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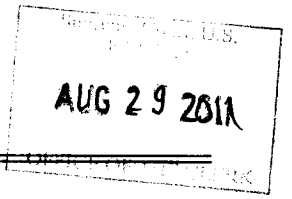

In The
Supreme Court of the United States

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

REPLY BRIEF FOR PETITIONER NAVAJO NATION

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The Government properly confesses error on the Ninth Circuit's ruling that the Secretary of the Interior can be impleaded under *Fed. R. Civ. P.* 14 to cure the EEOC's inability to sue him directly. Resp. Br. 9-10. The Ninth Circuit's erroneous use of Rule 14 to permit or require a party to implead the Secretary where the applicable statute does not permit derivative liability was one of the two questions presented by the Navajo Nation. The Navajo Nation thus agrees with the Government that the Court should grant the petition, vacate the judgment below, and remand for consideration of the Rule 14 issue in light of the position taken by the Solicitor General. Resp. Br. 10. The Navajo Nation also believes that the Court should consider a summary reversal of the judgment below and a remand with instructions to dismiss.

In 2001, the EEOC sued Peabody, alleging that its adherence to a Navajo-specific employment preference provision in its coal lease on the Navajo Reservation and to corresponding provisions of Navajo law violates Title VII of the 1964 Civil Rights Act. In their initial rulings, both the district court and the Ninth Circuit ruled that the case could not proceed without joinder of the Navajo Nation. In the second set of decisions, both lower courts ruled that the case could not proceed without the Secretary of the Interior, who negotiated the lease provision, insisted on its inclusion in the lease, approved the lease as trustee for the Nation, and approved all 326 business site leases with similar provisions on the Navajo Reservation, and whose regulations, consistent policy, and form

leases require tribe-specific employment preferences in all Indian mineral leases nationwide. But the Ninth Circuit, breaking with other courts of appeal, first held that the Navajo Nation could be sued by the EEOC under Rule 19 even if the EEOC could not state a claim against the Nation and is, indeed, barred by Title VII itself from suing the Nation. NN Pet. 25-28. In its second opinion, the Ninth Circuit held that the Secretary could be joined by either Peabody or the Navajo Nation under Rule 14 to cure the EEOC's inability to sue *him*, even though Rule 14 permits impleader only if the operative statute provides for derivative liability (such as contribution or indemnity) and even though this Court has held that Title VII is not such a statute. NN Pet. 21-25; Resp. Br. 12.

The Navajo Nation agrees with the Government that GVR on the Rule 14 issue is a proper disposition of the Nation's Petition. The Nation also believes that summary reversal on the Rule 14 question with instructions to dismiss would be proper, given the significance of the issue and the clear error of the court below. But if the Court decides not to GVR or summarily dismiss, the Court should grant the Nation's Petition on both questions presented and deny the Government's Conditional Cross-Petition for the reasons stated below.

I. ON THE RULE 14 ISSUE, THE COURT SHOULD GVR OR SUMMARILY REVERSE WITH INSTRUCTIONS TO DISMISS.

The Government properly confesses error on the Rule 14 issue. *E.g.*, Resp. Br. 14, 28. It urges the Court to GVR on that issue. *Id.* at 28. The Navajo Nation agrees that such GVR would be a proper disposition of the matter. As the Government states, no party briefed the issue, the panel did not thoroughly analyze it, and all parties agree that the panel erred. *Id.* at 11. Most importantly, the panel's decision cannot be squared with *Northwest Airlines, Inc. v. Transport Workers U.*, 451 U.S. 77 (1981), which held that Title VII does not confer a right to contribution. That holding has solid support in policy and logic when a party seeks to implead a "coercer" of an allegedly discriminatory practice, as the Secretary is alleged to be here. *See, e.g.*, *Carter v. Director, Office of Workers' Comp. Programs, Dep't of Labor*, 751 F.2d 1398, 1402-03 (D.C. Cir. 1985) (Scalia, J.) (citing *Northwest Airlines*). Moreover, the Government persuasively shows that neither the Nation nor Peabody has an Administrative Procedures Act ("APA") claim against the Secretary. Resp. Br. 13-14, 19-20. Such a claim was the lynchpin of the Ninth Circuit's ruling that Peabody could avoid prejudice to its interests caused by the EEOC's inability to join the Secretary. *See* NN Pet. App. 25a-29a.

The Government states, and the Navajo Nation agrees, that the court below "incorrectly held that Rule 14(a) may properly be used to bring a federal

agency into a case brought by another federal agency and presenting no claims for monetary relief," Resp. Br. 9-10; "its analysis of both steps [of the Rule 14 issue] was flawed," *id.* at 11; "[t]he court of appeals hypothesized a third-party claim against the Secretary without applying the appropriate standard," *id.* at 13; its analysis of the court's posited APA claim by Peabody against the Secretary is "not cognizable," *id.* at 14; its decision on the Rule 14 issue is "erroneous" and "flawed," *id.* at 15; and its Rule 14 holding could have "implications . . . for other cases in which a defendant seeks to implead a federal agency under Rule 14," *id.* at 28. The Navajo Nation agrees with the Government that there is a reasonable probability that the Ninth Circuit would reconsider its Rule 14 holding and that this case satisfies GVR standards. *See Lawrence v. Chater*, 516 U.S. 163, 170-74 (1996).

Given that all parties agree that the court of appeals erred on this important issue, this Court should also consider a summary reversal of the judgment and a remand with directions to dismiss. *See Sup. Ct. R.* 16.1. This case has been litigated for a decade without even touching on its dubious merits. *See* Resp. Br. 26-27. Both Peabody and the Navajo Nation have had to expend very significant resources in litigation where the EEOC assails conduct mandated by the Department of the Interior and disagrees with longstanding tribe-specific employment policies approved by that Department and other federal agencies. *See* NN Pet. 7-9. Peabody has aptly described

the Ninth Circuit as "creating a Rube Goldberg civil procedural mechanism" to obtain a result the court considered appropriate. Peabody Pet. 26. Summary reversal with instructions to dismiss would properly put an end to this extended and costly litigation.

II. IF THE COURT DECLINES TO GVR OR SUMMARILY REVERSE, IT SHOULD GRANT THE NATION'S PETITION ON BOTH QUESTIONS PRESENTED AND DENY THE GOVERNMENT'S CONDITIONAL CROSS-PETITION.

A. If the Court Declines to GVR or Summarily Reverse the Rule 14 Holding, It Should Grant Review of that Ruling.

The Rule 14 question is worthy of review. The holding below flatly contradicts *Northwest Airlines*. That case held that Title VII does not confer on an employer a right to assert by way of impleader that a third party shares in the employer's liability or is responsible for its alleged wrongdoing. The application of Rule 14 depends on such a right; "it must be an assertion of the third-party defendant's *derivative* liability to the third-party plaintiff." 3 *Moore's Federal Practice* § 14.04[3][a] at 14-18 (3d ed. 2010) (emphasis in original); *accord* 6 C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure* Civ. § 1446 at 413-15 (3d ed. 2010); Resp. Br. 12. The Ninth Circuit held that a defendant may implead a federal "coercer" (here, the Secretary) of actions allegedly causing damage to the plaintiff. *See* NN Pet.

App. 25a. The decision below creates a conflict among the circuits on this issue *See Malone v. United States*, 581 F.2d 582 (6th Cir. 1978), *cert. denied*, 439 U.S. 1128 (1979) (United States may not be impleaded in Title VII case under theory that the EEOC required defendant to hire a less capable employee who caused accident); *City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (rejecting impleader of FCC, whose regulation formed predicate of contract dispute); *Southeast Mortgage Co. v. Mullins*, 514 F.2d 747 (5th Cir. 1975) (affirming dismissal of impleader of HUD, alleged to have caused damage alleged by plaintiff by failing to enforce regulation); *see also Carter*, 751 F.2d at 1402-03 ("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.") (Scalia, J.) (emphasis in original) (*dictum*). In addition, the Government admits that the decision below could have implications for cases nationwide where a defendant seeks to implead a federal agency. Resp. Br. 28. The Rule 14 ruling below would open the floodgates for even unrelated claims against federal agencies. *See Fed. R. Civ. P.* 18(a) (third-party claimant "may join, as independent or alternative claims, as many claims as it has against an opposing party."). Therefore, if the Court chooses not to GVR or to summarily reverse, the Rule 14 question is worthy of review.

B. The Ninth Circuit's Holding that the EEOC Can Sue the Navajo Nation as a "Rule 19 Defendant" Presents Certworthy Issues.

The Rule 19 question presented by the Navajo Nation is also certworthy. The Government does not address the Nation's argument that sovereign immunity may not be negated through creative use of procedural rules by, in this case, permitting the EEOC to sue the Navajo Nation under a Rule 19 fiction. *See, e.g., United States v. United States Fid. & Guar. Co. ("USF&G")*, 309 U.S. 506, 512-13 (1940) (counterclaim against Government as trustee for tribe disallowed); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (compulsory counterclaim barred by tribal immunity, relying on *USF&G*). Nor does the Government dispute the Navajo Nation's argument that tribal sovereign immunity protects tribes not only from adverse judgments, but also from the expense and distraction of litigation. NN Pet. at 30 (citing, *inter alia*, *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 757 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). By contrast, because it cannot seek or obtain affirmative relief from the Navajo Nation, the EEOC must rely on the fiction that the Nation will be content to sit idly in a courtroom corner as other parties litigate its ability to control economic activity on its own lands, its right

to condition the entry of those seeking to do business on tribal lands, and its ability to deal productively with the staggering unemployment rate of Navajos qualified and eager to work. In reality, the Nation has been required to expend over $300,000 in this litigation to preserve the sanctity of its leases and ensure the recognition of its laws and treaty-based rights.[1]

Notwithstanding the Government's parsing of the decisions of the other circuits, the Ninth Circuit's Rule 19 ruling creates a direct conflict among the circuits. The court below ruled without equivocation that Rule 19 could be used by a plaintiff to join a party against whom the plaintiff cannot state a claim. NN Pet. App. 78a. It expressly recognized a conflict with the Fifth Circuit on this point: "our circuit has never agreed with the rule stated in *Vieux Carre*."[2] *Id.* at 80a. Both the Fifth and the D.C. Circuits adhere to

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[1] The Navajo Nation agrees that it may not interpose its sovereign immunity against federal agencies authorized to sue it. *See* Resp. Br. 22. In this case, however, the EEOC has been granted no authority to sue federally recognized Indian tribes, whether as "Rule 19 Defendants" or otherwise. The Government's contention that the suit by the EEOC against the Nation is not prohibited because the Nation is not a "respondent" is self-defeating. Even under the Government's view of Title VII, if the Nation is not a "respondent" for purposes of 42 U.S.C. § 2000e-5(f)(1), then the suit against it by the EEOC is unauthorized, because the EEOC may only bring suit against "any *respondent* not a government" under that section.

[2] *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990).

the view 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." *Vieux Carre*, 875 F.2d at 457; *Davenport v. Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (D.C. Cir. 1999) (quoting *Vieux Carre*). The Ninth Circuit disagrees. NN Pet. App. 80a.

Finally, none of the authorities cited in the Government's Brief concerns the joinder of a government in a lawsuit under Rule 19 by a plaintiff that not only has no claim against it, but is precluded by federal statute from suing that government directly. Other federal courts have rebuffed the EEOC's efforts to challenge indirectly government policies and practices through Rule 19. *See* NN Pet. 27-28. Only in the Ninth Circuit will the EEOC be permitted to do so and, in so doing, to upset Congress' careful allocation of authority between the EEOC and the Attorney General, which was motivated in large part by federalism considerations. *See* NN Pet. 32-35.

C. The Conditional Cross-Petition Presents No Issue Meriting Further Review.

In urging the Court to GVR on the Rule 14 issue, the Government suggests in a footnote that the Ninth Circuit could revisit the question of whether the Secretary is a required party under Rule 19(a). Resp. Br.

15 n.10. That question is the one raised in the Government's Conditional Cross-Petition.

None of the reasons supporting GVR of the Rule 14 issue applies to the required party issue. As the Government states, "[t]he court of appeals' ruling regarding Rule 14 . . . was incorrect, was based on only cursory analysis of key issues, and was issued without the benefit of full briefing by the parties." Resp. Br. at 28. By contrast, the Secretary's status as a required party was fully briefed by the parties, and both courts below analyzed the issue thoroughly. *See* NN Pet. App. 18a-22a (court of appeals), 55a-62a (district court). Both courts ruled that the Secretary is a required party under each of the three independently sufficient criteria of Rule 19(a)(1). *See also* Resp. Br. 7 (the "court relied on all three prongs of Rule 19(a)").

For this Court to reverse the Rule 19(a)(1) ruling below, it would have to find that the court below abused its discretion. NN Br. in Opp. 6-7. The Government does not even argue that the lower courts abused their discretion in this fact-bound and admittedly unique context; it merely contends that their shared "conclusion . . . is incorrect." Cr. Pet. at 10. The Government does not argue that there is any conflict between the Ninth Circuit and any other court on this ground. Nor does the Government argue that the Rule 19(a)(1) ruling contravenes any decision of this Court. It even hints that the Rule 19(a)(1)

question does not have local practical significance, much less national significance. *See* Cr. Pet. 17 n.11.

As the courts below ruled and the Government largely concedes, the Secretary has an interest in the legality of the leases he drafted, the terms that he insisted upon and approved under his statutory authority, the policies underlying these provisions, and his duties if the lease terms are breached.[3] NN Pet. App. 19a-22a (court of appeals), 58a-60a (district court); Cr. Pet. 13 n.8, 15. The Secretary is the focal point of the performance of the Government's trust duties to tribes. *See Nevada v. United States*, 463 U.S. 110, 127 (1983). The administration of the trust by the Secretary implicates important federal interests, *United States v. Jicarilla Apache Tribe*, ___ U.S. ___, 131 S. Ct. 2313, 2322-25 (2011); *United States v. Hellard*, 322 U.S. 363, 366-68 (1944), and the Secretary's interests in maintaining his statutory authority and in the performance of his public duties are sufficient to trigger Rule 19. *See SEC v. United States Realty & Improvement Co.*, 310 U.S. 434 (1940) (determining SEC's "interest" under analogous test for intervention). When the Secretary's immunity is implicated, only where his claimed interests are frivolous should the case proceed. *See Republic of*

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[3] *See Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373 (1968).

Philippines v. Pimentel, 553 U.S. 851, 866-67 (2008). That is plainly not the case here.

Moreover, without the Secretary's presence, Peabody is clearly at risk of inconsistent obligations under Rule 19(a)(1)(B)(ii): the obligation to abide by its federally approved lease requiring Navajo employment preference and the contrary obligation to abide by a court order sought by the EEOC enjoining it from preferring Navajo workers. Rule 19 is designed to protect against this kind of "whipsawing." *E.g.*, *Schlumberger Indus., Inc. v. National Surety Corp.*, 36 F.3d 1274, 1285-87 (4th Cir. 1994).

The Government's Conditional Cross-Petition presents no question worthy of this Court's review and any GVR order on the Rule 14 issue should preclude relitigation of the Secretary's interest under Rule 19(a).

III. CONCLUSION

The Court should either grant, vacate, and remand or summarily reverse on the Rule 14 question. If it chooses not to do so, the Navajo Nation's Petition should be granted on both the Rule 14 and the Rule 19 issues, and any review of the Rule 19(a) issue raised in the Government's Conditional

Cross-Petition by this Court or on remand should be denied.

Respectfully submitted,

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