No. 98-1628

In the Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER

v.

HAROLD DAWAVENDEWA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an employer's preference for members of a particular Tribe constitutes a form of discrimination on the basis of "national origin" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2.

2. Whether such a preference is justified by the Indian preference exemption to Title VII, 42 U.S.C. 2000e-2(i).

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Salt River Project (petitioner) is a municipal corporation and political subdivision of the State of Arizona. Pet. 2; Pet. App. 2a. Petitioner operates a generating station that is located within the boundaries of the Navajo Indian Reservation. Pet. App. 2a. Petitioner has operated the station pursuant to a lease agreement entered into with the Navajo Nation in 1969. *Ibid.* That lease requires petitioner to give an employment preference to qualified members of the Navajo Nation living on land within the Nation's jurisdiction.

Ibid. In the event that such persons are not available, preference must then be given first to non-local Navajos, then to non-Navajos. *Id.* at 2a-3a & n.2.

In 1991, Harold Dawavendewa (respondent) applied for a position at petitioner's generating station. Pet. App. 3a. Respondent is a member of the Hopi Tribe and lives less than three miles from the Navajo reservation. *Ibid.* Respondent passed petitioner's employment test, but after petitioner determined that respondent is not a member of the Navajo Nation, it rejected his application. *Ibid.* Respondent filed suit against petitioner, alleging that petitioner had discriminated against him on the basis of national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 3a.

Petitioner filed a motion to dismiss for failure to state a claim. Pet. App. 4a. Petitioner argued that its preference for members of the Navajo Nation reflects a distinction based on political affiliation, rather than national origin. *Ibid.* Petitioner alternatively argued that its policy is justified by the Indian preference exemption to Title VII set forth in 42 U.S.C. 2000e-2(i). Pet. App. 4a. That provision states that

> [n]othing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

42 U.S.C. 2000e-2(i).

The district court granted petitioner's motion to dismiss. Pet. App. 20a-27a. It ruled that petitioner's pref-

erence for members of the Navajo Nation is protected by the Indian preference exemption. *Id.* at 23a-27a.

2. The court of appeals reversed. Pet. App. 1a-19a. The court first ruled that discrimination on the basis of tribal affiliation constitutes national origin discrimination within the meaning of Title VII. *Id.* at 4a. The court reasoned that, "[b]ecause the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a 'national origin' claim under Title VII." *Id.* at 7a.

The court of appeals rejected petitioner's contention that, under *Morton* v. *Mancari*, 417 U.S. 535 (1974), a preference for tribal members is based on political affiliation rather than national origin. Pet. App. 7a-8a. The court distinguished *Mancari* on the grounds that (1) *Mancari* did not involve a claim of discrimination on the basis of membership in a particular tribe, (2) *Mancari* involved a constitutional claim rather than a Title VII claim, and (3) the preference involved in *Mancari* furthered an interest in tribal self-governance. *Ibid.*

The court of appeals next held that the Indian preference exemption does not authorize discrimination based on tribal affiliation. Pet. App. 11a-19a. The court noted that the text of the exemption extends protection to "preferential treatment given . . . to any individual *because he is an Indian* living on or near a reservation." Pet. App. 11a (quoting 42 U.S.C. 2000e-2(i)). The court further noted that "[t]he term 'Indian' is generally used to draw a distinction between Native Americans and all others." Pet. App. 11a. The court concluded that a preference for members of a particular Tribe falls outside the scope of the exemption, because it "does not afford preference to an applicant 'because

he is an Indian,' but rather because he is a member of 'a particular tribe.'" *Id.* at 11a-12a.

The court of appeals also concluded that a Tribe-specific preference is not consistent with the objectives of the Indian preference exemption. Pet. App. 12a. In the court's view, the purpose of the exemption is "to permit the favoring of Indians over *non-Indians*," not "to permit employers to favor members of one Indian tribe over another." *Ibid.* The court therefore concluded that, in order to fall within the terms of the exemption, "[t]he reason for the hiring must be because the person is an Indian, not because he is a Navajo, a male Indian, or a member of any other formal subset of the favored class." *Ibid.*

In reaching that conclusion, the court of appeals gave "due weight" to the position of the Equal Employment Opportunity Commission (EEOC). Pet. App. 11a. In a 1988 policy statement, the EEOC took the position that the "extension of an employment preference based on tribal affiliation" is not protected by the Indian preference provision. *Policy Statement on Indian Preference Under Title VII (EEOC Policy Statement)*, [8 Fair Empl. Prac. Man.] Lab. Rel. Rep. (BNA) 405:6647, 405:6653 (May 16, 1988).

The court rejected petitioner's reliance on the 1994 Amendments to the Indian Self-Determination Act (ISDA), which provide that, with respect to employment under "self-determination" contracts between a Tribe and the Departments of the Interior and Health and Human Services, "tribal employment or contract preference laws adopted by such tribe shall govern." 25 U.S.C. 450e(c). Pet. App. 13a-16a. The court reasoned that those amendments have "little if anything to do" with what Congress intended when it enacted Title VII, that ISDA and Title VII serve "fundamentally

different purposes," that ISDA "governs a very limited set of employment situations," and that petitioner is not acting pursuant to an ISDA contract. *Id.* at 15a. The court added that the 1994 Amendments demonstrate that "when Congress wishes to allow tribal preferences, it adopts an appropriate amendment to the applicable statute." *Id.* at 16a.

Finally, the court of appeals noted "the possible inequities that would arise in allowing tribal affiliation discrimination, particularly in areas where there are many different tribal reservations." Pet. App. 17a. The court observed that, under petitioner's interpretation of the Indian preference exemption, "any private employer situated near a Hopi *and* Navajo reservation could arbitrarily institute a blanket-policy of preferential treatment towards members of one or the other of the tribes." *Id.* at 17a-18a. The court concluded that "[w]ithout a clear indication to the contrary, this appears to be the sort of individual discrimination wholly within the scope of Title VII." *Id.* at 18a.

DISCUSSION

The court of appeals correctly held that an employment preference based on tribal affiliation is a form of national origin discrimination within the meaning of Title VII and that Title VII's Indian preference exemption does not justify such a preference. The court's holdings are consistent with the position of the EEOC, the agency charged with primary responsibility for enforcing Title VII. No other court of appeals has addressed either of the questions raised by petitioner. Moreover, this case is in an interlocutory posture, and petitioner would not be barred from presenting other arguments in defense of its preference on remand to the

district court. The petition for a writ of certiorari should therefore be denied.

1. Petitioner contends (Pet. 19-21) that discrimintion based on tribal affiliation is not a form of "national origin" discrimination within the meaning of Title VII. That contention is without merit.

In *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 88 (1973), the Court construed the term "national origin" to include "the country where a person was born, or, more broadly, the country from which his or her ancestors came." After *Espinoza*, a lower court held that discrimination against Cajuns who could trace their ancestry to Acadia constituted discrimination based on national origin, even though Acadia was not and had never been an independent nation. *Roach* v. *Dresser Indus. Valve & Instrument Div.*, 494 F. Supp. 215 (W.D. La. 1980). The EEOC subsequently revised its definition of national origin discrimination to reflect its approval of that decision. The EEOC's current regulations define national origin discrimination to include "the denial of equal employment opportunity because of an individual's or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. 1606.1; see also *Pejic* v. *Hughes Helicopters, Inc.*, 840 F.2d 667, 673 (9th Cir. 1988) (holding that discrimination against Serbians constitutes discrimination based on national origin even though Serbia as a nation had become extinct).

Under *Espinoza* and the EEOC's regulations, a preference that is extended only to members of a particular Indian tribe constitutes discrimination based on "national origin" within the meaning of Title VII. Before the arrival of the Europeans, Tribes had the status of independent nations. *Worcester* v. *Georgia*, 31 U.S. (6

Pet.) 515, 559-561 (1832). Moreover, while Tribes are no longer fully independent, they retain their status as "domestic dependent nations." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Discriminating against an individual because he is not a member of a particular Tribe is therefore a form of national origin discrimination within the meaning of Title VII. As the court of appeals explained, "[b]ecause the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a 'national origin' claim under Title VII." Pet. App. 7a.

Petitioner does not challenge the court of appeals' conclusion that a particular Tribe is a "nation" of origin for purposes of Title VII. Instead, petitioner argues (Pet. 19-21) that, under *Morton* v. *Mancari*, 417 U.S. 535 (1974), a preference extended to members of a particular Tribe is necessarily based on political affiliation, rather than national origin. Petitioner's reliance on *Morton* is misplaced.

In *Morton*, the Court upheld the constitutionality of a federal law extending a preference for employment in the Bureau of Indian Affairs (BIA) to members of federally recognized tribes. The Court rested its decision 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 a 'guardian-ward' status, to legislate on behalf of federally recognized tribes." 417 U.S. at 551. The Court emphasized that if laws "designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552. In that legal and historical context, the

Court concluded that the Indian employment preference was not a "racial preference," because it "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 553-554. More generally, the Court held that, "[a]s long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. Because the BIA employment preference rationally served the "non-racial" goals of "further[ing] the cause of Indian self-government," and "mak[ing] the BIA more responsive to the needs of its constituent groups," it did not violate constitutional equal protection principles. *Id.* at 554.

The preference at issue in this case was not adopted by the federal government as part of its "unique obligation toward Indians." Instead, it was adopted by a municipal employer acting without congressional authorization. Petitioner's assertion that the decision below conflicts with *Mancari* is therefore incorrect. Contrary to petitioner's contention, nothing in *Mancari* suggests that all preferences based on membership in an Indian Tribe should be regarded as being based on political affiliation, rather than national origin. If that were the case, any employer anywhere in the country might claim to be free to hire (or refuse to hire) individuals affiliated with a particular Tribe, even where there was no congressional authorization or reservation nexus.

Because the Navajo Nation has an ordinance that requires that a preference must be given to its members for work performed on its Reservation, and a similar preference is contained in the lease between the

Navajo Nation and petitioner concerning the use of land held in trust for the benefit of the members of the Nation, petitioner's preference for members of the Navajo Nation could arguably be viewed as "political." Petitioner, however, has not made that more limited argument. Instead, it has argued (Pet. 19-21) that *all* preferences based on membership in a Tribe are necessarily political and therefore not based on "national origin" within the meaning of Title VII. The court of appeals correctly rejected that contention.

Moreover, unlike the Constitution, Title VII prohibits not only practices that facially or intentionally discriminate on the basis of national origin, but also those that cause "a disparate impact on the basis of * * * national origin" unless they can be justified as "job related" and "consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i); see *Espinoza*, 414 U.S. at 92; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). An on-reservation employer's preference for members of a particular Tribe in conformity with a tribal ordinance, even if facially "political," plainly has the effect of preferring persons of a particular national origin group. Ordinarily, a preference that has such an effect violates Title VII unless it can be justified as job-related and consistent with business necessity. The court of appeals did not address the questions whether an on-reservation employer's preference for members of a particular Tribe in conformity with an ordinance of that Tribe (or the terms of a lease of the trust property of that Tribe) should be viewed as a political classification, whether such a preference should be viewed as having the effect of preferring persons on the basis of political affiliation rather than national origin, and whether, if viewed as having the effect of preferring persons on the basis of national origin, it could be

justified as job related and consistent with business necessity.[1] Review of those questions is therefore not warranted here. Those issues should be left for further development in the courts below in this case or future cases and in other courts of appeals.[2]

2. Petitioner also contends (Pet. 12-19) that a preference for members of a particular Tribe is justified by the Indian preference exemption. The court of appeals correctly rejected that contention.

a. By its terms, the Indian preference exemption applies when "preferential treatment is given to any individual because he is an Indian living on or near a reservation." 42 U.S.C. 2000e-2(i). For two reasons, that statutory text is most naturally read to authorize a preference for all Indians who live on or near a

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[1] The court of appeals likewise did not consider any argument that the treaty between the Navajo Nation and the United States, or any Acts of Congress governing the leasing or other use of property held in trust for a Tribe or its members, would furnish a justification for the preference challenged in this case.

[2] In *Rice* v. *Cayetano*, cert. granted, 120 S. Ct. 31 (1999) (No. 98-818), we have argued (Br. 11-30) that a congressionally authorized state law that provides that only Native Hawaiians may vote for members of the Office of Hawaiian Affairs creates a political classification and does not discriminate on the basis of race in violation of the Fourteenth or Fifteenth Amendments to the Constitution. Because the preference at issue here is not authorized by any Act of Congress identified by petitioner, because this case arises under Title VII rather than the Constitution, and because the narrower arguments concerning political classification based on the Navajo Nation ordinance and lease are not appropriately presented here, the question whether petitioner's preference should be regarded as national origin discrimination under Title VII is fundamentally different from the question at issue in *Rice*. This case therefore need not be held until this Court issues its decision in *Rice*.

reservation, not to authorize a preference for members of a particular Tribe who live on or near a reservation. First, when a preference is extended only to members of a particular Tribe who live on or near a reservation, rather than to all Indians who live on or near the reservation, it is difficult to say that the preference is extended to "any" individual because he is an Indian living on or near a reservation. And second, as the court of appeals explained (Pet. App. 11a-12a), a Tribe-specific preference is most readily understood as being given to an individual "because he is a member of a particular Tribe" living on or near a reservation, not "because he is an Indian" living on or near a reservation.

The facts of this case illustrate both points. Petitioner preferred members of the Navajo Nation over respondent, even though respondent is an Indian living near the Navajo reservation. If petitioner's preference had extended to "any" individual because he is an Indian living on or near a reservation, respondent presumably would have been eligible for it. Moreover, since both respondent and members of the Navajo Nation in the vicinity are Indians living on or near the reservation, it is difficult to say that a member of the Navajo Nation received a preference over respondent "because he is an Indian" living on or near a reservation. In ordinary usage, such an individual received a preference over respondent "because he is a member of the Navajo Nation" living on or near a reservation. The text of the exemption therefore supports the court of appeals' conclusion that the exemption does not protect preferences for members of a particular Tribe.

Even more important, petitioner's construction would lead to results we doubt Congress intended. Because the Indian preference provision applies not only

"on" a reservation, but also "near" a reservation, petitioner's interpretation would permit a major employer that is located near (but not on) the Navajo and Hopi Reservations to *unilaterally* prefer members of one of those Tribes. As the court of appeals explained (Pet. App. 18a), "[w]ithout a clear indication to the contrary, this appears to be the sort of individual discrimination wholly within the scope of Title VII."

The court of appeals' decision is also consistent with the EEOC's interpretation of the Indian preference exemption. In a 1988 policy statement, the EEOC expressed its considered view that the Indian preference exemption does not protect tribe-specific preferences. *EEOC Policy Statement* 405:6653. The EEOC reiterated that view in an amicus brief filed in the court below. Because the EEOC is the agency primarily charged with the responsibility of enforcing Title VII, the court of appeals appropriately gave the EEOC's view "due weight." Pet. App. 11a. See *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991).

The court of appeals' interpretation of Title VII's Indian preference exemption is also consistent with a substantial body of federal regulatory law. The issue of Indian-based employment preferences arises in several contexts. Most notably, it arises in the context of programs that impose requirements on federal contractors. A number of regulations require or permit these contractors to grant employment preferences to Indians. Those regulations make clear that, to be valid, an Indian preference may not make distinctions on the basis of tribal affiliation. See, *e.g.*, 48 C.F.R. 22.807(b)(4) (permitting federal contractors "to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near

an Indian reservation"; contractors may not "discriminate among Indians on the basis of * * * tribal affiliation"); 48 C.F.R. 352.270-2(a) (contractors with the Department of Health and Human Services permitted to grant preferences to "Indians" but not on the basis of "tribal affiliation"); 48 C.F.R. 1452.226-70 (contractors with the Department of Interior permitted to grant preferences to "Indians" but not on the basis of "tribal affiliation"); see also 23 C.F.R. 635.117(d) (permitting a state highway agency to extend "preferential employment to Indians living on or near a reservation" but stating that any such preference shall be applied "without regard to tribal affiliation"); 25 C.F.R. 256.3(b) (providing housing assistance to "[e]very Indian * * * regardless of tribal affiliation").

b. Petitioner contends (Pet. 12-13) that the court of appeals' interpretation ignores the analytical framework that this Court has established for deciding important issues of Indian law. In particular, petitioner argues (Pet. 12-13) that the court of appeals failed to apply the principle that "[t]raditional notions of Indian self-government" serve as an "an important 'backdrop' against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980) (citation omitted). In petitioner's view, the court of appeals' interpretation intrudes on tribal sovereignty because it precludes an employer who has a business on a reservation from adopting a tribe-specific preference pursuant to an agreement with the Tribe.

Petitioner's proposed construction of the Indian preference exemption, however, is not limited to protecting preferences that promote tribal sovereignty. As we have explained, petitioner's proposed construction would also permit an employer located *near* two res-

ervations to *unilaterally* favor members of a single Tribe. Indeed, taken to its logical extreme, petitioner's proposed construction would permit a reservation employer, disgruntled with the local governing Tribe, to prefer members of another nearby Tribe. Those kinds of preferences cannot be justified by the principle that petitioner invokes. Nor is there any basis in the text of Title VII's Indian preference exemption for distinguishing between those kinds of Tribe-specific preferences and the one at issue here. Because petitioner's construction of the Indian preference exemption would protect preferences that are unjustified by traditional notions of tribal sovereignty, as well as preferences that actually conflict with traditional notions of tribal sovereignty, the principle involved in *White Mountain Apache Tribe* does not support petitioner's reading of that exemption.

Petitioner also errs in contending (Pet. 11, 15-16) that the court of appeals' interpretation of the Indian Preference exemption conflicts with the 1994 Amendments to the ISDA. Those Amendments address the use of Tribe-specific preferences in the context of "self-determination" contracts with the Departments of Interior and Health and Human Services that are "intended to benefit one tribe." 25 U.S.C. 450e(c). In that limited context, ISDA provides that "tribal employment or contract preference laws adopted by [a] tribe shall govern with respect to the administration of [a self-determination contract]." 25 U.S.C. 450e(c). The 1994 Amendments therefore authorize Tribe-specific preferences only with respect to certain "self-determination" contracts and only when the preferences are based on tribal laws. They do not sanction Tribe-specific preferences in any other circumstances. Since petitioner is not acting pursuant to an ISDA self-determination

contract (Pet. App. 15a), the 1994 ISDA Amendments are inapposite here.[3]

3. Finally, the court of appeals' holdings in this case do not affect the Tribe's authority to hire on the basis of tribal status. Tribal employers are entirely exempt from the reach of Title VII. See 42 U.S.C. 2000e(b) (excluding Tribes from Title VII's definition of "employer"). Nor does the decision below affect a reservation-based employer's ability to adopt, or a Tribe's authority to require, a general Indian preference. Such a preference will in many cases result in employment opportunities for the Tribe's own members. The only questions involved in the present petition are whether an employer's preference for members of a particular Tribe is a form of discrimination based on national origin and whether such a preference is justified by the Indian preference exemption. Because the court below correctly resolved those questions, and because no other court of appeals has addressed them, review by this Court is not warranted.

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[3] Petitioner contends (Pet. 11) that the court of appeals erred in failing to resolve the conflict that might exist between Title VII and ISDA in a case in which a private employer is performing work under a contract issued pursuant to ISDA. As the court of appeals explained (Pet. 17a & n.15), however, since petitioner is not acting pursuant to the ISDA, there is no occasion to resolve that potential conflict in this case. We note that the principles for resolving such a conflict are well established. See *Mancari*, 417 U.S. at 550-551 (when a general statute and a more specific statute conflict, the more specific statute controls).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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