No. 08-519

In the
Supreme Court of the United States

RANDY ROBERTS,

Petitioner,

v.

JEFF HAGENER, Director, Montana Department of Fish, Wildlife and Parks, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SHARON L. BROWNE
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

Blank Page

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner Randy Roberts. Petitioner, Randy Roberts, granted consent to PLF to file this amicus curiae brief. However, Respondents Jeff Hagener, et al., withheld consent.

PLF believes that its amicus curiae brief brings to the attention of this Court relevant matter not already brought to its attention by the Petitioner and respectfully urges this Court to grant its motion.

DATED: November, 2008.

Respectfully submitted,

SHARON L. BROWNE
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

Blank Page

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 by a state or its political subdivisions that grants preferential treatment to, or discriminates against, American Indians or American Indian tribal members, without express delegation of such authority from Congress?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

United States Constitution

Federal Statutes

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully moves this Court, pursuant to Supreme Court Rule 37.2(b), for leave to file the accompanying amicus curiae brief in support of Petitioner.[1] Counsel of record for all parties received notice at least 10 days prior to the due date of amicus' intention to file this brief.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. For 35 years, PLF has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Despite Justice John Marshall Harlan's admonition 112 years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559

---

[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(1896) (Harlan, J., dissenting), the Montana Hunting Regulation, at issue in this case, treats individuals differently based upon their race. This case raises an important issue of constitutional law—the applicability of *Morton v. Mancari*, 417 U.S. 535 (1974), to racial classifications adopted by states, without congressional authority, in light of this Court's decision in *Adarand*, 515 U.S. 200. Amicus considers this case to be of special significance in that it concerns the fundamental issue of whether *all* race-based classifications are required to be reviewed under strict scrutiny. This issue is particularly compelling when the challenged regulation authorizes any Indian tribal member to hunt big game on non-Indian-owned fee lands within any of Montana's seven Indian reservations, but the non-Indian owners of that land are excluded from hunting big game on their own property.

The Ninth Circuit's decision below is based upon the political-racial distinction set out in *Mancari*. It held that Montana's hunting preference for "[o]nly tribal members" was a political classification, not a racial classification and, thus, it was subject only to the highly deferential rational basis review. The court did not require the state to show a congressional delegation of authority. This unwarranted extension of *Mancari* opens the door for states and political subdivisions to adopt laws that create distinctions based upon race without requiring those enactments to be reviewed under strict scrutiny when challenged under the Equal Protection Clause of the Fourteenth Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case examines what standard of review applies under the Equal Protection Clause to a state regulation that excludes non-Indian owners of fee land from hunting big game on their own property while allowing any tribal member to hunt on that same non-Indian-owned fee land[2] The discriminatory Montana hunting regulation provides: "*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." Petition for Writ of Certiorari (Pet.) at 3. The discriminatory hunting regulation was adopted without federal authority for the purpose of promoting wildlife conservation while avoiding the administrative difficulties of regulating "differently for tribal members and non-members within reservations because of the varying land ownership patterns within Indian Reservations." Pet. at 3.

In the decision below, the Ninth Circuit relied upon *Mancari*, 417 U.S. 535, to find that the Montana hunting preference was a political classification, not a racial classification, subject only to rational basis review. Pet. at 2. *Mancari*'s political classification has no place here. As explained in *Washington v.*

---

[2] Through several Acts of Congress, the Crow Reservation consists of approximately 2.23 million acres. *Montana v. United States*, 450 U.S. 544, 548 (1981). "Roughly 52 percent of the reservation is allotted to members of the Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians. The State of Montana owns in fee simple 2 percent of the reservation, the United States less than 1 percent." *Id.*

Confederated Bands & Tribes of the Yakima Indian Nation: "It is settled [in *Mancari*] 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. States do not enjoy this same unique relationship with Indians." 439 U.S. 463, 500-01 (1979) (citation omitted).

Montana has an obligation to treat all its citizens alike. The Montana hunting regulation violates the equal protection rights of non-Indian fee owners of land because it discriminates against them, while providing a race-based preference to tribal members. Although *Adarand*, 515 U.S. at 227, requires all racial classifications imposed by federal, state, and local governmental actors to be reviewed under strict scrutiny, the Ninth Circuit held that the proper standard of judicial review was rational basis because the term "tribal member" was a political classification, not a racial classification. Pet. at 2.

The Ninth Circuit's reliance on *Mancari*, 417 U.S. 535, is misplaced when, as here, the actions of the state are not based upon the "special relationship" the federal government has with Indian tribes. This Court should grant the Petition for Writ of Certiorari to clarify that either *Adarand* overruled *Mancari*, or *Mancari* is limited to Congress's "special relationship" with Indian tribes under which the federal government can single out tribes for different treatment under limited circumstances without triggering heightened scrutiny—but states cannot. When state actors create a racial preference for American Indians or American Indian tribal members without federal authority, it is a racial classification subject to strict scrutiny review.

REASONS FOR GRANTING THE WRIT

This case presents a question of nationwide legal and societal importance—whether states may carve out race-based preferences for American Indians or American Indian tribal members without the express authorization of Congress, notwithstanding this Court's mandate that all race-based classifications must be reviewed under strict scrutiny. The Ninth Circuit's decision below is based upon the political-racial distinction set out in *Mancari*. Without requiring the state to show a congressional delegation of authority, the circuit court held that Montana's hunting preference for "[o]nly tribal members" was a political classification, not a racial classification, and thus, it was subject only to rational basis review. As shown below, the Ninth Circuit decision conflicts with the decisions both of this Court and other appellate decisions. These conflicts require resolution by this Court.

I

THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION OF WHETHER *ADARAND* OVERRULED *MANCARI*

The issue of *Mancari*'s continued vitality following this Court's decision in *Adarand*, 515 U.S. 200, is a constitutional question of extraordinary importance. It will determine to what extent States and their political subdivisions can discriminate in favor of Indians. This debate is occurring not only in the courts but among commentators, both before and after

Adarand.[3] This case comes before this Court because a cloud of constitutional uncertainty has cast its shadow over the proper application of this Court's pronouncement that all federal, state, and local racial classifications "must be analyzed by a reviewing court under strict scrutiny," *Adarand*, 515 U.S. at 227, and whether strict scrutiny applies to Indian classifications.

The federal government's power to deal with Indian tribes is based upon the plenary power of

---

[3] A sampling of the legal-academic commentary includes: Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996) (recognizing that *Adarand* creates an uneasy relationship between Congress' special relationship with Indian tribes recognized in *Mancari*, and the hostility to racial classifications in *Adarand*; and ultimately, between historical tradition of treating native groups differently and the idea that racial classifications are repugnant and therefore are presumed to violate equal protection norms); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 718 (2001) (*Mancari*'s overlay of race with status may have hurt as much as it helped. It is a refuge for race-conscious legislation in an *Adarand* world of race neutrality. It permits preferences and delegations of authority that otherwise would not escape strict scrutiny . . . . Moreover, the Court has yet to rise to the scholarly bait offered to replace it.); Frank Shockey, *"Invidious" American Indian Tribal Sovereignty: Morton v. Mancari Contra Adarand Constructors, Inc. v. Pena, Rice v. Cayetano, and Other Recent Cases*, 25 Am. Indian L. Rev. 275 (2000/2001); Wayne R. Farnsworth, Note, *Bureau of Indian Affairs Hiring Preferences After Adarand Constructors, Inc. v. Pena*, 1996 B.Y.U. L. Rev. 503 (1996); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. Rev. 759 (1991); Carole E. Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 UCLA L. Rev. 169 (1991); David Williams, *Sometimes Suspect: A Response to Professor Goldberg-Ambrose*, 39 UCLA L. Rev. 191 (1991).

Congress to legislate with respect to Indian tribes.[4] *Mancari*, 417 U.S. at 551-52, recognizes that it is this unique relationship the federal government has with Indians that allows it to enact legislation singling out tribal Indians; otherwise, this legislation would be constitutionally offensive. *Id.* "States do not enjoy this same unique relationship with Indians." *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. at 501.

In this case, the State of Montana adopted its discriminatory hunting regulation without federal authorization. Relying upon *Mancari*, the lower court ruled that "[t]he challenged regulation permits only 'tribal members' to hunt big game on Indian reservations in Montana. The regulation clearly classifies based on tribal membership rather than racial status as an Indian." Pet. at 2. This state law is constitutionally offense because it singled out a preference to "tribal members" only and discriminated against non-Indian owners of land that are excluded from hunting big game on their own property.

This case presents an ideal vehicle for this Court to address this important constitutional issue. The court of appeals' ruling upholding the state's authority to carve out a preference for "[o]nly Indian tribes" without a showing of federal delegation or federal authority cannot be reconciled with this Court's pronouncement on the authority of government to distinguish between and among citizens on the basis of race. In *Adarand*, this Court held: "[F]ederal racial classifications, *like those of a State*, must serve a

---

[4] Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Treaty Clause, art. II, § 2, cl. 2.

compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235 (emphasis added). Thereupon, reflecting on its ruling of a decade earlier in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court declared: "Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard [than strict scrutiny], it is no longer controlling." *Adarand*, 515 U.S. at 235. Because this Court's ruling in *Mancari*, 417 U.S. 535, held that a federal racial classification was subject to a less rigorous standard, *Mancari*, like *Fullilove*, should be deemed "no longer controlling."

In *Adarand*, this Court enunciated three propositions regarding governmental racial classifications: First, skepticism—that any preference based on racial or ethnic criteria requires searching examination and "racial classifications [are] 'constitutionally suspect.' " 515 U.S. at 223 (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). Second, consistency—that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." 515 U.S. at 222 (citing *Croson*, 488 U.S. at 494 (plurality opinion)). And third, congruence—that "Equal 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). Moreover, this Court concluded in *Adarand* that these three propositions "all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." 515 U.S. at 227. Accordingly, this Court held:

> [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.

Adarand, 515 U.S. at 227.

In *Mancari*, deciding whether an employment preference for American Indians with the Bureau of Indian Affairs (BIA) violated the equal protection component of the Due Process Clause, this Court engaged in none of the analysis later required by *Adarand*. Instead, the *Mancari* Court declared simply:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

Mancari, 417 U.S. at 555. Then, as to the employment criterion under review, the Court held: "[W]here the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violated due process." *Id.*

Although it does not appear to have been the basis upon which the *Mancari* decision turned, this Court did hold that the "preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities," that is, "the preference is political rather than racial in nature." *Mancari*, 417 U.S. at 554, n.24. Whether such a careful distinction survives *Adarand* is uncertain, especially in a setting such as this one where Congress, the BIA, tribal sovereignty, or

self-governance is not implicated.[5] Instead, the race-based preference was created by a state without any federal authority whatsoever solely for the purposes of wildlife conservation and administrative convenience.

Because the Montana hunting regulation carves out a special exception to benefit members of an American Indian tribe, the court of appeals should have applied strict scrutiny to determine the validity of the regulation. Instead, relying upon the "highly deferential" rational basis test announced in *Mancari*, the lower court held that the application of strict scrutiny was not required, that so long as there is "some legitimate government purpose for carving out an exemption to benefit tribal members only, the state's actions creating the race-based preference would not be disturbed." Pet. at 2-3.

Such a broad interpretation of *Mancari* would allow any state or local government to treat Indians and non-Indians differently in virtually any legislation or regulatory measure. Amicus acknowledges that no lower court should conclude that this Court's "more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). It is precisely because only this Court has the

---

[5] This Court has struck down American Indian preferences when the legislation classified on the basis of race. For instance, in *Adarand*, the presumptively disadvantaged groups were "'Black Americans, Hispanic Americans, *Native Americans*, Asian Pacific Americans, and other minorities.'" *Adarand*, 515 U.S. at 205 (quoting Small Business Act, 15 U.S.C. § 637(d)(2)-(3) (1994)) (emphasis added). In *Croson*, the relevant definition was United States citizens who are "'Blacks, Spanish-speaking, Orientals, *Indians*, Eskimos, or Aleuts.'" *Croson*, 488 U.S. at 478 (quoting Richmond, Va., City Code, 12-23 (1985)) (emphasis added).

authority to overrule or limit its own prior holdings that the writ should be granted, to reconcile the tension between *Adarand* and *Mancari* on whether reviewing courts should apply strict scrutiny or the rational basis test to actions by states and their political subdivisions that carve out special benefits for members of Indian tribes.

II

THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *MANCARI* AND *RICE V. CAYETANO*

In rejecting Randy Roberts' equal protection argument, the court of appeals concluded that the race-based Montana hunting regulation is at least rationally related to "legitimate governmental purposes." Pet. at 3. However, the state was unable to cite to any federal statute authorizing them to provide such a preference. Nonetheless, the court below assumed that as long as the classification is based on membership in federally recognized Indian tribes, the classification is "political, rather than racial, and thus subject to rational basis review." Pet. at 2. Thus, the court of appeals extended *Mancari* to mean that the state and its political subdivisions may carve out a preference for American Indians and American Indian tribal members without specific authorization from Congress. This decision runs afoul of this Court's decisions in both *Mancari* and *Rice v. Cayetano*, 528 U.S. 495 (2000).

Mancari was the first time in which this Court was confronted with an equal protection challenge to a law benefitting American Indians. In *Mancari*,

non-Indian employees of the BIA argued that a BIA employment preference for Indians, authorized by a statute allowing Indian preferences,[6] violated the equal protection component of the Due Process Clause of the Fifth Amendment. This Court's discussion of the equal protection challenge was fairly brief but noted the "unique legal status of Indian tribes under federal law" and the "plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes." *Mancari*, 417 U.S. at 551. This Court found the special preference was justified because "as members of quasi-sovereign tribal entities," the "lives and activities [of Indians] are governed by the BIA in a unique fashion." *Id.* at 554. This Court concluded: "[T]he legal status of the BIA is truly *sui generis*." *Id.* Moreover, this Court limited its holding to "particular and special" legislation "designed to further Indian self-government." *Id.* at 555.

As long as this Court could characterize the special benefits to Indian Tribes as being extended on a government-to-government basis through acts of Congress, it could distinguish a special preference from suspect classifications that are subject to strict scrutiny. Here, the court of appeals' decision ignored the requirement in *Mancari* that the legislation be tied rationally to Congress' trust responsibility to Indian Tribes. In the present case, there is no evidence of any congressional authorization for the state to treat Indians differently under the Montana hunting regulation. In enacting the regulation, Montana had no federal authorization and the state regulation singling out tribal Indians is constitutionally offensive.

---

[6] The BIA was acting pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461, *et seq.*

The state's sole purpose was to preserve wildlife and it was logistically difficult to regulate nontribal members because of varying land ownership patterns. Pet. at 3. Yet, the court of appeals simply extended *Mancari* to uphold the state's actions of creating a preference for "tribal members" only for administrative convenience.

Further, the court of appeals' decision conflicts with *Rice*, 528 U.S. at 520. In *Rice*, this Court declined an invitation to extend *Mancari* to a new and larger dimension. Justice Kennedy explained that *Mancari* turned on quasi-sovereign authority relating to self-governance, which caused this Court to uphold "a federal provision giving employment preferences to persons of tribal ancestry." *Id.* at 518 (citing *Mancari*, 417 U.S. at 553-55). But, distinguishing the facts of *Mancari* from those before it, the Court declared that the legislative preference in *Mancari* was "'designed to further Indian self-government.'" *Id.* at 520 (quoting *Mancari*, 417 U.S. at 555). The Court in *Mancari* "was careful to note, however, that the case was confined to the authority of the BIA, an agency described as '*sui generis*.'" *Id.* (quoting *Mancari*, 417 U.S. at 554).

This Court has never accepted the rationales to promote wildlife and administrative convenience to justify an Indian preference, and to do so would ignore the "limited" nature of the *Mancari* exception and the "racial component" of *Mancari* recognized in *Rice*. This Court said: "It does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all Non-Indian citizens." 528 U.S. at 520. Similarly, "[i]t does not follow from *Mancari* . . . that Congress may authorize a State to establish a . . . scheme that limits

[hunting] to a class of tribal Indians, to the exclusion of all Non-Indian citizens." *Id.* at 497.[7] *Mancari* and *Rice* do not justify giving tribal members a preference simply because it promotes conservation of wildlife and is easier to enforce. Such a rationale would justify laws of all sorts and greatly alter equal protection jurisprudence.

In contrast, without any analysis whatsoever, the court below simply assumed that as long as the regulation classified on the basis of "tribal membership" it was required to apply the *Mancari* "highly differential" rational basis test—nothing more was needed.

By its decision below, the Ninth Circuit "extend[ed] the limited exception of *Mancari* to a new and larger dimension," *Rice*, 528 U.S. at 520, by according the states the same treatment as this Court accorded the BIA (notwithstanding this Court's caution that the BIA is truly *sui generis*, *Mancari*, 417 U.S. at 554), and by applying the language of *Mancari* to all matters tribal notwithstanding this Court's admonition that *Mancari* was limited solely to matters relating to quasi-sovereign authority and self-governance, *Rice*, 528 U.S. at 518, 520).

---

[7] The Court of Appeals cited two other decisions to support its rational basis review. Pet. at 2. *Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004). Neither of these decisions supports the broad proposition that tribes may be granted any preference.

III

THERE IS CONFUSION AMONG THE LOWER COURTS ON THE CONSTRUCTION OF *MANCARI*'S TEST

There is confusion among the lower courts on the construction and application of the *Mancari* test when the racial classification is aimed at assisting American Indians. In the decision below, the court said that the exemption carved out by the state for "[o]nly tribal members" meets the "highly deferential" rational basis test of *Mancari* simply because it involves American Indian tribes. This was so, according to the court below, even though there is no indication that Congress intended to authorize the states to regulate hunting on non-Indian fee property. The court of appeals did not independently examine whether the exemption was rationally tied to federal authority, but simply deferred to the state because it created a classification based "[o]nly on tribal membership." Pet. at 2-3.

In *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), the Ninth Circuit recognized that because the interpretation of the Reindeer Act of 1937, 50 Stat. 900 (Sept. 1, 1937), 25 U.S.C. § 500, *et seq.*, by the Interior Board of Indian Appeals (IBIA) created a racial classification that "pushes the constitutional envelope," the reviewing court was required to conduct its own examination.[8] The Ninth Circuit accepted that there

[8] The Ninth Circuit declined to defer to the agency's interpretation under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), explaining that when a federal agency's interpretation raises grave and serious constitutional doubts, reviewing courts are required "to scrutinize constitutional objections to a particular

(continued...)

was doubt as to the appropriate standard of constitutional review. It recognized that in *Adarand*, Justice Stevens dissented on several grounds, but objected that the majority's concept of consistency would subject preferences for American Indians or American Indian tribal members to the same scrutiny as invidious discrimination against minorities. *Williams*, 115 F.3d at 665 (citing *Adarand*, 515 U.S. at 244-45 (Stevens, J., dissenting)). The Ninth Circuit speculated that "[i]f Justice Stevens is right about the logical implications of *Adarand*, *Mancari*'s days are numbered." *Id.* at 665.

With these constitutional doubts unresolved, the Ninth Circuit in *Williams* assumed that the *Mancari* doctrine retained some vitality as long as the legislation provides "special treatment [that] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Williams*, 115 F.3d at 663. As explained by the Ninth Circuit:

> [Federal] Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions."

Id. (quoting *United States v. Antelope*, 430 U.S. 641 (1977)).

Applying this construction of *Mancari*, the Ninth Circuit in *Williams* found that IBIA's interpretation of the Reindeer Act, as barring all in Alaska who are not

---

[8] (...continued)
agency interpretation skeptically." *Williams*, 115 F.3d at 662.

Natives from owning imported reindeer, was wrong. The court reasoned that it provided "a naked preference for Indians unrelated to unique Indian concerns," because it involved a commercial industry "that is not uniquely native." The court found that the special preference "in no way relate[d] to native land, tribal or communal status, or culture." *Williams*, 115 F.3d at 664.

Based upon this construction of *Mancari*, the Ninth Circuit concluded that the Secretary's construction of the Act, albeit "not unreasonable" and otherwise entitled to deference under *Chevron*, raised "constitutional problems [that] are truly 'grave,'" which called judicial "constitutional narrowing" into play. *Id.* The court then adopted what it deemed to be a "less constitutionally troubling construction" of the Act, namely, "as not precluding non-natives in Alaska from owning and importing reindeer." *Id.* at 666.

In sharp contrast to the *Williams* decision, the court below carved out an "[o]nly tribal member" preference for hunting big game on fee land owned by non-Indians for the purpose of conserving wildlife and for administrative convenience. It is a "naked preference for Indians" that favors "tribal members" and discriminates against non-Indians who own fee land. Given the grave constitutional concerns raised by such a troubling regulatory regime, this Court should review the Ninth Circuit's understanding and application of the constitutional principles involved.

Another example of the conflict between *Adarand* and *Mancari* is found in *In re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (2001). There, the California appellate court applied strict scrutiny to the

federal Indian Child Welfare Act, 25 U.S.C. § 1901. The court noted:

> Post-*Adarand* Ninth Circuit Court of Appeals cases have focused on the text of *Mancari*, rather than on the footnote language that characterized the BIA preference as more political than racial, and have limited application of the rational basis test to legislation involving uniquely Indian concerns. (*Dawavendewa v. Salt River Project Agr. Imp.* (9th Cir. 1998) 154 F.3d 1117; *Williams v. Babbitt* (9th Cir. 1997) 115 F.3d 675; *Malabed v. North Slope Borough* (D. Alaska 1999) 42 F. Supp. 2d 927.) We do likewise, and do not find child custody or dependency proceedings to involve uniquely Native American concerns.

92 Cal. App. 4th at 1320-21.

The conflict in the courts over the proper standard of review for an American Indian preference is of pressing national importance that must be—and can only be—resolved by this Court.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: November, 2008.

Respectfully submitted,

SHARON L. BROWNE
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

Blank Page