

No. 12-17780

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

REPLY BRIEF OF THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION AS APPELLANT

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INTRODUCTION

The EEOC's opening brief explained that the district court erred in granting summary judgment to the defendants because the type of discrimination the EEOC alleges here—an on-reservation private employer's refusal to hire qualified applicants because they are not Navajo—states a claim of national origin discrimination under Title VII of the Civil Rights Act of 1964, and defendants have not offered any valid legal justification for such discriminatory conduct. *See* EEOC Opening Brief (EEOC-Brf) at 18-44 (discussing, *inter alia*, *Dawavendewa v. Salt River Proj. Ag. Impr. & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998) (*Dawavendewa I*); *on appeal after remand*, 276 F.3d 1150, 1158 (9th Cir. 2002) (*Dawavendewa II*)). As the EEOC's opening brief explained, the “legal justification” on which the district court granted summary judgment—the contention that Peabody's Navajo preference falls outside Title VII's prohibitions because it is a “political classification”—is unsound and was already rejected by this Court in *Dawavendewa I*. EEOC-Brf at 21-22.

Specifically, the EEOC explained that *Morton v. Mancari*, 417 U.S. 535 (1974), the case on which the district court relied here, does not support the grant of summary judgment because the Supreme Court's rationale in *Mancari* for upholding a statutorily-authorized preference for certain Indians was limited to the unique facts in that case. The preference in *Mancari* was for Indians who were

members of any tribe, *not*, as here, a tribe-specific preference that pitted Native Americans associated with one tribe against those associated with other tribes. And the Bureau of Indian Affairs jobs at issue in *Mancari* involved the unique political relationship between the federal government and Indian tribes, in contrast to the private mining jobs at issue in this case. EEOC-Brf at 23-29.

The EEOC's opening brief further argued that apart from the *legal* insufficiency of the Defendants' "political classification" defense, the district court erred in granting summary judgment because Defendants failed to establish the factual predicate for such a legal ruling. EEOC-Brf at 44-50. We argued that the district court, having ruled that an employment preference based on Navajo tribal *membership* falls outside Title VII, could not grant summary judgment on that legal ground absent evidence that Peabody actually bases hiring decisions on applicants' membership in the Navajo Nation. Given the absence of *any* evidence showing it was undisputed that Peabody based its hiring decisions on membership in the Navajo tribe, summary judgment should have been denied.¹

¹ In its opening brief, the EEOC also argued that the district court abused its discretion when the court denied the EEOC's motion to supplement the record with evidence from the EEOC's administrative investigation. EEOC-Brf at 51-57. The EEOC proffered evidence that Peabody's former hiring officials informed the EEOC they never asked job applicants if they were members of the Navajo Nation nor took any other steps to ascertain applicants' tribal membership before offering an applicant a job. Although the EEOC continues to believe the district court erred in ruling this evidence not relevant to the issues in this case, the EEOC no longer

In their Answer Briefs, no defendant contests that Title VII applies to on-reservation employers like Peabody. Instead, all three defendants argue—for various reasons—that Interior’s approval of the Peabody coal-mining leases insulates conduct that otherwise would violate Title VII’s prohibition against national origin discrimination under the law of this circuit. As explained within, Defendants’ arguments have no merit.

Peabody relies primarily on the Interior Secretary’s general authority to approve Indian mineral leases under the Indian Mineral Leasing Act (IMLA). *See* Peabody Answer Brief (P-Brf) at 15-16, 20-22 (citing 25 U.S.C. §§ 396a, 396d; 25 C.F.R. § 211.57). Peabody argues that because this Court, in *Dawavendewa I*, lacked the benefit of Interior’s insights, this Court is not bound by *Dawavendewa I*’s rejection of the defendant’s argument that a tribe-specific preference is a permissible “political classification” under *Morton v. Mancari*. P-Brf at 23-28. Alternatively, Peabody argues that the EEOC (and, therefore, this Court in *Dawavendewa I*) misconstrued Title VII’s Indian preference exemption in section 703(i), 42 U.S.C. § 2000e-2(i), arguing this exemption permits tribe-specific preferences if they are implemented at the insistence of the tribe and with the approval of Interior. *See* P-Brf at 16, 28-40.

challenges the district court’s denial of the EEOC’s motion to supplement the record with this evidence.

The Navajo Nation also argues, for different reasons, that a preference for its “citizens” is a lawful “political classification” and, alternatively, that section 703(i) preserves tribe-specific preference programs like the Navajo preference in the Peabody’s leases. NN-Brf at 43-46, 54-59. The Nation argues, in addition, that its fundamental sovereign right to exclude nonmembers and to condition their entry onto the reservation allows the Nation to impose a Navajo employment preference on Peabody. NN-Brf at 42-43. And although unclear, the Nation appears to suggest the 1950 Navajo-Hopi Rehabilitation Act, 25 U.S.C. §§ 631-638, somehow authorizes the Navajo preference in the Peabody leases, *see* NN-Brf at 51-52, an argument neither Peabody nor Interior joins.

The Department of Interior also contends that the Nation’s decision to require Peabody to give preference to its own tribal members or “citizens” is a “political classification.” Interior-Brf at 21-36. Purporting to rely on canons of statutory construction, Interior argues that Congress, when it enacted Title VII, did not intend to repeal the Secretary’s discretionary, administrative practice of approving tribe-specific preferences in Indian leases. Interior also argues that EEOC’s policy statement construing Title VII’s Indian preference exemption as barring tribe-specific preferences is irrelevant to this case because a preference for tribal members falls outside the scope of Title VII. Interior-Brf at 37-51, 54-58. Interior, like the Nation, further argues that the Nation’s inherent sovereign powers

include the authority to require Peabody to implement a Navajo preference, and that Title VII did not abrogate this sovereign authority. Interior-Brf at 52-54.

Defendants all argue the district court could properly dismiss the EEOC's lawsuit without any factual demonstration that Peabody actually based its hiring decisions on membership in the Navajo tribe. *See* P-Brf at 40; NN-Brf at 34-39; Interior-Brf at 65-70. The Navajo Nation asserts that the only question before the district court was "the legal question of whether the tribe-specific hiring preference in the Peabody leases reflects a lawful political distinction or an illegal *per se* national origin discrimination." NN-Brf 20.

As we explain, there is no merit to Defendants' arguments that the Navajo preference in the Peabody leases is a "political classification" that falls outside Title VII. Nor is there any merit to Defendants' contentions that summary judgment can be granted based on the purported lawfulness of a preference premised on tribal membership, without evidence that Peabody actually bases its hiring decisions on membership in the Navajo Nation. None of the Defendants' other arguments has merit. Summary judgment should, therefore, be reversed.

ARGUMENT

DEFENDANTS' ARGUMENTS DO NOT SUPPORT THE GRANT OF SUMMARY JUDGMENT AGAINST EEOC.

A. Defendants' Answer Briefs mischaracterize facts and distort EEOC's position.

1. Defendants' legal arguments rely significantly on the fact that Peabody's mining leases require Peabody to give hiring preference to "Navajo Indians." Notably, however, Defendants appear unable to agree just how this preference came to be included in the Peabody leases. The Nation, citing a remark this Court made in an earlier opinion in this case, states Interior insisted on including a Navajo employment preference in the leases. NN-Brf at 14-16 (citing *EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1075, 1081, 1084 (9th Cir. 2010) (*Peabody IV*)). Peabody, in contrast, states "[t]he parties negotiated" the terms of these leases, and Interior's role was simply one of approval. P-Brf at 11.

Nowhere does Interior state that it insisted on this provision. *See, e.g.*, Interior-Brf at 11-13 (noting Interior approved Peabody leases and was actively involved in their drafting, but not asserting Interior imposed a Navajo preference). Indeed, Interior's counsel clarified expressly below that it is *not* Interior's position that it could "unilaterally legally require" a tribe and a potential lessee to include a tribe-specific preference. II-ER-50 (noting tribe-specific preferences are included in leases when "tribes ask for them to be included").

In his deposition, Secretary Udall agreed that when Interior staff drafted the leases, they included a preference for “Navajo Indians” *because the Navajo Nation negotiated it with Peabody’s predecessor*. IV-ER-733 (Udall Dep. 58:7-60:20). Thus, contrary to the Nation’s contention, the record establishes that Interior included a Navajo preference in the Peabody leases because the Nation negotiated with Peabody’s predecessor for such a provision. *See* EEOC-Brf at 8.

This historic fact comports with the purposes of the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396g, the statute pursuant to which Interior approved the Peabody leases. P-Brf at 11; Interior-Brf at 11; I-ER-6. Congress enacted the IMLA to increase tribal *self-determination* (not tribal “*self-governance*,” as Peabody misstates, P-Brf at 24) by increasing the autonomy of Indian tribes to negotiate their own leasing terms when granting mining rights to a private entity and eliminating the federal government’s imposition of undesirable lease terms on tribes. *See, e.g., United States v. Navajo Nation*, 537 U.S. 488, 508 (2003) (“IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties.”) (citation omitted); *Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 923, 927 (9th Cir. 2008) (same, citing *Navajo Nation*, *supra*).

Interior did not impose this Navajo preference on Peabody. Interior simply approved a lease term that the Nation and Peabody’s predecessor negotiated.

2. Defendants use the phrase “tribal *self-governance*” throughout their Answer Briefs in contexts that actually address tribal *self-determination*. See, e.g., P-Brf at 24-25; NN-Brf at 47; Interior-Brf at 33. Defendants’ Answer Briefs thereby blur the important distinction between the two concepts, possibly in an effort to bolster their arguments that *Mancari*—which addressed Indian self-governance, not tribal self-determination—applies here.

Tribal self-governance addresses traditional governmental functions such as law enforcement over tribal members and “intramural matters” such as “conditions of tribal membership, inheritance rules, and domestic relations.” See *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004); *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). When a tribe regulates private commercial activity within its reservation, on the other hand, it exercises tribal *self-determination*, not self-governance. See *Ariz. Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1133 (9th Cir. 1995); Cohen’s Handbook of Federal Indian Law (2012 ed.), § 4.01[2][e], at 221 (“Tribal power to exclude nonmembers from tribal land also includes the power to regulate them, unless Congress provides otherwise.”); see also *Solis v. Matheson*, 563 F.3d 425, 434 (9th Cir. 2009) (“In general, tribal relations with non-Indians fall outside the normal ambit of tribal self-government.”); *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 999-1000 (9th Cir. 2003), and cases cited therein.

3. The Nation and Peabody mischaracterize the position previously taken by the Solicitor General in Supreme Court briefs filed on behalf of the EEOC. Peabody argues that the EEOC's reliance on *Dawavendewa I* "fails to account for" the views of the Solicitor General in opposing certiorari in *Dawavendewa I*. P-Brf at 18-19. The Nation argues that the Solicitor General has "consistently taken the position that tribe-specific hiring preferences in a lease of tribal trust land, approved by the Secretary, and in furtherance of a tribal law enacted pursuant to a fundamental right confirmed in a treaty with the United States, is [*sic*] a political preference not prohibited by Title VII." NN-Brf at 21. This characterization is simply untrue.

In briefs opposing certiorari in *Dawavendewa I*, *Peabody II*, and *Peabody IV*, the Solicitor General noted that certain arguments that could be asserted as a justification for a Navajo preference had not been considered by this Court in *Dawavendewa I*. See, e.g., Peabody's Supplemental Excerpts of Record (P-SER) 42-44 & n.1 (Solicitor General's December 1999 brief in *Dawavendewa I*); II-ER-158-59 (Solicitor General's December 2005 brief opposing certiorari in *Peabody II*); P-SER-83 (Solicitor General's August 2011 brief in opposition to certiorari in *Peabody IV*). The Solicitor General did not opine in those briefs that any such arguments would prevail and, to the EEOC's knowledge, the Solicitor General has never taken such a position.

4. Defendants also mischaracterize the EEOC's lawsuit in significant respects. The EEOC does not challenge the Peabody leases, nor does the EEOC seek to invalidate the Navajo Preference in Employment Act (NPEA) or assert a claim of "*per se* discrimination," as the Nation incorrectly asserts. *See* NN-Brf at 30, 35, 36, 38-39. EEOC's complaint makes no mention of the Peabody leases, the NPEA, or *per se* discrimination. *See* IV-ER-687-92. The EEOC's lawsuit challenges Peabody's *conduct*—its practice of hiring Navajos over qualified applicants who were not Navajo—and the EEOC seeks to ensure Peabody's compliance with Title VII, irrespective of the leases or the NPEA. *Id.* at 690-91.

B. Peabody's employment preference for Navajo Indians is not a political classification that falls outside Title VII's prohibition against national origin discrimination.

Defendants argue the EEOC places undue weight on this Court's prior decision in *Dawavendewa I*. It is true Defendants were not parties in *Dawavendewa I* and, thus, are not bound by principles of *res judicata* or collateral estoppel. They are, however, bound by *stare decisis*, a principle the Defendants' Answer Briefs virtually ignore in their failure to give *Dawavendewa I* its proper precedential significance.

For example, Peabody and Interior both argue that the rationale on which the district court relied—that under *Mancari*, tribal preferences are a political classification "beyond the scope of Title VII"—is still an open question following

Dawavendewa I. P-Brf at 19, 22-28; Interior-Brf at 21, 27-36. Peabody further argues this Court can affirm the district court on the alternate ground that the Navajo preference in this case falls within Title VII's exemption in section 703(i) and that this Court need not defer to the EEOC's contrary interpretation in its 1988 policy statement. P-Brf at 28-40. Interior similarly asserts the EEOC's policy statement incorrectly construes the language in section 703(i) exempting "Indian preferences" from Title VII's prohibitions. Interior-Brf at 40-44.

These arguments are foreclosed by this Court's decision in *Dawavendewa I*, which is binding precedent in this Circuit. In the context of a preference that explicitly mandated preference for "members of the Navajo Tribe," 154 F.3d at 1118 n.2, *Dawavendewa I* expressly addressed "whether discrimination on the basis of tribal membership constitutes 'national origin' discrimination for purposes of Title VII." *Id.* at 1119. This Court concluded that "under the case law and the regulations interpreting Title VII, tribal affiliation easily falls within the definition of 'national origin.'" *Id.* at 1120.

Dawavendewa I also considered, and rejected, defendant Salt River Project's (SRP) argument that under *Morton v. 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." *Id.* This Court considered this argument in the factual context of a business conducted on Navajo trust land pursuant to a lease

agreement with the Navajo Nation that mandated an employment preference for “members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe.” *Id.* at 1118 & n.2. This Court further noted that the preference policy in the lease was “consistent with Navajo tribal law.” *Id.* at 1118 (citing 15 Navajo Nation Code § 604 (1995)).

Against this factual background, this Court considered and rejected SRP’s argument that its Navajo preference was lawful under *Morton v. Mancari*, 417 U.S. 535. The Court noted that *Mancari* involved an Indian preference rather than “a claim of discrimination based on membership in a particular tribe” and that it involved particular interests this Court noted were *not* present in *Dawavendewa I*: “the unique interest the Bureau of Indian Affairs had in employing Native Americans, or more generally, Native Americans’ interests in “self-governance.” 154 F.3d at 1120. Based on these distinctions, this Court ruled: “*Morton [v. Mancari]* does not affect our conclusion that discrimination in employment on the basis of membership in a particular tribe constitutes national origin discrimination.” *Id.* This Court concluded that “differential employment treatment based on tribal affiliation is actionable as ‘national origin’ discrimination under Title VII.” *Id.*

Dawavendewa I further considered and rejected SRP’s argument that the Navajo preference mandated by SRP’s lease (a lease that was approved by Interior,

see EEOC-Brf at 20 & n.3) and the Navajo tribal ordinance fell within Title VII's Indian preference exemption in § 703(i). 154 F.3d at 1120-24. This Court reviewed the statutory language, legislative history, Congressional purposes, EEOC's regulatory interpretation, policy considerations, and recent amendments to other statutes addressing Indian or tribe-specific preferences. *Id.* at 1121-24. Taking all these considerations into account, this Court agreed with the EEOC's policy guidance that Title VII's Indian preference exemption in section 703(i) "does not include preferences based on tribal affiliation." *Id.* at 1121, 1124.²

In opposing certiorari in *Dawavendewa I*, the United States Solicitor General agreed unequivocally that this Court had properly ruled that tribe-specific preferences are a form of national origin discrimination prohibited under Title VII and that such preferences are not encompassed in Title VII's Indian preference exemption. II-ER-168-71, 173-78. As noted above, the Solicitor General made these statements in a factual context identical in all pertinent respects to the facts in this case, except that the lease provision in *Dawavendewa I* expressly required SRP to give preference to members of the Navajo tribe, *see supra* at 11-12, in contrast to the Peabody leases, which require preference for "Navajo Indians." I-ER-5.

² Thus, it is immaterial that the Supreme Court declined to defer to EEOC positions in other cases involving issues wholly unrelated to the question before this Court. *See* NN-Brf at 57-58.

Dawavendewa I is a published decision. Therefore, it serves as binding precedent on the legal questions noted above. The district court was bound to follow it, and so is this Court. See *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (“Binding authority . . . cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is* the law.”). Defendants, by asking this Court to affirm the district court on the ground that Peabody’s preference for Navajos is not national origin discrimination under Title VII, but a lawful “political classification” under *Mancari*, and by arguing for affirmance on the alternate ground that Title VII’s Indian preference exemption in section 703(i) permits tribe-specific preferences, improperly ask this Court to revisit and overturn the legal rulings in *Dawavendewa I*.

Under *stare decisis*, “one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel” except in very limited circumstances not present here. *United States v. Gay*, 967 F.2d 322, 237 (9th Cir. 1992) (citation omitted). If there is subsequent higher authority, such as “an intervening United States Supreme Court decision, or an intervening decision on controlling state law by a state court of last resort,” a panel can re-examine prior controlling circuit precedent to see if “the reasoning or theory of prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.” *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (*en banc*). A later panel can also

revisit decisions of prior panels if “subsequent legislation undermines those decisions.” *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 637 (9th Cir. 1993). These limited exceptions do not permit a later panel to revisit an earlier panel’s legal rulings simply because the parties in the subsequent litigation offer different or more nuanced arguments on the same legal questions in the same factual context.

There are no intervening Supreme Court decisions and no new legislation on the legal questions resolved by *Dawavendewa I*. Given Defendants ask this Court to address these same legal questions *in a factual context that is identical in every relevant respect*, the rule of *stare decisis* controls. *Hart*, 266 F.3d at 1170. The legal questions decided by *Dawavendewa I* can only be reconsidered *en banc*, and this panel must decline Defendants’ invitation to revisit those rulings.

The Nation incorrectly argues that Peabody’s Navajo preference “is precisely what the *second Dawavendewa* opinion of this Court contemplated as potentially lawful.” See NN-Brf at 21. The Nation is apparently referring to this Court’s description of the Nation’s proffered legal defenses as “plausible” in the context of explaining why the Nation was an indispensable party in *Dawavendewa*’s lawsuit. See *Dawavendewa II*, 276 F.3d at 1157-59. Describing defenses as “plausible” does not indicate they have merit. Moreover, the potential defenses this Court listed in *Dawavendewa II* do not even include the “political classification” argument Defendants raise here, probably because this Court had

already rejected it in *Dawavendewa I.* See *id.* at 1158-59 (listing potential defenses as “the Nation’s 1868 Navajo Treaty, the federal policy fostering tribal self-governance, the NPEA, or any other legal defense”).

Even if they were not precluded by *stare decisis*, Defendants’ arguments that Peabody’s Navajo preference is a lawful political classification under *Mancari* are unsound, in any event. See, e.g., Interior-Brf at 21-36; P-Brf at 23-28; NN-Brf at 39-42. *Mancari* addresses, and is limited to, the unique role of the BIA (formerly called the Indian Service) in the lives of Native Americans and why, because of that unique BIA role, a longstanding statutory “Indian” preference for BIA jobs remained lawful even after Congress extended Title VII to federal employees in 1972. See *Mancari*, 417 U.S. 535; see also *Doe v. Kamehameha Schools*, 470 F.3d 827, 880 (9th Cir. 2006) (*en banc*) (Bybee, J., dissenting) (explaining that *Mancari*’s “special relationship doctrine applies only to preferences by the federal government or by tribes themselves. It does not apply to private parties discriminating on the basis of tribal status.”).

In discussing *Mancari* and the two statutes it addressed (Title VII and Section 12 of the Indian Reorganization Act (IRA), 25 U.S.C. § 472), Interior misleadingly uses the phrases “tribal exemptions” and “preferences for tribal members” instead of the terms actually used in *Mancari* and those two statutes: *Indian* exemptions and *Indian* preferences. See, e.g., Interior-Brf at 23-24, 30, 32

(discussing—but not quoting—*Mancari*, 417 U.S. at 548) (emphasis added). For instance, Interior misstates that the Supreme Court, in *Mancari*, “looked to the congressional purpose behind the *tribal* exemptions in . . . Title VII of the Civil Rights Act of 1964” and “construed the *tribal* exemptions in the 1964 Act [*i.e.*, Title VII].” Interior-Brf at 22-23 (citing *Mancari*, 417 U.S. at 548) (emphasis added). Interior improperly paraphrases *Mancari* as ruling that “it would be ‘irrational[] and arbitrar[y]’ (*id.*) to conclude that preferences for *tribal* members were legal for purposes of one statute,” referring to Title VII’s private sector provisions, “but constituted racial discrimination for the other,” referring to the 1972 amendments that extended Title VII to federal employees. Interior-Brf at 23.

Title VII contains no “tribal exemptions,” and *Mancari* addressed only the extent to which Title VII’s *Indian* preference exemption for private sector jobs, 42 U.S.C. § 2000e-2(i), supported the continued validity of the statutory *Indian* preference for federal sector jobs in the BIA. *See Mancari*, 417 U.S. at 547-48.³ Interior’s misuse of this terminology, even if inadvertent, is significant because the distinction between tribal and Indian preferences is critical to the analysis in this case and goes to the core of the dispute between the parties. *See, e.g.*, EEOC-Brf at 31-35 & n.7. By repeatedly using the word “tribal” to refer to the Indian

³ The BIA preference addressed in *Mancari* was not limited to members of a particular tribe but was open to any Indian of one-fourth or more Indian blood who was a member of any federally-recognized tribe. *Mancari*, 417 U.S. at 553 n.24.

preferences of Title VII and the IRA, Interior seriously distorts the Supreme Court's analysis in *Mancari* to suggest the case holds something it does not.

Interior's remaining attempts to extend *Mancari*'s analysis of an *Indian* preference to Peabody's *tribe-specific* preference (Interior-Brf at 27-36) are circular, illogical, and wholly unavailing. Interior baldly pronounces that, "[c]onsistent with *Mancari*," Peabody's preference for Navajos "is a *political* preference, rationally connected to the fulfillment of the federal government's general trust relationship with federally-recognized Indian tribes, and with the Navajo Nation in particular." Interior-Brf at 27. This resembles the claim of both Peabody and the Nation that the "record" somehow "establishes" that Peabody's hiring preference for Navajos is a political distinction that falls outside Title VII, and Peabody's claim that "political reasons justify" inclusion of a tribal preference in the Navajo leases. P-Brf at 22-24; NN-Brf at 21. But simply declaring something to be a political preference or justified by political reasons neither places it within the ambit of *Mancari* nor advances the resolution of the legal issue in this case.

Interior also claims the EEOC's opening brief ignored three factors "unrelated to national origin, that demonstrate the legitimate purposes of the political preference in question." *Id.* Interior-Brf at 27. These factors, relating to principles of Indian tribal sovereignty and the federal trust doctrine, do not,

however, address the question of whether Congress, by enacting Title VII, limited any previously-existing tribal or Interior authority to authorize a private company to engage in tribal employment preferences.

Specifically, Interior argues: Indian tribes have a sovereign right “to direct the benefits of employment and other economic activity on the Reservation,” *id.* at 27; the United States’ trust relationship with the Navajo Nation is furthered by assisting the Nation in reaping the benefits of the tangible resource Peabody mines on the Navajo Reservation; *id.* at 28-29; and the Navajo hiring preference is a manifestation of the tribe’s inherent sovereign power to exclude nonmembers from its territory, *id.* at 29-30. Interior’s claim that these three factors place Peabody’s conduct, pursuant to its leases and the NEPA, outside Title VII ignores that tribes retain sovereign rights only to the extent not otherwise removed or restricted by Congress. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (Indian tribes’ sovereign powers yield to Congress’s exercise of its plenary control). When Congress enacted Title VII and included, in subsection 703(i), an explicit provision addressing private businesses operating on Indian reservations, Congress thereby limited any prior tribal sovereign authority that might have allowed Indian tribes to direct private businesses operating on reservations to undertake actions Title VII now prohibits. *Cf. Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir. 1961) (Navajo Tribe cannot exempt on-reservation employer from jurisdiction of National Labor

Relations Board).

In *Navajo Tribe v. NLRB*, the D.C. Circuit explained that before Congress enacted the National Labor Relations Act (NLRA), tribes like the Navajo Nation may have had authority over labor problems in private businesses located on the reservation under the tribe's broad, inherent sovereign powers. Once Congress adopted a national labor policy, however, the NLRA "supersed[ed] the local policies of . . . the Indian tribes, in all cases to which the [NLRA] applies." *Id.* at 164. On this basis, the D.C. Circuit rejected the Navajo Nation's claim that it could exempt the Texas-Zinc Minerals Corporation from compliance with the NLRA. As that court explained: "[T]hat the Corporation's plant is located on the Navajo Reservation cannot remove it or its employees—be they Indians or not—from the coverage of the Act"; the NLRA authorizes the Board to regulate labor disputes affecting interstate commerce "without stating any exception [for] a plant located within an Indian reservation, or one employing Indians" *Id.* at 164-65.

Likewise, even assuming *arguendo*, as Defendants assert, that before Title VII was enacted tribes had inherent sovereign power to impose tribe-specific employment preferences on private on-reservation employers, any such authority must accede to the dictates of applicable federal law. *See* Cohen, § 4.01[2][e]. Indeed, a generally-applicable federal law that regulates commercial enterprises and does not expressly exclude tribal governments applies to on-reservation

employment even when the tribe, itself, owns the commercial enterprise. *See Coeur d'Alene Tribal Farm*, 751 F.2d at 1115-16 (citing cases). As this Court explained in *Coeur d'Alene*, a tribe's inherent powers are limited by the superior power of Congress "to modify or extinguish" such inherent sovereign rights. *Id.* at 1115. This Court ruled in *Coeur d'Alene* that the Occupational Health and Safety Act (OSHA) applied to the tribe's commercial farm, notwithstanding the tribe's objection to the Secretary of Labor's enforcement of OSHA on tribal land. *Id.* at 1115-18; *see also Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (OSHA applies to tribal construction company performing work on reservation).

If a tribe, operating a commercial enterprise under its inherent sovereign powers, cannot excuse a *tribal* business from compliance with a federal law of general applicability that applies to on-reservation businesses, the tribe certainly cannot excuse a private business located on the reservation from compliance with a federal law that otherwise applies to that business. *See, e.g., Navajo Tribe v. NLRB*, 288 F.2d 162 (NLRA applies to businesses located on Indian reservations); *cf. Solis*, 563 F.3d at 436-37 (rejecting argument by tribal member that tribe's general treaty right to exclude non-Indians from reservation prevented Department of Labor from entering reservation to investigate Fair Labor Standards Act violations; reasoning FLSA is a generally-applicable federal law that DOL has

authority to enforce, including by entry on reservation).

Defendants argue that Peabody's employment preference for Navajos falls outside Title VII because it involves the tribe's natural resources, is limited to tribal members, and is contained in a lease approved by Interior. But, as the EEOC explained in its opening brief, the Secretary of Interior's general authority under the IMLA to "approve Indian leases," 25 U.S.C. § 396a, certainly does not imbue the Secretary with authority to approve a lease term that requires a private business to violate another federal law. *See* EEOC-Brf at 38-39. In other words, if the tribe-specific preference here would be unlawful under Title VII, it does not become lawful simply because the Secretary of Interior approved it.

Here, Interior approved this coal mining lease under the IMLA, a statute that contains no reference to employment preferences of any kind. That the royalties from this mining operation provide a source of revenue to the Navajo Nation from its tribal natural resources, and that the jobs created by Peabody's mining operations offer employment opportunities to local residents, do not transform a Navajo employment preference into a political classification under *Mancari*. *Mancari*'s rationale for concluding that the Indian preference for BIA jobs that Congress enacted in the IRA reflects a "political classification," *see* EEOC-Brf at 24-30, simply provides no logical support for the Defendants' contentions that the Navajo preference at issue here is a "political" classification.

Interior also mischaracterizes the bases on which the EEOC distinguishes *Mancari*. See Interior-Brf at 33-34. The EEOC does not argue that the Supreme Court characterized BIA jobs as “political” merely because they are in the public rather than private sector. Numerous public sector jobs—park maintenance, public sanitation, public education, public health, public housing—are not “political” in nature, although they involve the execution of governmental functions involving health and welfare. See Webster’s Third New Int’l Dictionary (1976) at 1755 (defining “political” as, among other things, “of, relating to, or concerned with . . . the making as distinguished from the administration of governmental policy”) (emphasis added). The Supreme Court properly characterized the BIA jobs as “political” in *Mancari* because the BIA is the arm of the federal government that interacts, on behalf of the United States, with the governing bodies of the hundreds of Indian tribes that the United States officially recognizes. The Supreme Court recognized that even BIA jobs involving the administration of United States policy toward Native Americans rather than the formulation of that public policy carry a symbolic value in terms of the United States Government’s relationships with Indian tribes, a symbolic value not found in other federal government jobs, let alone in private sector jobs.

The Supreme Court’s characterization of the BIA jobs in *Mancari* as “political” was not part of its Title VII analysis, as Interior wrongly asserts.

Interior-Brf at 35. None of the five reasons the Supreme Court gave in *Mancari* for concluding that the 1972 amendments to Title VII did not implicitly repeal the longstanding statutory Indian preference for BIA jobs, *see Mancari*, 417 U.S. at 547-51, even mentions, let alone relies on, a characterization of BIA jobs as “political” in nature. When the Supreme Court reconciled the Equal Employment Opportunity Act of 1972 (which extended Title VII to federal employees) with section 12 of the 1934 Indian Reorganization Act (IRA) (which established an Indian preference for BIA jobs some forty years earlier), the Court did *not* suggest, as Interior asserts, that the Indian preference in the 1934 statute was a “tribal hiring preference [that] was, as a legal matter, a *political* preference *as opposed to* a preference based on impermissible characteristics.” Interior-Brf at 35. Rather, the Court analogized the BIA Indian preference to a “political” classification only in the portion of the Court’s opinion addressing the plaintiffs’ constitutional Due Process challenge, as part of the Court’s explanation for why an “Indian” preference limited to individuals who are also members of any federally-recognized tribe is not a classification based on “race.” *See* 417 U.S. at 551-55 & n.24.

Interior erroneously complains that the EEOC’s opening brief “overlooks” the plaintiffs’ constitutional challenge in *Mancari*, arguing that *Mancari* does not

apply only to statutory preferences. Interior-Brf at 36. But Interior overlooks that, irrespective of the basis of the plaintiffs' challenge in *Mancari*—whether statutory or constitutional—the practice challenged in *Mancari* was a federally-enacted statutory preference involving federal jobs in the BIA, not a preference imposed by a tribe on a private employer with the concurrence of Interior, which is the issue here.

Finally, Interior's argument that implied repeals are disfavored (Interior-Brf at 45-51) has no application here. Interior incorrectly claims that the Secretary's existing practice of approving leases with tribe-specific preferences required express repeal when Congress enacted Title VII. That existing practice, however, was and still is a discretionary administrative practice of Interior that is not reflected in any statute or regulation, but only in form leases. Indeed, the form leases are not contained in Interior regulations but are evidenced here only by a 1957 form lease that was allegedly in effect when Interior approved the Peabody leases in 1964 and 1966—a form that appears in the record only in a private treatise and not in any government publication. II-ER-276-292.

When Congress enacts a law of general applicability like Title VII, it is entitled to assume that public and private parties alike will conform to the new legal requirements. Congress has no obligation to repeal expressly a discretionary administrative practice like Interior's practice of approving leases based on forms

that contain a tribal preference, particularly where there is no evidence that Congress, as a whole, was even aware this administrative practice existed. *See SEC v. Sloan*, 436 U.S. 103, 119-20 (1978) (Court “extremely hesitant to presume congressional awareness” of agency practice based on only “a few isolated statements” in thousands of pages of legislative documents); *cf. Nw. Envtl. Advocates v. U.S. EPA*, 537 F.3d 1006, 1022-1023 (9th Cir. 2008) (standard for finding congressional acquiescence in agency interpretation “extremely high”).

C. Defendants’ political classification argument is an affirmative defense, and the EEOC’s contention that Defendants must provide facts to support this defense is not a new “claim.”

Summary judgment was improperly granted in this case not just because the district court erred in ruling this hiring preference is a political classification that falls outside Title VII, *see* EEOC-Brf at 17-44, but also because Peabody offered no evidence it actually gives preference to Navajos based on their membership in the tribe. The district court improperly assumed this pivotal fact. Given Peabody and the other Defendants sought dismissal on the ground that a preference based on tribal membership is a political classification that falls outside Title VII, Peabody bore the burden of demonstrating that this material fact—that the preference was actually based on tribal membership—was undisputed. EEOC-Brf at 44-50.

In advancing this argument, the EEOC is not, as Peabody asserts, attempting to shift an element of the EEOC’s burden of proof onto the Defendants. *See, e.g.,*

P-Brf at 44-45. The EEOC satisfied its initial burden here because the discriminatory conduct the EEOC alleges in its complaint—Peabody’s failure to hire qualified Native Americans because they are not Navajo—is conduct this Court already has held states a claim of national origin discrimination under Title VII. *See Dawavendewa I*, 154 F.3d at 1119-24. The Defendants’ proffered reliance on the lease to justify Peabody’s conduct is clearly an affirmative defense.

Black’s Law Dictionary defines a “defense” as “[a] defendant’s stated reasons why the plaintiff . . . has no valid case,” and an “affirmative defense” as “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s . . . claim, even if all of the allegations in the complaint are true.” *See* Black’s Law Dictionary (9th ed. 2009) at 482. Defendants’ “political classification” arguments fit this definition. Specifically, Defendants argue that even if it is true, as EEOC alleges, that Peabody grants a hiring preference to Navajos, such conduct does not violate Title VII because, Defendants argue, Peabody can lawfully implement a preference pursuant to an Interior-approved mineral lease when the preference is based on tribal membership.

“In every civil case, the defendant bears the burden of proof as to each element of an affirmative defense.” *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1284 (9th Cir. 1993). Thus, Peabody bears the burden of proving the critical fact on which this defense is premised—that when Peabody gives a preference to job

applicants, it does so based on their status as members of the Navajo Nation and not based on some other consideration. *See El v. SEPTA*, 479 F.3d 232, 237 (3d Cir. 2007) (because summary judgment movant bears burden of proof of affirmative defense at trial, it must present sufficient proof in summary judgment motion to support findings of fact necessary to sustain affirmative defense); *see also Bates v. UPS, Inc.*, 511 F.3d 974, 992-95 (9th Cir. 2007) (because UPS linked “hearing” with “safe driving,” UPS bears burden to prove that nexus as part of its defense to its use of a hearing qualification standard).

Amazingly, Defendants complain that this constitutes a “new claim” the EEOC raises for the first time on appeal and that EEOC improperly “change[d] its claim from a *per se* claim of discrimination in an opposition to summary judgment.” P-Brf at 40-47; NN-Brf at 27-31, 35, 36. First, EEOC’s argument, which EEOC raised below (*see infra* at 29), is not a claim at all, but a response to Defendants’ “political classification” justification. Second, if the argument seems new, it is only because it responds to a defense the Defendants asserted for the first time in 2012—eleven years after the EEOC filed this lawsuit.

Defendants’ failure to raise the political classification defense during the first decade of this litigation is all the more notable because the argument is derived from a Supreme Court case decided in 1974, twenty-seven years before EEOC filed this lawsuit and thirty-one years before the EEOC joined the Nation as

a Rule 19 defendant in 2005. Accordingly, although Peabody and the Nation had ample opportunity and notice of this theory, they raised this defense for the first time only after Peabody impleaded Interior in October 2011.

The Navajo Nation's argument that the EEOC has changed its claim from "attacking" the validity of the preference to "attacking Peabody's implementation of [it]" is similarly unavailing. *See* NN-Brf at 27-28. Rather, as noted above, it is Peabody and the Nation that have changed their theories of defense. Now that Peabody and the Nation have joined Interior in asserting a political classification defense, it is entirely appropriate for the Commission to counter that nothing in the leases specifies that this preference is to be based on tribal membership, and there is no record evidence Peabody actually based its hiring decisions on tribal membership.

Below, EEOC moved to supplement the record with evidence that Peabody did *not* consider tribal membership in making hiring decisions. EEOC's decision not to pursue appeal of the district court's denial of that motion (*see supra* at 2-3 n.1) does not undermine EEOC's position that summary judgment is improper without evidence that Peabody bases hiring decisions on tribal membership. The EEOC argued below and as a separate point in its opening brief that discovery might reveal Peabody does not base its hiring decisions on membership in the Navajo Nation, but relies, instead, on personal attributes associated with a

particular national origin, such as appearance, name, speech, and attire. *See* R.253 at 35-36; EEOC-Brf at 44-50; *see also* R.262 at 17. To the extent Defendants suggest this argument depends on EEOC's excluded evidence, they are wrong. *See, e.g.*, Peabody-Brf at 40-44.

Nor does this argument relate only to the "fraction" of EEOC's claim that this Court ruled, in *Peabody IV*, the EEOC can no longer pursue. P-Brf at 41-43; NN-Brf at 28-29. In *Peabody IV*, this Court held that "EEOC's claim against Peabody for injunctive relief should be allowed to proceed." 610 F.3d at 1087. Even assuming *arguendo* that a tribal-membership-based preference could be upheld, if a factfinder ultimately determined that Peabody relied on improper considerations of national origin rather than tribal membership when it hired Navajos over non-Navajos, the EEOC would be entitled to seek instatement of non-Navajos who were rejected or deterred from applying to Peabody because of the company's "history of refusing to hire non-Navajo Native Americans for open positions at its mine." IV-ER-690-91; *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-421 (1975) (Congress intended that victims of discrimination be made whole); *Fuhr v. Sch. Dist. of City of Hazel Park*, 364 F.3d 753, 760-61 (6th Cir. 2004) (upholding award of instatement as proper "make whole" relief in Title VII action). Thus, even if this Court concluded that a preference based on tribal membership could be lawful, the absence of evidence demonstrating Peabody

bases its hiring decisions on tribal membership would still require reversal of summary judgment.

The EEOC does not, as the Nation asserts, claim to be “confused” by the meaning of “Navajo Indians”—the term used in the Peabody leases—and whether it means the same thing as “members of the Navajo Tribe”—the basis on which the district court found the preference lawful. *See* NN-Brf at 38 (citing EEOC-Brf 21 & n.5). To the contrary, the EEOC believes the term “Navajo Indians” is broader than the phrase “members of the Navajo Tribe” and includes both tribal members as well as those who are of Navajo heritage but fall outside the Navajo Nation’s definition of tribal members. *See* EEOC-Brf at 47-49.

Contrary to the Nation’s assertion (NN-Brf at 38), the EEOC raised this distinction below, and the district court understood the EEOC’s distinction. Prior deciding the Defendants’ summary judgment motions, the court asked the parties to comment on its proposed facts, including the statement: “Both leases contain provisions that require Peabody to give *members of the Navajo Nation* an employment preference.”) (emphasis added). II-ER-143 (R.269 at 4). During the motion hearing, the EEOC asked the court to correct this proposed fact to reflect the actual lease language, “Navajo Indians,” and the court made this correction in its summary judgment decision. *See* II-ER-42 (R.279, Tr. of motion argument, 15:8-24); I-ER-5 (“Both leases contain provisions that require Peabody to give

Navajo Indians an employment preference.”) (emphasis added). In the colloquy between the court and EEOC’s counsel, the court asked: “So you’re saying . . . somebody could be a Navajo and not a member of the tribe?”, and EEOC’s counsel responded: “Yes, . . . They could have Navajo national origin and not be a member of the tribe.” The court then agreed to change the factual summary to refer to “preference for Navajos.” II-ER-42 (Tr. 15:15-24).

It is true, as the Nation points out (NN-Brf at 39), that this Court, in deciding two jurisdictional questions in the first appeal, stated by way of background that both Peabody leases require preference be given “to members of the Navajo Nation.” *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 776 (9th Cir. 2005). The district court repeated that background characterization in 2006. *EEOC v. Peabody W. Coal Co.*, 2006 WL 2816603, at *4 (D. Ariz. Sept. 30, 2006). At the time, neither Peabody nor the Nation had argued that the preference was a “political classification” because it was based on tribal membership, and there is no indication this Court attached any particular importance to its characterization of the lease as requiring preference for members of the Navajo Nation. *See* 400 F.3d at 776. Now that the defendants—more than ten years into this litigation—assert for the first time a defense of “political classification,” arguing the preference is lawful, in part, because it is restricted to the Navajo Nation’s “members” or “citizens,” the distinction has become important, as the EEOC argued below and in

its opening brief.

The record is anything but clear on this point. During the EEOC's administrative investigation, Peabody represented to the EEOC that it adhered to an "Indian preference," consistent with Title VII's Indian preference exemption. *See* EEOC-Brf at 46. The EEOC filed suit because the EEOC concluded that Peabody was engaged in the unlawful practice of rejecting non-Navajo applicants because they were not Navajo. In this litigation, Peabody has never admitted using a Navajo preference. Indeed, in its Third Party Complaint, Peabody asserted it has tried in good faith "to comply with the obligations of its leases . . . and federal civil rights laws." IV-ER-676. And in its Answer Brief, Peabody states that the reason it rejected the three non-Navajo charging parties and hired Navajo applicants instead was not because the hired individuals were Navajo, but because they "had better qualifications." P-Brf at 47.⁴

Thus, the summary judgment record contains no evidence Peabody actually implemented a hiring preference based on Navajo tribal membership, let alone establishes this material factual assertion as "undisputed." Defendants' conclusory, self-serving, and unsupported assertions in their briefs that tribal

⁴ Peabody argues that its reasons for not hiring the three charging parties "have never been impeached," citing the statements Peabody submitted to the EEOC during EEOC's administrative investigation. P-Brf at 13-14, 47. Peabody never sought summary judgment on this basis, however, so Peabody's position on the factual merits of the EEOC's lawsuit is irrelevant to this appeal.

membership is the deciding consideration in Peabody's grant of a job preference, *see, e.g.*, NN-Brf at 39-40, are simply insufficient to support summary judgment. *See United States v. Wilson*, 881 F.2d 596, 601 (9th Cir. 1989).

D. The Nation's treaty and policy arguments and background facts do not supplant a proper legal analysis under Title VII.

The Nation mischaracterizes portions of the EEOC's opening brief as addressing the district court's constitutional, equal protection analysis. *See* NN-Brf at 46-7 (citing EEOC-Brf at 26-29). That portion of the EEOC's opening brief explains only why it was error for the district court to apply the Supreme Court's constitutional analysis in *Mancari* to the Navajo preference in the Peabody leases. The Nation nevertheless offers an extensive discussion of historical facts relating to the Nation's treaty with the United States and the federal government's faulty implementation of the trust doctrine with respect to the Nation, as well as a number of legal arguments grounded in tribal rights of self-government and other policy considerations.

The Nation argues incorrectly that its treaty-based "power to exclude" includes the authority to direct Peabody to give preference to Navajos. NN-Brf at 48. This Court held, in *Dawavendewa I*, that such conduct violates Title VII. Treaty rights, including an Indian tribe's right to exclude, are subject to the superior authority of the United States. *See Cohen, supra*, § 4.01[2][e], at 221.

The general principles and historic facts the Nation discusses in its brief reflect the types of considerations Congress properly weighs in enacting remedial legislation such as Title VII. *See, e.g., Dawavendewa I*, 154 F.3d at 1121-22. The Nation's discussion of them here, however, provides no legal support for Defendants' argument that a Navajo preference is a "political classification" that falls outside Title VII's prohibitions.

The Nation noted, for instance, that the United States' default on the promise it made in the 1868 Treaty to build schools and provide teachers on the Navajo Reservation produced dire consequences for Navajo literacy skills some eighty years later. NN-Brf at 9. The Nation's Brief describes various economic development initiatives in the 1940s and 1950s designed to increase employment opportunities for Navajo and Hopi Indians, some of which included employment preferences for Navajo and Hopi Indians. NN-Brf at 9-12. And the Nation noted that when the U.S. Commission on Civil Rights reexamined the Navajo situation in 1975, it concluded that "the Navajo were still 'the poorest of America's poor.'" NN-Brf at 12-13. It is no surprise, then, that former Interior Secretary Udall described the ability of the Navajo Nation to obtain an economic advantage from the coal on its reservation to be "a very critical matter." NN-Brf at 15.

These background facts, although compelling, do not assist this Court in determining whether the district court correctly held that Interior's approval of the

Peabody leases transforms the lease-based “Navajo Indian” preference on which Peabody relies from what is otherwise plainly national origin discrimination banned under Title VII into a “political classification” that falls outside Title VII’s prohibitions. The resolution of that question of statutory construction is not aided by references to the historic poverty of Navajo Indians and the importance of coal to Navajo economic development. Indeed, this Court concluded in *Dawavendewa I* that the economic plight of all Indians—including the Navajos—was precisely what motivated Congress to adopt an exemption that permitted preferences for Indians, generally, while maintaining a statutory prohibition against preferences that distinguish between members of different tribes. *Dawavendewa I*, 154 F.3d at 1121-22.

The Nation urges this Court to find significant the assertion that one EEOC district office director and one Department of Labor (DOL) acting official once believed tribe-specific preferences were lawful under Title VII. NN-Brf at 16-18, 48 (arguing the lease provisions reflect policies “repeatedly endorsed by . . . the Department of Labor . . . [and] the EEOC itself” as “an appropriate way to tackle the debilitating unemployment on the Navajo Reservation.”). The district court did not rely on this information, and this Court should likewise ignore it because it has no persuasive legal significance. That one EEOC district office director and one Acting Assistant Solicitor of the Department of Labor (DOL) may have endorsed

Navajo-specific preferences in the early and mid-1970s does not help this Court determine whether Congress meant Title VII to prohibit Peabody's conduct,⁵ particularly since EEOC and DOL both later took official positions to the contrary—the EEOC when it issued its policy guidance in 1988 (*see* P-SER-1-7), and the DOL when it adopted its regulations in 1978. *See* 41 C.F.R. 60-1.5(6)(1975) (now codified at 41 C.F.R. 60-1.5(7)).

Finally, the Nation argues that the 326 federally-approved business leases on the Navajo Reservation “are the foundation of the Navajo economy.” NN-Brf at 19-20. This is not a basis for finding Peabody's conduct lawful under Title VII. Those leases are not before this Court, and there is no evidence a determination in

⁵ The EEOC's alleged position is based on a written statement that Charles Lacey, a corporate officer of Bechtel Corporation, submitted to the U.S. Commission on Civil Rights at a 1973 hearing (VI-ER-591-606). Lacey represented that EEOC charges filed by Navajo Indians against Bechtel had been “*tentatively* conciliated by Bechtel.” *See* IV-ER-603 (emphasis added), cited in NN-Brf at 17-18. This “tentative” conciliation agreement is represented only by an unsigned document (IV-ER-608-617), and the record does not indicate whether this alleged agreement was ever finalized. In any event, when EEOC later adopted its Policy Guidance on Indian Preferences, the EEOC formally disavowed the position this unsigned document supposedly reflects.

The Nation based its representation of DOL's supposed position on a 1973 internal DOL memorandum from an Acting Assistant Solicitor of Labor. *See* IV-ER-619-622. A few years later, the DOL adopted formal regulations disavowing this position and adopting the position that Title VII's Indian preference provision prohibits distinctions between members of different tribes. *See* 41 C.F.R. 60.1-5(a)(7) (originally codified at 41 C.F.R. 60.1-5(a)(6)).

the EEOC's favor here will have any significant impact on any other leases or, more importantly, on the Navajo economy. That other leases contain similar preferences suggests only that if the EEOC prevails on its legal arguments here, the Nation and Interior may wish to renegotiate other leases to reflect an "Indian" rather than "Navajo" employment preference.

The Nation's background facts and policy arguments demonstrate why Congress thought it important to include an Indian preference exemption in Title VII, but they do not support the district court's grant of summary judgment. The question of Title VII interpretation that lies at the heart of this appeal is governed not by policy arguments but by rules of statutory construction and *stare decisis*.

CONCLUSION

For the reasons set forth in the EEOC's opening brief and this reply, the EEOC respectfully asks this Court to reverse summary judgment and remand this matter for further proceedings.

Respectfully submitted,

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Dated: October 22, 2013

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CERTIFICATE OF COMPLIANCE

1. This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) as modified by this Court by order dated October 21, 2013, because it contains 8,890 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This reply 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: October 22, 2013

Susan R. Oxford

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2013, I filed the EEOC's reply 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 the same date, served the counsel noted below, also by using the Court's ECF system:

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