No. 10-10-981

IN THE

Supreme Court of the United States

NAVAJO NATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the sovereign immunity of the United States and of a federally recognized Indian tribe, preserved in Title VII of the Civil Rights Act of 1964, be abrogated by application of Rules 14 and 19 of the Federal Rules of Civil Procedure?

2. May a court use Rule 14 to permit or require a party to implead the Secretary of the Interior in a case where the applicable statute does not confer a right of contribution?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are plaintiff Equal Employment Opportunity Commission, and defendants Peabody Western Coal Company and the Navajo Nation, also known as the Navajo Tribe of Indians.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Navajo Nation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinions of the Ninth Circuit for which review is sought are published at 610 F.3d 1070 (Pet. App. 2a - 32a) and 400 F.3d 774 (Pet. App. 67a - 87a). The initial District Court opinion is published at 214 F.R.D. 549 (Pet. App. 88a - 121a), and the opinion of the District Court entered after the first remand (Pet. App. 33a - 66a) is unpublished, but may be found at 2006 WL 2816603.

JURISDICTION

The court of appeals denied rehearing and rehearing en banc on September 1, 2010. See Pet. App. 1a. On November 22, 2010, Justice Kennedy extended the time for filing this Petition to and including January 29, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

Title VII of the Civil Rights Act of 1964

Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Under Title VII, "[t]he term 'employer' . . . does not include (1) the United States . . . [or] an Indian tribe." 42 U.S.C. § 2000e(b).

In addition, Title VII provides that:

> 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). Title VII also provides that:

> In the case of a respondent which is a government, government agency, or political subdivision, if the [Equal Employment Opportunity] Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no

> further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

42 U.S.C. § 2000e-5(f)(1).

Indian Land Leasing Statutes and Regulations

The Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g, provides in relevant part that:

> unallotted lands within any Indian reservation . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal counsel . . . .

25 U.S.C. § 396a.

The Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-638, provides in relevant part that:

> Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to this subchapter, and, in furtherance of this policy may be given employment on such projects without regard to the provisions of the civil-service and classification laws. . . .

25 U.S.C. § 633. The Rehabilitation Act also provides that:

> Any restricted Indian lands owned by the Navajo Tribe . . . may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public . . . or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted . . . shall be made under

> such regulations as may be prescribed by the Secretary. . . .

25 U.S.C. § 635(a).

Regulations promulgated by the Secretary under the IMLA have required at all relevant times that "[l]eases . . . shall be on forms prescribed by the Secretary of the Interior or his authorized representative . . . ." 24 Fed. Reg. 7949 (1959) (promulgating 25 C.F.R. § 172.3 (1965)); 25 C.F.R. § 211.57 (2010).

Regulations promulgated by the Secretary under the Rehabilitation Act have also required that "[a]ll leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval." 25 C.F.R. § 131.5(a) (1960); 25 C.F.R. § 162.604(a) (2010).

Federal Rules of Civil Procedure

Rule 14, Fed. R. Civ. P., provides in relevant part:

> (a) **When a Defending Party May Bring in a Third Party**.
>
> (1) Timing of the Summons and Complaint. A defending party may, as a third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. . . .

Rule 19, Fed. R. Civ. P., provides in relevant part:

> (a) **Persons Required to be Joined if Feasible.**
>
> (1) **Required Party.**
>
> A person . . . whose joinder will not deprive the court of subject matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may

(i) as a practical matter impair or impede the person's ability to protect that interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

* * *

(b) **When Joinder Is Not Feasible.**

If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

STATEMENT OF THE CASE

Introduction

The EEOC sued Peabody in 2001, alleging that Peabody's compliance with provisions of two coal leases with the Navajo Nation requiring Peabody to employ qualified Navajo workers violates Title VII. Those leases were drafted, negotiated and approved under the personal supervision of the Secretary of the Interior. Title VII does not authorize the EEOC to sue the Department of the Interior or the Navajo Nation, reserving that authority to the Attorney General.

The District Court dismissed the suit. In two opinions, the District Court held that the EEOC's action could not proceed in the absence of either the Navajo Nation or the Secretary, neither of which EEOC could lawfully join under Title VII. The Ninth Circuit reversed both judgments, with unprecedented applications of Rules 14 and 19 of the Federal Rules of Civil Procedure. First, it held that the EEOC could sue the Navajo Nation under Rule 19 so long as the EEOC's complaint did not expressly seek "affirmative relief" against the Nation. Second, it held that either the Navajo Nation or Peabody could be permitted or required to cure the EEOC's inability under Rule 19 to join the Secretary by impleading the Secretary under Rule 14 and asserting a claim against the Secretary under the Administrative Procedures Act ("APA").

In part in recognition of the contributions of Navajo soldiers and Code-Talkers in World War II, Congress addressed the Navajo situation in the late 1940s. The Department of the Interior reported in 1948 that the median education level of the Navajo people was one year, the Navajo people were living in abject poverty, and there were virtually no roads, utilities, hospitals, or jobs on the reservation. *See, e.g.*, H.R. Rep. No. 81-963 (1949); S. Rep. No. 81-550 (1949). Congress provided for Navajo-specific employment preferences in a specific airport project on land of the State of Utah near the Navajo Reservation in the Act of Sept. 7, 1949, Pub. L. 302, 63 Stat. 695. The next year, Congress accepted the Department's recommendation and more generally provided for Navajo-specific and Hopi-specific employment preferences in the Navajo and Hopi Rehabilitation Act of 1950. *See* 25 U.S.C. § 633.

Both the Rehabilitation Act and the Indian Mineral Leasing Act of 1938 ("IMLA") provide that leases under those laws must be approved by the Secretary. 25 U.S.C. §§ 396a; 635(a). Both laws permit the Secretary to promulgate regulations governing leasing of Navajo lands. 25 U.S.C. §§ 396d; 635(a). The Secretary's regulations under those laws have required that leases be made on forms provided by the Secretary. 24 Fed. Reg. 7949 (1959) (promulgating 25 C.F.R. § 172.30 (1965)), 211.57 (2010) (IMLA); 131.5(a) (1962), 162.604(a) (2010) (Rehabilitation Act). Those form leases, in turn, have required lessees to prefer qualified workers in hiring decisions on a tribe-specific basis. *See, e.g.*, Peter C. Maxfield, *et al.*, *Natural Resources Law on American Indian Lands* (1977) App. A at 277, Pet. App. 124a (form

prospecting permit requiring tribe-specific employment preference), 288, Pet. App. 127a (form mineral lease requiring same).

Peabody's Reservation leases each include a Navajo employment preference requirement. Pet. App. 39a-40a, 128a, 130a. The leases are "an important part of the program to rehabilitate the Navajo Tribe" under the Rehabilitation Act. *See United States v. Navajo Nation*, 556 U.S. ___, ___, 129 S. Ct. 1547, 1556 (2009). They were approved by the Interior Department in 1964 and 1966. Pet. App. 129a, 131a. The drafting and negotiation of those leases were undertaken by the Department under the direct and active supervision of then Secretary Stewart Udall. Udall testified that, although he did not attend every meeting among his staff, Peabody and the Tribe, "[w]hen it got to a crunch where the decision had to be made, I made the decision. I insisted on that." Depo. Tr. 24 (Jul. 6, 2006). Udall explained the employment preference provision in the Peabody lease, stating "if you combine the Navajo and Hopi land, you have an area which is now as large as New Jersey; and the resources they had were very important. And the concept that if jobs were created relating to the resources of the tribes, that in this huge area, the employment preference would be very important and was very important." *Id.* at 43. Udall recalled *no* Navajo lease that did not include a Navajo-specific employment preference. *Id.* at 45-46.

Udall's recollection was accurate. The undisputed record shows that every one of the 326 business site leases approved by the Department to this very day includes a Navajo-specific employment preference requirement. Nonetheless, the Navajo unemployment rate is still a staggering 48%.

After passage of Title VII, the Department of Labor in 1973 examined the question of whether Navajo-specific preferences were compatible with Title VII. The conclusion of the Department of Labor is that "the Indian preference provision of Title VII . . . [allows the Navajo Nation to] legally append bid conditions of its own on federally-assisted construction contracts which impose upon the contractors a burden of hiring an all or predominantly Navajo work force" and "there is no objection to even stronger language requiring employment of Navajos to the maximum extent of their availability." Pet. App. 133a.

A second federal agency, the United States Commission on Civil Rights, examined that same issue in 1975. The Commission observed that the Navajo preference requirement in tribal leases was "approved by the Solicitor's Office of the Department of Labor as being in accord with Title VII" and it recommended that the Bureau of Indian Affairs "demonstrat[e] that the full authority of the Federal Government stands behind enforcement of the Navajo preference clause in tribal contracts" and in other contracts involving reservation activities. U. S. Comm'n on Civil Rights, *The Navajo Nation: An American Colony* (1975) at 49, 126, 135. Pet. App. 137a-139a.

The 1868 treaty between the United States and the Tribe affirms the Navajo Nation's ability to exclude others (except federal officials) and condition their entry. 15 Stat. at 668; *see Williams v. Lee*, 358 U.S. 217, 221, 223 (1959); *see generally Worcester v. Georgia*, 31 U.S. 515, 561 (1832); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982). That Treaty "was meant to establish the lands as within the

exclusive sovereignty of the Navajos under general federal supervision." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 175 (1973). Under that supervision, the Navajo Nation Council passed a law in 1970 that conditions the entry and continued presence of those doing business on the Reservation on compliance with their federally approved leases and with other Navajo laws. *See* 5 N.N.C. § 403 (2005).[1] Those laws include the Navajo Preference in Employment Act ("NPEA") including its federally approved provision requiring Navajo hiring preference, 15 N.N.C. § 604(A)(1).[2]

Prior Proceedings

1. The EEOC sued Peabody in 2001, claiming that Peabody violated Title VII by giving hiring preference to qualified Navajo workers on the Navajo Reservation and seeking damages and injunctive relief. The EEOC alleged that Peabody's actions constituted prohibited discrimination on the basis of "national origin."[3] Compl.1. Peabody is obliged to prefer quali-

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[1] "The grant of the privilege of doing business within the Navajo Nation . . . is conditioned upon the business' compliance with the applicable laws of the Navajo Nation and upon the continuing effect or validity of prior leases . . . authorizing the business to enter upon lands subject to the jurisdiction of the Navajo Nation." 5 N.N.C. § 403 (2005)

[2] "All employers doing business within the territorial jurisdiction . . . of the Navajo Nation . . . shall: (1) Give preference in employment to Navajos." 15 N.N.C. § 604(A)(1) (2005).

[3] But see Morton v. Mancari, 417 U.S. 535 (1974) (federal Indian hiring preferences are permissible because they are based on political, not racial, distinctions). The employment preference here is properly viewed as a political distinction because it is required in a lease of tribal trust property executed by the Navajo Nation as a dependent sovereign with the

fied Navajo workers for two reasons. First, its federally approved coal leases on the Navajo Reservation require such preference. Pet. App. 128a, 130a. Second, Navajo employment law conditions the Navajo Nation's assent to Peabody's continued presence on the Reservation both on its compliance with the leases and on its adherence to the NPEA, including its federally approved, Navajo-specific hiring preference requirement.

Peabody moved to dismiss, arguing, among other things, that the suit was a thinly veiled suit against the Navajo Nation that the EEOC was prohibited from bringing directly. In response, the EEOC moved to join the Navajo Nation as a defendant under Rule 19 and requested that the District Court "order the Navajo Nation to appear and defend any interests it believes may be affected by this litigation." Pet. App. 105a. The District Court recognized that the Navajo interests are substantial, because the EEOC itself "characterizes [its] lawsuit as litigation over 'the validity of [the Navajo Nation's] discriminatory lease provision and employment preference provisions . . . [and] the interplay between its tribal sovereignty and Title VII.'" *Id.* (quoting EEOC's Opp. to Dismissal at 4).

The District Court held that the EEOC could not employ Rule 19 to avoid Title VII's preclusion of suits by EEOC against governments. "The Attorney General clearly has exclusive authority to file suit whenever a government such as an Indian tribe is involved." Pet. App. 108a (citing 42 U.S.C. 2000e-5(f)(1), (2); id. § 2000e-8(c)). The District Court found

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approval of its federal trustee and in accordance with a tribal law limited in scope to the tribal territory.

persuasive decisions of other federal courts rejecting similar attempts by the EEOC to invoke "joinder" to circumvent Title VII's prohibition of suits by the EEOC against government entities. *Id.* at 109a-111a. The District Court explained:

> The EEOC in effect is seeking to sue the Navajo Nation to force it to defend the Navajo Preference in Employment Act and its contracts with employers working on its lands, when it is prohibited from suing the Navajo Nation to enforce Title VII provisions against the tribe directly. This is contrary to the clear provisions of Title VII prohibiting the EEOC from suing governments, and specifically exempting the Indian tribes from its provisions.

Id. 108a-109a.

The District Court examined the Navajo Nation's interests, concluded it was an indispensable party and dismissed the EEOC's complaint because the Navajo Nation could not be joined by the EEOC. *Id.* at 111a-112a.

2. On the EEOC's appeal, the Ninth Circuit reversed. The Court of Appeals agreed with the District Court that the Navajo Nation is a necessary party under Rule 19. *Id.* 73a. It recognized that the Navajo Nation is a signatory to lease provisions that the EEOC challenges under Title VII. *Id.* 76a. The Court of Appeals recognized that the suit is essentially a challenge to provisions of the leases between Peabody and the Navajo Nation that require Navajo-specific hiring preferences. Pet. App. 68a-69a, 76a. The Court of Appeals accordingly agreed that suit could not proceed without the Tribe's presence. *Id.* 77a.

The Court of Appeals did not doubt that, through the provisions of Title VII exempting tribes from the definition of "employer" and providing that only the Attorney General could bring suits involving governments, Congress had prohibited the EEOC from suing the Navajo Nation. Pet. App. 78a. Nonetheless, the panel rejected the District Court's conclusion that the Nation could not be sued by the EEOC under Rule 19 and held that, so long as the EEOC does not seek affirmative relief from the Nation, "joinder . . . is not prevented by the fact that the EEOC cannot state a cause of action against [the Nation]." *Id.* 73a. It ruled that the case was controlled by the Circuit's prior construction of Rule 19 under which "a plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19." *Id.* 78a-79a (citing cases).

The Court of Appeals acknowledged that its holding, while assertedly consistent with decisions of the First, Sixth, and Tenth Circuits, was contrary to holdings of the D.C. and Fifth Circuits, with which the Ninth Circuit "has never agreed." Pet. App. 80a (citing *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 457 (5th Cir. 1989) ("it is implicit in Rule 19(a) itself that before a party . . . will be joined as a defendant the plaintiff must have a cause of action against it."), *cert. denied*, 493 U.S. 1020 (1990); *accord Davenport v. Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (D.C. Cir. 1999) (adopting *Vieux Carre*)).

3. After this Court denied Peabody's Petition for Certiorari (No. 05-353), the EEOC amended its complaint to add the Navajo Nation as a defendant. It continued to seek damages against Peabody and an injunction against Peabody "and all persons in active

concert or participation with it from engaging in discrimination on the basis of national origin." Am. Compl. 4.

The Navajo Nation moved to dismiss. Among other grounds, the Nation argued that the amended complaint did in fact seek affirmative relief from the Nation as a person acting in concert or participating with Peabody respecting the leases, and also that the suit could not proceed without the joinder of the Secretary of the Interior whose interests in the suit were substantial but whom the EEOC was statutorily precluded from joining.

The District Court agreed that the EEOC's amended complaint did indeed seek affirmative relief against the Nation. "[T]here can be no doubt that the Navajo Nation falls within the scope of affirmative relief sought by the EEOC. . . . Should the EEOC prevail in this suit and obtain the broad relief sought, the Navajo Nation would then be enjoined from implementing and requiring such lease provisions in the future" . . . . [T]here can be little doubt that the EEOC seeks affirmative relief not only against Peabody Coal but the Navajo Nation as well." Pet. App. 46a.

The District Court observed that the leases provide for Secretarial cancellation if breached by Peabody, found that the Peabody leases were drafted by the Department of Interior, approved by the Secretary of Interior and required that each lease contain a Navajo preference in employment provision, and acknowledged that the Secretary played and plays a similar role in other leases between the Navajo Nation and private business entities. Pet. App. 41a. For these and other reasons, the District Court found that the Secretary at the very least claims an interest

in this litigation. *Id.* 58a-60a. The District Court analyzed all of the Rule 19 factors and emphasized that "no procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable." *Id.* 59a. The court observed that any judgment in favor of the EEOC would impact not only the Peabody leases but also similar provisions in other leases among the Secretary, the Navajo Nation, and private non-Navajo businesses governed by or seeking lease agreements on the Reservation that require both Navajo and Secretarial approval. *Id.* 41a, 60a. It ruled that the EEOC is statutorily barred from suing federal agencies under Title VII, *id.* 62a, a proposition that the EEOC has never challenged.

All of the Rule 19 factors favored dismissal except the lack of an alternative forum. *See* Pet. App. 63a-65a. In this respect, the District Court ruled that, because of the importance of federal sovereign immunity, there was little need for additional balancing and dismissed for the EEOC's inability to join the Secretary. *Id.* 65a.

4. The Court of Appeals again reversed. First, the Ninth Circuit ruled that the prayer for relief implicating Navajo rights was mere boilerplate and, even if it were properly read as requesting affirmative relief against the Nation, the proper response of the District Court would be to deny the relief rather than dismiss the suit. Pet. App. 16a.

Second, the Court of Appeals agreed with the District Court that the Secretary is a required party under Rule 19. *Id.* 18a-20a. It also agreed that the Secretary has an interest in the subject matter of the

action, because, among other things, the Secretary has an interest in defending the legality of the lease provisions requiring Navajo hiring preferences. *Id.* 20a. It accepted that most "deeply imbedded" principle that, in an action to set aside a lease, all parties who may be affected by the decision are indispensable. *Id.* It had no difficulty finding that the Secretary was such a party because he mandated the challenged lease provisions, continues to exercise oversight over the leases, and has a well established interest in a lawsuit that could result in the invalidation of one of his regulations or practices. *Id.* 20a-22a.

The Court of Appeals *also* agreed that Title VII prohibits the EEOC from joining the Secretary and that only the Attorney General has the power to bring such a suit. *Id.* 22a. Indeed, it understood that "the Attorney General either has refused or will refuse" to do so. *Id.*

But instead of affirming the dismissal for the EEOC's failure and inability to join the Secretary as an indispensable party, the Court of Appeals assigned to the *defendants* the task of curing the EEOC's inability to join all proper parties by an unprecedented use of Rule 14. Recognizing that there was no waiver of federal sovereign immunity in the District Court for money damages that might be sought against the Government by either Peabody or the Navajo Nation, the Ninth Circuit ruled that the EEOC could not seek damages from either Peabody or the Navajo Nation. Pet. App. 23a-25a. By removing a possible damages remedy in favor of the EEOC, the Circuit assured that its ruling would not permit either the Navajo Nation or Peabody to seek money from the Secretary through impleader,

which could have deprived the District Court of jurisdiction over the claim. *Id.* 24a-25a.

The Court of Appeals based its decision on a presumption that either Peabody or the Navajo Nation would implead the Secretary and state a claim under the Administrative Procedures Act ("APA"). *Id.* 25a-29a. It did so without any briefing of the issue by the parties.[4] Now, with the EEOC's claim for damages off the table, Peabody's incentive to expend more resources for this litigation will be dramatically reduced. That leaves the EEOC to litigate primarily against the Secretary and the Navajo Nation, two parties that Congress has precluded the EEOC from suing.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's Rule 14 ruling is a direct affront to federal sovereign immunity and it is contrary to decisions of this Court and of other circuits. The applicable statute expressly precludes the plaintiff from suing a federal agency and does not confer a right of contribution. But, now, a defendant in the Ninth Circuit may be permitted or compelled to hail that agency into court under Rule 14 so that the plaintiff can challenge the agency's regulations or any actions based on these regulations.

The Ninth Circuit's ruling presents a square circuit conflict regarding the use of Rule 19, conflicts with this Court's decisions and decisions of other circuits holding that tribal sovereign immunity protects

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[4] The EEOC mentioned the issue without citation to authority only in one sentence and a footnote in its Reply Brief, saying that Peabody could assert a "cross-claim" under Rule 14 against the Secretary. EEOC Reply Br., *EEOC v. Peabody Western Coal Co.*, No. 06-17261 (9th Cir. filed Oct. 26, 2007) at 23 & n.17.

tribes not just from adverse judgments but from the considerable expense of suit, and upsets the careful balance of authority and prerogatives Congress established among the EEOC, the Attorney General, and tribal and other government entities. The Ninth Circuit's ruling in this case also has significant nationwide energy implications, since the tribe-specific preferences have been mandated by the Secretary in his form mineral leases since 1957 at the latest and were material inducements for the tribes to enter mineral leases and pipeline right-of-way agreements that endure to this day.

Certiorari should be granted to resolve the circuit conflicts, conform the Ninth Circuit's decision to the unambiguous precedents of this Court, and restore the allocation of authority between the EEOC and the Attorney General that Congress provided in Title VII.

I. THE NINTH CIRCUIT'S RULE 14 DECISION IMPROPERLY ABROGATES FEDERAL SOVEREIGN IMMUNITY, CONFLICTS WITH THIS COURT'S PRECEDENTS, AND CREATES A CLEAR CIRCUIT CONFLICT.

A. The Decision Below Subverts Federal Sovereign Immunity.

A basic principle of federal law is that the Federal Government cannot be sued without its consent. *Navajo Nation*, 129 S.Ct. at 1551. A well established corollary to that principle is that procedural rules may not be manipulated to chip away at federal sovereign immunity. This was made clear in three opinions of this Court handed down shortly after the adoption of the modern rules of procedure. *See*

United States v. Sherwood, 312 U.S. 584 (1941) (Rule 17 is not properly applied to authorize suit against United States); *United States v. United States Fid. & Guar. Co.* ("*USF&G*"), 309 U.S. 506, 512, 512-13 (1940) (rule permitting cross claims in federal courts did not abrogate federal sovereign immunity where an act of Congress provided that such cross claims could be asserted only in courts in the Indian Territory); *United States v. Shaw*, 309 U.S. 495, 502 (1940) (court rule permitting cross claim cannot abrogate federal sovereign immunity).

Sovereign immunity is not just immunity from an adverse judgment; it is freedom from having to participate in discovery, motion practice, and other litigation demands. *See Shaw*, 309 U.S. at 501 (sovereign immunity is based on considerations of dignity and decorum, and on the need of government officials to "operate undisturbed by the demands of litigants"); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 & n.29 (1982) (explaining rationale for allowing interlocutory appeal of rejection of defense of official immunity). The Ninth Circuit's ruling will not only permit Peabody, if it is so inclined, to litigate the issue of the employment preference with the Secretary, but also to raise any other claim it may have against the Secretary under Rule 18(a).[5] If the Ninth Circuit's ruling is allowed to stand, the Department of the Interior will be required to spend significant resources to defend its leases and policies. The Navajo Nation has already expended over $300,000 in attorney fees and costs in defending its

[5] "A party asserting a . . . third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party." *Fed. R. Civ. P. 18(a).*

leases and its laws since being sued by the EEOC as a "Rule 19 defendant."

The Ninth Circuit's ruling has broad ramifications. Its ruling is based on the apparent inequity of exposing Peabody to liability when its actions are dictated by regulations of and lease terms mandated by a government agency, the Department of the Interior. According to the Ninth Circuit, Peabody is between "a rock and a hard place." Pet. App. 21a. Under these circumstances, the Ninth Circuit held that Peabody may implead the United States under Rule 14 so that complete relief may be effected. *See id.* 18a; *but see USF&G*, 309 U.S. at 513 ("The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity."); *Shaw*, 309 U.S. at 502 ("principle of a single adjudication" does not overcome federal sovereign immunity so as to permit cross-claim).

Under the Ninth's Circuit's interpretation of Rule 14, defendants will routinely seek to implead the United States when a federal regulation or action arguably motivated the conduct alleged to have harmed a plaintiff. An early Title VII case illustrates the point. In *Malone v. United States*, 581 F.2d 582 (6th Cir. 1978), *cert. denied*, 439 U.S. 1128 (1979), a trucking company called "Shippers" was sued when one of its trucks collided with a car and killed the car's driver. Shippers claimed that its position was "passive, secondary and involuntary to the active, primary and mandatory position of third party defendant, United States of America" because Shippers had entered into an agreement with the EEOC and the Department of Justice requiring Shippers to hire minority drivers whose qualifications were assertedly less demanding than Shippers' previous

ones. *Id.* at 583. Shippers claimed it was "compelled to hire . . . the black truck driver involved in the accident under the affirmative action program and [it sued] the government . . . on the theory that it would not have hired the black truck driver if the consent decree had not required it to 'lower its standards.'" *Id.* The Sixth Circuit properly affirmed the dismissal of Shippers' third-party complaint. But the Ninth Circuit's novel Rule 14 interpretation would allow such a plaintiff to implead the Government for allegedly imposing particular terms of an agreement to which that plaintiff was bound.

Similarly, under the Ninth Circuit's ruling, if a Government agency, by regulation or agreement, requires the installation of particular technology and that technology fails, a company sued for the consequences of such failure would be able to implead the United States seeking contribution or invalidation of the regulation or agreement. Because of the ubiquitous involvement of federal agencies in commerce, the Government's exposure to litigation under the Ninth Circuit's ruling is virtually limitless.

B. Permitting or Mandating Impleader in a Title VII Case Conflicts Directly with Supreme Court Precedent.

The Ninth Circuit held that the Navajo Nation or Peabody may (or may be required to) implead the United States in a Title VII action under Rule 14 so that the merits could be decided with all interested parties present and accounted for. But impleader is proper only if the federal statute on which the main claim is based confers a right of contribution. *Texas Indus., Inc. v. Radcliff Mat'ls, Inc.*, 451 U.S. 630 (1981). Title VII, the only statute the EEOC seeks to enforce, does not confer a right of contribution.

Northwest Airlines, Inc. v. Transport Workers U. of Am., 451 U.S. 77, 90-99 (1981). The Ninth Circuit's holding contravenes these clear precedents. Indeed, having taken a damages remedy off the table, the Ninth Circuit transformed Rule 14 from a rule focused on contribution and indemnity into a sort of equitable interpleader rule.

C. Review Is Required to Resolve Conflicts Among the Circuits on the Rule 14 Issue.

Peabody was and is subject to regulations promulgated by the Secretary. Those regulations required, and still require, Peabody and other mineral lessees on Indian lands to use the Secretary's form leases. Those leases, in turn, require Peabody and others to agree to and abide by tribe-specific employment preferences. The Ninth Circuit held that Peabody could implead the Secretary in a case challenging Peabody's compliance with the Secretary's regulations and the lease contract that incorporates them.

The Ninth Circuit stands alone in this respect. Judge Posner put it concisely in a case where a defendant attempted to implead a federal agency to support its defense in a suit on a contract that incorporated an FCC regulation: "we have never heard of a case where a defendant who interposed a defense based on a law or regulation was allowed to implead the enacting body." *City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (affirming dismissal of third-party complaint against Federal Communications Commission, whose regulation was incorporated in a disputed contract). The Sixth Circuit has also ruled contrary to the Ninth in this case. *Malone*, 581 F.2d 582, discussed *supra* at 20-21. Similarly, the Fifth Circuit, in *Southeast Mort-*

gage Co. v. Mullins, 514 F.2d 747 (5th Cir. 1975), affirmed the dismissal of a third-party complaint against the Department of Housing and Urban Development notwithstanding the contention that HUD's failure to enforce regulations caused the harm alleged by plaintiff. The position of the Sixth Circuit in *Malone*, disallowing impleader of an alleged "coercer" of a Title VII violation, comports with the principal purpose of Title VII; the ruling of the Ninth Circuit below does not. "Disallowing a cause of action over against the alleged coercer of a Title VII . . . violation in no way impairs the Act's principal purpose of discouraging discrimination by the employer; in fact, it is arguably *necessary* for that purpose, since an employer confident of recovering for coercion will be more likely to yield to it." *Carter v. Director, Office of Workers' Comp. Prog., Dep't of Labor*, 751 F.2d 1398, 1402 (D.C. Cir. 1985) (Scalia, J.)(emphasis in original).

More generally, the other circuits, following *Northwest Airlines*, reject attempts to implead third parties in Title VII cases, again contrary to the decision below. *E.g., Atchley v. Nordam Group, Inc.*, 180 F.3d 1143, 1152 (10th Cir. 1999); *Scott v. PPG Indus., Inc.*, 920 F.2d 927, 1990 WL 200655 (4th Cir. 1990) (unpublished).

Finally, if the Navajo Nation and Peabody decide not to implead the Secretary, the case will have to be dismissed because the Secretary is a required party who must but cannot otherwise be joined. *See* Pet. App. 19a-22a.[6] Unless the Ninth Circuit's decision is

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[6] The Navajo Nation has no intention of impleading its trustee for its insistence on lease terms favoring Navajo workers, notwithstanding the Ninth Circuit's curious aside that the Nation "would quite reasonably want to seek prospective relief

to be a vain act, the District Court would be required to *order* Peabody or the Navajo Nation to implead the Secretary, in violation of a central tenet of Rule 14. Rule 14(a) provides that a defending party "may" implead a non-party who may be liable for all or part of a claim against it; Rule 14 claims are therefore "permissive and not compulsory." 3 *Moore's Federal Practice* § 14.03[3] at p. 14-13 (3d ed. 2010). If the Ninth Circuit's decision is properly read as requiring either Peabody or the Navajo Nation to implead the Secretary so that the EEOC's inability to join the Secretary is cured, this, too, is inconsistent with cases decided by the other federal courts of appeal regarding the voluntary use of Rule 14. *See, e.g., Fernandez v. Corporacion Insular de Seguros*, 79 F.3d 207, 210 (1st Cir. 1996); *City of Gretna v. Defense Plant Corp.*, 159 F.2d 412, 413 (5th Cir. 1947); *see also Mennen Co. v. Atlantic Mut. Ins. Co.*, No. CIV 93-5273 (WGB), 1996 WL 257147 at *5 (D.N.J. Jan. 29, 1996) (courts may not compel defendants to implead indispensable third party; using Rule 19 principles to augment Rule 14 "would undermine the system of impleader set forth in Federal Rule of Civil Procedure 14(a)"), *aff'd*, 147 F.3d 287 (3d Cir. 1998); *Jerez v. Cooper Indus., Inc.*, No. CIV 10119 NRB, 2003 WL 22126893 (S.D.N.Y. Sept. 12, 2003) (Rule 19 provides no authority for a plaintiff to compel a defendant to implead under Rule 14 a non-party whom plaintiff could not join).

The Ninth Circuit's application of Rule 14 is creative, "but the fact that [it was] dealing with an issue of sovereign immunity makes such an exercise in creativity inappropriate." *Hillier v. Southern*

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preventing the Secretary from enforcing the [employment preference] provision." Pet. App. 25a.

Towing Co., 714 F.2d 714, 722 (7th Cir. 1983) (rejecting Rule 14 claim against Government where it had breached no legal duty owed to plaintiff) (Posner, J.). And the likelihood that parties will collude to mount a stale and/or collateral attack on a government regulation cannot be discounted. *See Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365 (1978) (rejecting attempt to use Rule 14 to evade requirement of complete diversity); *City of Peoria*, *supra*.

This Court should therefore grant the Petition, conform the Court of Appeal's decision to this Court's precedents, and resolve the conflict between the Ninth Circuit and the other courts of appeals.

II. THE NINTH CIRCUIT'S RULE 19 DECISION CREATES A CLEAR CIRCUIT CONFLICT AND UNDERMINES TRIBAL SOVEREIGN IMMUNITY CONTRARY TO THIS COURT'S DECISIONS.

A. The Ninth Circuit's Rule 19 Holding Conflicts with Rulings of Other Circuits.

The Ninth Circuit ruled that a plaintiff may join a party to an action under Rule 19 even when no claim may be stated against that party and even if Congress explicitly precluded the plaintiff from suing the absent party. Pet App. 78a-79a. The Ninth Circuit recognized that its holding is contrary to precedent of both the Fifth and D.C. Circuits. *Id.* 80a-81a.

Vieux Carre, 875 F.2d 453, is indeed directly contrary to the ruling of the Ninth Circuit. In *Vieux Carre*, the plaintiffs were attempting to block developers from undertaking a park project. The plaintiffs

posited that, under the federal Rivers and Harbors Act ("RHA"), the project required prior clearance from the Army Corps of Engineers. The plaintiffs sued both the developers and the Corps, relying on the APA.

The Fifth Circuit recognized that the APA provided a "route through which private plaintiffs can obtain federal court review of the decisions of federal agencies" alleged to be violating the RHA. 875 F.2d at 456. But the APA provided no such way for adjudicating the private developers' compliance with the RHA. *Id.* And the plaintiffs could not sue the developers directly under the RHA because there was no private right of action under the RHA. *Id.*

So the plaintiffs contended that the developers could properly be joined under Rule 19 in their APA suit against the Corps, and thereby be subject to an adjudication under the RHA even though Congress had precluded the plaintiffs from achieving this result directly. *See* 875 F.2d at 456-57. The Fifth Circuit rejected that argument for two reasons, both applicable to this case. First, the court held that Rule 19 could not be used to circumvent Congress' determination to authorize only the Attorney General to bring suits to enforce the RHA against developers. *Id.* at 457. Second, and more generally, the Fifth Circuit in *Vieux Carre* held that "it is implicit in Rule 19(a) itself that . . . before [a party] will be joined as a defendant the plaintiff must have a cause of action against it." 875 F.2d at 457.

The Fifth Circuit unquestionably would reject the Ninth Circuit's ruling in this case. It pointedly refused to follow the Tenth Circuit's decision in *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), which the decision below embraces. Pet. App. 79a.

As shown below, the Ninth Circuit in this case ruled quite the opposite to *Vieux Carre*, allowing the EEOC to sue the Navajo Nation even though the EEOC cannot state a claim directly against the Nation and even though Title VII expressly allows only the Attorney General to sue tribes. Pet. App. 22a.

The Ninth Circuit's Rule 19 holding also conflicts with D.C. Circuit precedent. In *Davenport*, 166 F.3d 356, the D.C. Circuit embraced *Vieux Carre*. In *Davenport*, flight attendants sued their union alleging that the union had violated federal labor laws by entering into an interim labor agreement with an airline. The plaintiffs contended that they could bring the airline into the suit using Rule 19. The court rejected that contention. It did not dispute that the airline was a "necessary party" because the airline was a signatory to the agreement with the union. But the D.C. Circuit noted that the airline had not violated any labor law, and it adopted the Fifth Circuit's view that "while Rule 19 provides for joinder of necessary parties, it does not create a cause of action against them." *Id.* at 366.

The Seventh Circuit, moreover, has observed that the EEOC may not join a governmental agency under Rule 19 in a case against a union that had an agreement with the agency, because only the Attorney General may sue a governmental body under Title VII. *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 293 (7th Cir. 1994) (citing *EEOC v. Elgin Teachers Ass'n*, 45 Fair Empl. Prac. Cas. 446, 1986 WL 68560 (N.D. Ill. 1986)). Indeed, courts in the Seventh Circuit have imposed sanctions on the EEOC for its attempt to use Rule 19 to expand its substantive rights over governmental entities contrary to Title VII. In *EEOC v. American Fed. of Teachers*, Loc. 571

("*AFT*"), 761 F.Supp. 536 (N.D. Ill. 1991), the EEOC filed a complaint against a union and School District no. 205, a governmental entity. The EEOC's complaint "did not allege any claims against, or request any relief from, District 205. Rather, the EEOC named District 205 as a defendant, on the grounds that the school district was a 'necessary party' under *Fed. R. Civ. P.* 19." *Id.* at 537 (footnote omitted). Rejecting EEOC's argument that, in essence, "Congress intended to preclude the EEOC from suing governmental entities for some purposes but not for others," *id.* at 539, the court imposed sanctions of $14,209.50 in attorney fees against the EEOC for its frivolous joinder of the school district, *id.* at 542. The court relied on the fact that the EEOC persisted in its Rule 19 ploy even after it had been squarely rejected in two earlier decisions. *Id.* at 540. The EEOC's allegations regarding the Navajo Nation are no different in substance than those which earned the EEOC sanctions in *AFT*. The EEOC has finally found a court, the Ninth Circuit, that will allow it to sue a government agency.

The circuit conflict over the application of Rule 19 is longstanding and intractable. This Court is respectfully urged to resolve that conflict.

B. The Decision Impermissibly Abrogates Tribal Sovereign Immunity Contrary to Title VII and this Court's Decisions.

Tribal sovereign immunity is an important tribal and federal concern. Abrogation of tribal sovereign immunity by implication is inconsistent with the congressional goal of protecting tribal self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978). Tribal self-sufficiency and economic development are surely important federal interests served by tribal

sovereign immunity. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi indian Tribe*, 498 U.S. 505, 510 (1991).

The Navajo Nation is a "domestic dependent nation." *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). "Being a domestic and dependent state, the United States may authorize suit to be brought against [a tribe]. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases . . . The intention of Congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms." *Thebo v. Choctaw Tribe*, 66 F. 372, 375-76 (8th Cir. 1895); *accord Adams v. Murphy*, 165 F. 304 (8th Cir. 1908). Relying on *Thebo* and *Adams*, this Court in *USF&G* recognized the settled congressional policy forbidding suits against tribes, reasoned that the immunity of the dependent tribal sovereigns passed to the United States for their benefit, and ruled that affirmative statutory authority for such suits was required. 309 U.S. at 514 & n.15.[7] This Court reaffirmed the requirement of clear congressional intent in *Martinez*, 436 U.S. at 72, and acknowledged that "many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of defending federal lawsuits," *id.* at 65 n.19.

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[7] The Court's citation in footnote 15 of *USF&G* to *Kalb v. Feuerstein*, 308 U.S. 433 (1940), reveals one basis for the ruling that only Congress may authorize suits against tribes. Just as Congress' power over bankruptcy is "plenary," *Feuerstein*, 308 U.S. at 438-39, Congress' authority to regulate commerce with the tribes is also "plenary." U.S. Const. art. I, § 8, cl. 3; *United States v. Lara*, 541 U.S. 193, 200 (2004).

The vast majority of Indian tribes do not own lucrative casinos or other businesses. Most, like the Navajo Nation, are struggling to meet the basic needs of their citizens.[8] Congress "has consistently reiterated its approval of the [tribal] immunity doctrine." *Potawatomi*, 498 U.S. at 510. Most recently, in response to this Court's invitation in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), Congress reviewed the doctrine, required greater disclosure and specific terms related to tribal immunity in certain agreements,[9] but kept intact the basic premise that tribes should generally be immune from unconsented-to suits.

Just as sovereign immunity protects the United States not only from judgment but also from pre-trial litigation demands, tribal sovereign immunity guarantees immunity from suit, not merely a defense to liability. *Kiowa*, 523 U.S. at 757; *Martinez*, 436 U.S. at 58; *accord Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1179-80 (10th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000); *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 63 F.3d 1030, 1050 (11th Cir. 1995). And, as with federal sovereign immunity, tribal sovereign immunity may not be undermined by application of the rules of procedure. *Potawatomi*, 498 U.S. at 509-10 (tribal sovereign immunity may not be defeated by assertion of compulsory counterclaim under Rule 13); *USF&G*, 309 U.S. at 514 (rejecting an attempt to sue two tribes "whether

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[8] *See, e.g.*, Pres. Reagan's "Statement on Indian Policy," 19 Weekly Comp. Pres. Doc. 98, 100 (1983) ("Many reservations lack a developed physical infrastructure, including utilities, transportation, and other public services.").

[9] *See* Act of Mar. 14, 2000, Pub. L. 106-179, § 2, 114 Stat. 46 (amending comprehensively 25 U.S.C. § 81).

directly or by cross-action" even when complete relief was unavailable in tribes' absence); *see also Martinez* (rejecting attempt to circumvent tribal sovereign immunity by suing tribal officials).

A clear statement by Congress is required to permit suits against the tribes. *Martinez*, 436 U.S. at 72. But nowhere in Title VII is there even a hint that Congress authorized the EEOC to sue Indian tribes. Rather, Title VII expressly prohibits the EEOC from suing governments, 42 U.S.C. § 2000e-5(f)(1); excludes Indian tribes from the definition of "employer," *id.* § 2000e(b); provides that Title VII does not apply to *any* business operating on or near an Indian reservation in compliance with a publicly announced Indian preference practice; *id.* § 2000e-2(i); and provides that only the Attorney General may proceed in cases involving governments, *id.* § 2000e-5(f)(1), (2). The only pertinent clear statements in Title VII are those which *prohibit* the EEOC from suing Indian tribes.

The incremental invasion of tribal immunity countenanced by the Ninth Circuit is "an intrusion not only on the tribes, but on Congress, as well." *See In Defense of Tribal Sovereign Immunity* 95 Harv. L. Rev. 1058, 1072 & n.83 (1982). The Ninth Circuit's ruling that the EEOC may sue the Navajo Nation under Rule 19 where Congress expressly barred the EEOC from suing Indian tribes contravenes the holdings of this Court that procedural rules may not be employed to circumvent tribal immunity and undermines important federal and tribal interests. Review should be granted to conform the Ninth Circuit's decision to this Court's controlling precedent.

III. THIS COURT SHOULD PRESERVE THE CAREFUL BALANCE CONGRESS ESTABLISHED AMONG THE POWER OF THE EEOC, THE PREROGATIVES OF THE ATTORNEY GENERAL, AND RESPECT FOR STATE, LOCAL AND TRIBAL GOVERNMENTS.

Conforming the Ninth Circuit's decisions to this Court's precedents and resolving the circuit conflicts would also preserve the careful balance of power among government agencies established by Congress in Title VII. This balance implicates important issues of federalism and of the federal/tribal relationship.

Until the Ninth Circuit's rulings, courts rejected the EEOC's attempts to sue governmental entities either directly or indirectly. The Ninth Circuit's first ruling permits the EEOC to sue government entities under Rule 19, and its second ruling now permits the EEOC, in essence, to sue even *federal* agencies by manipulation of Rule 14.

This is contrary to the careful allocation of authority provided in Title VII. Title VII permits the EEOC to "bring a civil action against *any respondent* not a government, governmental agency, or political subdivision," but requires the EEOC to yield to the Attorney General in any "case *involving* a government, government agency, or political subdivision." 42 U.S.C. §2000e-5(f)(1) (emphases added). Congress repeated that demarcation of authority five times in subsections (f)(1) and (f)(2); *accord* 42 U.S.C. §2000e-8(c); *see Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 360 n.11 (1977).

The Navajo Nation is a government, *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), and the Department of the Interior is a government agency. Title VII should be construed consistent with its plain language. "Nothing could be broader than the term 'any respondent,'" *EEOC v. Elgin Teachers Ass'n*, 658 F.Supp. 624, 630 (N.D. Ill. 1987),[10] and the word "'involving' is broad and is indeed the functional equivalent of 'affecting,'" *Allied-Bruce Terminex v. Dobson*, 513 U.S. 265, 273-74 (1995). Both the District Court and the Ninth Circuit recognize that the Navajo and Secretarial interests are so significant so as to make them required parties under Rule 19; *a fortiori*, the EEOC's challenge to the Peabody leases, other federally approved business site leases on the Navajo Reservation, the Department's consistent practice in Indian mineral leasing nationwide, and federally approved Navajo laws indisputably "involves" the Tribe and the Secretary.

In cases where such important tribal and Departmental interests are at stake, Title VII reserves the ability to bring suit to the Attorney General. In contrast to the single focus of the EEOC, the Department of Justice has broad responsibilities regarding, and a greater sensitivity to, larger federal and tribal interests. *See* 28 U.S.C. §§ 512, 516, 519; 61 Fed. Reg. 29,424 (1996) (establishing the Office of

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[10] The EEOC argued in the District Court that the Navajo Nation is not a "respondent" because it is not an "employer" under Title VII, such that the restrictions on the EEOC's authority are inapplicable to the Tribe. The District Court rejected that argument, Pet. App. 106a-109a, and the Ninth Circuit did not rule otherwise. Even if the EEOC's logic were adopted, if the Navajo Nation is not a "respondent" for purposes of Section 2000e-5(f)(1)'s restrictions, then it is not a "respondent" for purposes of that Section's *authorization* for EEOC litigation.

Tribal Justice within the Justice Department and publishing the "Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes"); 25 U.S.C. §175 (Justice Department shall represent Indians in all suits at law and in equity).

Finally, the Ninth Circuit's ruling opens the door for the EEOC to sue states and state agencies. But charges of discrimination against state agencies posed a special concern to Congress, which sought to reduce the possibility of friction if a federal administrative agency interfered with states and their subdivisions. *See* S. Rep. No. 92-415 (1971) at 25; *see also United States v. Fresno Unified School Dist.*, 592 F.2d 1088, 1090-92 (9th Cir.) (regarding reservation of exclusive ability of Attorney General to sue state agencies for "pattern and practice" violations), *cert. denied*, 444 U.S. 832 (1979). Congress responded to this concern by permitting only the Attorney General to pursue claims involving government agencies. The EEOC tries to circumvent Title VII's structure by claiming here, as it has unsuccessfully claimed in the past, that "'[w]e are not threatening you because we are not seeking relief.'" *AFT*, 761 F.Supp. at 541. However, "[f]or a party to have to defend against litigation, even in the sense of just having to retain counsel . . . and to evaluate what the consequences are, is something that plainly the statute does not impose on the governmental body, except at the instance of the Attorney General." *Id.*

The Ninth Circuit's decision to allow the EEOC to sue the Navajo Nation directly and to litigate against the Department of the Interior through manipulation of Rule 14 implicates important principles of federal-

ism and government-to-government relations that should be addressed by this Court on certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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