No. 05-___

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

PETITION FOR A WRIT OF CERTIORARI

Jeffery L. Klinger
PEABODY WESTERN COAL COMPANY
701 Market Street
St. Louis, MO 63101

Thomas C. Goldstein
(*Counsel of Record*)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

September 15, 2005

QUESTION PRESENTED

Whether a plaintiff may join as an involuntary defendant under Federal Rule of Civil Procedure 19 a party which the plaintiff is prohibited from suing directly.

RULE 29.6 STATEMENT

Petitioner Peabody Western Coal Company is a wholly owned subsidiary of Peabody Holding Company, Inc. Petitioner Peabody Coal Company, LLC, is wholly owned by Interior Holdings, LLC, which is wholly owned by Eastern Coal Company, LLC, which is wholly owned by Peabody Holding Company, Inc. Peabody Holding Company, Inc., in turn, is wholly owned by Peabody Investments Corp., which is wholly owned by Peabody Energy Corporation, a publicly held company.

PARTIES TO THE PROCEEDING BELOW

Petitioner Peabody Western Coal Company appeared in the court below but in some instances was erroneously designated as Peabody Coal Company. For avoidance of doubt, both companies are named as petitioners in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Peabody Western Coal Company and Peabody Coal Company, LLC, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a-18a) is published at 400 F.3d 774. The opinion of the district court (*id.* 19a-48a) is published at 214 F.R.D. 549.

JURISDICTION

The court of appeals denied rehearing and rehearing en banc on May 18, 2005. See Pet. App. 49a. On August 3, Justice O'Connor extended the time to file this petition to and including September 15, 2005. App. 05A122. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULE

Title VII of the Civil Rights Act of 1964, provides, in relevant part:

> It shall be an unlawful employment practice for an employer * * * 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.

42 U.S.C. 2000e-2(a)(1).

42 U.S.C. 2000e(b) provides, in relevant part, that for purposes of Title VII, "[t]he term 'employer' * * * does not include (1) * * * an Indian tribe."

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[1] Because the real party in interest is petitioner Peabody Western Coal Company, hereinafter we use the singular "petitioner."

42 U.S.C. 2000e-2(i) provides:

> Nothing contained in this title 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-5(f)(1) provides, in relevant part:

> 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.

Federal Rule of Civil Procedure 19 provides, in relevant part:

> (a) Persons to be Joined if Feasible. A person * * * whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if * * * the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may * * * leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.
>
> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the

> parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

STATEMENT OF THE CASE

By statute, Congress has provided that suits by the federal government against Indian tribes under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, must be filed by the Department of Justice rather than the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. 2000e-5(f)(1), 2000e-6. The Ninth Circuit in this case, however, permitted the EEOC to circumvent this statutory restriction merely by suing a third party and then "joining" a tribe as a defendant. The court of appeals recognized that its ruling conflicts with the holding of two other circuits that Rule 19 does not provide parties with an avenue for evading limitations on their right to bring a direct suit against a defendant.

1. Title VII prohibits, *inter alia*, discrimination on the basis of national origin in certain employment relationships. 42 U.S.C. 2000e-2(a) to -2(d). Respondent EEOC construes that prohibition to include discrimination in favor of members of an Indian tribe. See *Dawavendewa* v. *Salt River Agr. Imp. & Power Dist.*, 154 F.3d 1117, 1121 (CA9 1998). Congress, however, made a special exception for certain employment preferences for Indians living on or near a reservation:

> Nothing contained in this title 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 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). The EEOC interprets this exception narrowly to permit preferences for Indians generally, but not preferences for members of the particular Indian tribe on or

near whose reservation the business operates. *Dawavendewa*, 154 F.3d at 1121.

On the EEOC's reading of Title VII, the statute renders invalid provisions in mining leases promulgated and subsequently re-approved by the Department of the Interior. The leases, which are entered into between tribes and mining companies, call for the mining companies to employ a hiring preference for members of the tribe in question. See Pet. App. 2a-4a; *id.* 30a. The EEOC's position also invalidates statutes enacted by numerous Indian tribes including the Navajo Nation (Nation), which is the country's largest federally recognized tribe.[2] To "protect the health, safety, and welfare of Navajo workers," 15 Navajo Nation Code 602(a)(6), quoted in *Ariz. Pub. Serv. Co.* v. *Aspaas*, 77 F.3d 1128, 131 (CA9 1995), the Nation has adopted the Navajo Preference in Employment Act (NPEA), which requires "[a]ll employers doing business within the territorial jurisdiction of the Navajo Nation, or engaged in any contract with the Navajo Nation" to "[g]ive preference in employment to Navajos," 15 Navajo Nation Code 604, quoted in Pet. App. 30a.

The EEOC cannot, however, sue Indian tribes under Title VII. Although Congress generally empowered the EEOC to enforce Title VII through suits in federal court, see *id.* § 2000e-5(f)(1), it specifically exempted from that authority claims against any "government, governmental agency, or political subdivision," *ibid.* See also 42 U.S.C. 2000e-5(f)(2), 2000e-8(c). Such suits must be brought not by the EEOC but instead by the Department of Justice. *Ibid.* The EEOC acknowledges that this provision vests the authority to sue Indian tribes in the Department of Justice. See Pet. App. 35a. In addition, neither the EEOC nor the Department of Justice may sue a tribe in its capacity as an employer because

[2] The Nation has over a quarter-million enrolled members and reservation lands covering 27,000 square miles in Arizona, Utah, and New Mexico.

Congress exempted Indian tribes from the definition of covered "employers" under Title VII. 42 U.S.C. 2000e(b).

2. Petitioner Peabody Western Coal Company (PWCC) mines coal within the Nation's territorial jurisdiction. In hiring employees for those mining operations, it is, for two reasons, required to give preference to members of the Nation. First, the preference is embodied in the leases – prepared and approved by the Department of the Interior – between petitioner and the Nation that govern petitioner's mining operations. See Pet. App. 30a, 2a. The leases were amended and re-approved in 1987 and 1999, with no changes to the preference provisions. *Id*. 29a. Either the Nation or the Department of Interior may cancel the leases for a violation of their terms. *Id.* 3a. Second, petitioner is subject to the NPEA with respect to its mining operations within the territory of the Nation.

In 2001, respondent EEOC initiated this action by suing PWCC's parent company, petitioner Peabody Coal Company, under Title VII. The complaint rests on the EEOC's view that an employment preference in favor of members of one particular tribe constitutes prohibited national-origin discrimination and that the exception created by 42 U.S.C. 2000e-2(i) does not permit a business to provide employment preferences to members of the tribe on whose reservation it operates. The EEOC specifically alleged that petitioner, in compliance with the terms of the leases, "has a history of refusing to hire non-Navajo Native Americans for open positions at its mine," in violation of Title VII. Compl. 3.

The EEOC sought an order requiring petitioner to pay back pay and compensatory and punitive damages to a "class" of non-Navajo Native Americans. Compl. 4. The EEOC also sought "a permanent injunction" against "Peabody, its officers, successors, assigns, and all persons in active concert or participation with it." *Ibid*. EEOC has never suggested that the suit was authorized by the Department of Justice, which did not sign the complaint. See *id.* at 5.

Petitioner sought to dismiss the EEOC's complaint, explaining that it was nothing more than a thinly veiled suit against the Nation that the EEOC was prohibited from bringing directly. In response, the EEOC moved to join the Nation as a defendant under Federal Rule of Civil Procedure 19. The EEOC specifically 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. 34a. As the district court recognized, those interests are substantial, for the EEOC "characterizes [its] lawsuit as litigation over 'the validity of its [the Navajo Nation's] discriminatory lease provision and employment preference provisions * * * [and] the interplay between its tribal sovereignty and Title VII.'" *Ibid.* (quoting EEOC's Opposition to Dismissal 4).

The district court held that the EEOC could not employ the joinder provisions of the Federal Rules of Civil Procedure to avoid the statutory prohibition that precluded it from suing the Nation directly. Not only are tribes "specifically exempt as employers from the requirements of Title VII," Pet. App. 37a (citing 42 U.S.C. 2000e(b)), but "[t]he Attorney General clearly has exclusive authority to file suit whenever a government such as an Indian tribe is involved," *ibid.* (citing 42 U.S.C. 2000e-5(f)(1), (2); *id.* § 2000e-8(c)). The district court found persuasive decisions of other federal courts rejecting similar attempts by the EEOC to invoke "joinder" to circumvent the prohibition on suits against a governmental entity imposed on it by statute. *Id.* 36a-37a (citing cases). 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. 37a-38a. Indeed, under these provisions, "joinder of an Indian tribe under Rule 19 would divest the EEOC of its authority to litigate." *Id.* 39a.

The district court further concluded that the Nation was an indispensable party to the suit, such that the EEOC's complaint must be dismissed because the Nation could not be joined. In particular, the absence of the Nation as a party would prejudice its own sovereign interests and the interests of the tribal members it represents. Pet. App. 40a. The court accordingly denied the EEOC's motion to join the Nation and dismissed the complaint. *Id.* 41a.

3. On the EEOC's appeal, the Ninth Circuit reversed. The court of appeals characterized the suit as, fundamentally, a challenge to the provisions of the leases between petitioner and the Nation that had been issued and approved by the Department of Interior to "require[e] that preference in employment be given to members of the Navajo Nation." Pet. App. 2a. The court of appeals did not doubt the district court's conclusion that, with respect to such a claim, "the EEOC cannot directly sue the Nation." *Id.* 5a. Rather, it 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.* 6a.

The Ninth Circuit reasoned in two stages. First, it agreed with the district court and the parties "that the Navajo Nation is a necessary party under Rule 19(a)(1)." Pet. App. 9a. It recognized that "the Nation is a signatory to lease provisions that the [EEOC] challenges under Title VII." *Ibid.* The court of appeals accordingly deemed the Nation an indispensable party under the settled rule that "tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise." *Ibid.*

Second, the Ninth Circuit nonetheless rejected the district court's conclusion that the Nation could not feasibly be joined to the suit under Rule 19. The court of appeals did not doubt that, through the provisions exempting tribes from the definition of "employer" and providing that only the Department of Justice could sue a government, Congress had prohibited the EEOC from suing the Nation under Title VII. Pet. App. 10a-11a. But it held that the case was controlled by the circuit's prior construction of the Rules of Civil Procedure as providing that "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.* 11a (citing *National Wildlife Fed'n* v. *Espy*, 45 F.3d 1337, 1344-45 (1995); *Beverly Hills Sav. & Loan Ass'n* v. *Webb*, 406 F.2d 1275, 1279-80 (1969)).

The court of appeals explained that its ruling was consistent with decisions of the First, Sixth, and Tenth Circuits. Pet. App. 11a (citing *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1077 (CA10 1988)); *id.* 14a (citing *EEOC* v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 52 (CA1 2002); *EEOC* v. *MacMillan Bloedel*, 503 F.2d 1086, 1088 (CA6 1974)). But it acknowledged the contrary holding of the D.C. and Fifth Circuits – with which the Ninth Circuit "has never agreed" (*id.* 12a) – 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 Prop. Owners* v. *Brown*, 875 F.2d 453, 457 (CA5 1989). See also *Davenport* v. *Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (CADC 1999) (adopting *Vieux Carre*). The Ninth Circuit also thought that those rulings might be distinguishable on the ground that in those cases the plaintiffs had directly sought injunctive relief as against the joined party. Pet. App. 12a-13a. Here, by contrast, "[j]oinder is necessary for the 'sole purpose' of effecting complete relief between the parties by ensuring that both Peabody and the Nation are bound to any judgment upholding or striking down

the challenged lease provision." *Id.* 13a-14a (citation omitted).[3]

5. The Ninth Circuit denied rehearing and rehearing en banc. Pet. App. 49a. This petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a recurring circuit conflict over the proper construction of a basic rule of civil procedure and to reinstate the careful balance Congress established between the powers of the EEOC and the sovereign interests of government entities such as the Navajo Nation.

I. The Ninth Circuit's Holding That A Party May Be Joined To A Suit Notwithstanding That No Claim May Be Stated Against The Joined Party Is The Subject Of A Square Circuit Conflict.

This Court's intervention is required to resolve an important division among the federal courts regarding the proper application and limits of Federal Rule of Civil Procedure 19.

A. The Ninth Circuit's Decision Conflicts With Precedent From Other Circuits On The Proper Scope Of Rule 19.

The Ninth Circuit in this case relied on that court's settled precedent to hold that a party may be joined to an action under Rule 19 even when no claim may be stated against it and even if Congress has explicitly precluded the plaintiff from suing the absent party directly. Pet. App. 14a (citing also *EEOC* v. *Union Independiente de la Autoridad de*

[3] The court of appeals separately rejected the district court's holding that the EEOC's suit was barred because it presented a nonjusticiable "political question," Pet. App. 17a, and reinstated the EEOC's unrelated challenge to certain recordkeeping by petitioner, *id.* 18a. Those holdings are not at issue in this petition.

Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49, 52 (CA1 2002); *Sierra Club* v. *Hodel*, 848 F.2d 1068 (CA10 1988); *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (CA6 1974)).

As the court of appeals recognized, the Fifth and D.C. Circuits disagree. In *Vieux Carre Property Owners* v. *Brown*, 875 F.2d 453, 457 (CA5 1989), a community group in New Orleans sought to block private parties and a local government from undertaking an aquarium and park project. The group's theory was that, under the federal Rivers and Harbors Act (RHA), the project first required clearance from the Army Corps of Engineers (Corps). The group sued both the developers and the Corps.

The Fifth Circuit recognized that Congress had provided the Administrative Procedure Act "as a route through which private plaintiffs can obtain federal court review of the decisions of federal agencies," alleged to be in violation of the RHA. 875 F.2d at 456. But the APA provided no such mechanism for adjudicating the private parties' compliance with the RHA. *Ibid*. Moreover, the plaintiffs could not sue the private defendants directly under the RHA because this Court had held that "a private party has no implied right of action for violations of the RHA." *Ibid.* (citing *California* v. *Sierra Club*, 451 U.S. 287 (1981)).

The plaintiffs nonetheless argued that the private parties could be properly joined to their APA suit against the Corps under Rule 19 and, thereby, could be subject to an adjudication under the RHA even though Congress has precluded the plaintiffs from achieving this end directly. 875 F.2d at 456-57 (relying on *Sierra Club* v. *Hodel*, 848 F.2d 1068 (CA10 1988)). The Fifth Circuit rejected that argument for two reasons: one narrow, the other broad. First, the court held that Rule 19 could not be used to circumvent Congress's determination to authorize only the Attorney General to bring suits to enforce the RHA against developers. 875 F.2d at 457. Permitting the plaintiffs to obtain an RHA adjudication

against the developers would, the Court held, "negate[] the Supreme Court's decision in *Sierra Club*" that Congress did not intend for private enforcement of that statute. *Id*. at 457. "As long as the private plaintiff joined the federal agency in the action, the former could reach a nonagency defendant * * *." *Ibid*. Rule 19, the court concluded, could not be used to permit private plaintiffs to sue to enforce the RHA against developers when the statute "explicitly vests that authority in the Attorney General." *Ibid*. "Any other conclusion, we believe, would be too at odds with *Sierra Club*." *Id.* at 457 n.2.[4]

The Fifth Circuit also rejected the plaintiffs' Rule 19 argument on a broader ground, holding 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. Because the plaintiffs had no private right of action to enforce the RHA, they obviously lacked a cause of action against the private developer defendants. *Ibid.*

The Fifth Circuit unquestionably would reject the Ninth Circuit's ruling in this case. The Fifth Circuit held that Rule 19 joinder is prohibited if it would otherwise circumvent a statutory restriction on suing the joined party directly. In reaching that conclusion, the Fifth Circuit notably refused to

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[4] The Fifth Circuit also cited *Dunn* v. *Carey*, 110 F.R.D. 439 (S.D. Ind. 1986), aff'd on other grounds, 808 F.2d 555 (CA7 1986), in which the plaintiffs filed suit alleging that the defendant government officials were subjecting pretrial detainees to unconstitutional prison conditions. The parties reached a consent decree under which a new correctional facility would be created and leased to the government. In response, certain taxpayers challenged the lease agreement in state court. The plaintiffs could not sue the taxpayers to preclude their suit, because the Tax Injunction Act forbids interference with such state court litigation. Not only did that statute "deprive[] the Court of jurisdiction over the [taxpayers'] state law claims," but also "therefore the [taxpayers] cannot be joined in this action." *Dunn*, 110 F.R.D. at 440.

follow the Tenth Circuit's decision in *Sierra Club* v. *Hodel*, 848 F.2d 1068 (1988), which the decision below embraces, see Pet. App. 11a-12a.

This case falls *a fortiori* within the Fifth Circuit's reasoning. Just as the Fifth Circuit relied on the fact that no right of action had been implied under the RHA, this case involves a clear prohibition on the EEOC suing the Nation. The Ninth Circuit's holding in this case also conflicts with the Fifth Circuit's broader conclusion that Rule 19 joinder is prohibited unless the plaintiff can state a claim against the joined party. Here, the EEOC is prohibited by statute from seeking even a declaratory judgment against the Nation that its law or the leases it entered with petitioner violate Title VII.[5]

As the Seventh Circuit observed in *EEOC* v. *Elgin Teachers Ass'n*, 27 F.3d 292, 293 (1994), other courts have also rejected similar attempts by the EEOC to circumvent the limits on its power to adjudicate claims against government entities. In *Elgin*, the EEOC sought to challenge a school district's pregnancy leave policies by suing the teacher's union and joining the school board under Rule 19. *EEOC* v. *Elgin Teachers Ass'n*, 658 F. Supp. 624, 625 (E.D. Ill. 1987).

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[5] The Ninth Circuit's expansive interpretation of Rule 19 is also in substantial tension with precedent of the D.C. Circuit. In *Davenport* v. *Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356 (1999), the D.C. Circuit embraced the Fifth Circuit's decision in *Vieux Carre*. In *Davenport*, flight attendants sued their union alleging that it had violated the federal labor laws by entering into an interim labor agreement with an airline. The plaintiffs argued that the airline could be joined under Rule 19. The D.C. Circuit rejected that argument. It did not dispute that the airline was a "necessary party" to the suit as a signatory to the agreement with the union. *Id.* at 366. Rather, it explained in detail that the airline had not itself violated any statute, see *id.* at 361-65, and 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.

Unlike the Ninth Circuit, the district court in that case refused to permit the EEOC to proceed indirectly against a government entity it could not sue directly. *Id*. at 624.[6] The district court in *EEOC* v. *American Federation of Teachers, Local No. 571*, 761 F. Supp. 536, 537 (N.D. Ill. 1991), likewise rejected the EEOC's attempt to litigate claims against a school board by joining the board to a suit against a teacher's union. In fact, the court found the EEOC's arguments so lacking in merit that it awarded attorney's fees to the school district, observing that the EEOC had attempted the same ploy twice before in different courts within the judicial district, each time to no avail. *Id*. at 540 (citing *Elgin*, *supra*, and *EEOC* v. *Oak Park Teachers' Ass'n*, 45 Fair Empl. Prac. Cases 446 (N.D. Ill. 1985)). If left unreviewed, the decision of the court of appeals in this case would permit the EEOC to resume these discredited tactics anew in the courts of the Ninth Circuit.

This Court's intervention is moreover required because the circuit conflict is both longstanding and intractable. The split has existed since 1989 (see *Vieux Carre*, 875 F.2d at 456-57 (rejecting Tenth Circuit's reasoning and conclusion in *Hodel*)) and – as evidenced by the Ninth Circuit's acknowledgement in this case of the contrary positions of the Fifth and D.C. Circuits, see Pet. App. 12a-13a – has only become more entrenched.

B. The Ninth Circuit's Attempt To Distinguish Contrary Precedents From Other Circuits Fails.

There is no merit to the Ninth Circuit's suggestion that the cases rejecting its construction of Rule 19 might be distinguishable on the ground that the plaintiffs there sought not only joinder but also an express injunction against the joined party. In *Vieux Carre*, the Fifth Circuit flatly concluded that *joinder* – as opposed to an *injunction* – is precluded when the plaintiff seeks to join the party in order to

[6] The EEOC did not appeal the dismissal. 658 F. Supp. at 624.

obtain an adjudication Congress has precluded it from obtaining directly. The court did not rely in any respect on the fact that the plaintiffs also expressly sought injunctive relief. To the contrary, it explained that Rule 19 may not be used to circumvent the rule that "a private plaintiff has no right to enjoin *or sue* a nonagency defendant for damages under the RHA." *Vieux Carre*, 875 F.2d at 457 (emphasis added).[7]

Subsequent cases from within the Fifth and D.C. Circuits confirm that those circuits' precedents do not turn on the types of relief sought. See, *e.g.*, *Chavous* v. *District of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 154 F. Supp. 2d 40 (D.D.C. 2001) (dismissing city from suit against city's control board and private hospital that sought to void contract between those parties for transfer of public hospital services; court explains that the city's "motion to dismiss the complaint against it also will be granted because the plaintiffs have alleged no cognizable claim against" the city); *Hines* v. *Grand Casinos of Louisiana, LLC*, 140 F. Supp. 2d 701, 705 (W.D. La. 2001) (in discrimination case, declining to join tribe as defendant and explaining that "implicit in Rule 19 is the requirement that the plaintiff have a viable cause of action against the party to be joined as a defendant"; here, "[e]ven if defendant were to establish that the Tribe was plaintiff's employer, plaintiff has no claim against the Tribe under Title VII").

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[7] The D.C. Circuit in *Davenport* did state that "[i]t is not enough that plaintiffs 'need' an injunction against Northwest in order to obtain full relief. They must also have a right to such an injunction, and Rule 19 cannot provide such a right." 166 F.3d at 366. But the court made that statement only after adopting the Fifth Circuit's holding that plaintiffs may sue under Rule 19 only if they can state a claim against the joined party, and the court's point was that the plaintiff must have a "right" to bring the joined party into the case, not that it was seeking an "injunction."

The purported distinction identified by the Ninth Circuit is, in any case, inapplicable here. The EEOC's complaint in this case broadly seeks an injunction against not only petitioner Peabody but also "all persons in active concert or participation with it," Compl. 4, ¶ A – language broad enough to encompass the Navajo Nation. In fact, the EEOC has expressly acknowledged that it is seeking an injunction that would prohibit the Navajo Nation from enforcing the NPEA and its leases with petitioner. Dist. Ct. Trans. 28, reprinted in SER 156 (EEOC seeks "to strike that provision from the lease and *order the Navajo Nation* [not] to enforce that lease provision against Peabody Coal" (emphasis added)). Beyond the order sought directly against the Nation, the *very point* of joining the Nation is to ensure that it is bound by a judgment in the case by res judicata, an effect no different than an injunction as a practical matter.

II. Certiorari Is Warranted In Light Of The Important Sovereign Interests At Stake In The Relationship Between Tribal Governments And The United States.

Certiorari would be warranted even in the absence of a circuit split because the decision below has a "significant impact on the relationship between Indian tribes and the Government." *United States Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001). See also *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 141 (1972) (granting certiorari "because of the importance of the issues for [certain] Indians"); *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 424 (1943) ("We granted certiorari because the case was thought to raise important questions concerning the relations between the two tribes and the United States."); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230 (1985) (granting certiorari because of "the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for many eastern Indian land claims").

The Ninth Circuit's decision implicates the delicate balance Congress has drawn between the interest of tribal sovereigns in avoiding suit in federal court and the power of federal agencies to enforce federal statutes. The case affects not only the relationship between the tribes and the federal government, but also the distribution of power among federal agencies themselves, a distribution that was designed to protect the interests of tribes and prevent unnecessary friction between tribes and the United States. As discussed below, the decision of the Ninth Circuit contravenes the careful balance Congress struck.

Indian Tribes have a sovereign interest in avoiding not only judgment, but also the indignity of being drawn before a federal court except when and as authorized by Congress. See *Kiowa Tribe of Oklahoma* v. *Mfg. Techs.*, 523 U.S. 751, 754 (1998) (tribes enjoy sovereign immunity to suit, absent waiver by tribe or abrogation by Congress); cf. *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 766 (2002) (sovereign immunity is an immunity from suit, not simply defense to liability). Accordingly, any delay in the resolution of the EEOC's authority to litigate claims against tribes through the device of Rule 19 joinder will not only impose substantial injury to the sovereignty interests of the nation's largest Indian tribe, but will risk similar affronts to the many other tribes that fall within the expansive jurisdiction of the Ninth Circuit. See Pet. for Cert. 27, *United States Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 530 U.S. 1304 (2000) (No. 99-1871) (urging court to grant certiorari despite lack of circuit split because "[t]he Ninth Circuit contains approximately 62% (28 million out of 45.5 million acres) of the lands held by the United States in trust for Tribes and individual Indians, and 400 of the 556 federally recognized Tribes are within that Circuit"); 530 U.S. 1304 (2000) (granting certiorari).

III. Rule 19 May Not Be Used To Circumvent Restrictions Congress Has Placed On A Party's Right To Sue An Absent Party Directly.

There is no dispute that the EEOC is prohibited from bringing an action directly against the Nation to challenge the legality of the Nation's preference requirement. See *supra* at 4. Although Congress designated the EEOC as the primary government enforcer of Title VII for most purposes, it specifically assigned authority to sue governments (including Indian tribes) to the Attorney General. 42 U.S.C. 2000e-5(f)(1). Permitting the EEOC to nonetheless obtain an adjudication against the Nation through Rule 19 joinder would impermissibly allow the Commission "to circumvent congressional intent by a mere pleading device." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

A. Congress Clearly Prohibited the EEOC From Litigating Disputes With Indian Tribes.

In enacting Title VII, Congress crafted a detailed enforcement scheme under which litigation with sovereigns shall be controlled and conducted by the Attorney General, not the EEOC. Those restrictions apply whether the litigation is conducted directly through a suit against the Tribe or indirectly through a suit in which the Tribe is joined as an involuntary defendant.

1. Plain Language of Title VII

The EEOC's actions in this case are, for all practical purposes, indistinguishable from filing a suit for a declaratory judgment against the Nation directly. Whether it sues the Nation directly or joins it under Rule 19, both the purpose and the effect of the EEOC's suit are to haul the Nation before a federal court to obtain a binding adjudication of the legality of the Nation's preference requirement. Indeed, the EEOC admitted as much below. See *supra* at 6.

But the plain language of Title VII prohibits the EEOC from seeking to resolve Title VII disputes with Indian tribes

in court. Section 2000e-5(f)(1) commands that if the EEOC is unable to resolve its differences with a government entity through conciliation, "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" (emphases added). This provision makes clear that the discretion to bring a civil action lies with the Attorney General, and not the EEOC. Moreover, whether the Attorney General decides to bring a case or not, the EEOC is plainly prohibited from taking *any* "further action" in the dispute, a phrase that clearly encompasses efforts to join a tribe to an existing case.

In the district court, the EEOC argued that the limitations in Section 2000e-5(f)(1) do not apply to this suit because the EEOC seeks to litigate claims against the Nation in its capacity as a contracting authority, rather than in its capacity as an employer. Subsection (f), the Agency argued, governs suits only against a government "respondent," which is defined in the statute as an "employer" against whom a claim of discrimination is made. See 42 U.S.C. 2000e-5(f)(1). Moreover, the Commission argued, a tribe is specifically excluded from the definition of "employer." See *id.* § 2000e(b). Accordingly, because a tribe cannot be an employer or a "respondent" within the meaning of Title VII, the EEOC reasoned, the restrictions on the EEOC's authority in Section 2000e-5(f)(1) are inapplicable.

The district court rejected that argument, see Pet. App. 36a-37a, and the Ninth Circuit did not disturb its understanding of the statute. If the Nation is not a "respondent" for purposes of Section 2000e-5(f)(1)'s restrictions, it is also not a "respondent" for purposes of the Section's authorization for EEOC litigation. See 42 U.S.C. 2000e-5(f)(1) ("[T]he Commission may bring a civil action against any *respondent* not a government * * *." (emphasis added)). And if the EEOC's litigation with the Nation is not

authorized by Section 2000e-5(f), then the action is not authorized at all.[8] No provision other than Section 2000e-5(f) authorizes the EEOC to litigate claims against the Nation.[9] The authority to litigate against entities that do not meet the definition of "respondent" or "employer" is provided in Section 2000e-6, which authorizes the Attorney General to bring an action against "any person or group of persons [that] is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." While much of this broader authority was subsequently transferred to the EEOC, see Section 2000e-6(d), the power to bring pattern and practice cases against a government entity was retained by the Attorney General, see Reorganization Plan No. 1 of 1978, reprinted in 92 Stat. 3781 (1978); *United States* v. *Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1090-92 (CA9 1979) (discussing history of re-assignment).

Finally, even if the EEOC could lay claim to an implied authority to litigate its claims against the Nation outside of the

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[8] Absent authorization from Congress, a federal agency has no inherent authority to litigate claims in federal court. See, *e.g.*, *United States* v. *City of Philadelphia*, 644 F.2d 187, 198 (CA3 1980). Particularly when Congress has created an express and comprehensive enforcement scheme, further litigating authority beyond the terms provided in the statute cannot be implied. See *ibid*.

[9] In the district court, the EEOC attempted to find an unrestricted source of authority in the introductory paragraph of Section 2000e-5, which provides that the "Commission is empowered, *as hereinafter provided*, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title." 42 U.S.C. 2000e-5(a) (emphasis added). But that authority must, by the provision's plain terms, be exercised "as hereinafter provided." Among the things Congress "hereinafter provided" was that in the case of government entities, the EEOC shall "prevent any person from engaging in an unlawful employment practice" through referrals to the Attorney General, not through independent litigation.

express terms of Title VII, surely that *implied* authority is subject to the same limitations imposed on its *express* statutory authority. As discussed below, a contrary interpretation would be completely incompatible with the purposes for which litigation with government entities has been reserved to the Attorney General.

2. Purposes

Permitting the EEOC to invoke Rule 19 to litigate claims against an Indian tribe is plainly inconsistent with the reasons that led Congress to prohibit the EEOC from bringing such claims directly. The division of litigating authority between the EEOC and Attorney General reflects the special status of suits between the United States and other sovereigns as well as important differences between the EEOC and the Attorney General.

Under our constitutional system, state and local governments "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). Indian tribes likewise enjoy a special sovereign status under our constitutional system, forming "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Suits against such sovereigns are not lightly permitted. See, *e.g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 227-28 (1989) (requiring clear statement of congressional intent to subject State to suit); *C & L Enters.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (same for Indian tribe).

It is thus unsurprising that when Congress revised Title VII to permit suits against government employers in 1972, it did so with the reservation that such suits would be instituted only by the Attorney General rather than the EEOC. The Commission is an independent agency with an important, but circumscribed, mission. See 42 U.S.C. 2000e-4. The

Attorney General, on the other hand, is a presidential appointee with broad responsibilities who serves at the pleasure of the President. Congress thus clearly contemplated that litigation against sovereigns should be undertaken by those with greater political accountability than can be expected from the EEOC which is, by design, insulated from political oversight.

Placing litigating authority in the hands of the Attorney General also reflects that the federal government's relationship with government entities, including tribes, is more complex than with ordinary Title VII defendants. States and tribes are not only employers, but also grant recipients, co-operating law enforcement agencies, and frequently entities subject to regulation by administrative agencies. It is especially important in this context for the federal government to speak with one voice, informed by consultation with the wide range of government agencies that have a role in the United States's relationship with other sovereigns.

The general means by which Congress assures uniformity in the federal government's interpretation of federal statutes is by assigning to the Attorney General the dual responsibilities for conducting the Government's litigation and providing authoritative guidance to agencies on the meaning of federal law. See 28 U.S.C. 512, 516; 28 C.F.R. 0.25(a) (describing duties of Office of Legal Counsel within the Department of Justice). Particularly relevant to this case, the Department of Justice serves as the Department of Interior's lawyer, representing it in litigation over mineral leases and providing legal advice to the agency as it administers its responsibility to review and approve lease provisions. See 25 U.S.C. 396a, 396e; 28 U.S.C. 512. Accordingly, in deciding whether to approve the challenged preference provision in this case, the Department of Interior was entitled to seek a legal opinion from the Attorney General. See 28 U.S.C. 512. And if it came to doubt whether that approval was proper in light of the EEOC's new interpretation of Title VII, the Department

could at any time request a legal opinion on the question from the Office of Legal Counsel in the Department of Justice. See 28 C.F.R. 0.25(a). The Attorney General would, moreover, represent the Department of Interior in any litigation arising from a dispute between the Department and the Nation were the Department to require a change in the lease. 28 U.S.C. 516.

The consequences of permitting the EEOC to nonetheless pursue its own interpretation of Title VII in litigation with an Indian tribe are amply illustrated by the facts of this case. The disputed preference terms in this case were subject to review by – and were in fact approved by – the Department of Interior. See Pet. App. 30a, 45-46a. Indeed, the district court noted that the preference provisions were originally "drafted by the United States Secretary of Interior or his authorized representative and presented to [petitioner's predecessor in interest] with no meaningful opportunity to bargain over the employment preference term." *Id*. 29a. The leases have since been modified and extended with the Department's approval. *Ibid*. At no time has the Department sought to rescind approval of the leases or otherwise seek their reformation. *Id*. 46a. Nor has the Department enacted regulations prohibiting such preference terms. At the same time, the Attorney General apparently has never issued a legal opinion concluding that such preferences are illegal or instituted litigation against an Indian tribe seeking to prevent their enforcement. Under these circumstances, the Nation and petitioner should be entitled to rely on the continuing validity of the federally approved preference provisions unless and until appropriate action is taken by the Department of Interior and/or Department of Justice.

Nonetheless, the EEOC has sued petitioner, seeking substantial compensatory and punitive damages because petitioner has done nothing more than comply with the terms of the lease the Department of Interior approved. Rather than attempting to coordinate its position with the Department of Interior and Department of Justice through appropriate inter-

agency channels, the EEOC has sought to challenge the Interior-approved lease provisions in court. Those attempts have already imposed seriously unfair consequences on petitioner, which has relied on the Department of Interior approval in implementing the preference provision.[10]

Congress could have resolved this potential for conflict in a number of ways. It could have provided the EEOC exclusive interpretative authority over Title VII by giving it sole authority to pursue Title VII litigation and to resolve questions regarding the statute arising during the course of other agencies' administrative duties. But Congress clearly rejected that solution, vesting litigating authority instead with the Attorney General. See 42 U.S.C. 2000e-5(f)(1), 2000e-6. In the alternative, Congress could have subjected the EEOC's litigation to supervision by the Attorney General, the general mechanism by which Congress has assured that the federal government speaks with one voice in the federal courts. See 28 U.S.C. 516. But that would have sacrificed a measure of the EEOC's independence, an independence Congress thought important in order for the EEOC to carry out its mission.

Instead, Congress chose another approach, carefully carving out for the Attorney General the particular class of Title VII cases for which it was essential to ensure a coordinated federal position with respect to the rights and obligations of government entities, including Indian tribes.

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[10] Further incongruous results are yet possible, if not in this case, then in others. The Attorney General is responsible not only for representing the interests of the Department of Interior in court, 28 U.S.C. 516, but also frequently participates in litigation to protect the interests of tribes. See, *e.g.*, *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 657 (1979); see also 28 C.F.R. 0.65(b). Allowing the EEOC to sue a tribe based on a legal theory the Department of Interior and Attorney General reject could foreseeably lead to the embarrassment of the federal government appearing on both sides of the same case in federal court.

Permitting the EEOC to nonetheless litigate claims against an Indian tribe through the mechanism of a Rule 19 joinder is completely incompatible with the carefully calibrated solution Congress enacted. The Ninth Circuit's ruling approving the EEOC's position raises the same prospect for drawing courts into inter-agency conflicts, and creates the same unfairness to tribes and their contracting partners, as the direct suit that even the EEOC acknowledges it is prohibited from bringing.

3. Statutory Provisions Limiting Suits Against Government Entities Must Be Strictly Enforced.

The same sovereignty interests that led Congress to assign to the Attorney General the decision whether and how to litigate Title VII claims against government entities also require strict enforcement of the limitations on such suits established by the statute.

It is well established that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma* v. *Mfg. Techs.*, 523 U.S. 751, 754 (1998). While Congress has plenary authority to remove that immunity, courts will assume that the immunity is intact unless Congress has made its decision to abrogate the tribes' immunity abundantly clear. See *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) ("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose."). Suits against States are likewise precluded absent express Congressional authorization. See, *e.g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 227-28 (1989)

It is also within Congress's power to impose limits or conditions on suits against States and tribes, and when it does so, those limits and conditions must be respected. See, *e.g.*, *Kiowa Tribe*, 523 U.S. at 759. Strict adherence to such limitations is required both in order to respect Congress's intentions and to protect the tribe's right to have its immunity removed only in the manner approved by Congress.

To be sure, as the Ninth Circuit observed, a tribe may not invoke sovereign immunity against the United States itself. Pet. App. 10a. But whether and how the federal government has power to sue a tribe is a matter for Congress to determine. Just as Congress may decline to permit private individuals to sue tribes, so too it may preclude the executive branch from suing a tribe, or it may prescribe conditions and procedures for such suits. And just as the limitations imposed by Congress for private suits against tribes must be strictly adhered to, the conditions and procedures Congress establishes for federal government suits must also be strictly enforced.

B. Rule 19 May Not Be Used To Circumvent Limits Congress Has Established On A Party's Ability To Sue.

Because Congress has clearly withheld from the EEOC the right to adjudicate claims against Indian tribes, the EEOC is likewise precluded from relying on Rule 19 to seek to litigate the same claims with a tribe.

As the text of Rule 19 reflects, there are occasions on which an otherwise necessary party "cannot be made a party." Fed. R. Civ. P. 19(b). Rule 19 does not itself purport to be the source of the barriers to joinder, but rather simply acknowledges that other sources of substantive law may preclude the joinder of a party to a particular case in some circumstances. Thus, the rule acknowledges that 28 U.S.C. 1332 precludes joinder of a party when doing so would destroy the diversity of citizenship upon which a court's subject matter jurisdiction is based. Fed. R. Civ. P. 19(a). Other substantive barriers to joinder are not mentioned specifically in the Rule. For example, as the Ninth Circuit and other courts have held, a court may not join an Indian tribe to a case when Congress has not authorized a suit against the tribe, because doing so would vitiate the tribe's common law immunity from suit. See, *e.g.*, *Dawavendewa* v.

Salt River Project Agr. Improvement & Power Dist., 276 F.3d 1150, 1153 (CA9 2002).[11]

Common law immunities are simply one way in which the law precludes a plaintiff from adjudicating a claim against a particular party. Congress may also forbid such suits by assigning the responsibility for adjudicating such claims to someone else, often the government, or in this case a particular agency within the government. Thus, when Congress declines to authorize a private right of action, it makes clear its intent that the obligations imposed by the law shall be enforced only in a particular matter. Rule 19 may no more be used to circumvent this prohibition than it may be used to avoid a claim of immunity from suit. See *Vieux Carre*, 875 F.2d at 456-58. Similarly, in this case, the EEOC may not use Rule 19 to avoid Congress's restrictions on its authority to sue an Indian tribe.

To conclude otherwise draws Rule 19 into conflict with the Rules Enabling Act, 28 U.S.C. 2072(b). "[N]o reading of the Rule can ignore the Act's mandate that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (citations and internal quotation marks omitted). "The test must be whether a rule really regulates procedure[] – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna* v. *Plumer*, 380 U.S. 460, 464 (1965) (internal quotation marks

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[11] Like state sovereign immunity, which is "a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction," *Idaho* v. *Coeur D'Alene Tribe*, 521 U.S. 261, 267 (1997), tribal immunity does not affect the subject matter jurisdiction of the federal courts. See, *e.g*, *Ninigret Dev. Corp*. v. *Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (CA1 2000); *Kreig* v. *Prairie Island Dakota Sioux (In re Prairie Island Dakota Sioux)*, 21 F.3d 302, 304 (CA8 1994) (per curiam).

omitted). Whether a tribe may be subjected to an adjudication of its rights and obligations, and at whose insistence, is a question of substantive law, one that must be resolved by Congress. See *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). There would be little doubt, for example, that a Rule could not establish a private right to enforce a statute that does not, itself, contemplate private enforcement. Cf. *id.* at 289-91 (when Congress authorized agency to promulgate regulations to "effectuate" statutory requirements, regulations may not themselves create a private right of action). Nor could the Rules authorize the EEOC to litigate claims against an Indian tribe when Congress has assigned that authority to someone else. Cf. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (interpreting Rules to govern preclusive effect of federal judgment "would arguably violate" Enabling Act's prohibition against modification of substantive rights); *Ortiz*, 527 U.S. at 842 (adopting a "limiting construction" of class action rule to "minimize[] potential conflict with the Rules Enabling Act").

Hence, when Congress has precluded one party from directly adjudicating a claim against another, that prohibition may not be circumvented by adverting to Rule 19. This principle applies whether the barrier to direct suit arises from a lack of jurisdiction (personal or subject matter), because the absent party enjoys an immunity to a direct suit, or because Congress has assigned the right to adjudicate the issue with the absent party to another, either by declining to create a private right of action (see *Vieux Carre*, 875 F.2d at 456-58) or, as here, by assigning enforcement responsibilities to a specific federal agency to the exclusion of another.

Contrary to the Ninth Circuit's opinion, see Pet. App. 13a, petitioner's view is consistent with decisions such as *General Building Contractors Ass'n* v. *Pennsylvania*, 458

U.S. 375, 399 (1982).[12] In that case, this Court held that an innocent employer could be joined and subject to a modification of its contract with a union if necessary to remedy the union's history of race discrimination in violation of 42 U.S.C. 1981. 458 U.S. at 400-01. There was nothing in Section 1981 or any other federal statute that indicated that Congress intended to protect innocent employers from such adjudications or obligations, or limit the class of parties who could seek such relief. In contrast, Congress has made clear in this case that any Title VII litigation seeking a modification of the rights and responsibilities of an Indian tribe must be prosecuted by the Attorney General.

Nor does petitioner's position conflict with other ordinary uses of Rule 19 approved in this Court's prior cases. For example, in *Martin* v. *Wilks*, 490 U.S. 755, 763-65 (1989), this Court indicated that Rule 19 would apply to permit the joinder of white firefighters to a race discrimination suit by their African American colleagues against the fire department. Joinder would permit the white firefighters to object to any proposed remedy in the case that might adversely affect their employment rights. Petitioner's view does not preclude joinder in such cases. The joinder of parties who might have grounds to object to the relief requested by the plaintiff is, in essence, the equivalent of a declaratory judgment action by the plaintiff against the absent party to resolve those objections. So long as there would be no impediment to the plaintiff bringing that request for a declaratory judgment directly against the absent party, Rule 19 permits the joinder. However, when the plaintiff is precluded from bringing a direct action – when, for example, the absent party is a State or an Indian tribe that enjoys

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[12] See also *Zipes* v. *TWA*, 455 U.S. 385, 399-400 (1982); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 356 n.43 (1977); *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1095-96 (CA6 1974).

immunity from suit – the plaintiff cannot achieve the prohibited result indirectly through Rule 19 joinder.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffery L. Klinger
PEABODY WESTERN COAL COMPANY
701 Market Street
St. Louis, MO 63101

Thomas C. Goldstein
(*Counsel of Record*)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

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