Winnter, Best Appellate Brief in the 2009 Native American Law Student Association Moot Court Competition

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Statement of Issues

I. Does the Fort Howe State tuition waiver policy violate the Colorado state constitutional prohibition on racial preferences by requiring that a student prove the existence of ancestral ties to a historical Colorado tribe in order to be eligible for the waiver?

II. Does the Fort Howe State tuition waiver policy violate the Equal Protection Clause of the Fourteenth Amendment?

Statement of the Case

I. Proceedings and Disposition in the Court Below

This appeal stems from a dispute regarding the legality of a tuition waiver policy of Fort Howe State University (hereinafter FHSU), a state university located in Bancos, Colorado. Since 1978, FHSU has followed a policy of granting tuition waivers to certain American Indian students who can prove ancestral ties to American Indian tribes that inhabited Colorado in the past. In 2007, Colorado citizens passed a constitutional amendment (hereinafter Colorado Racial Preference Ban) that bans the use of racial or gender preferences in any state-funded programs. A challenge to the constitutionality of the FHSU waiver policy followed shortly after this amendment was adopted.

In January 2008, plaintiff Tammy Chapman filed a lawsuit in federal district court alleging that the FHSU tuition waiver policy violated both the state constitutional amendment and the federal Equal Protection Clause. Chapman, a non-Indian student at FHSU, was subsequently joined by Elisa Begay, a

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Navajo tribal member who also attended FHSU. Plaintiffs claimed that FHSU granted the tuition waivers on the basis of race and unconstitutionally discriminated against non-Indian students and Indian students who were not connected to either specified tribe as a result.

In response, FHSU filed a motion for summary judgment arguing that the policy was not a racial preference, but instead a political preference that advanced an important state objective of ensuring that American Indians have access to public educational opportunities. FHSU contended that the policy was necessary to satisfy Colorado’s unique obligation to descendants of tribes whom it displaced or otherwise harmed in the past. The plaintiffs filed an opposing reply and a cross-motion for summary judgment. The lower court found that the tuition waiver preferences were not racial preferences on their face, but instead were of a political character designed to benefit students whose ancestors belonged to groups to whom the State of Colorado has a unique obligation. The lower court held that because the preferences were not racial, they did not violate the state constitutional amendment.

The lower court also found that the policy did not violate the Equal Protection Clause because it was consistent with federal policies regarding Indian education. Though the court acknowledged that states may not make their own Indian policy, it ruled that state policies that are in accord with federal objectives advance the unique obligation owed to Indian tribes. Based on these findings, the lower court granted summary judgment to FHSU, and the plaintiffs subsequently brought this appeal.

II. Statement of the Facts

FHSU explains the rationale underlying its tuition waiver policy in an official statement outlining the eligibility criteria and aims of the policy. The university’s statement touches on its own unique history, the historical interactions between the state and particular tribes, and the particular remedies the policy is designed to provide. The statement reads in full:

Fort Howe State University is a state-funded public institution of higher education. The land that the Fort Howe campus occupies is land that was once the territory of the Ute tribes. The wealth and prosperity that helped to create the Colorado state system of higher education can be traced in no small part to the state’s role in divesting the Utes, and the other Indian tribes that inhabited the Colorado territory, of their natural resources, their hunting grounds, and ultimately their homes. In addition, federal and state policies during the late nineteenth and early twentieth centuries directed
public money to educational programs designed to destroy the cultural and political life of Colorado’s tribes. To repair these historical wrongs, and to enrich the cultural and intellectual diversity of the educational environment at Fort Howe State University, Fort Howe offers a full tuition waiver to American Indians who can trace their heritage to an historical Colorado Indian tribe. Members of the Ute Mountain Ute and Southern Ute tribes are automatically eligible for the tuition waiver. Other American Indian applicants will be considered on a case-by-case basis to determine their eligibility for the tuition waiver, consistent with its stated purposes.

The eligibility criteria establish a three-tiered system of preferences based on the degree of an applicant’s ancestral connection to a historical Colorado Indian tribe. Enrolled members of the Ute Mountain Ute or Southern Ute tribes are automatically eligible. Members of other federally recognized tribes who can show lineal descent from either of these tribes are also eligible. Finally, FHSU has also waived the tuition of at least one student who was ethnically American Indian, had cultural and political connections to her tribe, could trace her ancestry to one of the historical Colorado tribes, but was not a member of any federally recognized tribe.

Although FHSU enacted the tuition waiver policy in 1978, no student applied for the scholarship until 1985. Over the next twenty-three years, the university granted the tuition waiver to twenty-seven students. Fifteen recipients were enrolled in the Southern Ute Tribe, and ten recipients were enrolled in the Ute Mountain Ute Tribe. One recipient was enrolled in the Navajo tribe with Southern Ute ancestry, and one recipient was of Taos Puebloan, Southern Ute, and Lakota Sioux heritage but had insufficient blood quanta to be enrolled in any of those tribes. Every recipient of the tuition waiver has been ethnically American Indian, which is a necessary, but not sufficient condition according to the policy’s terms.

In addition to the official policy statement’s explanation of the purpose behind the tuition waivers, FHSU also claimed in the lower court that the policy was intended to assure that Indians had access to educational opportunities. As a general proposition, there are significant disparities between the educational performance of Indian students and white students. Although FHSU did not submit any empirical data that specifies the effects or harm that tribal members suffered due to the historical settlement of Colorado, Jay House, an enrolled Navajo whose maternal grandparents were Southern Ute, indicated in a signed affidavit that he would not have been able to attend FHSU without the benefit of the tuition waiver.
The Colorado Racial Preference Ban does not include an exception for state programs that advance a compelling interest. It imposes a per se prohibition on preferences based on race or gender. Thus, if the policy is found to create a racial preference, the policy is illegal in Colorado.

III. Standard of Review

This appeal stems from a summary-judgment motion that the lower court granted to defendants-appellees. This court reviews grants of motions for summary judgment de novo. See Gutierrez v. City of San Antonio, 139 F.3d 441 (5th Cir. 1998). Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). This court must consider all materials in the light most favorable to the party opposing the motion for summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The judge's function at the summary-judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Appellees respectfully submit that no dispute of material fact exists and that the lower court correctly held that FHSU is entitled to summary judgment as a matter of law.

IV. Argument

I. The Fort Howe State University Tuition Waiver Is Valid Under the Colorado Ban on Racial Preferences Because It Is Based on a Political Classification

Indian tribes have a political relationship with the federal government. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). This relationship has fostered a variety of federal policies that promote differential treatment based on the status of tribes as independent sovereigns. Ignorance of the unique character of this relationship would suggest that such differential treatment is based on race. Indeed, the Supreme Court recognizes that members of Indian communities share a common race. Montoya v. United States, 180 U.S. 261, 266 (1901); United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846); Cherokee Nation, 30 U.S. (5 Pet.) at 22. But the Court has never found this as a basis to invalidate legislation that singles Indians out for differential treatment. Rather, it has recognized that such legislation is justified in light of the extra-racial status of tribal sovereigns under the Constitution. That
document expressly identifies tribes as political entities with whom the federal government will interact. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."). In order to understand the disputed issues before this court, it is vital to acknowledge that tribes are "distinct political communities." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). This legal principle governs the analysis of governmental programs dealing with Indians as a discrete class.

A. FHSU’s Tuition Waiver Policy Enacts a System of Differential Treatment for a Discrete Class of Individuals Who Descend from Select Tribes with Whom Colorado Has a Unique Historical and Political Relationship

The federal government has numerous responsibilities to Indian tribes, which have a unique legal stature in the American political system. Though tribes retain a degree of inherent sovereignty, they are nevertheless subject to the plenary power of Congress. See, e.g., Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 531 n. 6, (1998); United States v. Wheeler, 435 U.S. 313, 319 (1978); Lone Wolf v. Hitchcock, 187 U.S. 553, 564-65 (1903); United States v. Kagama, 118 U.S. 375, 384-85 (1886). The exercise of plenary power dovetails with a core bundle of responsibilities stemming from treaties and the trust and fiduciary relationships the federal government has with Indian tribes generally.

Whether created through treaties, the trust relationship, or specific congressional statutes, the federal government’s obligations to Indian tribes are part and parcel of tribes’ special political status. That status provides the rationale for preferential benefits accorded to Indian people. Such political preferences are categorically distinct from racially based preferences that receive strict scrutiny under the Fourteenth Amendment. Entire volumes of the United States Code are premised on this distinction. There is no basis for departing from the clear line of case law and doctrinal interpretation confirming its constitutional status.

The United States Supreme Court has repeatedly recognized that the political and legal status of Indian tribes is singular in character. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831), Chief Justice Marshall observed that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." It is thus unsurprising that Congress and the federal courts have seen fit to create legal classifications that distinguish between Indians and non-Indians in a number of significant ways. The FHSU tuition waiver policy at issue in this case is substantively similar to a number of such classifications that have long been
considered constitutional because they rest on the political character of quasi-sovereign tribal entities.


B. The Eligibility Criteria FHSU Uses to Determine Whether a Student Qualifies for the Tuition Waiver Are Permissible Grounds for Recognizing the Unique Political Status Accorded to American Indians Under the Law

The eligibility criteria employed by FHSU are designed to identify only those individuals who can trace their heritage back to the select tribes with whom the State of Colorado has a unique political and cultural relationship. The criteria follow acceptable methods of signifying "Indian" status that have been upheld in the past. Though the eligibility criteria that favor Indians may vary, two primary methods are employed: use of blood quanta and proof of enrollment in a federally recognized tribe. For instance, the statutory preference upheld in Morton v. Mancari, 417 U.S. 535, 555 (1974), favored individuals who were both of "one-fourth or more degree Indian blood and . . . member[s] of a Federally-recognized tribe." Id. at 554 n.24. Other courts have likewise signaled approval of blood quanta as a means of defining the class of individuals who qualify for a preference based on the unique political status of Indians. See Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce, 694 F.2d 1162, 1168 (9th Cir. 1982); Mullenberg v. United States, 857 F.2d 770, 772 (D. Mont. 1988) ("Blood quantum classification for employment . . . is permissible for Indian status . . .").

Blood quanta is a permissible eligibility criterion, but it has been challenged when used exclusively. At least one federal circuit court has also found that
proof of membership in a federally recognized tribe is sufficient to be eligible for grants for higher education, even if the recipient could not show that she had one-fourth or more Indian blood. *Zarr v. Barlow*, 800 F.2d 1484, 1490-93 (9th Cir. 1986). Conversely, federal courts have also held that one need not be an enrolled member to be considered “Indian” before the law. *See United States v. Pemberton*, 405 F.3d 656 (8th Cir. 2005) (affirming the proposition that individuals who hold themselves out to be Indian and who are of Indian blood are Indians under the federal statute addressing criminal jurisdiction in Indian Country); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979) (“Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.”) For additional discussion of variations on criteria used to define “Indian,” see infra Part II-A-2.

The case law demonstrates that, as a threshold issue, a party will be recognized as Indian so long as some combination of accepted indicia—blood quanta, membership, the individual’s life circumstances—is present. Thus, there is no set definition of “Indian” at work in federal law, especially because the criteria for membership vary from tribe to tribe. The FHSU policy consciously employs a strict set of criteria to identify a narrow class of American Indians who are eligible for the tuition waiver. The district court recognized as much when it observed that

> [t]he presence of Ms. Begay as a co-plaintiff supports the conclusion that the Fort Howe policy does not benefit those who are racially American Indian. Ms. Begay is a member of the Navajo Nation, is 100% Navajo by lineage, but is not eligible for the tuition waiver because she cannot trace her heritage to an historical Colorado tribe.


FHSU’s policy targets individuals whose ancestors experienced hardships because of the state’s growth and its cooperation in federal policies that sought to destroy the cultural integrity and way of life of tribes within Colorado’s boundaries. *See Plaintiffs’ Exhibit 1*. A close examination of the policy’s history makes clear that FHSU does not indiscriminately award tuition waivers to any American Indian. Rather, it requires some showing of an ancestral connection to the Ute Mountain Ute and Southern Ute tribes. Twenty-five of the twenty-seven recipients of the waiver were enrolled members in one of these tribes when granted the tuition waiver. One recipient (Jay House) was enrolled in the Navajo tribe, but provided evidence of descent from the Southern Ute tribe. The other recipient (Lily Esposito) was of Lakota, Taos
Puebloan, and Southern Ute heritage, but lacked sufficient blood quanta to be enrolled in any of these tribes. Nevertheless, Ms. Esposito satisfied the eligibility criteria because she was a lineal descendant of the Southern Ute Tribe. This history shows that the FHSU policy is not rooted in racial categories, but instead requires evidence of connection to one of the two tribes with whom Colorado has a unique political and historical relationship.

The FHSU eligibility criteria adopt a flexible-but-rigorous standard that treats as its benchmark proof of connection to one of two federally recognized tribes. This approach more faithfully adheres to the requirement that systems of differential treatment benefiting Indians focus on the political character of tribal sovereigns, rather than on mere racial traits of individual Indians. Plaintiffs misconstrue the policy when they claim that it is based on individuals' ethnic background. In actuality, the policy emphasizes the collective political and historical ties that bind the Ute nations and Colorado. The plaintiffs ignore this emphasis. Their position assumes that all Indians and all Indian tribes are similarly situated and treats tribes as if they are fungible entities that lack distinct cultural, political, or historical identities. This view is erroneous. It puts an onerous burden on tribes as they strive to define their own aspirations, respond to the problems they face, and build the institutions that are necessary to advance their collective interests. See, e.g., Max Minzner, Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country, 6 Nev. L.J. 89 (2005); Saikrishna Prakash, Against Tribal Fungibility, 89 Cornell L. Rev. 1069 (2004); Ezra Rosser, Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis, 119 Harv. L. Rev. F. 141 (2005).

The lower court understood that denial of the waiver to plaintiff Begay was not evidence of the policy's racial basis, but proof that it places political status over and above ethnic background. This observation clarifies the nature of the policy and the aim that it serves. Colorado has admirably taken responsibility for its role in divesting the Ute nations of their ancestral homelands and perpetuating educational policies in the past that tore their social fabrics apart. The tuition waiver policy is a modest measure to rectify the evils of the past and begin to establish mutual respect with tribal people. Moreover, the policy clearly falls within similar programs that target a discrete class of Indian peoples and attempt to respond to their unique needs.

The citizens of Colorado have chosen to prohibit consideration of race or gender in any state-funded programs. This prohibition does not touch the policy at issue in this appeal, which is grounded in the perception that the State of Colorado should affirmatively assume an obligation to descendants of two federally recognized tribes. That obligation is a welcome change from many
past incidents in which Colorado chose to treat tribes as adversaries, rather than as co-sovereigns with whom it shares both a political relationship and a common destiny. Because the classification in question is political, it does not violate the Colorado Racial Preference Ban.

II. FHSU'S Tuition Waiver Policy Fully Complies with the Equal Protection Clause of the Fourteenth Amendment

Plaintiffs allege that the FHSU policy violates the Equal Protection Clause of the Fourteenth Amendment and base the allegations on two alternative theories. First, they contend that the policy discriminates on the basis of race and fails to satisfy the strict-scrutiny standard warranted by such discrimination. They also claim that, even if the policy is not racially discriminatory, it impermissibly discriminates against Indians who do not satisfy the eligibility criteria and also exceeds the authority that states have in setting Indian policy.

Plaintiffs' arguments mischaracterize the aim of the policy and the means by which it is to be accomplished. The district court correctly rejected their crabbed reading of the policy and the infelicitous understanding of Supreme Court precedent on which it depends. Because the policy relies on political classification rather than racial categories to establish its eligibility criteria, it is subject to a rational-basis standard, not strict scrutiny. As the district court held, it is manifestly constitutional under this standard, and the plaintiffs' challenge to it should not survive a motion for summary judgment.

A. FHSU's Tuition Waiver Policy Enacts Politically Based Preferences That Are Based on the Quasi-Sovereign Status of Two Federally Recognized Tribes

1. The FHSU Policy Does Not Promote Invidious Racial Discrimination; It Merely Recognizes the Unique Political Status of American Indians

The legal status of Indian tribes is singular in character and has long triggered differential treatment that springs from the unique responsibilities the federal government owes to them. See supra Part I-A-1. For purposes of equal protection analysis, Indians are not similarly situated to other citizens. As a result, it is not discriminatory to treat Indians differently. Instances of differential treatment encompass multiple policy areas and vary significantly in their effects. See, e.g., United States v. Antelope, 430 U.S. 641 (1977) (rejecting claim that disparity between federal law and state law violated the Equal Protection Clause when federal jurisdiction was predicated on defendant's status as an enrolled member); Morton v. Mancari, 417 U.S. 535
(1974) (upholding a Bureau of Indian Affairs policy of granting preferences to Indians in its hiring and promotion procedures); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) (holding that state income tax could not be enforced against enrolled Navajos who resided on the Navajo reservation and whose income was wholly derived from within that reservation); *see also* 18 U.S.C. §1301 (2006) (exempting tribes from providing right to counsel to indigent defendants at their own expense when prosecuting the defendant in tribal court); 42 U.S.C. §§ 2000e(b)-2000(e)-2(i) (2006) (distinguishing permissible employment preferences accorded to Indians from racial discrimination that is expressly prohibited under Title VII of the Civil Rights Act).

Though distinctions based on tribal membership appear in a multitude of forms, all are predicated on political affiliation, not racial or ethnic categories. Accordingly, the relevant analytic principle is not contained in the line of equal-protection cases in which the Supreme Court has wrestled with the legality of affirmative-action programs. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that the University of Michigan Law School’s admissions selection process, which considered race as an admission criteria but did not treat it as determinative and which undertook individualized review of each applicant, satisfied strict scrutiny); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that the University of Michigan’s undergraduate admissions selection process, which automatically gave weight to an applicant from an underrepresented ethnic group, failed to satisfy strict scrutiny); *Adarand Constructors, Inc. v. Peña*, (1995) (holding that the Department of Transportation’s affirmative-action program offering incentives to contract with “disadvantaged business enterprises” failed to satisfy strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that the City of Richmond’s affirmative-action program for minority contractors failed to satisfy strict scrutiny).

The Supreme Court first differentiated Indian preferences from invidious racial classifications in *Morton v. Mancari*, 417 U.S. 535 (1974). *See supra* Part I-A. The Court found that an employment preference did not sanction “racial discrimination,” or even a racial preference, but was granted to Indians as members of quasi-sovereign tribal entities. *Mancari* at 553-54. The Court recently reaffirmed this principle in *Rice v. Cayetano*, 528 U.S. 495 (2000), in which it explained that

[although the classification [at issue in *Mancari*] had a racial component, the Court [in *Mancari*] found it important that the preference was “not directed towards a ‘racial’ group consisting of
‘Indians,’” but rather “only to members of ‘federally recognized’ tribes.”

... Because the BIA preference could be “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians,” and was “reasonable and rationally designed to further Indian self-government,” the Court [in Mancari] held that it did not offend the Constitution.

Id. at 519-20 (quoting Mancari, 417 U.S. at 553 n.24, 555) (citations omitted).

It is true that the Court in Mancari emphasized that the preference was implemented by, and in the context of employment with, the Bureau of Indian Affairs, an agency it described as “sui generis.” Mancari, 417 U.S. at 554. This could support the inference that such classifications are narrow in scope. Yet subsequent judicial opinions and a wealth of congressional statutes belie this inference. The Supreme Court in Cayetano acknowledged that “Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs.” Cayetano, 528 U.S. at 519 (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 673 n. 20 (1979) (treaties securing preferential fishing rights); United States v. Antelope, 430 U.S. 641, 645-47 (1977) (acknowledging exclusive federal jurisdiction over crimes committed by Indians in Indian Country); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 84-85 (1977) (distribution of tribal property); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 479-80 (1976) (Indian immunity from state taxes); Fisher v. District Court, 424 U.S. 382, 390-91 (1976) (per curiam) (acknowledging exclusive tribal court jurisdiction over tribal adoptions).

The decisions cited rely on the core justification of Mancari, which likewise supplies the relevant analytic standard for this appeal: preferences based on the political relationship between the federal government and Indian tribes are constitutional so long as they rationally relate to Congress’s unique obligation to tribes. The rational-basis standard gives Congress broad discretion in determining what action is necessary to make good on its obligation. Moreover, the means Congress uses to fulfill this obligation are viewed deferentially. The eligibility criteria that FHSU employs mirror the means that Congress has used in order to fulfill its unique obligation to Indian tribes. Accordingly, the eligibility criteria are constitutionally permissible.
2. Using a Combination of Blood Quanta, Tribal Membership, and Ancestral Lineage Is a Permissible Means of Defining Eligibility Criteria for Legitimate Non-Racially Based Preferences

Part I-B established the different acceptable criteria that may be used to identify those individuals who qualify for politically based preferences that benefit American Indians. When viewed against this body of precedent, the particular three-tiered system of eligibility FHSU uses when granting tuition waivers is manifestly constitutional. It relies on tribal membership, blood quanta, and—as a last available option—evidence of lineal descent combined with consideration of an applicant’s prior life circumstances. This flexible approach facilitates the goal of expanding educational opportunities for the class of American Indians the policy targets.

The official policy statement makes clear that connection to either of the Southern Ute or Ute Mountain Ute tribes is the most relevant criterion for eligibility. This is apt given that the objective of the policy is to atone for state action whose effects specifically harmed these tribes. The narrowness of the criteria is directly connected to the purported goal of the policy itself. Plaintiffs contend that if the Indian/non-Indian distinction is not discriminatory, then the distinction based on heritage is discriminatory because certain Indians who lack connection to a historical Colorado tribe are excluded. This merely substitutes one misreading of the policy for another. Plaintiffs characterize the flexible, individuated application of the criteria in rigid, monolithic terms. See supra Part I-B. The State of Colorado has assumed a responsibility to descendants of tribes whose collective fate was adversely impacted by the state’s growth and its conscious policy choices. That responsibility need not be all-encompassing, such that any student who is “Indian” by virtue of blood quanta or tribal membership is automatically eligible. This would mirror the mechanistic approach that the Supreme Court rejected in its most recent college-admissions cases. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003) (requiring that race-conscious admissions program involve individualized consideration of race, rather than assigning it a predetermined weight automatically, in order to satisfy strict scrutiny). Indeed, it is just this type of approach that could make “race” an overriding factor in this politically based system of preferences.

It is true that all recipients of the waiver have been ethnically American Indian, but this is a necessary, not sufficient, condition in order to be granted a tuition waiver. The crucial factor remains whether a student can establish his or her ancestral connection to a historical Colorado tribe. It is the historical relationship that Colorado has with such tribes that gave rise to the decision for
Colorado to assume a duty to the narrow class of modern-day descendants, rather than all Indians. The legislature may go one step at a time in addressing the problems facing tribes without violating the equal-protection doctrine. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Id.* at 110.). It is also well-established that the power to make that decision lies with the legislature, whether that power is used wisely or improvidently. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955). Second-guessing the mechanism by which the State chose to live up to its obligation exceeds the proper role of the judiciary. More importantly, it is unnecessary to do so. The policy effectively secures the laudable—and constitutional—end for which it is designed: expanding the educational opportunities of individuals who belong to groups with whom the State of Colorado has a unique cultural and political relationship.

It is significant to recognize that the decision is not whether a student is to be admitted into FHSU, but whether he or she is eligible for a tuition waiver. Tellingly, both plaintiffs received financial assistance, including partial scholarships, from other sources in order to pay for their higher education. The policy does not deny them equal protection under the law. It advances a legitimate state interest using means that are historically appropriate and legally valid.

**B. Because FHSU’s Tuition Waiver Policy Is Fully Consistent with Federal Indian Policies and Advances a Legitimate, Non-Racially Based State Interest, Its System of Preferences Satisfies the Relevant Rational-Basis Standard**

1. **States May Affirmatively Assume Obligations in Indian Affairs So Long as They Are Consistent with Overarching Federal Policy**

The predominant configuration of authority in Indian law emphasizes the role of the federal government in dealing with tribes and curtails the roles states play in defining policy goals. Certain pieces of federal legislation have delegated power to the states, e.g., Public Law 280, which gave certain states on-reservation jurisdiction. The general principle, however, remains in place: the most fundamental government-to-government relation in Indian Country is between the federal government and Indian tribes.

The original rationale for this configuration was the perceived hostility that states had to tribal interests and the perceived inability of tribes to protect themselves. This rationale was at the forefront of the Supreme Court’s
decision in *United States v. Kagama*, 118 U.S. 375 (1886), which upheld federal criminal jurisdiction over Indian Country:

These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

*Id.* at 383-84. Almost 125 years have passed since the *Kagama* decision. In that interval, the guiding ethos of paternalism and racial prejudice evidenced in the opinion has been supplanted by a commitment to meaningful tribal self-determination. Similarly, the assumption that states are by their very nature hostile to the best interests of Indian people has been jettisoned. In its place sits a provisional authority providing that states may act on behalf of tribes so long as their policies are consistent with the special political relationship tribes have with the federal government. FHSU’s tuition waiver policy is just such a policy: it amplifies the educational opportunities available to members of two federally recognized tribes and therefore increases the prospect of meaningful tribal self-determination.

Ample precedent supports the authority of individual states to enact legislation beneficial to Indian tribes and their members when it adheres to pre-existent federal policy. E.g., *Washington v. Washington Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979) (state regulations of hunting and fishing); *Artichoke Joe’s California. Grand Casino v. Norton*, 353 F.3d 712, 733 (9th Cir. 2003) (state gaming laws); *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979) (state arts-and-crafts preference for Indians); *McBride v. Shawnee County, Kansas Court Services*, 71 F. Supp. 2d 1098 (D. Kan. 1999) (state recognition of Native American Church); *St. Paul Intertribal Housing Board. v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983) (state housing programs); *Krueth v. Independent School District No. 38*, 496 N.W.2d 829, 836-37 (Minn. Ct. App. 1993) (state employment preference for Indian teachers). This line of precedent clearly supports the reasoning of the court below when it held that Colorado’s policy comported with the requirements of equal protection. Plaintiffs would contend that no state may establish legislation that creates a system of preferential treatment in accord with what
Congress has done previously. This view is at odds with current law; if accepted, it would seriously hamstring states' efforts to rectify the morass of problems that negatively impact the lives of their Indian citizens.

It is true that federal circuit courts have struck down preferential policies on the ground that such policies did not originate in Congress. See Malabed v. North Slope Borough, 335 F.3d 864 (9th Cir. 2003) (striking down ordinance adopted by local government that gave an employment preference to Indians); Dawavendewa v. Salt River Project Agricultural Improvement & Power District, 154 F.3d 1117 (9th Cir. 1998) (striking down hiring preference of Navajos implemented by corporation); Tafoya v. City of Albuquerque, 751 F. Supp. 1527 (D.N.M. 1990) (striking down a city's permitting policy that exclusively benefited members of federally recognized tribes). This line of cases is reconcilable with the long line of precedent affirming state authority. None of the cases striking down differential treatment involves a policy enacted at the state level. Malabed struck down a local ordinance, Dawavendewa struck down a private corporation's policy, and Tafoya struck down a city policy. Accordingly, there is nothing but the most tenuous connection between this line of cases and the question of what limits a state must observe when acting on behalf of Indian tribes.

There is a vast difference between the power of local municipalities and the power of states in the area of Indian affairs. States and tribes must address a litany of mutually applicable issues on a daily basis, whether they turn on issues of jurisdiction, civil regulation, or management of shared resources. There is also a significant difference in the responsibility that a state owes to its tribal citizens. To conflate the status of states with that of local municipalities or private corporations is to draw a false inference that obscures the issues at stake.

Important policy considerations must also be considered when evaluating plaintiffs' theory of the limited authority of states in Indian affairs. Political theorists and judges have long recognized the significant role that states play in producing innovative policies that respond to particular problems. See, e.g., New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). The power to pursue innovation to help facilitate tribal development is of immense significance. States should be encouraged to work with tribes to develop policies that are mutually beneficial; plaintiffs urge that they should be admonished for attempting to do so. This position is untenable given the long line of legal precedent affirming state authority and the clear
policy drawbacks that would follow from removing that authority. The district court correctly surmised that the FHSU policy reflects the conscious choice to assume an obligation to Indian tribes that is entirely consistent with overarching federal policy. That conclusion should be upheld.

2. Employing Non-Racially Based Preferences in the Context of Education Is Rationally Related to Achieving the Aim of Tribal Self-Governance and Tribal Self-Sufficiency

The unique obligation owed to Indian tribes is especially pressing in the context of education. Education has been a central component of the tribal-federal relationship from its inception. Yet the manner in which the federal government imposed its own educational vision and values on tribes has historically been "as much a curse as a blessing." Cohen's Handbook of Federal Indian Law 1356 (Nell Jessup Newton et al. eds., Michie 2005). To foster assimilation and end resistance to colonization, the federal government “sanctioned removing young children from their homes, punishing them for speaking their Native languages, and even denying parents subsistence rations if they did not send their children to school.” Id. This tainted legacy has been disavowed in the modern era.

Emphasis on tribal autonomy, culturally relevant curricula, and improvement in educational opportunities marks the modern era. Congressional efforts to realize these goals include the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §450 et seq., and continue more recently with the Native American Education Improvement Act of 2001, Pub. L. No. 107-110, Title X, pt. D (2002). Though such statutes signal dramatic improvement over those that preceded them, many Indian students continue to perform below average and do not enjoy the same educational opportunities as their non-Indian counterparts. Thus, legislative programs that deliver educational services and support to American Indians are still vitally necessary.

Congress has recognized the need to tailor educational programs and policies so they cohere with the government's unique responsibility to Indian people. One focus has simply been getting more input from tribes and more Indian educators in schools. For example, the Court in Mancari cited 20 U.S.C. § 887c(a) and (d), provisions in the Education Amendments of 1972 that "explicitly require that Indians be given preference in Government programs for training teachers of Indian children." Morton v. Mancari, 417 U.S. 535, 548 (1974). Emphasis has also been placed on expanding higher-education opportunities for Indians by offering targeted financial support of tribal colleges. See, e.g., Tribally Controlled College or University Assistance Act, Pub. L. No. 105-244, § 901, 112 Stat. 1828 (2006) (allocating funding to...
encourage development of tribally controlled colleges and to provide them with stable operational support). More significantly, there are also grants that expressly and exclusively target Indian students who seek assistance in their pursuit of higher education. See 25 C.F.R. § 40 (2008). Indeed, an entire subchapter of the United States Code—25 U.S.C. § 35—is devoted to statutes whose exclusive focus is expanding opportunities in higher education for Indian peoples.

Though the special-relationship doctrine confers certain responsibilities regarding Indian education on the federal government, Congress is not alone in recognizing the need for ameliorating the negative effects of past policies. States have also addressed Indian education, both in their curricula and policies. See, e.g., Indian Education Division, State of New Mexico, http://www.ped.state.nm.us/indian.ed/; Indian Education For All Program, State of Montana, http://opi.state.mt.gov/indianed2/; Office of Indian Education, Indian Education Council, State of South Dakota, http://doe.sd.gov/Secretary/indianed/; Office of Indian Education State of Arizona, http://www.ade.state.az.us/asd/indianed/. The State of Colorado has chosen to address Indian education in a number of ways. It includes Indian education as a featured program in its At Risk Students/Prevention Initiatives. http://www.cde.state.co.us/index_atrisk.htm. The FHSU tuition waiver policy parallels this effort at the collegiate level. It acknowledges and attempts to rectify the tangible role that the State of Colorado played in displacing the Ute Mountain Ute and Southern Ute tribes and adopting “educational programs designed to destroy the cultural and political life of Colorado’s tribes.”

Colorado’s programs are of a piece with the federal government’s objective of assisting American Indian tribes and constituent members to develop the capacities necessary for effective, meaningful self-determination. Thus, preferences akin to those at the center of the FHSU tuition waiver policy have routinely been codified into law by Congress and upheld in federal courts under a rational-basis standard. So long as this standard is satisfied, the preferences abide by all the relevant constitutional requirements. The inquiry into the basis for the FHSU policy reveals a clear determination that it is necessary to advance the legitimate state interest in assuring that American Indians students have access to educational opportunity.

3. The FHSU Policy Clearly Satisfies the Relevant Rational-Basis Standard for Assessing Non-Racial Preferences That Stem from the Political Status of Quasi-Sovereign Tribal Entities

As noted previously, the Mancari decision established the analytic framework for evaluating non-racially based preferences for Indian peoples.
The Supreme Court found that such preferences must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. The Court went on to explain that this meant the policy under review must be "reasonable and rationally designed to further Indian self-government." *Id.* The "fit" between the end goal of the FHSU policy and the means by which the school pursues this goal certainly satisfies this standard. Indeed, it is difficult to conceive of a more narrowly tailored scheme that was still directed at assuring that Indian citizens who are descendants of tribes with whom Colorado has a unique relationship have access to educational opportunities.

The policy must also be viewed in light of the historical injustices that mark the relationship between Colorado and select Indian tribes that inhabited geographic territory that now lies within the state. The policy is specifically intended to rectify these injustices. It notes that

the wealth and prosperity that helped to create the Colorado state system of higher education can be traced in no small part to the states [sic] role in divesting the Utes, and other Indian tribes that inhabited the Colorado territory, of their natural resources, their hunting grounds, and ultimately their homes.

*Plaintiffs' Exhibit 1.* Education has been a polarizing force in the history of Indian/non-Indian relations. *See supra* Part II-B-2. The FHSU policy acknowledges as much, describing how "federal and state policies during the late nineteenth and early twentieth century directed public money to educational programs designed to destroy the cultural and political life of Colorado's tribes." *Plaintiffs' Exhibit 1.* The tuition waiver policy intervenes to remedy the problems that past education policies created. The symmetry between these historical wrongs and the current policy is an indication of Colorado's attempt to revise the story of Indian education in the twenty-first century.

Expanded educational opportunities are indisputably necessary if tribes are to become as robust and self-sufficient as the self-determination paradigm would have them be. The Supreme Court recognized that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). It is long past the time where an equal commitment to education should be made in Indian Country. The FHSU policy has not dramatically reconfigured the educational landscape that Indian students encounter in the state of Colorado, but it does provide them with opportunities that would otherwise not exist. It is irrefutable that the policy is "rationally related" to the unique obligations owed to American Indians. The
responsibility that Colorado has assumed to the descendants of tribes on whom it had a negative effect is entirely consistent with Indian education policy at the federal level. As such, the policy comports with the requirements of the Equal Protection Clause.

Conclusion

For the foregoing reasons, this Court should affirm the decision of the lower court to grant summary judgment to Fort Howe State University in the matter of Chapman v. Fort Howe State University, XX F. Supp. 3d XXX (2008).

Respectfully submitted,
Counsel for Respondent
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