No. 10-____ 10-986 JAN 31 2011

In the

Supreme Court of the United States

PEABODY WESTERN COAL COMPANY,

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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QUESTION PRESENTED

Where the EEOC contends that conduct required by a tribal coal mining lease provision mandated by the Secretary of the Interior violates Title VII of the Civil Rights Act of 1964, which statute expressly bars the EEOC from suing the Secretary to enforce Title VII, does Federal Rule of Civil Procedure 14 permit the coal mining lessee or the tribal lessor to implead the Secretary as a third-party defendant?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Equal Employment Opportunity Commission is the plaintiff in this action. The defendants are Peabody Western Coal Company and the Navajo Nation—the latter as a "Rule 19 defendant."

Peabody Energy Corporation, a publicly traded company, through its wholly-owned subsidiary and sub-subsidiary, Peabody Investments Corp. and Peabody Holding Company, LLC, owns 100% of Peabody Western Coal Company's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Peabody Western Coal Company respectfully petitions the Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.-App. 1a–30a) is reported at 610 F.3d 1070. The District Court's opinion (Pet.-App. 31a–64a) is unpublished but available at 2006 WL 2816603. An earlier opinion of the Court of Appeals (Pet.-App. 65a–85a) is reported at 400 F.3d 774. The District Court's earlier opinion (Pet.-App. 86a–118a) is reported at 214 F.R.D. 549.

JURISDICTION

The Court of Appeals filed its opinion and entered judgment on June 23, 2010 and denied petitions for rehearing and rehearing en banc on September 1, 2010. On November 22, 2010, Justice Kennedy extended the time within which to file a petition for certiorari to and including Saturday, January 29, 2011, making the due date January 31, 2011, under S. Ct. Rule 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b), provides in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who

has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include

(1) the United States, a corporation wholly owned by the Government of the United States, [or] an Indian tribe . . . .

Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides in pertinent part:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . .

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any pub-

licly 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.

Section 706(f)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), provides in pertinent part:

> If within thirty days after a charge is filed with the [Equal Employment Opportunity] Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the 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.

Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702, provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United

> States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States[.]

Section 1 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a, provides in pertinent part:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes . . . .

Section 4 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396d, provides in pertinent part:

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior.

Section 3 of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 633, provides in pertinent part:

> 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.

Section 186.30 of the 1939 edition of Title 25 of the Code of Federal Regulations provides in pertinent part:

> Applications, leases, and other papers must be upon forms prescribed by the Secretary of the Interior, and the Superintendent will furnish prospective lessees with such forms at a cost of ten cents each or $1 per set.

Section 171.30 of the 1965 edition of Title 25 of the Code of Federal Regulations provides:

> Leases, assignments, and other instruments shall be on forms prescribed by the Secretary of the Interior or his authorized representative and may be obtained from the superintendent or other officer having jurisdiction over the lands.

INTRODUCTION

Peabody Western Coal Company ("Peabody") is subject to the inconsistent legal demands of two federal agencies with respect to its hiring practices at its coal mining operations on tribal lands in northeastern Arizona ("Peabody's Arizona operations").

Since mining began in the early 1970s, Peabody has been one of the largest private employers on the Navajo Reservation. The tribal coal leases authorizing Peabody to mine (and thus employ workers) were executed by Peabody and the Navajo Nation, and approved by the Department of the Interior, in 1964 and 1966. The two Navajo-Peabody leases contain

provisions that the Secretary of the Interior required, obligating Peabody to prefer Navajos in hiring, training, and promotion. Breach of this contract obligation subjects Peabody to the risk of Interior Department action to cancel the leases.

Since 1988 the announced policy of the Equal Employment Opportunity Commission ("EEOC"), implementing Title VII of the Civil Rights Act of 1964, has been that an employer violates Title VII if it uses a hiring preference for members of a specific Indian tribe. The only preference that the EEOC allows under the Indian preference exemption language of Title VII (where an employer conducts business "on or near an Indian Reservation") is a preference for American Indians generally, without any preference for members of any specific tribe.

If Peabody implemented the relief the EEOC seeks in this enforcement action, it would violate terms of its coal leases mandated by the Secretary. On the other hand, complying with the Navajo hiring preferences of the coal leases, in the EEOC's view, violates Title VII. Neither the EEOC nor the Interior Department has ever taken any action to resolve the conflict created by the two agencies' positions or to relieve Peabody from the risk of the penalties attached to violations of the agencies' contradictory demands.

STATEMENT OF THE CASE

I. Secretarial Approval of Tribal Employment Preferences

In 1961, the Navajo Nation and Peabody executed, and the Interior Department approved, a prospecting permit authorizing Peabody to prospect for

coal on the Navajo Reservation in northeastern Arizona. The prospecting permit contained hiring preferences for members of the Navajo Nation and granted Peabody the option of acquiring a lease in the form attached to the permit, which contained a slightly expanded version of the same tribe-specific hiring preferences.[1] That lease was executed by the Navajo Nation and Peabody, and approved by the Interior Department, in 1964. Also in 1964, the Navajo Nation, the Hopi Tribe and Peabody undertook the same sequence—execution of a prospecting permit (with option to lease, and containing tribal hiring preferences in the permit and option lease) approved by the Interior Department—for additional lands adjacent to the first parcel, where the mineral estate was owned in undivided 50 percent interests by the Navajo Nation and the Hopi Tribe. In 1966, Peabody and the Navajo Nation executed, and the Interior Department approved, a coal lease for the Navajo Nation's undivided mineral interest in that parcel, and Peabody and the Hopi Tribe executed, and the Interior Department approved, a similar coal lease for the Hopi Tribe's undivided interest in that same resource.

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[1] "ARTICLE XIX. NAVAJO EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this Lease.

II. The Federal Statutory and Regulatory Scheme Underlying the Secretary's Requirement of Tribal Employment Preferences

The prospecting permits and leases were executed and approved under the authority of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–396g ("IMLA"), which authorizes all tribes (with inapplicable exceptions) to lease their reservation mineral resources "with the approval of the Secretary of the Interior." 25 U.S.C. § 396a. The Secretary's regulations implementing IMLA govern all operations under such leases. 25 U.S.C. § 396d. Those rules have, since 1939, required that mineral leases be on forms prescribed by the Secretary. *E.g.*, 25 C.F.R. § 186.30 (1939); 25 C.F.R. § 171.30 (1965). Since as early as 1957, the prescribed IMLA solid mineral lease form has required hiring preferences for members of the lessor tribe.

The Navajo permits and leases also contained terms implementing relevant aspects of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631–638 ("the Rehabilitation Act"), such as provisions reflecting the possibility that the leased land might be conveyed out of trust to unrestricted ownership by the Navajo Nation under section 5(c) of the Rehabilitation Act, 25 U.S.C. § 635(c). The Rehabilitation Act was enacted in response to government reports completed after World War II that emphasized the desperate need for economic development on the Navajo and Hopi tribal lands. The Rehabilitation Act authorized and funded planning for development, which included coal development, with the coal to be delivered to generate electricity to support the growing Southwest, and with the mining providing jobs

and revenues for the Tribes, as a promising course of economic development for these reservations. Section 3 of the Rehabilitation Act specifically directed 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.

Consistent with existing practice under the Secretary's IMLA lease forms and under section 3 of the Rehabilitation Act, Secretary Stewart Udall insisted on inclusion of the tribal hiring preferences in the Peabody tribal coal leases.

The two Peabody-Navajo coal leases have been amended several times since 1964 and 1966. To be enforceable, amendments to the leases require the approval of the Interior Department. The last amendments to the Peabody-Navajo leases were executed in 1998 and approved by Secretary Bruce Babbitt in March 1999. No amendment of the hiring preference provisions has ever occurred; they stand as framed in the 1961 and 1964 option lease forms and as executed by Peabody and the Navajo Nation, and approved by the Interior Department, in 1964 and 1966.[2]

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[2] The several agreements to amend the leases have contained language like this from the 1998-1999 amendments: "Except as provided in this [Lease Amendment] Agreement, all provisions of the Coal Leases shall remain the same."

III. Proceedings in the District Court and the Court of Appeals

In 1997, three non-Navajo American Indians who allegedly had not been hired at Peabody's Arizona operations complained to the EEOC of discrimination. EEOC and Peabody unsuccessfully engaged in the EEOC's administrative charge resolution process. Peabody denied that it had engaged in unlawful discrimination and told the EEOC in that process that it held itself out as an "American Indian preference employer" at its Arizona operations.[3]

Refusing to credit Peabody's denials of discrimination, the EEOC in 2001 commenced this action against Peabody in the United States District Court for the District of Arizona. *See* Pet.-App. 86a–87a. The EEOC alleged that Peabody had violated Title VII's prohibition against discrimination on the basis

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[3] Peabody believes it has fully complied and is fully complying with all of its obligations under its leases and under Title VII. In defending itself against the EEOC's charges of discriminating against the three non-Navajo charging parties, and in seeking the dismissal of this action before the District Court in 2001 and 2002, Peabody stated that it was an "American Indian" (or "Native American") preference employer and expressly disavowed the alleged discriminatory hiring practices set forth in the EEOC's complaint. *See, e.g.*, Defs.' Reply in Supp. of Mot. Summ. J. at 2, Mar. 29, 2002. Peabody here notes and corrects the prior summary description of its employment practices as "nothing more" than Navajo preference at its Arizona operations, found at page 10 of its 2005 petition for a writ of certiorari in this litigation Pet. Writ Cert., *EEOC v. Peabody*, 546 U.S. 1150 (2006) (No. 05-353), 2005 U.S. S. Ct. Briefs LEXIS 1959 at 10. The relief now sought by the EEOC in this enforcement action, however, is in direct conflict with the provisions of the tribal hiring preferences included in the coal leases at the instance of the Secretary.

of national origin. Pet.-App. 87a. The EEOC alleged that members of the Hopi and Otoe Tribes had applied for positions with Peabody and been denied employment in favor of members of the Navajo Nation. Pet.-App. 87a. The District Court's jurisdiction was invoked under 28 U.S.C. §§ 1331, 1337, and 1343.

Peabody moved for summary judgment, arguing that: (1) the Navajo Nation was a necessary and indispensable party to the litigation and its joinder was not feasible under Fed. R. Civ. P. 19(b) because the EEOC lacked statutory authority to bring the action against the Navajo Nation as a governmental entity, as provided in 42 U.S.C. § 2000e-5(f)(1); and (2) the case presented a nonjusticiable political question, because it involved a dispute between two government agencies where Congress had not provided for judicial resolution. Pet.-App. 100a. The District Court granted Peabody's motion in 2002. Pet.-App. 118a. The EEOC appealed, and the Court of Appeals for the Ninth Circuit reversed and remanded. Pet.-App. 85a. The Court of Appeals held that the EEOC could join the Navajo Nation for the sole purpose of effecting complete relief between the parties, so long as the EEOC did not seek affirmative relief against the Nation. Pet.-App. 80a–82a. This Court denied Peabody's petition for certiorari. 546 U.S. 1150 (2006).

On remand, the EEOC amended its complaint to add the Navajo Nation as a "Rule 19 defendant." The Navajo Nation moved to dismiss for, among other reasons, the EEOC's failure to join the Secretary. Pet.-App. 31a. Peabody and the Navajo Nation argued that the Secretary was a necessary and indispensable party to the litigation who could not be

joined because the EEOC lacked legal authority to bring suit against him. Pet.-App. 52a. Following discovery limited to the origins of the lease provisions, the District Court converted the motions to motions for summary judgment and granted summary judgment in 2006. Pet.-App. 41a, 63a–64a.

On June 23, 2010, the Ninth Circuit again reversed the District Court's dismissal, remanding for further proceedings. Pet.-App. 30a. The Court of Appeals agreed with the District Court that the Secretary was a necessary party whose joinder under Fed. R. Civ. P. 19(a) was not feasible because the EEOC is barred by 42 U.S.C. § 2000e-5(f)(1) from itself filing suit against another government agency. Pet.-App. 20a–21a. The Court of Appeals also concluded that "[i]t would be profoundly unfair for a court to award damages against Peabody while allowing Peabody no redress against the government," and dismissed the EEOC's damages claim against Peabody pursuant to Fed. R. Civ. P. 19(b). Pet.-App. 23a.

But the Ninth Circuit held that the EEOC's claim for injunctive relief should not be dismissed under Rule 19(b). Pet.-App. 24a. The Court of Appeals concluded that, if an injunction were eventually issued requiring Peabody to ignore the employment preference provisions in the Peabody-Navajo leases, Peabody and the Navajo Nation "would quite reasonably want to seek prospective relief preventing the Secretary from enforcing the provision." Pet.-App. 24a. With only limited briefing on the issue, the Ninth Circuit ruled that even though the EEOC had not joined the Secretary, because Fed. R. Civ. P. 14(a) would permit Peabody or the Navajo Nation to file a third-party complaint for prospective declara-

tory or injunctive relief against the Secretary, the EEOC's claim for declaratory and injunctive relief against Peabody could proceed. Pet.-App. 24a–29a.

The Ninth Circuit held that the Administrative Procedure Act, 5 U.S.C. § 702, which permits persons "adversely affected or aggrieved by agency action" to seek judicial review, operates as an "'unqualified waiver of sovereign immunity [of the United States] in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable.'" Pet.-App. 26a–27a (quoting *Presbyterian Church v. United States*, 870 F.2d 518, 525 (9th Cir. 1989)). Accordingly, because, in the Court of Appeals' view, the Secretary's mandating the tribal-preference lease terms constituted "final agency action," either Peabody or the Navajo Nation might now assert a third-party claim against the Secretary, requesting injunctive or declaratory relief. Peabody's ability to implead the Secretary under Rule 14(a) and assert an APA review claim, the Court of Appeals reasoned, eliminates any prejudice to Peabody and the Navajo Nation resulting from the EEOC's not having sued the Secretary and precludes dismissal of the action under Rule 19(b). Pet.-App. 28a–29a.

Peabody's and the Navajo Nation's separate petitions for rehearing and rehearing en banc were denied. Pet.-App. 119a.

Since the Ninth Circuit issued its mandate, the EEOC has again amended its complaint. It continues to allege that Peabody has discriminated and continues to discriminate against non-Navajo Native Americans on the basis of their national origin by failing to hire qualified non-Navajo American Indi-

ans, in violation of Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). It requests that the District Court (i) permanently enjoin Peabody "from engaging in discrimination on the basis of national origin," (ii) "[o]rder Peabody to carry out programs "which provide equal employment opportunities for non-Navajo Native Americans . . ."; and (iii) "[o]rder Peabody to provide Charging Parties and a class of similarly situated non-Navajo Native Americans the affirmative relief necessary to eradicate the effects of Peabody's unlawful employment practices on them, including instatement" (Second Am. Compl. at 5).

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Rule 14 "Solution" to the EEOC's Rule 19 "Problem" of Being Unable to Join the Indispensable Secretary as a Defendant Decides an Important Federal Question in a Way That So Departs From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Supervisory Power.

The Ninth Circuit has acknowledged that "Peabody is caught in the middle of a dispute not of its own making. EEOC contends that the Navajo employment preference provision contained in the leases violates Title VII. The Secretary required that this provision be included in the leases." Pet.-App. 15a. Peabody, which has no desire to contravene the lease obligations the Secretary imposed or federal employment policy as being enforced by the EEOC, has been put in this position because the EEOC declined to ask the Attorney General to medi-

ate its dispute with the Secretary—the sole mechanism that Congress provided in Title VII for resolving such federal inter-agency interpretive disagreements. The EEOC's choice instead, to sue Peabody and the Navajo Nation and thereby evade Congress's decision to leave such disputes to the Attorney General to resolve, is barred by the inability of any party properly to hale the Secretary into court.[4]

The Ninth Circuit correctly recognized that the EEOC's action cannot proceed in the absence of the Secretary:

> If the Secretary is not made a party and if EEOC prevails, the Secretary may choose to cancel the leases or to modify them to eliminate the Navajo employment preference. Alternatively, the Secretary may choose to continue the leases in their current form, ignoring the judgment in the case to which he has not been made a party. If the Secretary chooses to do this, he will put both Peabody and the Nation "between the proverbial rock and a hard place."

Pet.-App. 19a (quoting citation omitted). The Court of Appeals further correctly recognized that the "EEOC cannot join the Secretary as a defendant [because] EEOC is prevented by 42 U.S.C. § 2000e-5(f)(1) from filing suit against the Secretary on its own authority." Pet.-App. 20a. On this basis, the Ninth Circuit properly upheld dismissal of the EEOC's damages claims. Pet.-App. 22a–23a.

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[4] The EEOC's action is also barred because no party (other than the Attorney General) can properly join the Navajo Nation, as the Nation properly argues in its separate petition to review the Ninth Circuit's 2005 ruling to the contrary.

But, refusing to dismiss the suit in its entirety at this point, the Ninth Circuit reasoned that EEOC's action against Peabody and the Rule 19 defendant Navajo Nation could continue solely for purposes of seeking injunctive relief, because Peabody or the Nation could join the Secretary as a third-party defendant under Fed. R. Civ. P. 14 by asserting a claim for judicial review under the APA.

Rule 14 authorizes a defendant to join "a nonparty who *is or may be liable to it* for all or part of the claim against it." Fed. R. Civ. P. 14(a)(1) (emphasis added). The Ninth Circuit's conclusion that the Secretary "is or may be liable to [Peabody] for all or part of [EEOC's injunction] claim against" Peabody misreads this language. Rule 14's plain text limits third-party claims to those by defendants asserting that a third party is or may be responsible to the defendant for the relief sought by the plaintiff against the defendant. Peabody, if it were found to have violated Title VII by employing Navajo-specific preferences, cannot avoid the injunctive relief that the EEOC seeks by contending that the Secretary "is or may be liable . . . for all or part of the [EEOC's] claim." Even if Peabody could obtain prospective relief barring the Secretary from enforcing the putatively illegal lease provisions, the Secretary would not be "responsible for the relief sought by the" EEOC, which includes, among other things, the hiring of new employees at Peabody's Arizona operations.

In *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5 (1990) (per curiam), another Court of Appeals had so departed from the accepted and usual course of judicial proceedings in its application of Rule 19 that this Court invoked its supervisory powers to reverse the

decision summarily. There, the Fifth Circuit had affirmed dismissal of a claim against one tortfeasor for the plaintiff's failure to join another in the same action, even though, as this Court noted, "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Id.* at 7 (citations omitted).

Similarly here, the Ninth Circuit has sanctioned continuing this litigation, even though the EEOC has not joined (and cannot lawfully join) as a defendant the Secretary whose indispensability the Ninth Circuit itself acknowledges. It has done so by invoking Rule 14 in a way that undercuts the clear command of Rule 19 and visibly departs from the clear and longstanding function of and practice under the third-party claim rule. Perhaps the best evidence that the Ninth Circuit has departed from the accepted and usual course of judicial proceedings in a way that requires supervisory correction is the inconsistency of its decision here with settled and important case law that the Ninth Circuit itself has developed that upholds the sovereign immunity of Indian tribes in intra-tribal disputes, case law that the decision below effectively negates. The Ninth Circuit's current decision also conflicts with the rationale underlying an important Seventh Circuit decision, properly applying Rule 14 to prevent parties from evading statutory limits on dragging federal agencies into district court litigation based on agency decisions' effects on the parties.

II. By Allowing Peabody to Implead the Secretary, the Ninth Circuit's Decision Conflicts With Its Prior Decisions Applying Rule 19 to Prevent Evasion of Tribal Immunity, as Well as a Seventh Circuit Decision Preventing Third-Party Litigation Against Federal Agencies.

The Ninth Circuit's ruling, that Rule 14 can be used to avoid finding that an action is not fairly justiciable in the Secretary's absence, and thereby to avoid dismissing it in its entirety, not only misreads Rule 14's text but also abandons the Ninth Circuit's own consistent prior application of Rule 19—particularly in actions in which tribal members have sought to litigate tribal issues against the Secretary, without joining the tribe. Moreover, the Ninth Circuit's approach conflicts with the Seventh Circuit's construction of Rule 14, all to the impermissible end of expanding federal courts' jurisdiction to resolve types of disputes that Congress has expressly barred from adjudication.

A. The Ninth Circuit's expansive interpretation of Rule 14 will involve the federal judiciary in suits challenging tribal governance previously barred by tribal immunity.

The Ninth Circuit contains more than half of the country's Indian reservations and more than two-thirds of on-reservation Native American population. *See* Terry L. Anderson & Dominic P. Parker, *Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations*, 51 J. L. & ECON. 641, 650 (2008). It thus has appellate jurisdiction over a substantial percentage of all disputes

between Indian tribes and their members and the Government concerning commercial uses of tribal land, including mining. Before this case, the Ninth Circuit had long ruled that individual tribal members or unofficial tribal groups could not sue the Secretary under the APA to challenge the Secretary's approval of leases and other actions taken by a tribal government. The Ninth Circuit had routinely held that such disputes were not justiciable because the tribes were indispensable parties that could not be joined by the plaintiff, because of their sovereign immunity. For example, in *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996), an individual Navajo resident sued the Secretary under the APA to set aside an environmental permitting agreement among Peabody, the Navajo Nation, and the Hopi Tribe that governed mining operations under the same leases at issue here. The Ninth Circuit affirmed dismissal because the tribes were indispensable and their sovereign immunity precluded the individual member of the tribe's effort to have her dissenting view of tribal policy aired in a federal district court. *Id.* at 1310–12. *See also Clinton v. Babbitt*, 180 F.3d 1081, 1089 (9th Cir. 1999) (Rule 19 dismissal due to absent and indispensible tribe's sovereign immunity); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975) (suit against Secretary by Hopi faction members to void approval of the Peabody-Hopi lease at this mine dismissed as not justiciable in the absence of the Hopi Tribe, which could not be joined because immune).[5]

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[5] These prior Ninth Circuit decisions are consistent with the approach taken in other circuits. In *Citizen Potawatomi Nation v. Norton*, for example, a tribe sued the Secretary of the Interior regarding a formula negotiated among several tribes

With the new construction of Rule 14 adopted by the Ninth Circuit in this case, however, tribal members who dissent from matters of tribal governance approved by the Secretary will logically be able to challenge the tribe's decision in federal court by filing an APA suit against the Secretary. Although the tribe enjoys immunity from suit by the tribal member, it has no immunity from the Secretary's suit. Thus, under the reading of Rule 14 embodied in the decision in the present case, the Secretary is empowered to implead the tribe, because the defendant-third-party plaintiff (in such a case, the Secretary) no longer has to demonstrate that the third-party defendant (the tribe) is potentially liable for the relief sought by the plaintiff (the complaining tribal member). And because the Secretary can file a third-party claim against the tribe, joinder is now feasible and Rule 19 no longer allows dismissal of the plaintiff's claim. Thus, in its effort to allow the EEOC to press a claim that Congress intended should not be adjudicated, the Ninth Circuit has opened the federal courts to intra-tribal disputes previously foreclosed by the tribes' sovereign immunity.

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and used by the United States in determining the amount of federal funding awarded to each of the tribes pursuant to a funding agreement between the tribes and the Government. 248 F.3d 993, 995–96 (10th Cir. 2001). The Tenth Circuit affirmed the district court's holding that the other tribes subject to the funding agreement were necessary and indispensible parties under Rule 19 who could not be joined. *Id.* at 1001. *See also Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986) (tribe's crossclaim against Department of the Interior for retroactive redistributions of income from land could not proceed because first and third tribes were indispensable parties).

The Ninth Circuit's decision also conflicts with the permissive character of Rule 14 impleader. Under the rule, the filing of any impleader complaint is clearly within the discretion of the defendant. *See, e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998) ("Rule 14 makes claims by a plaintiff against a third-party defendant permissive, not compulsory."). The decision below, however, reverses the district court's ruling that the Secretary is necessary (and must be joined before the merits can be adjudicated against the defendants), and directs that the case proceed on remand on the basis of the novel finding that Rule 14 can apply where the Rule 19 party to be impleaded is not and may not be liable to the plaintiff. The Ninth Circuit ruled:

> [P]rospective relief in the form of an injunction or declaratory judgment is available in a Rule 14(a) impleader against the Secretary. . . . We therefore conclude, "in equity and good conscience," that EEOC's claim against Peabody for injunctive relief should be allowed to proceed.
>
> . . .
>
> We vacate all of these rulings [appealed by the EEOC] to allow reconsideration once the Secretary has been brought into the suit as a third-party defendant.

Pet-App. 29a–30a.

Assuming that Rule 14 applies at all where the third-party defendant is not liable to the plaintiff, it cannot also be made compulsory. This approach eviscerates Rule 19—it removes from the plaintiffs

the limitations, and from the defendants the protection, properly flowing from the Court's correct Rule 19 ruling. By apparently directing that the case proceed whether or not either defendant files an impleader complaint, the Ninth Circuit has improperly interpreted and applied Rule 14.

B. The decision below conflicts with a Seventh Circuit decision preventing parties from using Rule 14 to hale federal agencies into district court.

The Ninth Circuit's construction of Rule 14, directing Peabody or the Navajo Nation to bring a third-party claim against the Secretary to declare his regulatory conduct unlawful, conflicts with the rationale of the Seventh Circuit's decision in *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116 (7th Cir. 1982) (Posner, J.). Peoria granted a cable television franchise to GECCO under which GECCO agreed to pay the City 10 percent of its gross revenues. After the Federal Communications Commission adopted a regulation limiting franchise fees to three percent, Peoria sued GECCO to require GECCO to continue paying 10 percent and for a declaration that the FCC's three-percent rule was invalid. GECCO claimed that the controversy was really between Peoria and the FCC, because it was willing to pay either fee, so the district court allowed GECCO to implead the FCC as a third-party defendant.

Reversing, the Seventh Circuit construed Rule 14 in a manner irreconcilable with the Ninth Circuit's construction in this case. Addressing "the district court's assumption of jurisdiction over GECCO's third-party complaint against the FCC," the Seventh

Circuit reasoned rhetorically, "we have never heard of a case where a defendant who interposed a defense based on law or regulation was allowed to implead the enacting body." 690 F.2d at 119. The court held that it is "beyond the power of the district court," *id.* at 120, to allow a defendant to implead a federal agency as a means of adjudicating the validity of a regulation on which the defendant relies as defense against the plaintiff's claim: "[S]ince GECCO cannot seriously be contending that if it loses to Peoria in the original suit the FCC 'may be liable to [GECCO],' . . . Fed. R. Civ. P. 14(a), GECCO's third-party complaint is . . . outside the impleader jurisdiction that has been conferred on the federal courts." *Id.* Peabody and the Secretary are no differently situated.

III. The Ninth Circuit's Decision to Allow a Novel Third-Party Claim Against the Secretary Impermissibly Expands the District Court's Jurisdiction to Resolve Inter-Agency Disputes.

The Court of Appeals' decision improperly allows the EEOC to do indirectly what Congress has denied it the right to do directly—sue the Secretary in federal court to adjudicate whether tribal hiring preferences in IMLA tribal mineral leases have been rendered unlawful by Congress's enactment of Title VII, decades after the Secretary began requiring those preferences. Congress did not grant the EEOC the authority to litigate a claim for which the Secretary may be responsible. 42 U.S.C. § 2000e-5(f)(1). And only by ignoring Rule 14(a)'s operative language could the Ninth Circuit conclude that "Rule 14(a) would permit Peabody and the Nation to file a third-party complaint seeking [injunctive] relief against

the Secretary," "preventing the Secretary from enforcing the [leases' employment preference] provision[s]." Pet.-App. 24a. Rather than a claim *by Peabody* that the Secretary is liable for all or part of the EEOC's claim against it—the form in which the Ninth Circuit wrongly casts its novel Rule 14 claim—the claim in substance is a claim *by the EEOC* to stop the Secretary from requiring or approving tribal preferences. But Congress did not bestow on the EEOC the right to bring that federal lawsuit. To the contrary, it expressly precluded the EEOC from seeking judicial enforcement against the Secretary, leaving such inter-agency disputes to the Attorney General to resolve.

The Ninth Circuit's "solution" to the EEOC's inability to sue the indispensable Secretary in this case may be no solution at all, for other reasons under the Administrative Procedure Act. As far as any impleader complaint that Peabody can frame is concerned, the final "agency action" required under 5 U.S.C. § 702 for judicial review was the approval of the leases by the Interior Department in 1964 and 1966. The hiring preference provisions in the Navajo-Peabody leases have been unchanged since then. If Peabody were to file on remand the APA claim against the Secretary that the Ninth Circuit contemplates, the law is clear that the Secretary, like any other Rule 14 defendant, would be free to raise all applicable defenses, including limitations. If the Secretary were to move successfully to dismiss the impleader claim, then the Ninth Circuit, in addition

to departing from settled law under Rules 19 and 14, would have required an exercise in futility.[6]

Finally, Congress did not authorize the EEOC to sue Indian Tribes, including the Navajo Nation, which is both the lessor of the natural resource and the tribe whose members are favored by the leases' Navajo-specific preferences. *See* 42 U.S.C. § 2000e(b)(1) (exempting Indian tribes from the definition of "employer"). The new procedural mechanism created by the Ninth Circuit to avoid the requirements of Rule 19 is not only an improper use of Rule 14, but it ultimately requires the District Court to adjudicate a dispute between competing congressional policies—namely, the tribe-specific hiring preferences mandated by the Secretary, in implementing statutes governing economic development of tribal lands, on the one hand, and the EEOC's view of Title VII as banning tribe-specific hiring preferences, on the other. Both cannot be right about their assertion of federal policy, and their standardless dispute is nonjusticiable because Congress has specifically vested in the Attorney General the sole authority to resolve their conflict. *Cf. United States v. ICC*, 337 U.S. 426, 430 (1949) ("[C]ourts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.").

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[6] Moreover, as the Navajo Nation's petition for certiorari explains, it has no intention of suing the Secretary to challenge a long-standing Indian law policy of the Interior Department that the Navajo Nation supports and encourages. Given its support for the policy, it likely could not sue; the Navajo Nation cannot claim to be adversely affected under the APA by anything that the Secretary has done in this connection.

By creating a Rube Goldberg civil procedural mechanism that would allow the EEOC to have a federal court adjudicate whether its view of Title VII's anti-discrimination policy trumps federal Indian policy as seen by the Secretary,[7] the Ninth Circuit has so far departed from the accepted and usual course of judicial procedure as to justify this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted, to the end that the Ninth Circuit's decision may be reversed.

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[7] Though this case involves leases with the Navajo Nation, the Secretary's policy, since 1957 on the current record, applies to the solid mineral leases of all tribes. The EEOC now appears undeterred by Congress's having forbidden it to sue any tribe or the Secretary directly and stands ready to challenge other Navajo-preference provisions in tribal lease contracts. *See* Compl. at 2–3, *EEOC v. Bashas' Inc.*, No. 05-CV-02382 (D. Ariz.), filed Aug. 17, 2005.

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