No. 05-353

IN THE
Supreme Court of the United States

Peabody Western Coal Company and
Peabody Coal Company, LLC,
Petitioners,

v.

Equal Employment Opportunity Commission.

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

REPLY BRIEF FOR THE PETITIONERS

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The government acknowledges that Congress in Title VII withdrew from the EEOC the authority to litigate claims directly against government entities, including States and Indian tribes, reserving that power to the Attorney General. BIO 18-19. The government nonetheless defends the Ninth Circuit's holding that the EEOC may circumvent this prohibition by suing a private party and joining a government entity to that suit as an involuntary defendant under Fed. R. Civ. P. 19 for the explicit purpose of obtaining a binding adjudication against that government entity. That holding, which conflicts with the precedent of the Fifth Circuit, leaves the EEOC free to continue its systematic litigation against Indian tribes throughout the Ninth Circuit, which encompasses nearly three-quarters of the nation's tribes. The government does not deny that this litigation constitutes a substantial incursion on tribal sovereignty or that the lawsuits seek to invalidate tribal preference provisions that have been approved by the Department of Interior and are of enormous practical importance to hundreds of tribes within the Ninth Circuit and beyond. In short, the government does not and cannot contest that the decision below will have a "significant impact on the relationship between Indian tribes and the Government," a sufficient reason even apart from the circuit split to grant the petition for certiorari. *United States Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001).

Certiorari is warranted for the further reason that the case presents an untenable intra-governmental conflict on a matter of substantial national importance for private companies and their government contracting partners that cannot be resolved without this Court's intervention. The government acknowledges that petitioner is being sued by the EEOC (including for punitive damages) for implementing a tribal preference required by the Department of Interior. Innumerable other entities are subject to identical Interior-

imposed requirements, all of which are unlawful according to the EEOC. The Solicitor General goes out of his way to cast doubt on the EEOC's dubious interpretation of Title VII, which the EEOC nonetheless will continue to pursue absent review in this Court. BIO 23 n.7. As petitioner has explained, Pet. 20-24, Congress provided a solution to this dilemma by requiring that all litigation involving government entities be undertaken by the Attorney General, who represents the Department of Interior, thus ensuring that in tribal matters, the federal government speaks with one voice. The consequences of the Ninth Circuit's unraveling of that sensible solution are evident in this case.

I. Certiorari Is Warranted In Light Of The Importance Of The Question Presented To The Relationship Between The Federal Government And State And Tribal Governments.

The government has not, and cannot, contest the overriding importance of the question presented to the sovereign interests of both tribes and state governments. Although this case presents a question of broad significance regarding the proper interpretation of Rule 19 generally, see Pet. 9-15, it arises in a specific context that is independently worthy of this Court's attention in two important respects.

1. First, as discussed below and in the amicus brief filed on behalf of seven western states, the Ninth Circuit's holding eviscerates the structural protections Congress intended to provide government entities subject to suit under Title VII. See Pet. 20-24; Brief of Amicus Curiae State of New Mexico et al (States Br.) 10-16. The States' view that the Ninth Circuit's decision threatens their sovereign interests is well supported. For example, the decision would permit the EEOC to join a State to a suit against a state highway contractor that implements a provision of its state contract calling for a hiring preference or employment test that the EEOC views as illegal under Title VII. And, in fact, the EEOC has previously attempted to use Rule 19 as a means of

litigating claims against local governments. See States Br. 11-14. Unless the decision below is reversed, the EEOC will be permitted to continue that practice throughout the Ninth Circuit. See Pet. 12-13.[1]

2. Second, the EEOC's litigation tactic arises in a context of vital importance to the nation's Indian tribes and has resulted in an avoidable inter-agency conflict that has put both tribes and their contracting partners in a completely untenable position that, the government's brief makes clear, will not be remedied absent intervention by this Court.

The amicus briefs demonstrate that the legality of tribal preference provisions is a question of enormous importance to Indian tribes and is the subject of recurring litigation with the EEOC. As the brief for the National Congress of American Indians (NCAI) explains, "[m]ost of the major Indian tribes today have * * * ordinances granting employment preferences to Indians generally or to certain Indians." Br. 5. Many, like the Navajo Nation's, require preferences (or a superior preference) for the tribe's own members. *Ibid.* Such tribal preferences have been incorporated in hundreds, if not thousands, of leases nationwide. See NCAI Br. 5-7; Nation Br. 1 (hundreds of leases in Navajo Nation alone). The amici

[1] The government suggests a distinction between the EEOC's cases against school boards and this litigation, noting that the prior suits "called into question the legality of the school boards' conduct as employers covered by Title VII" whereas the Navajo Nation is not an "employer" within the meaning of Title VII. Br. 20 n.5 (emphasis omitted). But the government takes care *not* to assert that this distinction makes a legal difference or that the school board cases were correct In dismissing the EEOC's suits. In any event, the Ninth Circuit's decision made no such distinction, holding instead that the EEOC may join a government entity under Rule 19 even if it is precluded under Title VII from suing it directly. See Pet. App. 11a, 14a. Thus, nothing in the government's brief or the court of appeals' decision diminishes the threat to state sovereignty created by the decision below.

further explain that these preferences are a traditional and vital means of ensuring that the tribe retains the benefits of the employment opportunities created by the development of the tribe's own natural resources. See, *e.g.*, Navajo Br. 1 (preference provisions are "a primary, bargained-for consideration" for its mining contracts); NCAI Br. 3-4; see also States Br. 1 (Navajo Nation's unemployment and poverty rate above 40% and the tribe's dependence on mining to provide 50% of revenue).

Congress has specifically required the Department of Interior to review and approve all leases of tribal land extending seven years or more, see 25 U.S.C. 81(b), and to "refuse to approve an agreement or contract" if it "determines that the agreement or contract * * * violates Federal law," *id.* § 81(d). Acting pursuant to that authority, the Department of Interior has repeatedly approved of, and indeed required, tribal preferences in Indian leases, including the leases at issue in this case. See Pet. 5 (Interior wrote preference provisions into Peabody leases). In fact, as the amicus briefs demonstrate, the Department has approved such provisions in hundreds of leases over many decades, including leases presented as recently as 2002. See Navajo Br. 1; Brief of Amici Curiae Bashas' Inc. and Salt River Project Agricultural Improvement and Power District (Bashas' Br.) 4-5.

The EEOC, however, disagrees with the Department of Interior's interpretation of Title VII and has made clear that it intends to systematically challenge these tribal preference provisions by suing private contractors and joining the tribes under Rule 19, so long as it is permitted to do so. See BIO 3; Basha's Br. 1-2. Thus, for example, the EEOC recently filed suit against Basha's under the authority of the Ninth Circuit's decision in this case. See, *e.g.*, Bashas' Br. 10.

Although this petition presented the government with the opportunity resolve this inter-agency division, it has been unable or unwilling to do so. Thus, the brief makes clear that if this Court denies certiorari, the EEOC will continue to

pursue the litigation in this case. At the same time, nothing in the brief states or even suggests that the Department of Interior has changed is view or practices and intends to retreat from its position that employers such as Peabody and Basha's are required to employ the very preferences that the EEOC maintains are illegal and indeed justify the imposition of punitive damages. For his part, the Solicitor General has taken pains not only to avoid approving of the EEOC's interpretation of Title VII, but even goes so far as to suggest that it may be wrong. See BIO 23 n.7. Nonetheless, the government contends that all this litigation must be allowed to march forward at considerable cost to private parties and sovereign Indian tribes.[2]

While this conflict is untenable, it is not inevitable. As the petition explained, Pet. 20-24, Congress provided a solution within Title VII itself, requiring that all litigation involving government entities, including Indian tribes, be conducted by the Attorney General, who *does* have authority over the positions taken by the Department of Interior and can, therefore, ensure that the federal government speaks with a single voice to tribes and their contracting partners. See Pet. 21-24. However, that solution can only be made effective by this Court's granting certiorari in this case and reversing the judgment of the Ninth Circuit.

3. This Court has repeatedly granted certiorari to resolve questions of importance to the sovereign interests of Indian tribes without regard to whether they presented a circuit conflict. See Pet. 15 (citing cases). Moreover, given the importance of the interests at stake, this Court's intervention

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[2] The government attempts to downplay the seriousness of this imposition by noting that petitioner may raise Interior's approval of the lease as a defense on remand. BIO 22-23. But that offer of reassurance rings hollow. The government clearly does not believe the leases are a valid defense. Otherwise, the EEOC would not have brought the suits in the first place or would have mooted this petition by agreeing to dismiss the action below.

should not be delayed. Standing alone, the Ninth Circuit's decision will subject nearly three-quarters of the nation's federally recognized tribes to the tactics employed by the EEOC in this case. See NCAI Br. 6 (Ninth Circuit contains 74% of recognized tribes). In *United States Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), the Court granted certiorari to decide a Freedom of Information Act question involving Indian tribes in response to a petition by the United States that acknowledged that no other court had decided the question presented. See Pet. 27. However, the government successfully argued that immediate review was nonetheless warranted in light of the importance of the question and the comprehensiveness of the Ninth Circuit's jurisdiction over tribal affairs. *Ibid*. There is no reason for a different result in this case. Indeed, the question in this case is of far greater significance to tribal interests than was issue in *Klamath Water Users*. See NCAI Br. 3-7; Navajo Br. 3-9.[3]

II. The Court Of Appeals' Decision Is Wrong.

The government contends that the decision below was not erroneous, but that claim misconceives petitioner's argument as well as the scope of Rule 19 and the EEOC's authority under Title VII.

Contrary to the government's assumption, petitioner does not argue in this Court that "Rule 19(a) imposes the additional requirement that * * * the EEOC have an independent cause

[3] That this petition is brought by a private company rather than a tribe is no reason to hesitate granting certiorari. The only reason the Navajo Nation is not the petitioner in this case is that the Ninth Circuit decided the joinder question in response to petitioner's motion for summary judgment for failure to join a necessary party; as a result, the Nation was never a "party" in the district court with the ability to appeal. However, as the Nation's amicus brief makes clear, the tribe supports the petition, desiring an immediate resolution of the question presented, and will continue participate if certiorari is granted.

of action against the Nation." BIO 11. Petitioner claims only that where, as in this case, Congress has made plain its intent to affirmatively preclude litigation between two parties, that intent may not be circumvented through joinder under Rule 19. See Pet. 27. Declining to provide an explicit cause of action is not, in itself, sufficient grounds for concluding that Congress has precluded a party from litigating a claim against another through Rule 19. See Pet. 27-28 (discussing, *inter alia*, *Martin* v. *Wilks*, 490 U.S. 755 (1989)). In this case, however, by assigning the authority to engage in Title VII litigation against government entities to the Attorney General alone, Congress plainly precluded the EEOC from engaging in such litigation itself. Rule 19 cannot provide an avenue for circumventing that intent. See Pet. 26-27.

The government contends that Congress did not, in fact, intend to prevent the EEOC from litigating claims against government entities through joinder, see BIO 18-23, but that assertion is wholly unconvincing. See, *e.g.*, Pet. 17-25; States Amicus Br. 4-14; Navajo Br. 9-17. The government's principal argument is that the provision authorizing the EEOC to sue private employers, but not government entities, Section 2000e-5(f)(1), "does not address the situation presented here" because the Tribe is not sued in its capacity as "respondent." BIO 19. But if the litigation is not authorized (and limited) by Section 2000e-5(f)(1), the natural conclusion is that there is no statutory authorization for the litigation at all, not that the EEOC may enjoy the authority of the provision while disregarding its limitations. See Pet. Br. 19-20.

The government responds that the EEOC *must* have this claimed extra-statutory authority to litigate against a tribe through joinder because otherwise "neither the EEOC *nor* the Attorney General would be empowered to take that step since Indian Tribes – including the Nation – are excluded from Title VII's definition of 'employer.'" BIO 21 (emphasis in

original)[4] This is simply not the case. The statutory authority to sue non-employers that interfere with Title VII rights is provided for in 42 U.S.C. 2000e-6(a), which authorizes the Attorney General to bring suit against "any person or group of persons * * * engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title." The government suggests in passing that this view is "problematic," but does not claim that it is wrong. BIO 21-22 n.6. The government's reservations are both surprising and unpersuasive.[5] In any case, even if Title VII did not expressly authorize the Attorney General to sue an Indian tribe in these circumstances, that hardly compels the conclusion that it intended for the *EEOC* to wield that authority indirectly through joinder. The more natural conclusion is that any implicit authority to litigate against a tribe belongs to the Attorney General. See Pet. 19-20.

The government argues that Congress intended to remove those limitations when the EEOC litigates claims against government entities through joinder rather than direct suit, because joinder "does not expose the Nation to the remedies authorized by Title VII, nor does it rest on any allegation that the Nation itself has violated the statute." BIO 20. Both assertions are inaccurate, but the argument would fail in any

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[4] This argument has no relevance to the joinder of other government entities, such as States, which are not excluded from the Title VII definition of "employer." See 42 U.S.C. 2000e(b).

[5] Petitioner's reading of the provision is consistent with the plain terms of the statute and with EEOC guidance. See EEOC Compliance Manual § 2(B)(3)(ii) ("For example, an allegation of selective enforcement of a licensing requirement against African-Americans or some other protected class would constitute an allegation of pattern or practice discrimination covered by Section 707."). Moreover, although the Reorganization Plan does not specifically mention tribes, there can be no doubt that the intent of the plan is to create a parallel allocation of authority under both Section 706 and 707. Contra BIO 22 n.6.

event. First, the judgment the EEOC seeks in this case against the tribe is indistinguishable in every meaningful respect from a direct Title VII action for declaratory judgment against the tribe. See States' Br. 9; Pet. App. 43a. Second, even if the EEOC does not claim that enactment of a tribal preference statute or the enforcement of a lease preference term directly violates Title VII (but see 42 U.S.C. 2000e-6), the EEOC nonetheless contends that enforcement of preferences required by tribal law are precluded by federal law. Thus, the litigation plainly imposes the most serious injuries Congress intended to avoid when it restricted the EEOC's authority to litigate against government entities, namely the cost and indignity of being hauled before a federal court to defend against an attempt to invalidate government rules and practices. That the litigation will not immediately result in the additional injury of an injunction is of little significance. The government cannot seriously claim that the Nation would (or even could) flout the federal court judgment declaring its preferences illegal under federal law.

III. The Ninth Circuit's Holding Conflicts With The Fifth Circuit's Decision in *Vieux Carre*.

As the Ninth Circuit itself recognized, Pet. App. 13a, its decision conflicts with *Vieux Carre Prop. Owners* v. *Brown*, 875 F.2d 453 (CA5 1989). In both cases, a plaintiff charged that a joint private-government action was in violation of a federal statute, but federal law permitted the plaintiff to sue only one of the participants directly. In *Vieux Carre*, the Fifth Circuit recognized that Congress divided authority for suing private and government entities for alleged violations of the Rivers and Harbors Act, permitting private plaintiffs to sue the Army Corps of Engineers under the APA, while giving the responsibility for suits against developers solely to the Attorney General. 875 F.2d at 456-57. That allocation of authority, the Fifth Circuit held, could not be circumvented by recourse to Rule 19. *Id*. at 457. The Ninth Circuit, however, held the opposite here, concluding that the division of direct

litigating authority under Title VII does not affect the application of Rule 19. Pet. App. 11a.

The government's attempt to distinguish *Vieux Carre* fails. The Fifth Circuit did not turn on whether the joinder was attempted at the outset of the litigation or later in the case. Contra BIO 14. The government points out that the plaintiff there sought an injunction against the absent party, while the EEOC seeks only a declaration that the Nation's preference are illegal. *Id.* 14-15. As discussed above, this is a distinction without any meaningful difference. The Fifth Circuit notably made no mention of the request for an injunction when it gave its three reasons for holding that the private developers could not be subject to suit under Rule 19. See 875 F.2d at 457.[6] Finally, that *Vieux Carre* did not decide whether the suit should be dismissed if the absent party could not be joined, BIO 16, is beside the point. The petition presents only the question whether the EEOC may join the tribe notwithstanding Title VII's limitations on its authority, not whether the suit must be dismissed if the tribe cannot be joined, a question the Ninth Circuit did not reach.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, this Court should grant the petition for certiorari.

Respectfully submitted,

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[6] Moreover, although the Ninth Circuit pointed out that the EEOC was not seeking a direct injunction against the Nation in this case, it based its decision on the general principle that any party may be joined to a litigation "for the sole purpose of making it possible to accord complete relief between those who are already parties," relying on cases that permit an injunction against the joined party. See Pet. App. 11a (relying on, *e.g.*, *National Wildlife Fed'n* v. *Espy*, 45 F.3d 1337, 1344 (CA9 1995)).

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