This case is scheduled for oral argument on March 13, 2002.
No. 02-5142

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2263, ROSE REED, INEZ MARQUEZ,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA, JAMES G. ROCHE, in his official capacity as Secretary of the Air Force,

Defendants-Appellees

CHUGACH MANAGEMENT SERVICES JOINT VENTURE, CHUGACH MANAGEMENT SERVICES, INC.,

Intervenors-Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties And Amici*

Except for the following, all parties, intervenors, and amici appearing in the district court and in this court are listed in the Brief for Appellants. The Appellants omitted the intervenors-defendants, Chugach Management and Chugach Management Services JVC, who appeared in the district court and before this court.

B. *Ruling Under Review*

Except for the following, references to the ruling at issue appears in the Brief for the Appellants. The ruling at issue can be found at pages 11-32 of the Joint Appendix.

C. *Related Cases*.

The United States is not aware of any prior appeal in this case or of any related cases pending in this or any other court.

January 10, 2003

SARAH E. HARRINGTON

Attorney

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GLOSSARY OF ABBREVIATIONS

AFGE . . . . . American Federation of Government Employees

AFN . . . . . Alaska Federation of Natives

ANC . . . . . Alaska Native Corporation

ANCSA . . . . . Alaska Native Claims Settlement Act

CEG . . . . . Civil Engineer Group

DoD . . . . . U.S. Department of Defense

MEO . . . . . Most Efficient and Cost-Effective Organization

USAF . . . . . United States Air Force

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STATEMENT OF JURISDICTION

The plaintiffs-appellants' statement of jurisdiction is complete and correct.

STATUTES AND REGULATIONS

The challenged statute is Section 8014 of the Fiscal Year 2000 Defense Appropriations Act, Pub. L. No. 106-79, 113 Stat. 1212, 1234 (1999), which provides:

> SEC. 8014. None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that, on or after the date of the enactment of this Act, is performed by more than 10 Department of Defense civilian employees until a most efficient and cost-effective organization analysis is completed on such activity or function and certification of the analysis is made to the Committees on Appropriations of the House of Representatives and the Senate: *Provided*, That this section and subsections (a), (b), and (c) of 10 U.S.C. 2461 shall not apply to a commercial or industrial type function of the Department of Defense that: (1) is included on the procurement list established pursuant to section 2 of the Act of June 25, 1938 (41 U.S.C. 47), popularly referred to as the Javits-Wagner-O'Day Act; (2) is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act; or (3) is planned to be converted to performance by a qualified firm under 51 percent Native American ownership.

STATEMENT OF THE ISSUE

Whether the contracting provision relating to members of federally recognized Native American tribes in Section 8014(3) of the Fiscal Year 2000 Defense Appropriations Act violates the Fifth Amendment to the Constitution.

STATEMENT OF THE CASE

This suit was filed by the American Federation of Government Employees, Local 2263 (AFGE), Rose Reed, and Inez Marquez (the plaintiffs) against the United States of America and James G. Roche, in his official capacity as Secretary of the Air Force. Section 8014 of the Fiscal Year 2000 Defense Appropriations Act, Pub. L. No. 106-79, 113 Stat. 1212 (1999) (Section 8014 or 8014(3)) provides that the Air Force may contract out work performed by more than ten federal civilian employees after a "most efficient and cost-effective organization" (MEO)

analysis is completed and certified to Congress. The statute allows the Air Force to forego the MEO analysis when, *inter alia*, the Air Force converts an activity or function to performance by a qualified firm under "Native American ownership."[2] The Air Force may not undertake a direct conversion of a function to a private contractor unless it can demonstrate that such a conversion would be cost-effective for the government (JA 11)[3]. In 2000, the Air Force awarded a civil engineering contract for Kirtland Air Force Base to Chugach Management and Chugach Management Services JVC, enterprises owned by Native American tribal entities.

In their complaint, the plaintiffs assert a facial challenge to the provision regarding firms under Native American ownership in Section 8014(3), alleging that the exception violates their equal protection and substantive due process rights secured by the Due Process Clause of the Fifth Amendment to the Constitution (JA 14). The plaintiffs filed their initial complaint and motion for a preliminary injunction on May 1, 2000. Chugach Management and Chugach Management Services JVC intervened as defendants in this action on May 3, 2000. The district court denied the plaintiffs' motion for a preliminary injunction on June 30, 2000. *AFGE* v. *United States*, 104 F. Supp.2d 58 (D.D.C. 2000).

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[2] Section 8014(3) also allows the Air Force to forego the MEO analysis when an activity is converted to performance by a qualified nonprofit agency for the blind, or by a qualified nonprofit agency for "other severely handicapped individuals."

[3] References to "JA __" are to pages in the eight-volume Joint Appendix filed with the plaintiffs-appellants' opening brief; references to "Br. __" are to pages in the plaintiffs-appellants' opening brief.

The plaintiffs filed their amended complaint on June 11, 2001, and all parties moved for summary judgment on August 7, 2001. On March 29, 2002, the district court granted the United States' and Chugach's motions for summary judgment. The district court found that Section 8014(3) is subject to rational basis review, and held that the statute is constitutional. The plaintiffs filed a timely notice of appeal on April 25, 2002.

STATEMENT OF FACTS

This case arises from the Air Force's award of a civil engineering contract at Kirtland Air Force Base to Chugach Management Services, JVC (Chugach), an Alaska Native Corporation created pursuant to the Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, 85 Stat. 688 (1971), codified as amended at 43 U.S.C. 1601 *et seq.* The individual plaintiffs are or were civilian employees of the United States Air Force (USAF) stationed at Kirtland Air Force Base (Kirtland AFB) in Albequerque, New Mexico, during the events leading to this law suit. Plaintiffs Reed and Marquez were both assigned to the 377th Civil Engineer Group (CEG) at Kirtland AFB. Plaintiff AFGE is a labor organization whose members occupied positions alleged to have been affected by the award of this contract to Chugach. Plaintiff AFGE Local 2263 is the collective bargaining representative of the civilian employees of the Air Force Command and Kirtland AFB.

In December 1998, the Air Force announced that it would initiate a study of the 377th CEG at Kirtland AFB to determine whether it would be efficient and

cost-effective to hire a private company to perform the civil engineering functions being performed by USAF employees (JA 75). Before the competitive bidding process was fully underway, however, the Air Force declared its intention, pursuant to Section 8014(3), to utilize the "direct conversion" study process permitted under Section 8014(3) for Native American owned firms (JA 76-77). The Air Force solicited capability statements from three Native American-owned firms and, after officials at Kirtland AFB determined that cost savings could be achieved by converting civil engineering functions at the Base from in-house performance to performance by the intervenor-defendant Chugach, the Air Force awarded the contract to Chugach (JA 76-78).[4] Following the direct conversion of civil engineering functions to Chugach, Kirtland AFB eliminated a number of positions. At that time, plaintiff Marquez retired from her employment with USAF and was subsequently hired by Chugach to work on this contract at Kirtland AFB. Plaintiff Reed relocated to a federal institution elsewhere in the country.

SUMMARY OF ARGUMENT

The Supreme Court has long held that federally recognized Native American tribes exist within the bounds of the United States as a separate and semi-autonomous people. The Constitution explicitly singles out Indian tribes for

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[4] Prior to awarding the contract to a private firm, the Air Force determined that historically the cost comparison between continuing to have government workers perform a function and utilizing labor in the private sector yielded a 41% savings. By ultimately awarding the contract to Chugach, the Air Force achieved its goal of saving 41% in labor costs (Deposition of Colonel Strom at 89-90, attached to United States' Motion for Summary Judgment as Exh. 25).

special treatment and the federal government has unique obligations toward the tribes. Based on this relationship and the fact that Indian tribes were once sovereign nations, both the Supreme Court and this Court have held that federal legislative and regulatory classifications that single out Indians affiliated with federally recognized tribes for special treatment are generally considered political classifications subject to rational basis review rather than racial classifications subject to strict scrutiny.

Section 8014(3), the statute at issue in this case, is such a political classification that satisfies rational basis review because it singles out federally recognized Native American tribes and furthers the cause of tribal self-government. Contrary to the plaintiffs' contentions, this Court should not construe the language of Section 8014(3) as providing a benefit to individuals on the basis of their race. Subsequent legislative amendments to Section 8014(3) and established canons of statutory construction, not to mention established Agency practice, dictate that the language of Section 8014(3) should be interpreted to apply only to members of federally recognized Native American tribes and tribal entities. Moreover, because the plaintiffs have mounted a facial challenge to Section 8014(3), they can only prevail if they can demonstrate that Section 8014(3) is unconstitutional under almost every conceivable set of facts. It is impossible for the plaintiffs to make that showing, given that Section 8014(3) has *never* been invoked to benefit non-tribally affiliated Indians. Because Congress has a legitimate interest in promoting the economic and political self-sufficiency of federally recognized Indian tribal

entities, and because providing limited avenues of securing federal procurement contracts is a rational means of reaching that goal, the district court was correct in concluding that Section 8014(3) passes constitutional muster.

In the event this Court determines that Section 8014(3) is subject to strict scrutiny, it should remand this action to the district court for an evaluation of the government's compelling interests and the statute's narrow tailoring. If, however, the Court decides to engage in strict scrutiny analysis for the first time on appeal, the Court should find that Section 8014(3) is narrowly tailored to the United States' compelling interest in furthering tribal self-government by promoting the economic self-sufficiency of tribes as a means of fulfilling the government's unique obligations towards Native American tribes which arise from the historical context of the federal government's relationship with the tribes.

ARGUMENT

The plaintiffs challenge the constitutionality of Section 8014(3) of Fiscal Year 2000 Defense Appropriations Act, Pub. L. No. 106-79, 113 Stat. 1212, 1234 (1999) (Section 8014(3)). The plaintiffs contend that Section 8014(3), which allows the United States Air Force (USAF) to convert a government activity or function to performance by a qualified firm under Native American ownership without conducting a most efficient and cost effective organization analysis, violates their right to equal protection of the laws and due process under law as secured by the Fifth Amendment to the Constitution. This appeal arises out of the district court's grant of summary judgment to the United States and USAF, and to

the intervenor-defendants Chugach, on the ground that "no reasonable trier of fact could find that Section 8014(3) is not a reasonable method for fulfilling Congress's special responsibilities to Alaska Natives" (JA 31). This Court reviews a district court's grant of summary judgment *de novo*. *Association of Flight Attendants, AFL-CIO* v. *USAir, Inc.*, 24 F.3d 1432, 1436 (D.C. Cir. 1994).

I. The Contracting Provision In Section 8014(3) Directed At Companies Owned By Members Of Federally Recognized Native American Tribes And Tribal Entities Does Not Violate The Equal Protection Guarantee Of The Fifth Amendment

A. Federal Political Classifications Based On Membership In A Federally Recognized Indian Tribe Are Subject To Rational Basis Review

The Supreme Court has held that federal legislative and regulatory classifications based on affiliations with federally recognized Indian tribes which further the cause of Indian self-government are subject to rational basis review, rather than strict scrutiny review, because such classifications are based on political status rather than on race. This Court has held that ordinary rational basis review applies to all Indian tribal classifications by Congress. As the district court found, the statutory provision at issue in this case is such a political classification and satisfies rational basis review because it furthers the cause of Indian self-governance.

Congress's unique authority to legislate on behalf of tribally affiliated Indians as a politically-defined group is "expressly provided for in the Constitution," and derives from Indian tribes' histories as sovereign nations "with

their own political institutions." *United States* v. *Antelope*, 430 U.S. 641, 645-646 (1977); see also *Morton* v. *Mancari*, 417 U.S. 535, 551-554 (1974); *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979); *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978); *Narragansett Indian Tribe* v. *National Indian Gaming Comm'n*, 158 F.3d 1335, 1340 (D.C. Cir. 1998). In light of this history, federal laws singling out tribally affiliated Indians constitute "governance of once-sovereign political communities" and are "not to be viewed as legislation of a 'racial group' consisting of 'Indians.'" *Antelope*, 430 U.S. at 646 (quoting *Mancari*, 417 U.S. at 533 n.24). Pursuant to the unique legal status conferred on tribally affiliated Indians, Congress is empowered to enact legislation which singles them out for "particular and special treatment" in a manner in which it could not constitutionally single out other groups. See *Mancari*, 417 U.S. at 554-555; *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976); *Yakima Indian Nation*, 439 U.S. at 500-502. "The decisions of [the Supreme] Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *Antelope*, 430 U.S. at 645. Supreme Court precedent therefore makes clear that Congress is authorized to enact legislation singling out tribally affiliated Indians for differential treatment based on a political classification, rather than a racial classification. See, *e.g.*, *Mancari*, 417 U.S. at 551-552.

In 1974, the Supreme Court considered an equal protection challenge to an Indian hiring preference utilized by the Bureau of Indian Affairs in *Morton* v.

Mancari, 417 U.S. 535 (1974). In upholding the preference under the Fifth Amendment, the Court found that the "preference does not constitute 'racial discrimination'" and, indeed, "is not even a 'racial' preference" because "[t]he preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes" and "operates to exclude many individuals who are racially to be classified as 'Indians.'" *Id.* at 553-554 and n.24. The Court explained that the hiring preference, "as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities" and in that sense "the preference is political rather than racial in nature." *Id.* at 554.[5] Based on this analysis, the Court upheld the BIA preference holding that "[a]s 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." *Id.* at 555.

Since its decision in *Mancari*, the Supreme Court has upheld other congressional classifications on the basis of membership in Indian tribes because they were "political rather than racial in nature." *Id.* at 554 n.24. For example, in 1976 the Court upheld the application of state taxes only to non-Indians in *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), holding that the tribal classifications were "neither 'invidious' nor 'racial'

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[5] The Court held that the statute at issue in *Mancari* was related to Indian tribal self-governance. The statute at issue here, which is designed to promote the self-determination and economic condition of tribal entities, shares the same aim. See pp. 17-28 *infra*.

in character." *Id.* at 480. The Supreme Court has also upheld the application of federal criminal law to tribally enrolled Indians on Indian land, while non-Indians were subject to more lenient state law, observing that "[t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications" and noting that the defendants "were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." *Antelope*, 430 U.S. at 645-646; see also *Yakima Indian Nation*, 439 U.S. at 500-501 (holding that Congress may legislatively single out Indian tribes subject to rational basis review).

This Court has followed this line of Supreme Court precedent, as it must, noting in recent years that:

> the Supreme Court has long distinguished Indian [tribal] classifications from suspect racial classifications, holding 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.

Narragansett Indian Tribe, 158 F.3d at 1340 (internal quotation marks omitted); see also *United States Air Tours Ass'n* v. *FAA*, 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002), petition for cert. pending, No. 02-931.

Contrary to the plaintiffs' contention (Br. 35-36), the Supreme Court's decision in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), does not call into doubt the holding in *Mancari* that tribal classifications are political in nature and therefore subject to rational basis review. In holding that federal government

classifications on the basis of *race* are subject to strict scrutiny review, the *Adarand* Court did not have occasion to consider the standard of review it would apply to an act of Congress like Section 8014, which is limited to Indian tribes and tribal entities. The difference, therefore, is that the governmental classification in *Adarand* was racial whereas the classification in Section 8014 is based on tribal affiliation. Moreover, this Court has determined that it should continue to apply *Mancari* until the Supreme Court itself explicitly overrules *Mancari*, noting both that, "[a]lthough the [plaintiff] contends that *Adarand* effectively overruled *Mancari*, the Supreme Court has made clear that the lower courts do not have the power to make that determination," and that "this circuit has continued to apply *Mancari* post-*Adarand*." *United States Air Tour Ass'n*, 298 F.3d at 1012 n.8 (citing *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) and *Narragansett India Tribe*, 158 F.3d at 1340).[6]

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[6] Although the plaintiffs claim (Br. 35 n.42) that "in other contexts, courts readily appear to interpret 'Native-American' as designating a racial classification," examination of the cases cited in support of that statement reveal it to be hollow. Half of the cases deal with regulations such as the one at issue in *Adarand*, which include "Native American" in a laundry list of populations entitled to a government benefit. As is the case with *Adarand*, none of those cases directly considers the "Native American" classification apart from the others. The other half of the cases – dealing with jury selection and various state policies and practices – do not concern congressional action. The United States has never contended that individual prosecutors, for example, enjoy the same sovereign-to-sovereign relationship that Congress enjoys with respect to federally recognized Indian tribal entities. And the Supreme Court has made clear that States do not enjoy such a relationship. *Yakima Indian Nation*, 439 U.S. at 501 ("States do not enjoy this same unique relationship with Indians."); see also *Rice* v. *Cayetano*, 528 U.S. 495, 519 (2000).

The plaintiffs also cite *Williams* v. *Babbit*, 115 F.3d 657 (9th Cir. 1997), cert. denied, 525 U.S. 1117 (1998), for the proposition that application of the *Mancari* rational basis standard is limited to statutes that affect "uniquely Indian interests" (Br. 33-34). However, in *Narrangansett Indian Tribe*, which involved a federal Indian classification of a tribe in Rhode Island, this Court declined to follow the Ninth Circuit's interpretation of *Mancari*, stating instead that "ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis." *Narrangansett Indian Tribe*, 158 F.3d at 1340 (decided in the context of an Indian tribal classification).[7] But even if the *Williams* standard were the prevailing standard, as discussed *infra* at pp. 17-28, the tribal classification in Section 8014(3) promotes the federal government's interests in encouraging the self-sufficiency and self-determination of federally recognized Native American tribes – interests that are unquestionably uniquely Indian interests related to the United States' special obligations to federally recognized tribes. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (stressing that Congress's objective of furthering tribal self-government includes the "'overriding goal' of encouraging tribal self-sufficiency and economic development"); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (citing *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136,

[7] In addition, the *Williams* court's conclusion that application of the *Mancari* rational basis standard was so limited was based in part on the Supreme Court's decision in *Adarand*.

143 (1980)). Accordingly, it is the economic welfare of tribal natives – accomplished in this case through the mechanism of the Alaska Native Corporation entities – which constitute the "uniquely Indian interests" with respect to which the Constitution authorizes Congress to legislate.

B. Section 8014(3) Is A Federal Legislative Classification On The Basis Of Membership In A Federally Recognized Indian Tribe

As the district court found, Section 8014(3) is a valid exercise of Congress's power to employ a political classification when legislating in order to benefit formerly sovereign federally recognized Native American tribes by promoting their economic independence and self-determination. To prevail in their facial constitutional challenge, the plaintiffs must prove that Section 8014(3) is unconstitutional under almost every conceivable set of facts. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); *Steffan* v. *Perry*, 41 F.3d 677 (D.C. Cir. 1994). The plaintiffs' challenge to the constitutionality of Section 8014(3) turns entirely on their misplaced contention that the term "Native American" in the FY 2000 version of Section 8014(3) is a racial classification rather than a political classification. Although Section 8014(3) does not define the term "Native American," every conceivable indicator dictates that the contracting provision in Section 8014(3) regarding Native Americans is a congressionally enacted political classification intended to benefit members of federally recognized Native American tribes and tribal entities, and is therefore subject to rational basis review.

In addition, principles of statutory construction dictate that this Court should construe the statutory term "Native American" to be limited to members of federally recognized Native American tribes and tribal entities. The Supreme Court and this Court have repeatedly held that, where two permissible constructions of a statute are available, a court should construe the statute so as to avoid serious constitutional questions. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996) ("It is certainly true that a court is bound to construe a statute to save it from constitutional infirmities."). Although the United States maintains (see *infra*, pp. 30-40) that Section 8014(3) withstands strict scrutiny review as well as rational basis review, construing the statute as a government classification on the basis of race certainly raises a much more serious constitutional question than does construing the statute as a political classification subject to rational basis review. Thus, this Court should interpret the phrase "Native American" in Section 8014(3) as including only members of federally recognized Native American tribal entities because such a construction both would not run counter to any indication of congressional intent and would allow this Court to avoid confronting a more difficult constitutional question.

Moreover, in response to this very lawsuit, Congress specifically amended Section 8014(3) in 2000 to clarify the original meaning of the statutory language by substituting the term "ownership by an Indian tribe, as defined in 25 U.S.C. 450b(e), or a Native Hawaiian organization, as defined in 15 U.S.C. 647(a)(15)" for the more general term "Native American ownership." Amendment No. 3319, 146 Cong. Rec. S4961 (daily ed. June 12, 2000), Pub. L. No. 106-259, 114 Stat. 656, 677 (2000) (JA 375). In enacting this amendment, the Senate sponsors of the original language in Section 8014(3) intended to "further clarify that the exception for Native American-owned entities in section 8014 is based on a political classification, not a racial classification." 146 Cong. Rec. S5019 (daily ed. June 13, 2000) (colloquy between Sen. Stevens and Sen. Inouye) (JA 378). The sponsor of Amendment 3319 specifically stated that:

> The Native American exception contained in section 8014 is intended to advance the Federal Government's interest in promoting self-sufficiency and the economic development of Native American communities. It does so not on the basis of race, but rather, based upon the unique political and legal status that the aboriginal, indigenous, native people of America have had under our Constitution since the founding of this nation.

Ibid. (Sen. Stevens). Moreover, Senator Inouye, who was involved in drafting the original Section 8014(3), confirmed that the amending language reflects that "the exception for Native American-owned entities" in the original version of Section 8014(3) was "based on a political classification, not a racial classification." *Ibid.* The Supreme Court has indicated that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion*

Broadcasting Co. v. *FCC*, 395 U.S. 367, 380-381 (1969).[8] Thus, this Court should construe the term "Native American" as it was intended to be interpreted: as including only members of federally recognized Native American tribes and tribal entities.[9]

C. Section 8014(3) Is Rationally Related To The Government's Legitimate Interests In Fulfilling Its Unique Obligations To Alaska Natives

The Section 8014(3) exception applicable to Native American tribes and tribal entities satisfies rational basis review because it is based on a non-suspect political classification designed to further Native Alaskan tribal self-government. See *Mancari*, 417 U.S. at 555; *Narragansett Indian Tribe*, 158 F.3d at 1340. Under rational basis review, a statute comes to the Court "bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the

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[8] Because Congress amended the statute in 2000 to further clarify that Section 8014(3) is only intended to be used to benefit enterprises owned by members of federally recognized Native American tribes, see *supra* at 16-17, the statute will continue to be applied only in a constitutionally permissible manner in the future.

[9] There is no basis for the plaintiffs' suggestion (Br. 29-31) that Congress must specifically invoke its authority under the Indian Commerce Clause in order for a legislative tribal classification to be subject to rational basis review. The Supreme Court has never held that the constitutionality of a statute is contingent on Congress's intention regarding the power exercised to support the enactment of that statute. To the contrary, it has adopted a strong presumption of constitutionality that places the burden on the party challenging the federal statute to make "a *plain showing* that Congress has exceeded its constitutional bounds." *United States* v. *Morrison*, 529 U.S. 598, 607 (2000) (emphasis added); accord *Union Pac. Ry. Co.* v. *United States*, 99 U.S. (9 Otto) 700, 718 (1878) ("Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.").

burden to negative every conceivable basis which might support it." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (quoted in *Calloway* v. *District of Columbia*, 216 F.3d 1, 8 (D.C. Cir. 2000). This Court should affirm the district court's decision granting summary judgment to the appellees because the Section 8014(3) exception for tribal entities such as Chugach is rationally related to Congress's unique obligations to compensate Alaska Natives for their aboriginal land titles and to safeguard their self-determination by promoting economic self-sufficiency. See *Koniag, Inc.* v. *Koncor Forest Res.*, 39 F.3d 991, 996-997 (9th Cir. 1994); cf. *Jacobs* v. *Barr*, 959 F.2d 313 (D.C. Cir. 1992), cert. denied, 506 U.S. 831 (1992).

Because of its unique historical obligations toward Indian tribes, the federal government has sought to further the economic and political self-sufficiency of federally recognized Indian tribes and tribal entities. See *Mancari*, 417 U.S. at 555 (noting that "fulfillment of Congress' unique obligations toward the Indians" is a legitimate government interest). Moreover, the Supreme Court has found that "encouraging tribal self-sufficiency and economic development" are "important federal interests." *Cabazon*, 480 U.S. at 216-217; see also *Mescalero Apache Tribe*, 462 U.S. at 334-335. This Court has also noted that the "federal government has substantial trust responsibilities toward Native Americans," responsibilities that "are grounded in the very nature of the government-Indian relationship." *Cobell* v. *Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

Providing contracting avenues such as the one in Section 8014(3) is rationally related to the federal government's interest in promoting tribal self-governance and economic self-sufficiency. As the Supreme Court has noted, "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Cabazon Band of Mission Indians*, 480 U.S. at 219. Providing an easier alternative contracting process to qualified companies owned by members of federally recognized Native American tribal entities increases the likelihood of new business opportunities for those tribal entities and provides a potential stream of new income to the tribes and their members. The legislative history of the 2000 clarifying amendment to Section 8014(3) confirms that Congress "sought to do its part in fostering strong Native economies through the enactment of a wide range of Federal laws, including a series of incentives that are designed to stimulate economic growth in Native communities and provide economic opportunities for Native American-owned businesses." 146 Cong. Rec. S5019 (daily ed. June 13, 2000) (Sen. Inouye) (JA 378).

In addition, the Supreme Court has "stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *Mescalero Apache Tribe*, 462 U.S. at 335 (citing *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)); *Cabazon*, 480 U.S. at 216. Accordingly, since

Mancari, the Supreme Court and other appellate courts have applied *Mancari*'s political classification holding to federal statutes implicating the general economic interests of Indians. See *Alaska Chapter, Associated General Contractors of Am., Inc.* v. *Pierce*, 694 F.2d 1162, 1167-68 (9th Cir. 1982) (noting Supreme Court's subsequent application of *Mancari* to statute implicating "the right[s] of individual Indian profit-making businesses"); *Narragansett Indian Tribe*, 158 F.3d at 1340-1341 (applying rational basis standard to a constitutional challenge to an amendment to the Rhode Island Indian Claims Settlement Act prohibiting the National Indian Gaming Commission from authorizing gambling on Narragansett lands). Presented with a case analogous to the instant litigation, the Ninth Circuit held in *Pierce* that a federal regulation granting Indians a preference with respect to housing construction contracts, which had resulted in a contract award to an Alaska Native-owned corporation, created a political, rather than racial, classification which passed rational basis review. 694 F.2d at 1169-1170.

The government's interests with respect to Alaska Native Corporations, who also qualify for the exception in Section 8014(3), arise from a slightly different historical context than its interests with respect to Native American tribes in the contiguous 48 states. The United States acquired the territory of Alaska by means of the 1867 Treaty of Cession with Russia, which provides that:

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of

> the United States. * * * The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

15 Stat. 542 (Mar. 30, 1867).[10] By linking its treatment of Alaska Natives to its treatment of other "aboriginal tribes," Congress signaled that it believed Alaska Natives are to be accorded the same legal status as the Indian tribes of the contiguous 48 states.

The Organic Act of 1884 brought civil government to Alaska and purported to protect aboriginal land rights by prohibiting natives from being "disturbed in the possession of any lands actually in their use or occupation." See *Alaska Native Land Claims: Hearings Before the Senate Comm. on Interior & Insular Affairs*, 90th Cong., 2d Sess. 117 (1968). The Act failed to resolve formal land titles or to define "use or occupation," however, creating ongoing controversy regarding its effects on aboriginal title. *Ibid.*

Congress extended the Dawes Act, which it had used to settle land disputes of the Indian tribes of the contiguous 48 states through allotments and other compensation, to Alaska Natives in 1906, but the government's failure to

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[10] No treaties with Alaska Natives were signed between 1867 and 1871 in light of the absence of serious hostilities and the government's lack of familiarity with the aboriginal peoples. See *Alaska Native Land Claims: Hearings Before the Senate Comm. on Interior & Insular Affairs*, 90th Cong., 2d Sess. 117 (1968) ("Native Land Claims Report" of the Institute of Social, Economic and Government Research of the University of Alaska, Vol. 4, No. 6 attached to the statement of Barry W. Jackson, Esq.) (hereinafter "*Alaska Native Land Claims Hearings*"). Congress prohibited further treaty-making with all Native Americans in 1871. *Ibid.*

appropriate the funds necessary to investigate land claims and record allotments, along with Alaska Natives' unfamiliarity with the law and the English language, prevented Alaska Natives from claiming any land through the allotment process. *Alaska Native Land Claims Hearings* at 70 (Statement of William Hensley, University of Alaska, "The Primary Issue: What Rights To Land Have The Alaskan Natives?"). Extension of the Indian Reorganization Act of 1934 to Alaska in 1936 permitted the Secretary of the Interior to designate reservations in Alaska, but this power was exercised in only a few instances due to political controversy over the topic. *Id.* at 72.

The Statehood Act of 1958 left open the final settlement of Native land claims, but granted the new state authority to select over 900 million acres of federal land for state ownership, over the following twenty years, which were "vacant, unappropriated and unreserved" at the time of selection. *Alaska Native Claims Hearing* at 73. To fulfill the federal government's obligation to protect the "use and occupation" of lands by Alaska Natives, around 1967 Secretary of the Interior Udall placed a highly controversial "freeze" on the disposition of lands protested by Native groups. *Ibid.*

In the absence of clear federal protection for Alaska Native land rights, from the late 1800's and through the 1950's, settlers had gradually encroached on lands occupied and used for subsistence by Alaska Natives. The settlers' establishment of high volume commercial fishing operations, hunting for sport, and mining operations – all of which were undertaken without regard to the Alaska Natives'

dependency on natural resources for subsistence – diminished the sources of food and materials available to Alaska Natives. See *Alaska Natives Claims Hearings* 31-32 (Statement of Emil Notti, Alaska Federation of Natives); see also Alaska Natives Comm'n, *Final Report*, Vol. I 13-14 (1994) (JA 404-405). By the 1960's, the situation of Alaska Natives had become dire. See *Alaska Native Land Claims Hearings* at 32 (Statement of Emil Notti). The collapse of the salmon fishing industry while it was under the supervision of the federal government, in conjunction with the government's imposition of hunting and fishing restrictions foreign to the natives who had historically made their living through subsistence, had left Alaska Natives in a state of near starvation and widespread unemployment. *Alaska Native Land Claims Hearing* at 57 (Statement of Father Simeon Oskolkoff, Orthodox Priest, Tyonkek Village); see also Alaska Natives Comm'n, *Final Report*, Vol. I 13-14 (1994) (JA 404-405). The government's reluctance to resolve aboriginal land titles thus threatened Alaska Native survival, contributing to an erosion of native sovereignty and culture as settlers imposed changes that undermined traditional native self-reliance. See, *e.g.*, *2(c) Report: Federal Programs and Alaska Natives, Intro. and Summary, Part B*, Section 1 at 1.

In 1971, Congress finally addressed the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. 1601(a). Because Congress recognized that Alaska Natives believed that the establishment of reservation lands in the contiguous 48 states had not adequately protected the interests and economic self-

sufficiency of Indian tribes, see *Alaska Native Land Claims*, Congress adopted a non-reservation system of compensating them for losses of aboriginal land titles. The Alaska Native Claims Settlement Act (ANCSA) divided Alaska Native groups into corporate structures (Alaska Native Regional and Village Corporations) rather than creating a reservation system. This use of corporate structures to provide greater control and self-governance for Alaska Natives, in lieu of the trusteeship system in the contiguous 48 states, thus represented a new chapter in the government's approach to fulfilling federal obligations towards Native Americans. See *Alaska Land Claims Hearings* at 28 (Statement of Hon. Howard Pollack, U.S. Rep. from Alaska); *id.* at 33; *id.* at 55 (Statement of Byron I. Mallot, Second Vice-President, Alaska Fed'n of Natives). As the Supreme Court explained in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520, 523-24 (1998): "In enacting ANCSA, Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy."

Under the ANCSA scheme, Alaska was divided into 12 geographic regions "with each region composed * * * of Natives having a common heritage and sharing common interests." 43 U.S.C. 1606(a). Native Alaskans living within each region were then required to form corporate structures known as Alaska Native Corporations (ANCs). The corporations were intended to be the vehicles for Alaska Natives to receive, manage, and enhance the distributions of federal monies and lands that they received in exchange for the extinguishment of their aboriginal titles. 43 U.S.C. 1603, 1605, 1606, 1608. Each regionally enrolled

Native received an allotment of shares of his or her corporation, 43 U.S.C. 1606(g), and is entitled to a share of the revenues generated by the corporation's business activities, 43 U.S.C. 1606(i) & (r).

Furthermore, ANCs[11] themselves are important vehicles for promoting such self-sufficiency. By statute, shareholders of ANCs may not sell their shares to non-Natives and shares acquired by non-Natives through inheritance do not carry voting rights. 43 U.S.C. 1606. In addition, over the past decade, Congress and the commissions Congress has assembled have repeatedly concluded that the generation of revenue and infrastructure for Alaska Natives through ANC business development is the most effective means of promoting economic self-sufficiency by minimizing dependency on federal transfer payments or subsidies intended to address Alaska Native poverty. See Alaska Natives Comm'n, *Final Report,* Vol. I (1994) (JA 380-472). After receiving the Final Report of the Alaska Native Commission in 1994 and conducting follow-up hearings in 1995, see *Alaska Native Comm'n Report: Joint Oversight Hearing Before the House Comm. on Res. and the House Comm. on Energy and Natural Res. and the Senate Comm. on Indian Affairs*, 104th Cong., 1st Sess. (1995), in 1996 Congress directed the Alaska Federation of Natives (AFN) to develop proposals for implementing the recommendations of the Alaska Native Commission. See Pub. L. No. 104-270 (Oct. 9, 1996). The AFN submitted its Implementation Study in December 1999.

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[11] The district court found that Chugach is an Alaska Native Corporation. *AFGE* v. *United States*, 104 F. Supp.2d 58, 74 (D.D.C. 2000).

See *AFN Implementation Study* (December 1999) (JA 486-508). The study concluded that "Alaska Natives need more jobs and economic opportunities," *id.* at 11 (JA 496), and that self-governance and self-determination are "essential" in overcoming the economic and social problems of Alaska Natives, *id.* at 8 (JA 493).

Extending the availability of Section 8014(3) to members of Alaska Native Corporations is, therefore, a rational means of fulfilling Congress's obligations toward federally recognized Indian tribes. Alaska Natives have long been afforded the same treatment as Indian tribes for statutory purposes.[12] Indeed, ANCSA specifies that, "Notwithstanding any other provision of law," Alaska Natives "remain eligible for all Federal Indian programs on the same basis as other Native Americans." 43 U.S.C. 1626(d). And Alaska Natives have been so treated consistently both by Congress, see, *e.g.*, 25 U.S.C. 473; 25 U.S.C. 479; 16 U.S.C. 4702(9); 18 U.S.C. 208(b)(4), and by courts, see *Pierce*, 694 F.2d at 1168 n.10 ("Alaskan Natives, including Eskimos and Aleuts, have been considered to have the same status as other federally recognized American Indians, through the treaty powers of the President and the Senate pursuant to Article II, Section 2, cl. 2 of the Constitution."); cf. *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78 (1918).

Because the legal position of Alaska Natives is in all relevant respects similar to that of Indian tribes in the contiguous 48 states, congressional legislative

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[12] The plaintiffs have not disputed that Alaska Natives are entitled to the same legal treatment as are other Native American tribes with regard to the application of Section 8014(3).

classifications that single out Alaska Natives for special treatment in order to further tribal self-government should be deemed political rather than racial classifications. Section 8014(3) therefore is rationally related to the federal government's legitimate interests in compensating Native American tribal entities, including Alaska Native entities, for their loss of aboriginal title and in fulfilling its obligations arising from the unique history of the federal government's relationship with those tribes.

The direct conversion of Civil Engineering ("CE") functions at Kirtland to Chugach was fully consistent with the Fifth Amendment because enhancing business opportunities for an ANC such as Chugach furthers the government's legitimate interests in compensating Native Americans, including Alaska Natives, for their aboriginal land titles and promoting their self-governance and economic self-sufficiency. Because Plaintiffs cannot demonstrate that application of Section 8014(3) to ANCs (the only circumstance in which the Air Force has applied it), which are federally recognized Native American tribal entities akin to tribes, is unconstitutional as a matter of law, they cannot establish that the statute is invalid on its face. See *Mancari*, 417 U.S. at 553-554 & n.24 (upholding section 12 of the Indian Reorganization Act, 25 U.S.C. 472, which created an employment preference for Indians with out any reference to tribal affiliation on its face, against plaintiffs' Fifth Amendment due process challenge because "the preference, as applied" only to tribally affiliated Indians by the BIA, was based on a political classification and withstood rational basis review). Where, as here, a statute has at

least some clearly constitutional applications, a facial challenge cannot succeed. *Steffan*, 41 F.3d at 693.[13]

D. If This Court Determines That The Provision In Section 8014(3) Relating To Native Americans Is Subject To Strict Scrutiny Review, It Should Either Remand This Case So That The District Court May Apply That Level Of Review Or Affirm The District Court's Grant Of Summary Judgment For The Defendants

1. If this Court were to determine that the district court erred as a matter of law in determining that the provision in Section 8014(3) relating to members of federally recognized Native American tribes is subject to rational basis review, the Court should remand this case so that the district court may apply that level of review. The application of strict scrutiny does not involve findings of fact in the traditional sense, and therefore need not necessarily be performed by a district court in the first instance. However, as a prudential matter, reviewing courts that have determined that a district court erroneously failed to apply strict scrutiny review have tended to remand the case to the district court for the initial application of strict scrutiny in order to preserve the function of the court of appeals as a

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[13] It is worth noting that the statutory language upheld in *Mancari* as a rational political classification referred only to "Indians" rather than to members of federally recognized tribal entities. See *Mancari*, 417 U.S. at 537-538 (quoting 25 U.S.C. 472). In that case, the BIA had issued written policy guidance directing that the hiring preference be made available to any individual who was "one-fourth or more degree Indian blood and * * * a member of a Federally-recognized tribe." *Mancari*, 417 U.S. at 553 n.24. Similarly, USAF has limited application of Section 8014(3) to federally recognized tribes and tribal entities. Although USAF here did not issue a written policy with respect to how the Indian classification in Section 8014(3) was to be applied, the district court found that, as a matter of practice, USAF had "never * * * used [Section 8014(3)] to favor an enterprise which was not owned by or affiliated with a tribal entity." *AFGE*, 104 F. Supp.2d at 74.

"reviewing court." In *Adarand*, the Supreme Court noted that, because the district court had improperly applied a lower level of scrutiny, questions such as "whether the interests served by the use of subcontractor compensation clauses are properly described as 'compelling,'" "whether there was any consideration of the use of race-neutral means to increase minority business participation in government contracting," and "whether the program was appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate" remained unanswered. 515 U.S. at 237-238 (internal quotation marks omitted). These and other questions are the types of questions, the Supreme Court reasoned, that "should be addressed in the first instance by the lower courts." *Id.* at 238-239.

More recently, the Court of Appeals for the Federal Circuit has followed suit, stating that, "like the Supreme Court, we believe that it is the province of the district court to evaluate whether evidence within the particular reports and studies before Congress was indeed sufficient to constitute a 'strong basis in evidence' of discrimination or its lingering effects." *Rothe Dev. Corp.* v. *United States Dep't of Def.*, 262 F.3d 1306, 1323 (Fed. Cir. 2001) (quoting *Adarand*, 515 U.S. at 237). The Federal Circuit reasoned that, in order for the court to "undertake meaningful appellate review, it is essential that the district court set forth detailed findings as to the scope and content of the reports before Congress when it enacted the challenged legislation, and set forth whatever meaningful inferences may be drawn as to whether such reports could constitute a 'strong basis in evidence' for remedial action." *Rothe Dev. Corp.*, 262 F.3d at 1323 (quoting *City of Richmond* v. *J.A.*

Croson Co., 488 U.S. 469, 510 (1989)). In its memorandum opposing the plaintiffs' motion for summary judgment in the district court, the United States asserted an alternative defense, setting forth ample evidence of compelling government interests and narrow tailoring to support the constitutionality of Section 8014(3) under strict scrutiny review. Because the district court correctly concluded that the provision in Section 8014(3) relating to Native Americans is subject to rational basis review, the district court did not evaluate the evidence presented or determine whether Section 8014(3) survives strict scrutiny review.[14] If this Court determines that the district court applied the wrong standard of review, the United States urges the Court to remand this case for further proceedings.

2. If, however, this Court believes that it is appropriate to apply strict scrutiny review to Section 8014(3) at this stage of the proceedings, the Court should find that the statute satisfies that rigorous level of review. As this Court has recently noted, "[s]ince the founding of this nation, the United States' relationship with the Indian tribes has been contentious and tragic." *Cobell*, 240 F.3d 1081, 1086 (D.C. Cir. 2001). In light of this history, the federal government has assumed unique obligations towards the tribes in an effort to promote tribal self-sufficiency and self-determination. See *Mancari*, 417 U.S. at 552. The United States has a compelling interest in continuing to promote the economic self-

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[14] In denying the plaintiffs' motion for a preliminary injunction, the district court determined that, "if the section 8014 preference is construed as it has been applied, it is likely to pass strict scrutiny." *AFGE*, 104 F. Supp.2d at 75.

sufficiency of federally recognized Indian tribes in order to satisfy its obligations. See *United States* v. *Paradise*, 480 U.S. 149, 167 (1987).

Over the past several decades, Congress has engaged in extensive fact-finding and legislating in order to assess and redress the continuing problems facing Indian tribes that arise from the historical context of their relationship to the federal government. In particular, Congress has held a multitude of hearings addressing the overwhelming poverty and unemployment experienced by Native Americans both on and off reservations,[15] the continuing desperate need for economic development opportunities for Native Americans,[16] and the unique

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[15] See, *e.g.*, Report of the Task Force on Indian Econ. Dev. 71-91 (Dep't of Interior 1986) (detailing federal government's efforts to combat poverty in Indian populations); *Native American Bus. Dev., Trade Promotion, & Tourism Act of 1999: Hearing Before the Senate Comm. on Indian Affairs*, 106th Cong., 1st Sess. 69 (1999) (Prepared Statement of John Sunchild, Sr., Executive Director of Nat'l Tribal Dev. Ass'n) ("Economic conditions in Indian Country are among the worst found anywhere in the world."); S. Rep. No. 149, 106th Cong., 1st Sess. 2 (1999) ("[T]he unemployment rate for American Indian and Alaskan Native populations continues to hover at 50%, with some Native communities suffering unemployment rates of 80-90%."); S. Rep. No. 151, 106th Cong., 1st Sess. 2 (1999) ("Native Americans suffer the highest rates of poverty, unemployment, ill-health, and associated social pathologies in the nation."); *Assessment of Tech. Infrastructure in Native Cmtys.* 14 (Dep't of Commerce) ("Unemployment rates among Native Americans remain among the highest in the nation."); *id.* at 18 (noting that approximately 40% of Native American households "still have inadequate water provision"); *id.* at 19 (12% of Native households lack electricity and 23% lack gas); *We the First Americans*, U.S. Dep't of Commerce, Econ., & Statistics Admin., Bureau of Census 5 (Sept. 1993) (noting higher unemployment rate for Native Americans compared to general population); Report of the Task Force on Indian Econ. Dev. 53-60 (Dep't of Interior 1986) (discussing the socioeconomic status of off-reservation Indians).

[16] See, *e.g.*, *Indian Econ. Dev. Pt. I: Oversight Hearing Before the*

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obstacles that hinder Native American-owned businesses from participating in government contracts and other business enterprises.[17] Geographic isolation of

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[16](...continued)
Subcomm. on Native American Affairs of the House Comm. on Natural Res., 103d Cong., 1st Sess. 3 (1993) (discussing tribes' "chronic loss or inability to get the venture capital necessary for tribal enterprises" and reservations' lack of "appropriate infrastructure"); H.R. Rep. No. 907, 93d Cong., 2d Sess. 7 (1974) ("If the long-sought goal of Indian self-sufficiency is to be reached, * * * financial assistance must be provided or facilitated."); *Economic Dev. on Indian Reservations: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong., 2d Sess. 62-63 (1996) (Cornell & Kalt, eds., *What Can Tribes Do? Strategies & Insts. in American Indian Econ. Dev. Pt. II* (American Indian Studies Ctr. 1992)) (noting obstacles in Indian Country to economic development); *Small Bus. Dev. in Indian Country: Hearing Before the Senate Comm. on Small Bus.*, 103d Cong., 1st Sess. 30-38 (1993) (Testimony & Prepared Statement of Kenneth P. Provost, United Sioux Tribes); *Indian Econ. Dev. Pt. II: Oversight Hearing Before Subcomm. on Native American Affairs of the House Comm. on Natural Res.*, 103d Cong., 1st Sess. 73-74 (1993) (Prepared Statement of Ctr. for American Indian Econ. Dev. at N. Ariz. Univ.); Report of the Task Force on Indian Econ. Dev. 58-59 (Dep't of Interior 1986) (charts showing distribution of income among Indian households compared to U.S. generally); *Barriers to Indian Participation in Gov't Procurement Contracting: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 55 (1988) (Prepared Statement of Conrad Edwards, Executive Dir. of Council for Tribal Employment Rights); *Indian Dev. Fin. Corp. Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 1st Sess. 4-6 (1989); *Indian Participation in Gov't Procurement Contracting: Hearing Before the Senate Select Comm. on Indian Affairs*, 101st Cong, 1st Sess. 115-117 (1989) (Testimony of Edward Lone Fight, Chairman of Three Affiliated Tribes of Fort Berthold, N.D.); *id.* at 118-127 (Written Testimony of Phillip Martin, Chief of Miss. Band of Choctaw Indians).

[17] See, *e.g.*, *Business Opportunities Enhancement Act (Draft Legislation to Amend the Buy Indian Act): Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 2d Sess. 34-35 (1992) (Prepared Statement of Steven L.A. Stallings, President of Nat'l Ctr. for American Indian Ent. Dev.) ("Historically having been denied access to entrepreneurship and therefore, having little knowledge of related economic implications, Indians have systematically been excluded from much of the economic transactions that impacts our lives and future generations."); H.R. Rep. No. 907, 93d Cong., 2d Sess. 7 (1974) ("Indian tribes and individuals have been categorized as poor credit risks in the private market for

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Native Americans due to historic federal removal and relocation policies, and the present effects of past inconsistent patterns of federal deference to tribal sovereignty and self-determination have impeded economic development efforts in Native American communities.[18] Various federal regulations arising from the trust

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[17](...continued)
reasons often beyond their control."); S. Rep. No. 151, 106th Cong., 1st Sess. 3 (1999) (listing some of the "main obstacles to Native business and economic development"); Report of the Task Force on Indian Econ. Dev. 159 (Dep't of Interior 1986) (instability of tribal governments has contributed to private businesses' reluctance to do business with Indian enterprises); *id.* at 158 ("the social and political environment of reservations is generally perceived by business as being risky"); *id.* at 186 (uncertainty regarding applicable legal authority when dealing with tribes a deterrent to businesses); *Indian Econ. Dev. Pt. II: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Res.*, 103d Cong., 1st Sess. 74 (1993) (Prepared Statement of Ctr. for American Indian Econ. Dev. at N. Ariz. Univ.); *Providing Fin. Servs. to Native Americans in Indian Country*, Native American Working Group, Office of Comptroller of the Currency 2-3 (July 1997) (noting difficulties banks encounter in doing business with Indian tribes); *Business Opportunities Enhancement Act (Draft Legislation to Amend the Buy Indian Act): Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 2d Sess. 58-59 (1992) (Prepared Statement of Edward H. Hall, President of Transportation Assoc., Inc.).

[18] See, *e.g.*, S. Rep. No. 149, 106th Cong., 1st Sess. 2 (1999); *Economic Dev. on Indian Reservations: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong., 2d Sess. 44-54 (1996) (Prepared Statement of Prof. Joseph P. Kalt, Harvard Project on American Indian Econ. Dev.) (describing negative impact on economic development of past federal challenges and limitations on tribal sovereignty and self-determination, and a destructive legacy of institutional dependency created by decades of federal-tribe relations); H.R. Rep. No. 838, 100th Cong., 2d Sess. 6 (1988) (explaining that there is no incentive for federal contractors to use Indian contractors located on reservations due to their remoteness); *Small Bus. Dev. in Indian Country: Hearing Before the Senate Comm. on Small Bus.*, 103d Cong., 1st Sess. 48-49 (1993) (Testimony of Fred Dubray, President of InterTribal Bison Coop.); Report of the Task Force on Indian Econ. Dev. 17, 30-33, 78-79, 122 (Dep't of Interior 1986) (citing misguided attempts to turn Indians into farmers through land allotment, the negative impact for businesses of isolated, harsh, and poor quality reservation lands, and changing

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status of Indian land have been a hindrance to capital formation and economic development that does not exist for other Americans.[19] While the history of the Alaskan Natives is different in some respects from that of the Indian tribes within the contiguous 48 states, as set forth in Section I.B, *supra*, lack of federal protection of Alaskan Native land rights from the late 1800's through the 1960's

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[18](...continued)
and inconsistent federal policies toward Native Americans as factors undermining economic self-sufficiency).

[19] See, *e.g.*, Report of the Task Force on Indian Econ. Dev. 239-240 (Dep't of Interior 1986) (explaining that trust relationship and associated federal reviews of Indian business arrangements have undermined business development because substantial delays are inconsistent with critical business timing issues); S. Rep. No. 150, 106th Cong., 1st Sess. 7 (1999); *Business Dev. on Indian Lands: Hearing Before the Senate Comm. on Indian Affairs*, 106th Cong., 1st Sess. 1 (1999) (Testimony of Sen. Nighthorse Campbell) (explaining that required BIA approval process for all contracts between third-parties and Indians involving Indian lands, which takes long periods of time and creates uncertainty, thwarts economic development); *id.* at 77 (Prepared Statement of Harold D. Salway, President of Oglala Sioux Tribe) (explaining that the Oglala Sioux, like other tribes, "have often been prevented from taking advantage of sound business opportunities because of delays caused by the requirements imposed by a variety of federal regulations affecting the manner in which tribes may conduct business with the private sector"); *Economic Dev.: Hearing Before the Senate Comm. on Indian Affairs*, 105th Cong., 2d Sess. 67 (1998) (Testimony of Russell D. Mason, Sr., Chairman of Three Affiliated Tribes) (citing trust status of Indian lands as creating barriers to capital formation because land cannot be used as collateral); *ibid.* at 67 (citing the federal government as a "barrier to economic development for Indian tribes); *Economic Dev. on Indian Reservations: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong., 2d Sess. 132-136 (1996) (Prepared Statement of Ivan Makil, President of Salt River Pima-Maricopa Indian Community) (citing numerous federal laws and regulations that pose obstructions to economic development for Native Americans).

led to depletion of the natural resources Alaskan Natives relied on for subsistence and the erosion of native sovereignty and self-reliance.[20]

Congress also has determined that increasing Indian participation in federal contracting is an important means of promoting economic self-sufficiency among the tribes,[21] and that the Department of Defense in particular has a history of reluctance to contract with Native American-owned businesses.[22]

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[20] See, *e.g.*, *2(c) Report: Federal Programs and Alaska Natives, Intro. and Summary, Part B*, Section 1 at 1; *Alaska Native Land Claims Hearings* at 428-429 (David T. McCabe, *Money & Credit in Rural Alaska* (1964)) (describing the lack of access to currency, credit, and loans in rural Alaska Native village, and the commensurate lack of economic development).

[21] See, *e.g.*, *Indian Participation in Gov't Procurement Contracting: Hearing Before the Senate Select Comm. on Indian Affairs*, 101st Cong, 1st Sess. (1989); *Barriers to Indian Participation in Gov't Procurement Contracting: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 11-13 (1988) (Statement of Steve Stallings, Executive Dir. of United Indian Dev. Ass'n); *Business Opportunities Enhancement Act (Draft Legislation to Amend the Buy Indian Act): Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 2d Sess. 34 (1992) (Prepared Statement of Steven L.A. Stallings, President of Nat'l Ctr. for American Indian Enterprise Dev.); *AFN Implementation Study*, Alaska Federation of Natives 13 (Dec. 1999) (listing proposals for strengthening rural Native Alaskan communities through federal agency involvement); *MHPI & Utils. Infrastructure: Hearing Before the Subcomm. on Gov't Mgmt., Info. & Tech. of the House Comm. on Gov't Reform* (2000); *Indian Econ. Dev. Pt. I: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Res.*, 103d Cong., 1st Sess. 12-13 (1993) (Prepared Statement of Caleb Shields, Chairman of Assiniboine & Sioux Tribes of Fort Peck Indian Reservation); *id.* at 53-54(testimony of Mr. Shields); S. Rep. No. 151, 106th Cong., 1st Sess. 2 (1999) ("[T]he evidence shows that true self-government flows from the ability of Native people to take control of and master their economic lives.").

[22] See, *e.g.*, *Indian Econ. Dev. Pt. I: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Res.*, 103d Cong., 1st Sess. 58-59 (1993) (Testimony of Caleb Shields, Chairman of

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The plaintiffs' argument (Br. 21-24) that the district court erred in considering legislative hearings and reports associated with legislation and legislative efforts other than Section 8014(3) is contrary to Supreme Court directives. As Justice Powell noted in his concurrence in *Fullilove* v. *Klutznick*, 448 U.S. 448, 502 (1980), "Congress is not expected to act as though it were duty bound to find facts and make conclusions of law" before enacting legislation. Rather, "[a]fter Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Id.* at 503. Justice Powell specifically noted that "[o]ne appropriate source" for Congress to rely upon in assessing the need for particular legislation "is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation." *Ibid.* As demonstrated above, see *supra* pp. 30-35, over a number of years Congress amassed a great deal of information about and acquired extensive expertise in the economic plight of Native Americans, and it was appropriate for

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[22](...continued)
Assiniboine & Sioux Tribes of Fort Peck Indian Reservation); *Barriers to Indian Participation in Gov't Procurement Contracting: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 10 (1988) (testimony on inadequacy of Section 8(a) program, on which Department of Defense relied exclusively, to address Indian contracting problems); *Indian Participation in Gov't Procurement Contracting: Hearing Before the Senate Select Comm. on Indian Affairs*, 101st Cong, 1st Sess. 49, 60 (1989) (Testimony of Steven L.A. Stallings, President of Nat'l Ctr. for American Indian Enter. Dev.); Report of the Task Force on Indian Econ. Dev. 215-221 (Dep't of Interior 1986) (inadequacy of Department of Defense's exclusive use 8(a) program to boost Indian procurement contracting).

the members of Congress to rely on that information and expertise in determining that there was a need for Section 8014(3).[23]

In response to the widespread poverty of American Indians, the difficulty tribes have had overcoming such disadvantages, and recognizing the unique historical role of the federal government in relation to American Indian tribal entities, Congress has adopted various legislative measures designed to boost the economic position of federally recognized American Indian tribes.[24] Those efforts

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[23] Moreover, the Constitution grants Congress discretion to regulate its internal proceedings, U.S. Const. Art. I, § 5, which allows it to establish committees and authorize committee reports; the Constitution grants Congress the authority, incidental to lawmaking, to conduct investigations and hold hearings to gather information regarding national problems, see *McGrain* v. *Dougherty*, 273 U.S. 135, 174-175 (1927); cf. *Watkins* v. *United States*, 354 U.S. 178, 193 (1957) (noting rarity of legislative hearings in 1800's); and the Constitution grants Congress broad discretion in determining what must be published in the official record, see *Field* v. *Clark*, 143 U.S. 649, 671 (1892); cf. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Gov't, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 166 (1995) (noting that in the early congresses, consistent with practice during the Articles of Confederation, Senate deliberations were not open to the public and the House did not provide verbatim transcripts of debates). These grants of authority to Congress, which have become utilized with greater regularity as the nation has matured, provide no textual basis for *requiring* Congress to hold hearings, issue committee reports, publish a Congressional Record, or enact findings or statements of purpose, even though such requirements might assist in the process of judicial review. See *Nixon* v. *United States*, 506 U.S. 224, 228-229 (1993); cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

[24] See, *e.g.*, Indian Tribal Econ. Dev. & Contract Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46 (2000) (see 25 U.S.C. 71 note); Amendment to Indian Financing Act of 1974, Pub. L. No. 100-442, 102 Stat. 1765 (1988); Indian Employment, Training & Related Servs. Demonstration Act of 1992, Pub. L. No. 102-477, 106 Stat. 2302 (25 U.S.C. 3401-3417) (1992); Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, 101 Stat. 1788 (1988); Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat.

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include such measures as Section 8014(3), which has been implemented in a manner that is narrowly tailored to fulfill the government's compelling interest in fulfilling its responsibilities it has adopted with regard to federally recognized tribes. For instance, Section 8014(3) is narrowly tailored because it has been made available only to Native American-owned businesses that are socially and economically disadvantaged.[25] The district court found that the Air Force had not used Section 8014(3) "to benefit Native-American enterprises generally without regard to their economic and social circumstances." *AFGE*, 104 F. Supp.2d at 75. As the district court concluded, Section 8014(3) "directs the financial resources and social benefits flowing" from the statute "to the place where Congress determined those benefits are most sorely needed: *disadvantaged* Native-American enterprises." *Ibid.* (emphasis in original). Moreover, Section 8014(3) is narrowly tailored because it has a one-year duration period and is reassessed annually by

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[24](...continued)
2467 (25 U.S.C. 2701 *et seq.*) (1988); Indian Self-Determination & Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975); Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (1974); Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, 85 Stat. 688 (43 U.S.C. 1601 *et seq.*) (1971); Indian Arts & Crafts Act of 1935, Pub. L. No. 74-355, as amended (25 U.S.C. 305 *et seq.*) (1935); Buy Indian Act of 1910, ch. 431, 36 Stat. 861 (25 U.S.C. 47) (1910).

[25] The record below reflects that Chugach was certified by the Small Business Association (SBA) as an economically and socially disadvantaged small business, a certification that reflects both that Chugach is owned by socially and economically disadvantaged individuals and that Chugach falls within the size limitations established by the SBA for such businesses (see Exh. 14 to United States' Motion for Summary Judgment).

Congress. Cf. *O'Donnell Constr. Co.* v. *District of Columbia*, 963 F.2d 420, 428 (D.C. Cir. 1992) (holding that a contracting preference was not narrowly tailored in part because it was of unlimited duration).[26] Section 8014(3) is also narrowly tailored because Congress considered ineffective other alternatives that did not single out members of federally recognized Native American tribes for contracting benefits. See *Croson*, 488 U.S. at 507 (stating that consideration of alternative means is a factor in assessing narrow tailoring). Congress recognized that the inclusion of Native Americans with other socially and economically disadvantaged groups in other contracting programs and goals previously utilized by the Department of Defense (DoD) had not helped to remedy the inadequate self-sufficiency caused by economic hardship.[27] Congress was also aware that

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[26] With respect to Alaska Natives in particular, the requirement that enterprises taking advantage of the contracting shortcut be under at least 51% ownership by Native Americans is also narrowly tailored to the federal government's obligation to encourage the economic self-sufficiency of ANCs because ANCSA itself states that, "[f]or all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives" if a majority of both the total equity of the corporation and the total voting power of the corporation is controlled by Native Alaskans and their descendants. 42 U.S.C. 1626(e)(1). In addition, the intervenor-defendant Chugach, which received the benefit of Section 8014(3) in this case, is wholly owned by an Alaska Native Corporation (JA 74-75).

[27] See, *e.g.*, *Indian Econ. Dev. Pt. I: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Res.*, 103d Cong., 1st Sess. 58 (1993) (Testimony of Rep. Richardson); *Indian Participation in Gov't Procurement Contracting: Hearing Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 1st Sess. at 4-6 (1989) (Testimony of Steve Stallings, President of Nat'l Ctr. for American Indian Enter. Dev.) (explaining that SBA's poor record of recruiting and certifying tribal enterprises and structural incompatibilities between SBA programs and tribal entities have hindered Native

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alternative federal initiatives to increase contracting opportunities between DoD and Native American-owned firms have not achieved the desired ameliorative effects on tribally affiliated Indians.[28]

Thus, although the United States believes that the district court should have an opportunity to apply strict scrutiny to Section 8014(3) in the first instance, if this Court believes that is the appropriate level of review, this Court may uphold Section 8014(3) under strict scrutiny if it feels that it is more appropriate to make that determination at this stage.[29]

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[27](...continued)
American-owned firms from obtaining defense contracts); *id.* at 12-13 (Statement of Dan Press, Esq.) (same); *Barriers to Indian Participation in Gov't Procurement Contracting: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 26-31 (1988) (Testimony of Steven A. Johnson) (explaining how the SBA had a history of failing to certify ANCs in the 8(a) program and had been reluctant to seek out DoD procurement opportunities in Alaska for them); *id.* at 9-10 (Testimony of Dan Press, Esq.) (describing failure of efforts to increase DoD contracting with Native American-owned firms through the SBA's 8(a) program); *id.* at 11-13 (Testimony of Steve Stallings) (same); Report of the Task Force on Indian Econ. Dev. 217-222 (Dep't of Interior 1986).

[28] See, *e.g.*, *Barriers to Indian Participation in Gov't Procurement Contracting: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 10 (1988) (Testimony of Dan Press, Esq.) (describing Memorandum of Understanding between DoD and the SBA to increase defense contracting opportunities for Native American-owned firms); *id.* at 53 (Prepared Statement of Conrad Edwards, Executive Dir. of Council for Tribal Employment Rights) (same).

[29] If this Court should decide that Section 8014(3) does not survive constitutional scrutiny under any standard of review, the United States urges the Court to remand the case to the district court for determination of the appropriate remedy. As the district court noted, ordering the relief sought by the plaintiffs would "seriously disrupt civil-engineering operations at Kirtland" and "would undermine military preparedness." *AFGE*, 104 F. Supp.2d at 79. In order to

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II. Section 8014(3) Does Not Violate The Plaintiffs' Due Process Rights Under The Fifth Amendment To The Constitution

The plaintiffs allege in count two of their complaint that the Air Force's use of the provision in Section 8014(3) relating to Native American-owned firms "deprives federal employees of their constitutionally protected interest in their federal employment in violation of the substantive due process guarantee under the Fifth Amendment" (JA 39). The plaintiffs have not made any claims of deprivation of procedural due process rights secured by the Constitution. As the cursory treatment given to this issue by the plaintiffs in their brief before this Court might suggest (Br. 36), the plaintiffs cannot prevail on this claim. The plaintiffs argue that their right to continued federal employment is a fundamental right and therefore triggers strict scrutiny review. But no court has ever held that such a "fundamental" property right exists with respect to continued government employment. The Supreme Court has held that "there is no fundamental right to government employment for purposes of the Equal Protection Clause." *United Building & Constr. Trades Council* v. *Mayor & Council of Camden*, 465 U.S. 208, 219 (1984). Although public employees may have procedural due process rights associated with their employment – indeed, all of the cases cited by the plaintiffs in

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[29](...continued)
minimize disruption to our nation's military preparedness, it would be prudent to allow the district court to hold evidentiary hearings before fashioning an appropriate remedy.

support of their assertion that public employees "have a constitutionally protected property interest in their employment" (Br. 36) are *procedural* due process cases – the plaintiffs have never alleged that their procedural due process rights were violated and cannot do so for the first time now.

CONCLUSION

This Court should affirm the district court's grant of summary judgment to the defendants-appellees and the intervenor-defendants-appellees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief for the United States as Intervenor is proportionally spaced, has a typeface of 12 points, and contains 12,004 words.

January 10, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2003, two copies of the foregoing Brief for the United States as Appellee were served by overnight mail, postage prepaid, on the following counsel:

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