UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-17780

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

PEABODY WESTERN COAL COMPANY,
Defendant-Appellee;

NAVAJO NATION,
Rule 19 Defendant-Appellee;

KEVIN K. WASHBURN and KENNETH L. SALAZAR,
in their official capacities as Assistant Secretary for Indian Affairs
and Secretary of the U.S. Department of the Interior,
Third-Party Defendants-Appellees.

On Appeal from a Judgment of the United States District Court
for the District of Arizona, Civil Action No. 2:01-cv-1050 JWS

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, 1345 and 42 U.S.C. §§ 2000e-5(f)(1) and (3) and 42 U.S.C. § 1981A. The district court's final judgment entered October 18, 2012 (District Court Record # (R.) 277; Excerpts of Record Volume II (II-ER) 27), is a final decision that this Court has jurisdiction to review pursuant to 28 U.S.C. § 1291. Appellant Equal Employment Opportunity Commission (EEOC or Commission) filed a timely notice of appeal on December 17, 2012. R.282 (II-ER-24).

STATEMENT OF THE ISSUES

1. Did the district court err in granting summary judgment here on the ground that Peabody's preference for Navajo Indians is a "political classification" outside the scope of Title VII, especially where defendants offered no evidence, and Peabody never claimed, that Peabody based its hiring decisions on Navajo tribal membership or even asked applicants their tribal status?

2. Did the district court abuse its discretion when it denied EEOC's motion—on grounds of irrelevance and untimeliness—to supplement the summary judgment record with evidence from EEOC's administrative investigation indicating Peabody made no effort to ascertain whether applicants were enrolled members of the Navajo tribe but merely assumed applicants were "Navajo" based on personal attributes such as their appearance, dress, speech, and name?

STATEMENT OF THE CASE

A. Nature of the Case

The EEOC sued Peabody Western Coal Company in June 2001 alleging two claims: that Peabody violated Title VII's prohibition against national origin discrimination when Peabody refused to hire qualified Native American job applicants because they were not Navajo, and that Peabody failed to maintain records as required by Title VII. R.1. Peabody moved to dismiss the first claim, asserting two separate grounds. R.7.

Peabody argued, first, that the leases with the Navajo Nation under which it operated its two mines on the Navajo Reservation required it to give employment preference to Navajo Indians. *EEOC v. Peabody Coal Co.*, 214 F.R.D. 549, 556 (D. Ariz. 2002) (*Peabody I*). Peabody contended that the Nation was, therefore, a necessary party that the EEOC lacked authority under Title VII to join and without whom the lawsuit should not proceed. *Id.* And because the leases had been approved by the Secretary of Interior (SOI or Secretary), Peabody argued, in addition, that the EEOC was challenging conduct essentially required by another federal agency and, therefore, the case presented a non-justiciable political question. *Id.* The district court agreed and, in September 2002, granted summary judgment and dismissed EEOC's lawsuit. R.59, 60.

The EEOC appealed, and in June 2005, this Court reversed. *EEOC v.*

Peabody W. Coal Co., 400 F.3d 774 (9th Cir. 2005) (*Peabody II*). This Court held the EEOC could join the Navajo Nation as a Rule 19 defendant even though EEOC was not authorized, under Title VII, to bring a claim directly against the Nation. 400 F.3d at 781-84. This Court further ruled the district court was competent to resolve the lawfulness of the Navajo preference in the two Peabody leases. *Id.* at 784-85. This Court also reinstated EEOC's record-keeping claim. *Id.* at 785. The Supreme Court denied Peabody's petition for certiorari. *Peabody W. Coal Co. v. EEOC*, 546 U.S. 1150 (2006).

On remand, the EEOC filed an Amended Complaint naming the Navajo Nation as a Rule 19 defendant. R.67. The Navajo Nation and Peabody moved to dismiss EEOC's Amended Complaint on the grounds that EEOC's complaint sought affirmative relief against the Nation, which exceeded EEOC's authority under Title VII, and that the Secretary was an indispensable party who could not be joined and without whom the lawsuit should not proceed. R.89, R.119. The district court agreed and again dismissed EEOC's lawsuit. R.142, R.143; *EEOC v. Peabody W. Coal Co.*, 2006 WL 2816603 (D. Ariz. Sept. 30, 2006) (*Peabody III*).

EEOC appealed, and in September 2010, this Court reversed in part, vacated in part, and remanded the case. *EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070 (9th Cir. 2010) (*Peabody IV*) (IV-ER-693). This Court reaffirmed that EEOC can name the Nation as a Rule 19 defendant. 610 F.3d at 1077-80. This Court also

ruled the Secretary was a required party under Rule 19 who should be joined, if feasible; the EEOC could not join the Secretary; and, therefore, the EEOC should not be allowed to proceed with its claim against Peabody for money damages. *Id.* at 1080-85. This Court permitted the EEOC to proceed with its claim for injunctive relief, however, on the basis that either the Nation or Peabody could implead the Secretary under Rule 14 and, thereby, mitigate any prejudice from the Secretary's absence. *Id.* at 1086-87.

The Supreme Court denied the Navajo Nation and Peabody's petitions for certiorari and the EEOC's conditional cross-petition seeking review of this Court's ruling that the Secretary is a party who should be joined to the lawsuit if feasible. 132 S.Ct. 91 (2011) (denying petitions No. 10-981, 10-986, and 10-1080). Peabody filed a third-party complaint against the Secretary and a counterclaim against the Chair of the EEOC, R.195 (IV-ER-669), and the Nation renewed its motion to dismiss EEOC's lawsuit, R.196.

The district court denied the Nation's motion to dismiss EEOC's lawsuit. R.237 (IV-ER-661); 2012 WL 748301 (D. Ariz. March 7, 2012). The district court deferred one issue (relating to the Navajo-Hopi Rehabilitation Act of 1950) until the Secretary had the opportunity to address that claim. IV-ER-665. The district court granted the EEOC's motion to dismiss Peabody's counterclaims against the EEOC. R.267 (II-ER-146); 2012 WL 4339208 (Sept. 20, 2012).

The Secretary moved to dismiss Peabody's third-party claims, arguing Peabody did not state a proper claim under the Administrative Procedures Act (APA) and EEOC had no claim against Peabody and, therefore, Peabody could have no counterclaim against the Secretary. R.243. The Nation and Peabody joined the latter argument. R.265 at 1 (II-ER-153); R.255 at 19 (III-ER-338). The district court heard legal arguments from the parties on October 11, 2012. R.279 (amended transcript (Tr.)) (II-ER-28).

The day before the hearing, the EEOC moved to supplement the record with the declaration of the EEOC investigator who interviewed two Peabody officials and her notes from those interviews. R.270 (II-ER-105). The EEOC also moved the district court to take judicial notice of population and employment data related to the Navajo Nation and the Hopi tribe. R.271. The court denied both motions. R.272 (I-ER-23); R.279 at pp. 6-8 (II-ER-33-35).

On October 18, 2012, the district court granted summary judgment to the defendants. R.276 (I-ER-1-22). Although no party ever moved to dismiss the EEOC's record-keeping claim, the district court dismissed all of the EEOC's claims with prejudice and dismissed Peabody's third-party claims and counterclaims without prejudice. R.277 (II-ER-27). This appeal followed. R.282 (II-ER-24).

B. Statement of Facts

In 1970, Peabody began mining coal at the Black Mesa Complex and Kayenta mines on the Navajo and Hopi reservations in northeastern Arizona. The Navajo Reservation is the largest Indian reservation in the United States. *United States v. Navajo Nation*, 537 U.S. 488, 495 (2003). The Hopi Reservation occupies a relatively small area completely surrounded by the Navajo Reservation.

Three leases that Peabody's predecessor entered into with the Navajo Nation and the Hopi Tribe in the 1960s permit Peabody to mine coal on these two reservations. II-ER-194-95. The 1964, lease referred to as the "Peabody North" or "8580 Lease," authorized mining on the Navajo Reservation on land held in trust by the United States for the Navajo Nation. II-ER-194. The two 1966 leases, the "Peabody Joint Use" or "9910 Lease" and the "Hopi" or "5743 Lease," II-ER-195, authorized mining on land formerly known as the "joint use" area which the United States held in trust for both the Navajo Nation and the Hopi Tribe. *See Peabody III*, 2006 WL 2816603, at *4. Congress ultimately partitioned the joint use area between the two tribes, but Peabody continued to mine coal on land held in trust for both Tribes.

All three leases were authorized under the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396g. *Navajo Nation*, 537 U.S. at 493. Prior to 1938, the United States government regularly entered into mining leases with

private companies for mineral mining on Indian trust land without consent or input from the tribes whose resources were being mined. *Crow Tribe of Indians v. State of Mont.*, 650 F.2d 1104, 1112-13 & n.11 (9th Cir. 1981). Congress enacted the IMLA to provide Indian tribes more control over their own resources. *Id.* at 1112-13 (one goal of IMLA was to give tribal governments control over decisions to lease their lands for mining, subject to the Secretary of Interior's approval). Thus, although the IMLA requires the Secretary of Interior to approve IMLA leases, 25 U.S.C. § 396a, the Act places primary responsibility on individual Indian tribes to decide whether to enter into mineral leases and, if so, to negotiate the terms of such leases. *See Wilson v. U.S. Dep't of Interior*, 799 F.2d 591, 592 (9th Cir. 1986) ("Only the Tribe has authority to lease its lands. The Secretary's authority extends only to approving or disapproving leases entered into by the Tribe.") (per curiam).

A representative of the Department of Interior (DOI or Interior) approved the three Peabody leases on the Secretary's behalf. *Peabody III*, 2006 WL 2816603, at *4-5. The 8580 and 9910 leases require Peabody to give employment preference to "Navajo Indians." *Id.* at *4. Article XIX of Lease 8580 states, in relevant part: "Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of the Lessee, they are qualified." Article XVII of the Lease 9910 includes the same language and states, in addition:

"Lessee may at its option extend the benefits of this Article to Hopi Indians." The 5743 Lease which, as noted above, covers the same mining operation as the 9910 Lease, requires Peabody to give preference to Hopi Indians:

> Lessee agrees to employ Hopi Indians when available in all positions for which, in the judgment of Lessee, they are qualified . . . .Lessor [*i.e.*, the Hopi Tribe] may by agreement with the Navajo Indians extend the benefits of this article to the Navajo Indians.

II-ER-195, 272.

Counsel for Interior explained that when DOI includes tribe-specific employment preferences in Indian mining leases, as it did in the Peabody leases, it is because "tribes ask for them to be included." R.279 (transcript) at 23 (II-ER-50). DOI's attorney further clarified that "it is not the Department's legal position that the [DOI] could unilaterally require the negotiating parties, a tribe and the potential leasee [*sic*] to include a tribe-specific preference." *Id.* Consistent with this position and with the IMLA's intent, Stewart L. Udall, the SOI when the Peabody leases were signed, attested that the DOI staff who drafted the Peabody leases included the Navajo employment preference because the Nation bargained with Peabody for it. *Peabody III*, 2006 WL 2816603, at *5.

By the late 1990's, Peabody's two mines employed between 600 and 700 mining personnel plus additional support staff and administrators. *See* III-ER-358-383. In 1998, three non-Navajo Native Americans filed charges with the EEOC

alleging they had applied to Peabody for vacant positions for which they were qualified, but they were not hired because they were not Navajo.[1] During EEOC's investigation of the charges, Peabody submitted "position statements" responding to the three charges. Peabody asserted it utilized an "Indian" preference rather than a "Navajo" preference when it filled job vacancies. R.254-1, III-ER-348-353.

The EEOC interviewed two Peabody Human Resources officials during the investigation. The EEOC offered below, but the district court excluded as untimely, the statements of these two Peabody officials reiterating that Peabody implemented an "Indian" preference rather than a "Navajo" preference but further stating that Peabody received pressure from the Navajo Nation to give preference to Navajos. *See* R.270-1 (Declaration of Lori Barreras) (II-ER-111-115); R.272 (10/10/12 Order denying EEOC motion to supplement the record) (I-ER-23).

In the evidence excluded by the district court, these Peabody officials explained that they did not ask applicants if they were members of an Indian tribe before offering someone a job; they could tell if someone was Navajo without asking. Human Resources Supervisor Jerry Antone, who is Navajo, worked in Peabody's Human Resources Department from 1979 until 1998 and was

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[1] Robert Koshiway filed his charge in January; Thomas Sahu filed his charge in February, and Delbert Mariano filed his charge in March. III-ER-345-47.

responsible for recruiting and advertising and conducted all screenings of applicants while he was at Peabody. II-ER-116. Antone stated that he never asked job applicants for proof of tribal enrollment at the application stage. II-ER-121. He further explained he could tell which applicants were Navajo by their names, how they talked, and how they looked. Sometimes he would speak to an applicant in Navajo, and if they responded, then he knew they were Navajo. II-ER-121-122.

Anthony Baca started working at Peabody in 1984 and served as Director of Human Resources (HR) from 1995 until he left in 1998. II-ER-128. He reiterated that Peabody had an "Indian" preference when he was HR Director, as required by the federal Office of Federal Contract Compliance Programs (OFCCP). II-ER-134. He further explained, however, that the Nation requested regular reports on the number of Navajos hired by Peabody and, from time to time, pressed Peabody to hire more Navajos. *Id.* Baca confirmed that Peabody did not ask job applicants for their tribal affiliation until after they were employed, when the information was needed for tax purposes. He explained it was usually obvious if someone was Navajo based on their name and sometimes their facial features and attire. II-ER-135-137.

The EEOC sued Peabody in June 2001 alleging two claims: that Peabody refused to hire two Hopi Indians, one Otoe Indian, and other Native Americans for positions for which they were otherwise qualified because they were not Navajo, in

violation of Title VII; and that Peabody failed to maintain employment records as required by Title VII. R.1. Apart from the limited discovery the district court allowed to address the Nation's motion to dismiss on various jurisdictional grounds, the district court has never permitted the EEOC to conduct discovery concerning the facts underlying the EEOC's claim that Peabody discriminates in hiring by giving employment preference to individuals who appear, to Peabody's hiring officials, to be of Navajo national origin.

The Navajo Nation and Interior filed separate motions to dismiss and/or for summary judgment with respect to the EEOC's discrimination claim against Peabody. R.243 (Interior), R.251 (Navajo Nation). Of relevance here, Interior argued that Peabody's preference for Navajos was based on a "political classification" that falls outside the scope of Title VII. R.243, at 18-19. Peabody and the Navajo Nation both joined this argument. R.255. at 19; R.265 at 1. No party moved to dismiss the EEOC's Title VII recordkeeping claim against Peabody, which EEOC continues to assert. R.253, at 3 n.1.

C. District Court Denial of EEOC's Motion to Supplement the Record

On October 10, 2012, the EEOC moved to supplement the record with the declaration of the EEOC investigator who interviewed Peabody's hiring officials and her notes from those interviews. R.270 (II-ER-105). The district court denied the EEOC's motion. R.272 (I-ER-23). The court stated that the summary

judgment motions filed by DOI and the Nation had been pending since April and June 2012 and that the EEOC's proffered supplemental information was available when EEOC prepared its responses to both motions. *Id.* The court further stated the information "is not relevant" because EEOC may not recover damages and "[t]here is no reason to believe the pre-1999 practices shed light on [Peabody's] contemporary practices." *Id.* The court ruled: "Based on the foregoing reasons, the Court hereby denies EEOC's request as untimely." *Id.*

D. District Court Grant of Summary Judgment to Defendants

The district court granted summary judgment in favor of the defendants. R.276, *EEOC v. Peabody W. Coal Co.*, 2012 WL 5034276 (D. Ariz. Oct. 18, 2012) (*Peabody V*). After examining "the status of Indian tribes in general and their relationship to the federal government," the district court concluded that the Navajo employment preference in the Peabody leases is a political classification rather than discrimination based on national origin. I-ER-15-19. Relying on *Morton v. Mancari*, 417 U.S. 535 (1974), the court reasoned that the United States has a special relationship with Indian tribes as sovereign nations and that tribes have unique political attributes under federal law that include the right to restrict entry on tribal lands. I-ER-15-16. The court concluded that, pursuant to these rights, tribe-specific employment preferences imposed on private employers who conduct business on the tribe's reservation fall outside the scope of Title VII and

"is rationally tied to legitimate, nonracially based goals." I-ER-17-22.

The district court acknowledged that Interior included a Navajo preference in the two Peabody leases because "[t]he Nation negotiated for [its] inclusion." I-ER-4-7. The court nevertheless found it significant that the leases were "drafted and approved by DOI" and that Interior had a longstanding practice of approving tribe-specific employment preferences in mineral leases for on-reservation mining. I-ER-12, 15-18. The court rejected the EEOC's argument that a Navajo preference conflicts with Title VII's Indian preference exemption, 42 U.S.C. § 2000e-2(i), stating that if Congress intended to prohibit DOI's longstanding practice of approving tribe-specific preferences in Indian leases, Congress would have said so more explicitly. I-ER-20-21. The court concluded that this Court's decision in *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998) (*Dawavendewa I*), did not resolve the question here because *Dawavendewa I* held only that the plaintiff stated a claim under Title VII and did not address whether there might exist some legal justification for a tribe-specific preference. I-ER-13-15 & nn.34, 36.

SUMMARY OF ARGUMENT

Neither an Indian tribe nor the Secretary of Interior has the legal authority to excuse a private employer who is otherwise subject to the provisions of Title VII from complying with Title VII. The district court's decision here would effectively accomplish this result, however, merely by renaming Peabody's Navajo employment preference—a preference this Court previously recognized as national origin discrimination prohibited by Title VII—as a permissible "political classification." The district court erred.

This Court previously held that a lawsuit alleging an employer discriminates in favor of members of a particular tribe and against other job applicants because they are not members of that tribe states a claim of national origin discrimination in violation of Title VII. *Dawavendewa I*, 154 F.3d at 1119-20. This Court further held that Title VII's Indian preference provision in section 703(i), which authorizes preferential treatment for "*Indian*(s) living on or near a reservation," 42 U.S.C. § 2000e-2(i), authorizes preferences for Indians over non-Indians, but does not authorize an employment preference based on tribal heritage or affiliation. 154 F.3d at 1120-23. The relevant facts in *Dawavendewa* are indistinguishable from the present case.

Even if a possible legal justification for a tribe-specific employment preference may exist in theory, however, *see Dawavendewa v. Salt River Project*

Agric. Improvement & Power Dist., 276 F.3d 1150, 1157-59 (9th Cir. 2002) (*Dawavendewa II*), the defendants have not established any such defense here, at least not as a matter of law on this sparse summary judgment record. There is no legal or factual support for district court's conclusion that the employment preference for "Navajo Indians" in the Peabody leases is a lawful "political classification" that falls outside the scope of Title VII. The district court's reliance on *Morton v. Mancari*, 417 U.S. 535, is misplaced. *Mancari* upheld a different type of preference—a preference for *Indians* over non-Indians, the same preference that Title VII authorizes for employers located on or near a reservation. Equally significant, the jobs at issue in *Mancari* were governmental in nature, unlike the private sector mining jobs at issue here.

The Bureau of Indian Affairs (BIA) jobs in *Mancari* involved federal government oversight over Indian tribes and distribution of governmental benefits to tribes and individual Indians. Given the governmental nature of these jobs, the Supreme Court held that Interior's preference for Indians over non-Indians was appropriate and, indeed, could properly be characterized as "political," rather than racial, in nature. Here, on the other hand, the EEOC's complaint alleges Peabody gave preference to job applicants of one tribal affiliation—Navajos— for jobs that have nothing to do with governance by one political entity over another—private sector jobs in a mining operation. The district court thus erred in applying

Mancari's reasoning to the very different facts present here.

Nor does the court's decision find support in the government's trust obligation toward Indian tribes, the Nation's treaty rights or retained rights of self-government, or the fact that the Secretary alleges a longstanding, discretionary administrative practice of approving tribe-specific preferences in on-reservation business leases. None of these sources of legal rights provides the Secretary or the Nation with the legal authority to excuse Peabody from complying with Title VII's prohibition against national origin discrimination. This is not a case of conflicting *statutes*, because there is no statute, regulation, or treaty that authorizes the Secretary to permit or require Peabody to give employment preference to members of one Indian tribe over another in contravention of Title VII's provisions. DOI's *discretionary administrative practice*, albeit long-standing, simply cannot trump Title VII's clear congressional mandate.

Furthermore, no record facts support the district court's conclusion that Peabody's preference for Navajos is a political classification that falls outside Title VII. The Navajo preference in the Peabody leases was not drafted in terms of political membership; it dictates a preference for "Navajo Indians," *not* enrolled members of the Navajo tribe. More importantly, even if the lease was construed as referring to Navajo tribal membership, there is no evidence Peabody implemented the preference based on tribal membership. No defendant has tendered any

evidence that Peabody made any effort to determine whether an applicant was an enrolled member of the Navajo Nation before extending a job offer.

Given this factual vacuum on this pivotal element of the defendants' defense, the district court abused its discretion by denying the Commission's motion to supplement the record with evidence on this point. Even absent the excluded evidence, however, the district court erred in ruling that Peabody's Navajo preference was a permissible political classification because the defendants failed to offer any factual support for their claim that Peabody acted based on applicants' political affiliation.

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS ON EEOC's TITLE VII CLAIM AGAINST PEABODY.

A. Peabody's employment preference for Navajo Indians over non-Navajos violates Title VII's prohibition against national origin discrimination.

This Court reviews *de novo* the district court's grant of summary judgment on a plaintiff's Title VII claim. *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1033 (9th Cir. 2005). Viewing the summary judgment evidence in the light most favorable to the nonmoving party, this Court determines whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Dawson v. Entek Intern.*, 630 F.3d 928, 934

(9th Cir. 2011). "Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

This Court will reverse a grant of summary judgment when it concludes the nonmoving party presented sufficient facts that a reasonable trier of fact could rule in the nonmoving party's favor. *Dominguez-Curry*, 424 F.3d at 1033-34; *see also Dawson*, 630 F.3d at 937. The district court erred here in concluding that Peabody's employment preference for Navajo Indians falls outside Title VII's prohibitions. Therefore, summary judgment should be reversed.

Title VII prohibits employers from discriminating against employees and applicants based on race and national origin, among other things. 42 U.S.C. § 2000e-2(a). Section 703(i), however, specifically exempts discrimination in favor of Indians over non-Indians if a business or enterprise is located "on or near an Indian reservation" and the preferential treatment is pursuant to a "publicly announced employment practice." 42 U.S.C. § 2000e-2(i).[2] Thus, the fact that

[2] This provision provides: "Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." 42 U.S.C. § 2000e-2(i).

Peabody conducts its mining business on the Navajo and Hopi Reservations means Peabody may lawfully give "preferential treatment" to "any individual because he is an Indian living on or near a reservation." *Id.* Apart from this exemption, the fact that Peabody conducts its mining business pursuant to leases with the Navajo Nation does not relieve Peabody of the obligation to comply with Title VII's nondiscrimination provisions, including Title VII's prohibition against national origin discrimination. And the fact that the Secretary of Interior approved Peabody's mining lease with the Navajo Nation does not convert Peabody's preference for Navajos from "national origin" discrimination into a "political classification."

As the district court acknowledged (I-ER-13-14), this Court previously held that "differential employment treatment based on tribal affiliation is actionable as 'national origin' discrimination under Title VII." *Dawavendewa I*, 154 F.3d at 1120. The district court erred in concluding that the involvement of the Secretary of Interior in approving the Peabody leases transformed what would otherwise be unlawful national origin discrimination under this Court's analysis in *Dawavendewa I* into "lawful discrimination based on a political classification."

The facts in *Dawavendewa I* are remarkably similar to the present case. In that case, a member of the Hopi tribe sued the Salt River Project (SRP) alleging SRP violated Title VII when it failed to interview him for a vacancy even though

he was qualified for the position. *Dawavendewa I*, 154 F.3d at 1118. SRP conducted its business on the Navajo Reservation pursuant to a lease with the Navajo Nation that the Secretary had approved and that required SRP to give employment preference to members of the Navajo tribe. *Id.* at 1118 & n.2.[3] SRP moved to dismiss Dawavendewa's lawsuit on two grounds: that discrimination on the basis of tribal membership does not constitute "national origin" discrimination, and that even if it did, Title VII expressly exempts tribal preferences under the Indian preference exemption, 42 U.S.C. § 2000e-2(i). 154 F.3d at 1119. After careful analysis, this Court rejected both arguments.

Regarding the first argument, this Court concluded "tribal affiliation easily falls within the definition of 'national origin.'" 154 F.3d at 1120. This Court cited with approval the EEOC's regulation defining national origin discrimination as including discrimination based on a person's "place of origin" and concluded that the phrase "national origin" as used in Title VII "includes the country of one's

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[3] Although this Court did not mention in the decision that the Secretary had approved the SRP lease, SRP included that information in at least one of its briefs. *See, e.g.*, Appellee SRP's Answering Brief in *Dawavendewa v. SRP*, No. 00-16787, found at 2001 WL 35957430 (CA 9) (Appellate Brief) (1969 lease under which SRP operates the Navajo Generating Station on the Navajo Reservation "was approved by the United States Secretary of the Interior").

ancestors." *Id.* at 1119 (internal quotations and citations omitted).[4] This Court found no significance in the fact that new political boundaries and political structures now exist, noting instead that "the different Indian tribes were at one time considered nations, and indeed still are to a certain extent." *Id.* at 1120.

The lease between SRP and the Navajo Nation—unlike the Peabody leases—explicitly extended the SRP employment preference to "members of the Navajo Tribe."[5] Nevertheless, this Court rejected SRP's argument that under *Mancari*, "employment preferences based on tribal affiliation are based on *political affiliation* rather than national origin and are thus outside the realm of Title VII." *Dawavendewa I*, 154 F.3d at 1120 (citing *Mancari*, 417 U.S. at 552-54).

This Court observed that *Mancari* addressed an entirely different situation: a constitutional challenge to the Bureau of Indian Affairs' (BIA) employment preference for Indians over non-Indians as unlawful race-based discrimination.

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[4] The EEOC's regulation provides: "The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunities because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (cited and quoted in *Dawavendewa I*, 154 F.3d at 1119 & n.5). *See also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) (term "national origin" refers more broadly to country from which an individual's ancestors came).

[5] The Peabody leases require employment preference for "Navajo Indians" rather than members of the Navajo tribe. *Peabody III*, 2006 WL 2816603, at *4.

Dawavendewa I, 154 F.3d at 1120. As this Court further noted, the Supreme Court held that such a preference is not an impermissible racial classification because the jobs in question involved the United States's governance over Indians and Indian tribes, and the Supreme Court concluded that employing Indians for these jobs—defined as someone who is a member in any Indian tribe—was "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* (quoting *Mancari*, 417 U.S. at 554). Significantly, this Court explained that although the employment preference in *Mancari* required membership in any federally-recognized tribe, it did not involve a preference based on membership in a *particular* tribe. *Id.*

This Court also rejected SRP's second argument—that the Indian Preference exemption in section 703(i) of Title VII authorized the Navajo-specific preference in SRP's business lease with the Navajo Nation. *Dawavendewa I*, 154 F.3d at 1120-24. This subsection exempts "preferential treatment" by "any business or enterprise on or near an Indian reservation . . . to any individual because he is an Indian living on or near a reservation." 42 U.S.C. § 2000e-2(i). In refusing the construe this exemption to encompass SRP's Navajo preference, this Court reasoned that Congress included this exemption "to compensate for the effects of past and present unjust treatment, not in order to authorize another form of

discrimination against particular groups of Indians—tribal discrimination." 154 F.3d at 1121-22. As this Court further explained: "[W]e read the term 'because he is an Indian' to mean precisely what it says. The reason for the hiring must be because the person is an Indian, not because he is a Navajo, a male Indian, or a member of any other formal subset of the favored class." *Id.* at 1122.

Thus, in *Dawavendewa I*, this Court carefully examined whether a Navajo employment preference contained in a business lease between the Navajo Nation and an on-reservation private employer violated Title VII's prohibition against national origin discrimination, and concluded it does. This Court further considered, and rejected—under virtually identical circumstances—the very defenses asserted by Peabody and the other defendants here. Nothing in the present case warrants a different conclusion with respect to the Navajo preference in the Peabody leases. Therefore, the district court was obliged to follow this precedent. *Gonzalez v. Arizona*, 677 F.3d 383, 390 n.4 (9th Cir. 2012) (*en banc*) (Unless distinguishable, a published decision of this Court is binding authority that must be followed by district courts in this circuit and other panels of this Court until overruled by either the Supreme Court or this Court sitting *en banc*.).

The district court wrongly adopted the Secretary's argument that DOI approval of the Peabody leases converted a preference that this Court otherwise found, in *Dawavendewa I*, to be conduct based on "national origin" into conduct

based on a "political classification." Indeed, the district court's reasons for construing Peabody's Navajo preference as a "political classification" are wholly unpersuasive. The court stated that, as a result of "conquest and treaties," the United States induced Indian tribes "to give up complete independence . . . in exchange for federal protection, aid and grants of land," and, "[a]s a result, Congress has plenary power over Indian affairs." I-ER-15 & nn.37 & 38. The court noted that Indian tribes, including the Navajo Nation, retain certain sovereign rights, including the right to govern their internal affairs, to exclude nonmembers from the reservation, and to regulate activities of nonmembers who enter into contractual relationships. I-ER-15-17 & nn. 39-47. The court further observed that "Congress has passed various pieces of legislation intended to benefit Indian tribes." I-ER-17 & n.48. Finally, the court discussed the Supreme Court's decision in *Morton v. Mancari* to uphold the BIA's employment preference for Indians—a preference extended to individuals who are members of any federally-recognized tribe, for the unique circumstance of jobs that directly involve in the government's regulation of Indian affairs. I-ER-17-18 & nn. 49-50.

There is no support for the district court's application of the Supreme Court's reasoning in *Mancari* for upholding the federal government's *Indian* preference for *BIA* jobs to Peabody's tribe-specific Navajo preference for the private-sector jobs in Peabody's mining operations. I-ER-18-19. The district court

acknowledged that *Mancari* addressed a different type of preference than present in this case. *See* I-ER-18 (noting "employment preference in *Mancari* was a general preference for members of any Indian tribe and not a specific tribe"). Yet the district court failed to appreciate the significance of this distinction, particularly in light of the significant difference between the BIA jobs at issue in *Mancari* as compared to the jobs subject to the preference in this case.

Indeed, the Supreme Court characterized the situation in *Mancari* as wholly distinct from other situations: "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly sui generis." *See* 417 U.S. at 554; *see also id.* at 554 n.25 (Senator Wheeler described BIA as "'an entirely different service from anything else in the United States'") (citation omitted).

The Supreme Court noted that Congress, in 1934, had determined that "proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies." *Mancari*, 417 U.S. at 553. As the Court further explained, a preference for Indians in BIA jobs was, in this sense, an employment criterion "designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups[,] . . . . similar in kind to the

constitutional requirement that a United States Senator, when elected, be 'an Inhabitant of that State for which he shall be chosen,' . . . or that a member of a city council reside within the city governed by the council." *Id.* at 554 (internal citations omitted).

In this very narrow context, the Court concluded that the Department of Interior's employment preference for members of any Indian tribe over non-Indians, *solely for jobs within the BIA*, was a political classification, not a racial classification, and that the classification served important governmental interests. *See id.* at 553-54. The Court therefore applied a rational basis test (rather than the strict scrutiny accorded a constitutional challenge to a racial classification) and concluded that the preference for Indians over non-Indians was rationally related to a legitimate governmental purpose. *Id.* at 555 ("preference is . . . rationally designed to further Indian self-government").

The Supreme Court's discussion in *Mancari* leaves no doubt the Court perceived itself to be analyzing a singular situation rather than fashioning a general rule broadly applicable to other contexts. In extending *Mancari*'s ruling to the very different facts in this case, the district court noted that the federal government has "distinct trust obligations owed to each tribe" and stated that "[t]ribe-specific employment preferences in DOI-approved leases help discharge those trust obligations." I-ER-18. Earlier in its decision, the district court noted that Interior

included a Navajo preference in the Peabody leases because "[t]he Nation negotiated for [their] inclusion." I-ER-6 & nn.9&10. That the Secretary may believe including a tribe-specific preference in the leases at the Navajo Nation's request helps to discharge the government's trust obligation does not, ipso facto, establish that these lease terms are lawful.

The district court further explained that inclusion of tribe-specific employment preferences in DOI-approved leases

> is for political reasons: to benefit the members of the tribe—a political entity—and to foster tribal self-government and self-sufficiency. It is tribal membership, not status as an Indian, that is the touchstone. Like the general Indian preference in *Mancari*, the tribe-specific preference included in the DOI-approved leases is a political classification.

I-ER-18. It may well be true that the Interior Secretary included a Navajo preference in the Peabody leases "for political reasons." Former Interior Secretary Udall attested that his staff included a Navajo preference in the Peabody leases because the Nation negotiated with Peabody for inclusion of such a tribe-specific hiring preference. *See* I-ER-6 & n.10. It is plausible that Interior, when it approved these leases in 1964 and 1966, believed there was a political advantage to complying with the Nation's request for a Navajo-specific employment preference rather than the Indian preference Congress authorized in Title VII. That Interior may have included a Navajo preference in the Peabody leases for political reasons

flowing from a desire to satisfy another political entity (the Navajo Nation) does not, however, make the preference itself a political classification.

In contrast, the BIA jobs in *Mancari* were, in fact, political in nature. Specifically, these jobs involved administering government benefits for individual Native Americans and interfacing between political entities—the United States (in the form of the Bureau of Indian Affairs), on the one hand, and Indian tribal governments, on the other. Applicants seeking to claim DOI's Indian preference for these jobs had to demonstrate they were a member of *any* federally-recognized tribe. Given that the BIA jobs involved overseeing Indians and Indian tribes, the Supreme Court likened this requirement to the Constitution's requirement that a United States Senator must be a resident of the state he or she represents.

The Supreme Court's characterization of the "Indian" preference for BIA jobs as "political rather than racial in nature," *see Mancari*, 417 U.S. at 553 n.24, is consistent with the ordinary definition of the word "political." Black's Law Dictionary defines "political" as "[p]ertaining to politics; of or related to the conduct of government." *See* Black's Law Dictionary (7th ed.) (defining "politics" as "[t]he science of the organization and administration of the state" and "[t]he activity or profession of engaging in political affairs"). Webster's Dictionary similarly defines "political" as: "of or relating to government . . . or the conduct of

governmental affairs." Webster's Third New Int'l Dictionary (1976) at 1755.[6]

Under these definitions, the political nature of BIA jobs, which involve interactions between the United States government and various Indian tribes, is readily-apparent. In contrast, there is no similar "political" aspect to the private-sector jobs at Peabody's coal mines. In fact, in light of the ordinary meaning of the word "political," calling the Navajo preference for Peabody's mining jobs a "political classification" seems somewhat absurd. None of the reasons the Supreme Court identified in *Mancari* for characterizing Interior's preference for Indians over non-Indians in BIA jobs as "political rather than racial in nature," 417 U.S. at 553 n.24, apply to Peabody's preference for "Navajo Indians" in Peabody's private sector mining jobs.

The only other legal support the district court offered is a passing reference to "various pieces of [federal] legislation" that the district court mischaracterized as "intended to benefit Indian *tribes*." I-ER-17 (emphasis added). The court stated:

> Even though these laws often single out Indian tribes for special treatment, the Supreme Court has consistently upheld them, reaffirming that Indian tribes possess a special status under the law, distinct from that held by non-Indians.

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[6] Additional definitions of "political" are very similar, including "of or relating to matters of government as distinguished from matters of law"; and "of, relating to, or concerned with politics[,] . . . party politics[, or] the making as distinguished from the administration of governmental policy." Webster's Third New Int'l Dictionary (1976) at 1755.

I-ER-17 & n.48 (citing *Mancari*, 417 U.S. at 555 and cases listed therein). The cases cited in *Mancari* (417 U.S. at 555) primarily involved laws that accorded special treatment to Indians over non-Indians, not special treatment for one Indian tribe over another tribe or for the members of one tribe over the members of another tribe. The analogy the district court sought to draw to these cases would be sound only if Peabody had implemented an *Indian* preference rather than a *Navajo* preference. In that event, however, Peabody's conduct would not have conflicted with Title VII.

More importantly, in each of the cases cited in *Mancari*, the special legal status for Indians was expressly authorized by a federal statute (although none that included a tribe-specific preference). Here, in contrast, neither the court nor any party has cited any federal statute that specifically authorizes the Navajo Nation or the Secretary to permit or to require Peabody to implement a tribe-specific employment preference for jobs that otherwise fall within the scope of Title VII's non-discrimination protections. Thus, the cases cited by *Mancari* (417 U.S. at 555) provide no support for the district court's conclusion that the Navajo preference in the Peabody leases is a "political classification" that falls outside the scope of Title VII.

This absence of any congressional authorization for a Navajo preference in Peabody's mining operations is significant, because Congress knows how to

authorize tribe-specific preferences when it wants to and has done so in other contexts. In 1950, for instance, Congress enacted the Navajo-Hopi Rehabilitation Act of 1950 to fund a ten-year program of infrastructure development to assist the Navajo and Hopi tribes. 25 U.S.C. §§ 631-638. In that Act, Congress specifically authorized an employment preference for Navajo and Hopi Indians for the infrastructure projects listed in 25 U.S.C. § 631. *See* 25 U.S.C. § 633. Almost 50 years later, Congress amended the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450 *et seq.*, to authorize tribe-specific employment preferences for a different set of specified, BIA-funded projects. *See* 25 U.S.C. § 450e(c); *Dawavendewa I*, 154 F.3d at 1122-23 & n.11 (discussing 1994 ISDA amendments).

As these two federal statutes illustrate, when Congress wanted the special treatment the federal government accords Native Americans to include tribe-specific preferences, Congress specifically so provided. In the 1938 Indian Mineral Leasing Act, in contrast, Congress chose to benefit Indian tribes by giving tribes more authority to negotiate lease agreements with private companies to mine their mineral assets. Congress did not, however, authorize the inclusion of tribe-specific preferences in those mining leases. The district court erred in failing to appreciate the importance of this contrasting congressional legislation.

The district court's analysis also failed to accord proper deference to the

EEOC's longstanding interpretation of Title VII as reflected in the EEOC's 1988 policy statement on Title VII's Indian preference exemption, subsection 703(i) of Title VII. The district court based its deference to Interior's administrative practice over the EEOC's regulatory interpretation largely on three considerations: the unique position Indian tribes hold with respect to the federal government, the retained sovereign rights of Indian tribes, and the federal government's historic efforts to improve the circumstances of Indian tribes such as the Navajo Nation. *See, e.g.*, I-ER-15-17. In enacting Title VII, however, Congress took these same considerations into account by excluding Indian tribes entirely from the definition of "employer," *see* 42 U.S.C. § 2000e(b), and by adding an Indian preference exemption in section 703(i), 42 U.S.C. § 2000e-2(i).

As Senator Humphrey explained:

> A new subsection 703(i) has been added permitting enterprises on or near Indian reservations to follow preferential hiring practices toward Indians. This exemption is consistent with the federal government's policy of encouraging Indian employment and with the special legal position of Indians.

110 Cong. Rec. 12723 (1964) (statement of Senator Humphrey). Thus, Congress recognized "the special legal position of Indians," addressed the critical need for Indian employment opportunities, and established the specific contours for such assistance by authorizing employers to offer a preference to "*any* individual *because he is an Indian* living on or near a reservation." 42 U.S.C. § 2000e-2(i)

(emphasis added).

In determining whether Congress intended section 703(i) to authorize tribe-specific employment preferences, the EEOC considered regulations of the Departments of Labor (DOL) and Interior interpreting the same or similar statutory language to *exclude* tribe-specific preferences. *See* EEOC Policy Statement on Indian Preference, No 915.027 (May 16, 1988), available at http://www.eeoc.gov/policy/docs/indian_preference.html (last visited April 24, 2013). The DOL regulation EEOC considered, which is still in effect today, permits federal contractors to give preference to Indians over non-Indians for work on or near Indian reservation, but prohibits discrimination "among Indians on the basis of . . . *tribal affiliation*." *See* 41 C.F.R. § 60-1.5(a)(6) (1987) (emphasis added) (now codified at 41 C.F.R. § 60-1.5(a)(7)). The DOI regulation, based on the ISDA before it was amended in 1994, 25 U.S.C. § 450e(b), required inclusion of Indian preference provisions in certain federal contracts and grants. The specific clause that Interior required grantees and contractors to include in these grants and contracts stated, in relevant part: "Contractor agrees to give preference to Indians . . . *regardless of* . . . *tribal affiliation*." 48 C.F.R. § 1452.204-71 (1987) (emphasis added). The EEOC concurred with these administrative interpretations of its sister agencies and concluded, in its 1988 policy statement, that "Congress intended to encourage the extension of employment opportunities to Indians

generally, without allowing discrimination among Indians of different tribes." *See id*.

As this Court discussed in *Dawavendewa I*, Congress thereafter amended the ISDA to permit tribe-specific employment preferences under certain specified circumstances. *See Dawavendewa I*, 154 F.3d at 1122-23. The fact that Congress recognized the need to alter the ISDA's statutory language expressly in order to permit tribe-specific employment preferences provides further support for the EEOC's interpretation in its policy statement that statutory language permitting an "Indian" preference does not signal a congressional intent to authorize tribe-specific preferences. *See id.* at 1123. Notably, current Department of the Interior regulations expressly define the phrase "Indian preference" as referring to a preference that distinguishes between Indians and non-Indians, in contrast to the phrase "tribal preference" which, according to Interior, could include a preference limited to Indians of a particular tribe. *See, e.g.*, 25 C.F.R. § 170.914.[7]

The EEOC's 1988 policy statement notes that in some parts of the country, where an employer is located near the reservation of only one tribe and the Indians

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[7] This provision is part of DOI's Indian Reservation Roads Program regulations. The provision explains the difference between tribal preference and Indian preference: "Indian preference is a hiring preference for Indians in general. Tribal preference is a preference adopted by a tribal government that may or may not include a preference for Indians in general, Indians of a particular tribe, Indians in a particular region, or any combination thereof." 25 C.F.R. § 170.914 (2013).

living on or near that reservation are all members of the same tribe, the distinction may have no practical significance. EEOC Policy Statement, *supra*. In other parts of the country—as is the case here with the Hopi and Navajo reservations—employers may be situated near the reservations of more than one tribe or more than one tribe may share the same reservation. As the EEOC's Policy Statement observes, "The potential inequities resulting from according a preference based on tribal affiliation are most clearly evident when these circumstances are contemplated." *Id.*

In *Dawavendewa I*, this Court gave the EEOC's policy statement "due weight" and agreed with the EEOC's regulatory interpretation. *See* 154 F.3d at 1121. The district court here acknowledged the correctness of the EEOC's interpretation, at least with respect to employers that are not operating under a DOI-approved lease, conceding: "[I]t is likely that Congress intended to only exempt Indian employment preferences in general and not tribe-specific preferences from Title VII" in those situations "where an employer discriminates against members of a particular tribe without oversight or approval by the federal government." I-ER-21. The district court erred, however, in concluding that "oversight or approval by the federal government" could excuse a private employer from complying with Title VII.

Part of the court's faulty reasoning stems from the court's belief that because

the EEOC's 1988 policy statement does not expressly state that it addresses "a tribe-specific hiring preference maintained by an employer complying with the terms of a DOI-approved lease for the development of the tribe's natural resources that are held in trust by the federal government," EEOC's policy statement does not cover this specific situation. I-ER-20-21. To the contrary, EEOC's policy statement is written broadly to cover *all* employers on or near a reservation, regardless of the presence of a DOI-approved lease. Nothing in the statement or elsewhere suggests that when the EEOC published this guidance, the EEOC contemplated any limitation on the employment contexts the guidance addressed. And the district court points to nothing that suggests EEOC's policy statement excludes some subset of employers such as those engaged in mining or operating pursuant to a DOI-approved lease.

In fact, if such a limitation were read into EEOC's policy statement, the exceptions would likely swallow the rule. Congress has long imposed on the Department of Interior a broad statutory obligation to approve business leases of all kinds for private companies conducting business on Indian trust lands. For example, Congress enacted the Indian Long-Term Leasing Act, 25 U.S.C. § 415, in 1955, requiring DOI to approve all, or virtually all, business leases for on-reservation activities conducted by private employers on Indian trust land. *See* 25 U.S.C. § 415(a). This statute was in effect when SRP entered into its business

lease with the Navajo Nation in 1969, and it was still in effect when the EEOC adopted the Indian preference policy statement in 1988, Likewise, when the EEOC published this policy statement, DOI was obligated, under the Indian Mineral Leasing Act of 1938, to approve all mineral mining leases like the Peabody leases at issue here. 25 U.S.C. § 396a.

The EEOC's policy statement, by its express terms, addresses businesses located "on" as well as "near" Indian reservations. And when the EEOC issued the 1988 policy statement, the factual backdrop was a near universal requirement that the Department of Interior approve leases between an Indian tribe and a private business for on-reservation employment located on Indian trust land.[8] Thus, the only logical reading of the EEOC's policy statement is that it includes on-reservation businesses that operate pursuant to a DOI-approved lease. There is simply no basis for inferring an unspoken exclusion of the vast majority of on-reservation businesses, simply because the policy statement does not explicitly say it addresses businesses operating under a DOI-approved lease. The district court, in addressing the EEOC's claim that Peabody violated Title VII, erred in failing to

[8] In 2000, Congress added subsection (e) to the Indian Long-Term Leasing Act, creating an exception for certain leases by the Navajo Nation entered pursuant to tribal regulations approved by the Secretary. 25 U.S.C. § 415(e) (added by Pub.L. 106-568, Title XII, § 1203, 114 Stat. 2934). This provision was only added in 2000, however, so it does not alter the legal landscape that existed when EEOC issued the 1988 policy statement on Title VII's Indian preference exemption.

accord EEOC's policy statement proper deference.

The district court's failure to give proper deference to the EEOC's regulatory interpretation is compounded by the fact that the court wrongly gave substantial deference to a discretionary administrative practice of Interior that has no statutory or regulatory grounding. DOI claims to have a long-standing practice of approving tribe-specific employment preferences in mining leases under the IMLA even though, in contrast to the express language of Title VII, the Secretary's administrative practice is unsupported by any statutory or regulatory provision. In accepting Interior's claim that Peabody's discriminatory conduct is lawful, the district court placed great weight on the Secretary's representation that Interior has been approving tribe-specific preferences in mining leases since "before the passage of Title VII." R.276 at 21. The Secretary has never identified any statute or regulation, however, that expressly authorizes this discretionary administrative practice.

That the Department of Interior has engaged in a particular *discretionary administrative* practice for many years does not, itself, justify the continuation of that practice in the face of a conflicting statutory prohibition. *See Conn. Light & Power Co. v. Fed. Energy Reg. Comm.*, 627 F.2d 467, 473 (D.C. Cir. 1980) (court declined to defer to FERC's longstanding administrative practice that was not based on any express statutory authorization and, in fact, violated an express

statutory mandate); *Wilderness Soc. v. Morton*, 479 F.2d 842, 865-67 (D.C. Cir. 1973) (agency cannot justify its circumvention of an express statutory mandate by pointing to a past pattern of violating that mandate). Indeed, the Secretary's contention that DOI has long been approving tribe-specific preferences essentially amounts to an admission that, since 1964, Interior has been directing private companies to ignore Title VII. Regardless of how long-standing DOI's discretionary administrative practice has been, it cannot serve as the legal grounds to enable private companies to violate Title VII.

Only an explicit congressional directive, which is not present here, could authorize the Secretary to direct or permit private companies to engage in conduct that ordinarily would violate Title VII. Such congressional authority cannot be found in or inferred from the statute under which these two leases were entered, the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g. Congress gave the Interior Secretary responsibility under the IMLA to approve Indian mineral leases to ensure a tribe does not enter into an agreement that would squander the tribe's mineral resources. 25 U.S.C. § 396a. According to one scholar, "[a]s a practical matter, however, the BIA simply approves transactions that tribal governments support." Wood, Mary Christina, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," 1994 Utah L. Rev. 1471, 1480 (1994).

Nothing in the IMLA's statutory provisions or regulations addresses employment preferences of any kind. IMLA regulations require parties to use a form lease provided by the Secretary, and defendants offered evidence that at least some form mineral leases include a tribe-specific preference. But the regulations also make clear that parties are not required to adhere to the terms in the form lease; the regulations expressly permit parties to negotiate different terms. 25 C.F.R. § 211.57. And Interior's attorney clarified at the summary judgment hearing that Interior does *not* take the position that it can or would ever impose a tribe-specific preference apart from a tribe's request for it. *See* II-ER-50. There is simply no basis for construing the IMLA's silence with respect to employment preferences as congressional authorization for the Secretary to give lessees permission to violate another federal law that is otherwise applicable.

Nor does the government's general trust obligation toward Indian tribes authorize the Secretary to direct or permit Peabody to violate Title VII. First, it is doubtful the trust doctrine applies here. The Supreme Court recently examined a related question and concluded that in the context of DOI's limited oversight of Indian mineral leases, there was no indication Congress intended the Secretary to exercise a fiduciary or "trust" role. *See Navajo Nation*, 537 U.S. at 506-08 (IMLA does not give rise to a "trust" obligation requiring the Secretary to act in a tribe's best interests when performing IMLA duties).

More importantly, we know of no legal authority for the principle that the trust doctrine allows the Secretary to excuse a private, non-tribal business from complying with federal law. The trust doctrine is a general principle that directs the Secretary, when there are a range of lawful choices, to select a choice that will benefit the tribe. It is not a basis for excusing compliance with the law. Indeed, the expectation that lessees will comply with the law appears to be an accepted concept, as number of the business leases in the record include express provisions requiring lessees to comply with all applicable tribal, state, and federal laws. *See, e.g.*, III-ER-411, 425. The record includes, as well, business leases in which the parties qualified the requirement for a Navajo employment preference with the explicit condition that the preference is to be implemented only to the extent it is not prohibited by federal law. *See* III-ER-392-393, 406-407, 417.

In any event, the trust doctrine is most useful in situations where the federal government is dealing with an individual tribe; the doctrine is well-suited for situations in which the interests of only one tribe are at stake. The obligation does, however, extend generally to Indians as a group rather than only to select Indian tribes. *See, e.g., U.S. v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2334 (2011) (noting "undisputed existence of a general trust relationship between the United States and the Indian people"). And because the trust doctrine extends beyond the government's relationship with just a single group, the trust doctrine is much less

helpful in situations like the present case, involving competing interests of different tribes. Indeed, former Secretary Udall acknowledged, in his deposition, that Peabody's leases between the Navajo Nation and the Hopi Tribe required Peabody to give preference to Navajos, under Lease 9910, and to Hopis, under Lease 5743, *for the same jobs in the same mine*. *See* IV-ER-727, 730-734. When Secretary Udall was asked, in his deposition, how Peabody could possibly implement these competing lease directives to favor Navajos over everyone else (including Hopis) and Hopis over everyone else (including Navajos) at the same time for the same jobs, he had no an answer. *Id*. The trust doctrine is not the proper source of authority to justify Peabody's failure to comply with Title VII.

Justification for Peabody's conduct likewise cannot be found in the 1850 and 1868 treaties between the United States and the Navajo Nation or in the Nation's inherent sovereign authority to regulate companies that conduct business on the Navajo Reservation. The treaties provide, among other things, that the Navajo Nation can prohibit or condition entry onto its reservation by nonmembers of the tribe. *See* I-ER-16. The Tribe cannot, however, condition entry onto its reservation on a requirement that a non-tribal business such as Peabody violate applicable federal law. The defendants have offered no legal precedent in which any court has so held.

Of course, some federal laws, by their terms, do not apply to a private entity

doing business on an Indian reservation and, under those circumstances, there is no conflict. Title VII is not such a statute, however. To the contrary, the total exclusion of Indian tribes from the definition of "employer" and the Indian preference exemption in section 703(i) establishes that Congress thought about the impact of Title VII on tribes and their members and, apart from excluding tribes as employers and permitting a limited "Indian" preference, Congress otherwise intended Title VII to apply to businesses operating on a reservation.

Finally, the Navajo Nation's inherent sovereign powers do not authorize the Nation to require Peabody to violate Title VII as a condition of mining coal on the Navajo Reservation. Tribes retain certain inherent sovereign powers to govern their internal affairs on matters such as domestic relations, rules of inheritance, tribal membership criteria, taxation, property rights, and the administration of justice with respect to disputes and offenses among the members of the tribe. *See* Cohen's Handbook of Federal Indian Law, at §4,01[2] (2005 ed.). These inherent sovereign powers do not, however, include the power to authorize or direct a nontribal private business to violate a federal law of general applicability that otherwise applies to that business. *See, e.g., Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425-26 (1989) ("A tribe's inherent sovereignty . . . is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's external relations.").

Simply put, then, there is no legal authority to support the district court's determination that Interior and/or the Navajo Nation could excuse Peabody from complying with Title VII.

B. The district court improperly granted summary judgment here for the additional reason that defendants offered no evidence Peabody based its preference for Navajos on applicants' status as enrolled members of the Navajo tribe.

Apart from the absence of legal support for the district court's conclusion that Peabody's Navajo preference is a political classification that falls outside Title VII, there is no record evidence to support the factual premise underlying the district court's conclusion that this is a political classification—the assumption that Peabody based its hiring decisions on an applicant's tribal membership status. To be entitled to summary judgment, a party must demonstrate both the absence of any genuine dispute concerning a material fact *and* entitlement to judgment in its favor as a matter of law. Fed. R. Civ. P. 56(a); *Soremekun*, 509 F.3d at 984 ("movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party"). If a movant fails to establish a factual predicate for judgment in its favor as a matter of law, summary judgment must be reversed. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153-161 (1970) (reversing summary judgment because moving party failed to carry its burden to foreclose existence of a possible fact that would support nonmoving party's claim).

Where the moving party has the burden of proof on a particular issue at trial—as where the movant, like DOI and the Navajo Nation here, offers a fact-based defense to the nonmoving party's claim—the movant has the burden of establishing the predicate factual basis in support of summary judgment. *See Adickes*, 398 U.S. at 158-59 (unexplained gaps in the materials submitted by movant would permit a jury to infer that the facts supported nonmovant's claim). "If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000) (citations omitted); *see also Adickes*, 398 U.S. at 159-160.

To be entitled to judgment here, the defendants had to demonstrate not only the merit of their legal theory (*i.e.*, that a hiring preference in favor of members of the tribe on whose reservation the employment takes place and is done pursuant to a DOI-approved lease is, as a matter of law, a political classification), but also that sufficient facts exist to support that legal theory. In other words, the defendants had to prove that Peabody actually relied on applicants' tribal membership status in making employment decisions and that no reasonable jury could find to the contrary. Defendants' summary judgment documents failed to make this factual showing.

The district court concluded that Peabody's Navajo preference is a lawful "political classification" under the theory that the Nation can lawfully request, and the Secretary can lawfully require, an on-reservation employer to favor *members of the Nation's own tribe* for jobs on the Nation's reservation. There is, however, no evidence in the summary judgment record that Peabody actually acted pursuant to the leases. Indeed, there is contrary record evidence indicating that during the EEOC's investigation, Peabody *denied* using a tribe-specific preference in its hiring, notwithstanding the language in its leases with the Nation.[9] *See, e.g.*, R.254 (EEOC's Statement of Facts) Facts ##6&7 (III-ER-341-342); R.254-1 Exhs. 2&3 (III-ER-348-357).

Specifically, defendants have offered no evidence Peabody ever asked applicants if they were members of the Navajo tribe before offering them a job. Certainly, Peabody has never represented that it screened applicants based on their tribal membership or inquired about tribal membership before making a job offer.

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[9] The fact that Peabody advanced a position during the EEOC investigation (that it used an "Indian" preference) that is wholly inconsistent with the position Peabody advances in this litigation (that its conduct is justified by the Navajo preference in the leases) demonstrates the pretextual nature of Peabody's assertion that it does not discriminate in violation of Title VII. Apart from the EEOC's other arguments, this evidence of pretext warranted denial of summary judgment here in any event. *See Raad v. Fairbanks No. Star Bor. Sch. Dist.*, 323 F.3d 1185, 1193-95 (9th Cir. 2003) (reversing summary judgment where evidence would permit a jury to infer defendant's reasons for non-hire were pretextual).

To the contrary, as noted above, in responding to the charges of discrimination, Peabody denied that it maintained a Navajo preference and represented, instead, that it maintained an "Indian" preference. And the evidence that the EEOC argues the district court wrongly excluded from the summary judgment record (*see infra*) demonstrates that during EEOC's administrative investigation, Peabody's hiring officials admitted they never asked applicants if they were members of a particular tribe or checked applicants' tribal status in any other way before offering someone a job. The EEOC's proffered evidence also includes statements of Peabody hiring officials that the Navajo Nation pressured them to hire more Navajos and that they (Peabody's hiring officials) could tell if someone was "Navajo" or non-Navajo by an applicant's appearance, speech, and name, among other things.

The distinction between giving preference to individuals who appear to be Navajo as opposed to giving preference to enrolled members of the Navajo Nation is significant, because not everyone who appears Navajo and who lives on or near the Navajo Reservation is an enrolled member of the tribe. The Navajo Nation's legal code contains very specific requirements concerning tribal membership. *See* Navajo Nation Code Annotated (NNCA) §§ 701-705, 751-760. Under the Nation's own tribal membership requirements, there are a number of scenarios where someone could have sufficient Navajo blood that they would appear, to Peabody's hiring officials, to be Navajo and yet would not actually be eligible for a

preference based on Navajo tribal membership.

For instance, children born to an enrolled member of the Navajo Nation are automatically members, but only if they are at least one-fourth degree Navajo blood. NNCA § 701.C. It is quite possible there are individuals living on the Navajo reservation who have a Navajo-sounding name and a Navajo appearance who are not actually tribal members because, although born to an enrolled member, they are less than one-fourth degree Navajo blood.

Similarly, the Navajo Code provides that "[a]ny enrolled member of the Navajo Nation may renounce his [tribal] membership." NNCA § 705. Once that occurs, the individual cannot be reinstated except by a vote of the Navajo Nation Council. Unless Peabody asked job applicants if they were tribal members—and, as noted above, defendants offered no evidence that Peabody did, and Peabody's officials said they did not—such an applicant would appear, to Peabody's hiring officials, like anyone who *is* a member of the Navajo Nation. Someone who had renounced Navajo tribal membership, however, would not satisfy the criterion for the "political classification" that, in the district court's view, separated this preference from unlawful national origin discrimination.

The Navajo legal code also provides that someone who is otherwise eligible to be enrolled as a member of the Navajo Nation is *in*eligible if he or she is, at the same time, on the roll of any other tribe of Indians. NNCA §§ 701.B., 703.

Individuals with one non-Navajo parent who enrolled them, at birth, in the non-Navajo tribe would not be eligible to be enrolled in the Navajo Nation as long they remained a member of the other tribe. Nevertheless, these individuals might appear Navajo, speak the Navajo language, and live on the Navajo reservation with their Navajo parent or a Navajo spouse.

In opposition to summary judgment, the EEOC noted that "[f]ull fact discovery has not yet begun" in this case. R.253 (EEOC Response to Third Party Defendant's Motion for Summary Judgment), at 5. EEOC argued that "[o]nce discovery begins, the evidence may well demonstrate that Peabody Coal used proxies for national origin such as facial features and surnames to implement its preferences." *Id.* at 35. The EEOC thereafter moved to supplement the record with evidence from the EEOC's investigation demonstrating that this was, indeed, the case when the EEOC investigated these charges. R.270 (II-ER-105-139). The EEOC's proffered evidence demonstrates that Peabody did not ask applicants if they were members of the Navajo tribe, or any tribe, until after they were hired, and then only because it was relevant for tax purposes.

The EEOC argued, in further opposition to summary judgment, that "the evidence Interior offers does not justify summary judgment [because] Interior has not shown that the preference is a political classification rather than national origin discrimination." R.253 at 35-36. The defendants' failure to offer any evidence to

demonstrate that Peabody actually based its hiring decisions on Navajo tribal membership can either be construed as defendants' failure to *disprove* an element of the EEOC's case (*i.e.*, their failure to disprove EEOC's claim that Peabody engaged in national origin discrimination) or defendants' failure to *prove* an element of their proffered justification (*i.e.*, their failure to prove their contention that Peabody favored individuals based on their "political" classification as members of the Navajo tribe). Either way, the omission is critical.

By denying the EEOC's motion to supplement the record (a decision the EEOC challenges in this appeal, *see infra*), but then granting summary judgment under a legal theory that assumes conduct based on tribal membership, the district court incorrectly assumed a critical fact that the movants were obligated to demonstrate affirmatively as part of their motion for summary judgment. Even in the absence of the EEOC's motion to supplement the record, the district court was obligated to deny summary judgment because the defendants failed to demonstrate, on this record, that they were entitled to judgment in their favor as a matter of law.

C. The district court abused its discretion when it denied the EEOC's motion to supplement the record with critical facts showing Peabody's preference for Navajo Indians was not based on tribal membership.

This Court reviews for abuse of discretion a district court's denial of a motion to supplement the summary judgment record with facts not included in the party's initial response. *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (9th Cir. 1985) ("A district court's refusal to accept a late affidavit is reviewable only for abuse of discretion."). The district court abused its discretion here in denying the EEOC's motion, and that decision should be reversed.

The day before the district court heard oral argument on defendants' motions for summary judgment, the EEOC moved to supplement the record with evidence from EEOC's administrative investigation. This evidence demonstrates, among other things, that Peabody did not rely on the leases to justify a preference for Navajos. Rather, according to these company officials, Peabody initially implemented an "Indian" preference but, over time, experienced pressure from Navajo tribal leaders to hire more Navajos. The evidence also demonstrates that Peabody's hiring officials did not attempt to ascertain an applicant's tribal membership before making a job offer. Instead, Peabody's hiring officials told EEOC's investigator they generally knew which applicants were "Navajo" based

on their name, appearance, and speech, among other indications. R.270.

The court offered two reasons for excluding this evidence. The court concluded the evidence is not relevant to EEOC's claim that Peabody is liable for violating Title VII because the evidence relates to Peabody's hiring practices during the 1990s, and this Court has ruled EEOC may not seek monetary relief against Peabody. R.271. The court also found the motion "untimely," noting the evidence had been in the EEOC's possession when EEOC initially responded to defendants' summary judgment motions. *Id.* The court did not, however, conclude that any party would have been prejudiced by the court's acceptance of the EEOC's supplemental evidence the day before the hearing. *See id.*

The district court abused its discretion in excluding this critical evidence on these bases. The 1999 statements of Peabody's hiring officials constitute the most direct evidence of which EEOC is aware concerning Peabody's actual hiring practices. EEOC does not have more recent information on this because the EEOC has not been permitted to conduct any discovery since filing this lawsuit. The evidence is highly relevant, for several reasons.

First, in order for the EEOC to establish a violation of Title VII and a basis for injunctive relief, the EEOC must demonstrate that Peabody based its hiring practices on discriminatory considerations. The statements of Peabody's hiring officials would permit a reasonable jury to infer that although Peabody officially

adhered to an "Indian" preference, the company eventually succumbed to pressure from the Navajo Nation to hire more Navajos. Peabody joined in Interior's motion for summary judgment, but offered no evidence disputing it gives employment preference to individuals it believes are Navajo or demonstrating hiring practices that differ from the practices Peabody's officials described in 1999.

Second, the statements of Peabody's officials undermine two factual foundations for the defendants' claim that Peabody's conduct was lawful—defendants' contentions that Peabody relied on the preference in the leases and that Peabody based its hiring on a "political classification"—Navajo tribal membership. Peabody's officials stated that Peabody did not implement the Navajo preference in the leases, and they stated that Peabody did not inquire about tribal membership, maintaining they could just tell if someone was "Navajo" by such attributes as appearance, speech, and name.

A court abuses its discretion when it rests on an error of law (such as the application of the wrong legal principle) or a clearly erroneous assessment of the evidence, or when the district court's decision "cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168-69 & nn.4-6 (2d Cir. 2001) (citations omitted). The district court abused its discretion here under all three facets of this test.

The district court abused its discretion because the court's conclusion that

the period of time covered by the evidence (the 1990s) is irrelevant to the legal issues presented in these summary judgment motions, simply because the EEOC cannot seek monetary damages against Peabody, rests on an error of law. *See Zervos*, 252 F.3d at 168-69. The fact that this Court ruled in *Peabody IV* that the EEOC may not seek monetary damages, *see Peabody IV* (IV-ER-713-714), does not limit the period for which the EEOC might seek to establish that Peabody has been violating Title VII. To the contrary, evidence demonstrating how long and in what way Peabody has violated Title VII is directly relevant to the proper terms, scope, and duration of any injunctive relief the EEOC might seek here. *See, e.g.*, *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 100 (2d Cir. 2012) (in considering whether to impose injunction, court may consider "the character of the past violations") (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1578 (7th Cir. 1997) ("Once employment discrimination has been shown . . . district judges have broad discretion to issue injunctions addressed to the proven conduct."); *Briscoe v. Fred's Dollar Store, Inc.*, 24 F.3d 1026, 1029 (8th Cir. 1994) (upholding permanent injunction, in part, based on finding that "Fred's implementation of its policies and regulations revealed a 'consistent practice' of discrimination against its Black employees."). The district court's refusal to supplement the record based on the mistaken belief that EEOC's inability to seek monetary damages makes the proffered evidence

irrelevant is all the more damaging given the absence of any other evidence on Peabody's hiring practices.

The district court also abused its discretion because its denial of the EEOC's motion to supplement the record rests on a clearly erroneous assessment of the evidence. *See Zervos*, 252 F.3d at 168-69. The district court failed to appreciate the critical significance of evidence that two Peabody officials involved in Peabody's hiring process in 1999 admitted Peabody made no effort to ascertain whether applicants were members of the Navajo tribe before offering them a job, but could tell who was "Navajo" based on their appearance, attire, name, and speech. This evidence directly supports the EEOC's contention that Peabody was engaging in national origin discrimination, not a "political classification" as defendants contend. National origin discrimination can be demonstrated by evidence that an employer judges applicants based on traits associated with a particular ethnic group (such as Indians of Navajo heritage), including such distinguishing elements as facial appearance, speech, name, and attire. *See* 29 C.F.R. § 1606.1 (national origin discrimination includes denial of equal employment opportunity "because an individual has the physical, cultural, or linguistic characteristics of a national origin group" or an individual's "name . . . is associated with a national origin group"); *cf. El-Hakem v. BJY, Inc.* 415 F.3d 1068, 1073 (9th Cir. 2005) ("A group's ethnic characteristics encompass more than its

members' skin color and physical traits. Names are often a proxy for race and ethnicity.") (citation omitted). Given defendants based their claimed justification for a Navajo preference on "political classification," this evidence that Peabody did not check tribal status is undeniably highly relevant. In stating that this evidence lacks relevance to EEOC's present claim against Peabody, the district court based its decision, at least in part, on a clearly erroneous assessment of the evidence.

Finally, in denying the EEOC's motion to supplement the record, in part, on the ground that the evidence was "untimely" without finding that any party would have been prejudiced by admission of the evidence the day before the summary judgment hearing, the district court abused its discretion because its decision fell outside "the range of permissible decisions." *See Zervos*, 252 F.3d at 168-69 . The EEOC offered this evidence by motion to supplement the record because the evidence was being offered outside the time the court had set for opposing briefs and affidavits. The EEOC offered the evidence prior to the court's summary judgment decision, however. The critical consideration, at that point, would be whether any party would be prejudiced by the inclusion of additional facts concerning Peabody's hiring practices. The court made no finding that any party would be prejudiced; indeed, the court did not even ask for the parties' positions concerning admission of the evidence before denying the EEOC's motion. Thus, the court's finding of untimeliness is not based on any prejudice to the parties.

This case is not like situations where a party filed only a bare-bones response to a motion in the timeframe established by the court and then later sought to rectify the omission with a voluminous late filing of supplemental materials. In *GoPets v. Hise*, 657 F.3d 1024 (9th Cir. 2011), this Court concluded that where a party made little or no effort to respond to a motion within the established timeframe, a district court did not abuse its discretion in refusing to consider the party's late-filed materials. *Id.* at 1029. This Court reasoned that the district court in *GoPets* acted within its discretion because the moving party had failed to take advantage of its initial opportunity to present its position. Under those circumstances, neither the federal rules nor the local rules required the district court give the party "'yet another bite at the apple,' and, in any event the new documents would not change the result." *Id.*

Here, in contrast, the EEOC offered well-developed legal arguments supported by comprehensive documentation in its initial opposition to defendants' summary judgment motions. The EEOC's proffered supplemental information fills in a single specific—but highly significant—element of the factual background on which the district court's grant of summary judgment rests. The district court abused its discretion in refusing to consider this potentially outcome-determinative evidence.

CONCLUSION

For the foregoing reasons, the EEOC respectfully asks this Court to reverse the district court's denial of EEOC's motion to supplement the record and the court's grant of summary judgment to the defendants and to remand this matter for further proceedings.

Respectfully submitted,

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/s/ Susan R. Oxford

Dated: April 24, 2013

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,364 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman for both text and footnotes.

/s/ Susan R. Oxford

Dated: April 24, 2013 Susan R. Oxford

A D D E N D U M

ADDENDUM TABLE OF CONTENTS

Title VII of the Civil Rights Act of 1964

42 U.S.C. §2000e Definitions

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen or more employees* for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) . . . an Indian tribe, ...

42 U.S.C. §2000e-2 Unlawful Employment Practices

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, term, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

29 C.F.R. § 1606.1 Definition of National Origin Discrimination

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as . . . (d) because an individual's name or spouse's name is associated with a national origin group. . . .

NAVAJO NATION CODE ANNOTATED

Chapter 7. Membership in the Navajo Nation (Excerpts)

§ 701. Composition

The membership of the Navajo Nation shall consist of the following persons:

A. All persons of Navajo blood whose names appear on the official roll of the Navajo Nation maintained by the Bureau of Indian Affairs.

B. Any person who is at least one-fourth degree Navajo blood, but who has not previously been enrolled as a member of the Navajo Nation, is eligible for membership and enrollment.

C. Children born to any enrolled member of the Navajo Nation shall automatically become members of the Navajo Nation and shall be enrolled, provided they are at least one-fourth degree Navajo blood.

§ 703. Member of another tribe

No person, otherwise eligible for membership in the Navajo Nation, may enroll as a member of the Navajo Nation, who, at the same time, is on the roll of any other tribe of Indians.

§ 705. Renunciation of membership

Any enrolled member of the Navajo Nation may renounce his membership by written petition to the President of the Navajo Nation requesting that his name be stricken from the Navajo Nation roll. Such person may be reinstated in the Navajo Nation only by the vote of a majority of the Navajo Nation Council.

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2013, I filed the EEOC's opening brief with the Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit, using the court's electronic case filing (ECF) system and, on this same date, served the counsel noted below, also by using the Court's ECF system:

/s/ Susan R. Oxford

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