007, final orders that disposed of all of the parties' claims. Excerpts of Record ("ER") 18-28, 52-53. Mr. Roberts' appeal is taken from both of these Orders. Plaintiff-Appellant's Notice of Appeal was filed timely on March 5, 2007. ER 54.

ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in applying the "rational basis standard" rather than "strict scrutiny" to a state regulation that, absent any treaty obligation or explicit federal measure, discriminates against Mr. Roberts based solely on the fact that he is not an American Indian and his ancestry and bloodline prevent him from ever becoming a member of an American Indian tribe.

STATEMENT OF THE CASE

On or before February 10, 2005, Defendant Montana Fish, Wildlife & Parks Commission adopted the following hunting regulation (the "challenged regulation"):

> 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.

2005 Montana Hunting Regulations: Deer, Elk, and Antelope, at 16; ER 50.

As adopted and enforced by Defendants, the challenged regulation permits members of the Crow Indian Tribe to hunt big game on land located within the exterior boundaries of the Crow Reservation, regardless of whether the land is: (1) that member's fee property, (2) owned by the Crow Tribe, or (3) non-Indian fee land and the tribal member is hunting with the permission of the landowner.

Plaintiff Randy V. Roberts ("Mr. Roberts") is a resident of Billings, Montana. He is a white, non-Indian and non-member of any federally recognized Indian tribe. Although Mr. Roberts has the owner's express authority to hunt big game on 1,500 acres of deeded, non-Indian fee land located within the exterior boundaries of the Crow Reservation in Big Horn and Yellowstone Counties, the challenged regulation prohibits him from such hunting. Mr. Roberts is an avid hunter of all game and, but for the adoption, implementation, and enforcement of the challenged regulation, would hunt big game on these 1,500 acres.

Mr. Roberts is barred only because he does not possess at least one-quarter (¼) Crow Indian blood, was not enrolled as a Crow Indian on the date of passage of the Crow Tribal Constitution, or is not a descendant of a Crow Indian. As such, Mr. Roberts has never been eligible and never will be eligible for membership in the Crow Tribe or any other American Indian tribe.

In a Complaint filed on November 30, 2007, Mr. Roberts brought action against Defendants challenging Montana's Big Game Hunting Regulations in the U.S. District Court for the District of Montana. ER 1-14. On February 10, 2006, Defendants filed a Motion to Dismiss, arguing that, under the rational basis test, Montana's discriminatory regulation was constitutional. ER 15-17. In an Order issued August 4, 2006, the District Court found that, "although Roberts' 'equal protection argument has real force,' 'the weight of established law' requires [the] Court to review the regulation for a rational basis."[1] Order, at 10; ER 27.

Thereupon, the District Court "converted" the Motion to Dismiss to a Rule 56 motion for summary judgment. Order, at 10; ER 27. On September 26, 2006, Mr. Roberts filed his Motion for Summary Judgment arguing that, even under the rational basis standard, Montana's regulation should be held unconstitutional. ER 29-33. On February 2, 2007, applying mere rational basis scrutiny despite the State's disparate treatment of Mr. Roberts on the basis of his inborn inability to

[1] Citing *Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005).

meet tribal blood quantum or ancestral requirements, the District Court held that Defendants were entitled to judgment as a matter of law. ER 52-53.

STATEMENT OF FACTS

Mr. Roberts is a citizen of the United States of America and a resident of Billings, Montana, located within Yellowstone County. Declaration, ¶ 1; ER 45. Mr. Roberts is a white or Caucasian male, a non-Indian, and is not a member of the Crow Tribe or any other federally recognized American Indian tribe. *Id.*, ¶¶ 3-5; ER 45.

Mr. Roberts has the owner's express authority to hunt big game on his family's 1,500 acres of deeded, non-Indian fee land located within the exterior boundaries of the Crow Reservation in Big Horn and Yellowstone Counties, Montana, and, but for the challenged regulation, would do so. *Id.*, ¶¶ 2, 6; ER 45, 46.

Defendant Jeff Hagener is the Director of the Montana Department of Fish, Wildlife & Parks ("the Department"). He is responsible for administering the rules and regulations of the Department and for carrying out the policies of the Montana Fish, Wildlife & Parks Commission ("the Commission"), including the adoption and implementation of the challenged regulation that is the subject of this lawsuit.[2]

Also sued in their official capacities are Montana Fish, Wildlife and Parks Commissioners Victor Workman, Tim Mulligan, Steve Doherty, John Brenden, and Shane Colton. The Commission is a quasi-judicial citizen board and agency of

[2] http://fwp.mt.gov/insidefwp/department/commission/default.html

the State of Montana. The five members of the Commission are appointed by the Governor of the State of Montana. The Commission sets fish and wildlife regulations, including the challenged regulation that is the subject of this lawsuit, and approves certain rules and activities of the Department as provided by State statute.[3]

Defendant Brian A. Schweitzer is Governor of the State of Montana. As Governor, he ultimately is responsible for administration of the Department and the Commission and allocation of the resources and funds of each entity.[4]

The State of Montana is one of the 50 States of the United States. As such, it receives federal funds for fish and wildlife programs from a variety of sources, including the Federal Aid in Sport Fish and Wildlife Restoration programs and an excise tax on sporting arms and ammunition, handguns, and certain archery equipment. It receives additional federal funds from an excise tax on fishing equipment and electric trolling motors, a federal fuel tax, and import duties on fishing tackle and pleasure boats. It also received and/or receives federal funds from the federal State Wildlife Grant program and the federal Land and Water Conservation Fund.

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[3] *Id.*

[4] http://governor.mt.gov/hottopics/Goals_Objectives_2006_08_28.pdf

The Department and the Commission receive federal funds, as appropriated by the State of Montana and the Governor of the State of Montana, for the management and regulation of fish and wildlife.

The Commission adopted the "challenged regulation" regarding tribal land for the 2005 hunting season on February 10, 2005:

> 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.

2005 Montana Hunting Regulations: Deer, Elk, and Antelope, at 16; ER 50. The challenged regulation was valid from March 1, 2005, through February 28, 2006.[5]

All Defendants currently participate and/or have participated in the formulation, adoption, implementation, and/or enforcement of the challenged regulation in general and as applied to Mr. Roberts.

As adopted and enforced by Defendants, the challenged regulation permits members of the Crow Indian Tribe to hunt big game on land located within the exterior boundaries of the Crow Reservation, regardless of whether the land is that member's fee property or the land is owned by the Crow Tribe, including non-Indian fee land with the permission of the landowner.[6]

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[5] Although Mr. Roberts' injury is both capable of repetition and evading review, the 2006 Montana Hunting Manual demonstrates that the challenged regulation remains in effect. http://fwp.mt.gov/FwpPaperApps/hunting/2006DEARegs.pdf

[6] http://fwp.mt.gov/FwpPaperApps/hunting/2006DEARegs.pdf

Tribal members, including those of the Crow Indian Tribe, are permitted by Defendants to hunt big game on land located outside the exterior boundaries of their respective Reservations within the State of Montana. Mr. Roberts also is permitted by Defendants to hunt big game on land located outside the exterior boundaries of reservations within the State of Montana.[7]

Although referenced in the challenged regulation, no agreement between the State of Montana and the Crow Indian Tribe currently allows non-tribal members to hunt big game within the exterior boundaries of the Crow Reservation nor does any treaty grant the Crow Indian Tribe exclusive hunting rights within those boundaries. Declaration, ¶ 9; ER 46.

Mr. Roberts is denied the ability to hunt big game on this deeded, non-Indian fee land located within the exterior boundaries of the Crow Reservation solely because of his race, color, ancestry and/or national origin; that is, because he is white or Caucasian and non-Indian.

[7] *Id.*

STANDARD OF REVIEW

The Court of Appeals reviews a District Court's findings of fact for clear error. "A finding of fact is deemed clearly erroneous when although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made."[8]

The Court of Appeals reviews *de novo* a District Court's conclusions of law.[9] Unless a mixed question of fact and law is primarily factual, mixed questions are reviewed *de novo*.[10]

Here, the District Court erred by applying rational basis scrutiny rather than strict scrutiny; therefore, this Court must review the District Court's decision *de novo*.

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[8] *Burlington Northern, Inc. v. Weyerhaeuser Co.*, 719 F.2d 304, 307 (9th Cir. 1983).

[9] *Id.*

[10] *United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 824 (1984); *Gregory K. v. Longview School Dist.*, 811 F.2d 1307 (9th Cir. 1987).

SUMMARY OF ARGUMENT

Mr. Roberts is being denied federal equal protection rights by the State of Montana because of his immutable status as a non-Indian. The District Court erred when it failed to apply strict scrutiny to Mr. Roberts' constitutional challenge to Montana's hunting regulation.

The challenged regulation was not enacted pursuant to a federal treaty or any explicit federal measure or mandate. Moreover, the racially discriminatory regulation is outside the narrow scope of the *Mancari* line of Indian preference cases in that *Mancari* and its progeny require explicit federal direction and mandate a clear relationship to tribal self-government or internal relations, neither of which exists in the instant case.

This Court should remand the case to the District Court with instructions to apply strict scrutiny to Mr. Roberts' constitutional challenge to the State of Montana's discriminatory regulation.

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT APPLYING STRICT SCRUTINY TO MONTANA'S DISCRIMINATORY HUNTING REGULATION.

This Court should review *de novo* the District Court's errant application of the rational basis standard to a State regulation that discriminates based on ancestry. The Court of Appeals reviews *de novo* a District Court's conclusions of law.[11] Unless a mixed question of fact and law is primarily factual, mixed questions are reviewed *de novo*.[12]

Equal Protection Clause jurisprudence establishes that "whenever the government 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."[13] A proper plaintiff challenging governmental use of racial preferences states a prima facie case simply by pointing to this practice and showing that he or she was treated "unequally because of his or her race."[14] Thereupon, the burden of sustaining the constitutionality of the use of racial preferences passes to the government, which must establish that it is

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[11] *Burlington Northern*, 719 F.2d at 307.

[12] *McConney*, 728 F.2d at 1199-1204; *Gregory K.*, 811 F.2d 1307.

[13] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-230 (1995).

[14] *Ibid.*

remedying "identified discrimination" and that it "had a 'strong basis in evidence' to conclude that remedial action was necessary."[15]

A. Classifications Based On Race, National Origin, Ancestry, And Alienage Necessitate Strict Scrutiny By This Court.

In considering whether a State's actions violate the Equal Protection Clause of the Fourteenth Amendment,[16] this Court must initially determine the correct level of scrutiny. Classifications based on race or national origin[17] and classifications affecting fundamental rights[18] are given the most exacting scrutiny. Strict scrutiny also is applied when the classification involves ancestry[19] and alienage[20] or when categorizations impinge upon a fundamental right such as voting,[21] travel,[22] and freedom of association.[23] To withstand strict scrutiny a statute must be precisely tailored to serve a compelling state interest.[24]

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[15] *Shaw v. Hunt*, 517 U.S. 899, 909-910 (1996).

[16] U.S. Const. amend. XIV, § 1.

[17] *E.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

[18] *E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672 (1966).

[19] *Oyama v. California*, 332 U.S. 633, 644-646 (1948).

[20] *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

[21] *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

[22] *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

[23] *NAACP v. Alabama*, 357 U.S. 449, 460-462 (1958).

[24] *Plyler v. Doe*, 457 U.S. 202, 216, 217 (1982).

The State of Montana has denied Mr. Roberts the privilege of hunting on his family's private property because he does not meet certain immutable blood quantum, race, national origin, and ancestral requirements. Thus, the District Court erred by not applying strict scrutiny to the State's hunting regulation.

B. No Treaty or Explicit Federal Measure Allows The State Of Montana To Escape Strict Scrutiny.

1. The State is not acting pursuant to any federal treaty requirement.

No federal treaty grants the Crow Indians exclusive hunting rights within their reservation boundary. Rather, the State adopted its discriminatory hunting regulation *sua sponte* and may not shield itself from constitutional scrutiny by hiding beneath the shroud of some federal trust relationship. States "do not enjoy th[e] same unique relationship with Indians [as that enjoyed by Congress]."[25]

Although the Treaties of Fort Laramie reserved to the Crow rights to hunt and fish within the reservation on Indian lands free from state control,[26] the Roberts property *is not* "Indian land," even though it *is* being regulated by the State as if it were some type of hybrid Indian and non-Indian land.[27] Of course, the

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[25] *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979).

[26] *Montana v. United States*, 450 U.S. 544, 558 (1981).

[27] The regulation at issue does not prohibit Indians from hunting on the 1,500 acres of non-Indian fee land at issue here. There is no reason to believe that an Indian, having secured a Montana big game hunting license and permission from Mr. Roberts' family to hunt, would be barred from

language of the Treaties of Fort Laramie contemplates that certain land within the reservation was not or would not be "Indian land." Otherwise, identifying parcels that are within the reservation *on Indian lands* would be redundant.

In fact, in *Montana v. United States*, the U.S. Supreme Court held that even "[i]f the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to land held in fee by non-Indians."[28]

Of course, even if such a treaty existed, there is an even more fundamental problem with the State of Montana's position that federal treaties with the Crow Tribe allow the State to deny Mr. Roberts State privileges and immunities based on his lack of Indian blood. For, if treaties existed that mandated disparate treatment based on blood, race, national origin, or ancestry, those treaties must then be invalidated by this Court because "it is well settled that the Bill of Rights limits both the federal government's treaty-making powers as well as actions taken by federal [and necessarily state] officials pursuant to the federal government's treaties."[29] "[N]o agreement with a foreign nation can confer power on the

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hunting big game on the family land, whereas Mr. Roberts, with the same license and permission, is prohibited by state regulation from doing so.

[28] *Montana*, 450 U.S. at 559.

[29] *Sahagian v. United States*, 864 F.2d 509, 513 (7th Cir. 1987).

Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[30]

Article VI, the Supremacy Clause of the U.S. Constitution, states: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . "

Moreover, according to *Reid*:

> There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result.
>
> * * *
>
> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.[31]
>
> * * *
>
> "The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the

[30] *Reid v. Covert,* 354 U.S. 1, 16 (1957).

[31] *Id.* at 16-17.

> government or in that of one of the States, or a session of any portion of the territory of the latter, without its consent."[32]

If such a treaty exists between the United States and the Crow Tribe, the State of Montana necessarily concedes the applicability of the holding in *Reid v. Covert*. Therefore, any treaty interpreted to deny Mr. Roberts rights guaranteed him by the federal Bill of Rights must necessarily be held invalid.

2. The State is not acting pursuant to any other explicit federal measure.

The plenary authority of the United States has no application here given the independent nature of the State's action. Unlike *Washington v. Confederated Bands*, where the state law in question was in response to an explicit "federal measure,"[33] here the State of Montana acts of its own volition insofar as the Crow Tribe enjoys no exclusive hunting rights as a result of any federal treaty, and, according to briefs filed with the District Court, it has chosen to regulate non-Indians on non-Indian land rather than face "logistic difficulties." That being the case, denial of Mr. Roberts' rights to equal protection may not be "tied rationally to the fulfillment of Congress' *unique obligations* toward Indians"[34] nor may it be justified because state regulatory authority was somehow federally preempted.

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[32] *Id.* at 17-18, quoting *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

[33] *Confederated Bands*, 439 U.S. at 501.

[34] *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (emphasis added).

The State of Montana has "chosen" to discriminate and thus may not rely on language in *Washington v. Confederated Bands* to suggest that it is "acting in response to a federal measure explicitly designed to adjust allocation of jurisdiction over Indians."[35]

Under *Montana v. United States*, "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the *tribe bears no clear relationship to tribal self-government or internal relations.*"[36] Absent such a clear relationship to a federal "scheme," state laws are not reviewed as if they were federal law.[37]

To the extent that the State of Montana implicitly claims or might claim in the future that Mr. Roberts is not denied equal protection because he may hunt pursuant to State/tribal cooperative agreements, such "agreements" are illusory. First, no such agreement exists. Complaint, ¶ 27; ER 8. Second, and more importantly, the U.S. Supreme Court has held, in *Montana v. United States*, that, even "[i]f the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee

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[35] *Id.*

[36] *Montana*, 450 U.S. at 564-565 (emphasis added).

[37] *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 734 (9th Cir. 2003).

by non-Indians."[38] Furthermore, "it defies reason to suppose that Congress intended that non-members who reside on fee patent land could hunt and fish thereon only by consent of the tribe."[39] Absent this necessity for "consent of the tribe," a tribe is explicitly denied regulatory hunting authority over non-Indian lands and has no authority to enter into such agreements with the State, thus making Montana's non-existent State/tribal cooperative agreement both illusory and illegal.

C. Even If, *Arguendo*, The State Of Montana's Regulation Were In Response To Some Explicit Federal Measure, The Regulation Is Outside the Scope Of The *Mancari* Line Of Cases.

By its own language, *Mancari* is limited to "employment in the Indian service. The preference does not cover any other Government agency or activity."[40] *Mancari* involves preferences or disabilities directly promoting Indian interests in self-government, whereas the present case deals, not with matters of tribal self-regulation, but with state regulation of non-Indians on non-Indian lands! In fact, the U.S. Supreme Court held "regulation of hunting and fishing by

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[38] *Montana*, 450 U.S. at 559.

[39] *Id.* at n.9.

[40] *Mancari*, 417 U.S. at 554.

nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations."[41]

Although the U.S. Supreme Court has yet to revisit the *Mancari* doctrine post-*Adarand*, given the blood quantum, *i.e.*, racial, ancestral, and national origin, requirements maintained by so-called "political groups," the breadth, or even survivability, of *Mancari* is now questionable.[42]

In *Adarand,* the Supreme Court ruled that racial classifications by the federal government are subject to strict scrutiny. The Court overruled *Metro Broadcasting*,[43] in part because its application of intermediate scrutiny to federal racial classifications was inconsistent with the strict scrutiny applied to state classifications.[44] Although the majority emphasized that it was only overruling *Metro Broadcasting*,[45] Justice Stevens in dissent argued that the majority's "concept of 'consistency' [in equal protection jurisprudence] would view the special preferences that the National Government has provided to Native

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[41] *Montana*, 450 U.S. at 564.

[42] *See Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997).

[43] *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

[44] *See Adarand*, 515 U.S. at 225-227.

[45] *Id.* at 233-235.

Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history."[46]

Any attempt to classify this case among the *Mancari* line of minimal scrutiny cases may be distinguished easily from the present case. For example, in *Artichoke Joe's*,[47] the State of California was acting pursuant to the IGRA, a federal congressional measure explicitly directing state governments to negotiate Indian gaming compacts in states where casino gaming is permitted.[48] As explained above, however, in the present case no such explicit federal measure exists.[49] In addition, in *Artichoke Joe's*, Congress was acting with respect to Indian casinos on Indian land, whereas in the present case Montana is regulating non-Indians on non-Indian fee land. In *Williams v. Babbitt*, moreover, the Ninth Circuit expressed "serious doubt that Congress could give Indians a complete monopoly on the casino industry"[50] in the interest of "promoting Indian interests in

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[46] *Id.* at 244 (Stevens, J., dissenting) (footnote citing *Mancari* omitted).

[47] *Artichoke Joe's*, 353 F.3d 712 (9th Cir. 2003).

[48] *Id.* at 715.

[49] Although Congress, in enacting the IGRA, arguably attempted to adhere to constitutional equal protection requirements (by including a "most-favored-nations" clause to assure equal treatment by State gaming regulators), the Ninth Circuit deemed the "most-favored nation" language ambiguous and invoked the "Blackfeet doctrine," another judicial invention that itself arguably violates equal protection, to defeat Congress's intent.

[50] *Williams*, 115 F.3d at 665.

self government"[51] and, apparently, would have applied strict scrutiny to the facts in *Artichoke Joe's*.

Attempts to escape strict scrutiny by hiding behind a "tribal" or "political group" classification must fail when the so-called "political group" has race-based membership requirements such as blood quantum, ancestry, or national origin, just as "when a statute classifies by race, alienage, or national origin":[52]

> These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.[53]

Even absent the Crows' blood quantum, race, or national origin requirements, not lost on the U.S. Supreme Court is the unconstitutionality of any system of so-called "group" rights. "At the heart of the Constitution's guarantee of equal protection is the simple command that the Government must treat citizens

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[51] *Id.*

[52] *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

[53] *Id.*, citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham*, 403 U.S. 365 (1971).

"as *individuals,* not 'as simply components of a racial, religious, sexual or national class.'"[54]

"Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."[55]

D. The State Of Montana's Hunting Regulation Is Not Precisely Tailored To Serve A Compelling State Interest And Must Be Stricken.

Even if the State of Montana's interest in game conservation constitutes a compelling state interest, its discriminatory regulation is not "precisely tailored" to address that interest, and numerous non-discriminatory alternatives to conserve wildlife are available. "A complete race-based ban is the broadest possible remedy."[56] For example, as explained in a litany of privileges and immunity discrimination cases, the State could limit the total number of licenses issued or increase the license fee so as to limit the number of persons who choose to hunt.[57]

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[54] *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris,* 463 U.S. 1073, 1083 (1983).

[55] *Metro Broadcasting*, 497 U.S. at 602 (O'Connor, J., dissenting) (*Metro* majority later overruled by *Adarand*).

[56] *Williams*, 115 F.3d at 665.

[57] *See, e.g., Conservation Force, Inc. v. Manning*, 301 F.3d 985, 997 (9th Cir. 2002).

Land ownership patterns are not respected by migrating animals. Whether the harvest of an animal is by an inholder or a non-inholder, an American Indian or a non-Indian, has no biological impact on the population of game, and, as such, the State's regulation cannot survive strict scrutiny.

In any event, Mr. Roberts has stated a prima facie case simply by pointing to this practice and showing that he is treated unequally because of his race and ancestry. Thereupon, the burden of sustaining the constitutionality of the use of racial preferences passes to the government, which must establish that it is remedying "identified discrimination" and that it "had a 'strong basis in evidence' to conclude that remedial action was necessary . . ."[58]

Moreover, constitutional jurisprudence bars any attempt by the State of Montana to discriminate on the basis of race or ethnicity due to some administrative difficulties the State may face in achieving a legitimate state interest, in the present case, the State's desire to prevent illegal hunting by non-Indians within the Crow Reservation. "[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."[59] Even if it is difficult for the State to ensure that the only non-Indians hunting within exterior

[58] *Shaw*, 517 U.S. at 909-910.

[59] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989).

boundaries of the Crow Reservation are those hunting on land owned by non-Indians, that administrative difficulty does not permit the State to bar all hunting within the Crow Reservation by non-Indians. *Id.*

CONCLUSION

Mr. Roberts is being denied his constitutional right to equal protection by the State of Montana because of his immutable status as a non-Indian. In denying Mr. Roberts this right, the State is acting *sua sponte* rather than pursuant to some federal treaty or explicit federal obligation.

The State of Montana attempts to couch the discriminatory regulation as pursuant to federal obligations in an attempt to avail itself of a line of aging Indian preference cases, cases for which, according to the Ninth Circuit, the "days are [arguably] numbered."[60] In any event, the State's *sua sponte* action is not consistent with the more deferential line of cases because these cases require explicit federal direction and mandate a clear relationship to tribal self-government or internal relations, neither of which exists here.

For these and all the other reasons stated above, the District Court's decisions should be overturned and the case remanded with instructions to apply strict scrutiny to Defendants' discriminatory regulations.

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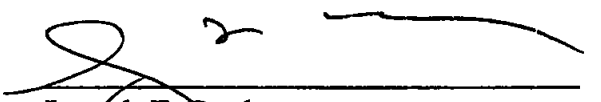
[60] *Williams*, 115 F.3d at 665.

STATEMENT OF RELATED CASES

Mr. Roberts is unaware of any related cases pending in, or previously decided, by this Court other than those cited and distinguished herein.

Respectfully submitted this 21st day of June, 2007.



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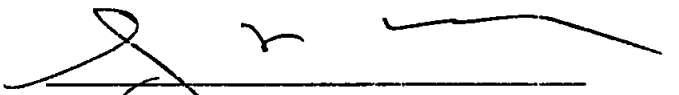
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that this brief contains 4,902 words in 14-point, proportionally spaced Times New Roman type, exclusive of those parts excepted by Fed. R. App. P. 32(a)(7)(B)(iii), as computed by the word counter in Microsoft Word© 2003.



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CERTIFICATE OF SERVICE

I hereby certify that this 21st day of June 2007, I served two (2) true and accurate copies of APPELLANT'S OPENING BRIEF on opposing counsel by overnight Federal Express, pre-paid, and addressed to the following:

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