No. 05-353

In The Supreme Court of the United States

PEABODY WESTERN COAL CO.
and PEABODY COAL COMPANY, LLC,

Petitioners,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF NEW MEXICO AND *AMICI CURIAE* STATES OF ARIZONA, COLORADO, MONTANA, OKLAHOMA, OREGON AND UTAH IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE* STATE OF NEW MEXICO

Patricia A. Madrid, Attorney General of the State of New Mexico, submits the following statement, which reflects the interest of the State of New Mexico in supporting the Petitioners' Petition for Writ of Certiorari, seeking to reverse the decision of the Ninth Circuit Court of Appeals. This decision, which empowers the Equal Employment Opportunity Commission ("EEOC") in a way expressly prohibited by Congress, threatens the sovereignty of the Navajo Nation and of the State of New Mexico and places in jeopardy the delicate balance of power that Congress has established between the United States Government and the governments of the Navajo Nation, other Indian Tribes and the States. If allowed to stand, that decision would permit the EEOC to usurp the authority established by law of the United States Attorney General and to arrogate unto itself the discretion and judgment lawfully confined to the United States Attorney General, to the detriment of the Navajo Nation and of the State of New Mexico.

The Navajo Nation is the largest reservation in the United States, comprising over 27,000 square miles within the states of Arizona, New Mexico, and Utah. According to the 2000 census, the Navajo population within the State of New Mexico is 106,807. The Navajo Nation suffers from 42% unemployment and endures a below-poverty rate of 43%. Revenue sources include 51% from mining.[1] Quite clearly, the Navajo Nation's economic interests and the

[1] The source of this information may be found at www.navajobusiness.com and related links.

well being of its members are of great importance and concern, not only to the Navajo Nation but also to the State of New Mexico.

The EEOC, in this litigation, challenges the lawful authority of the Navajo Nation to require, contractually, adherence to Navajo employment preferences. The Navajo Nation has enacted the Navajo Preference in Employment Act ("NPEA"), 15 N.N.C. §§ 601-619. Congress has expressly denied the EEOC the authority to litigate against a government, in this case, the Navajo Nation. Instead, under Congress' law, only the United States Attorney General may litigate against a government, such as the Navajo Nation. The purpose of NPEA is, among others, to provide employment opportunities, to provide training to the Navajo People, to promote economic development and to protect the health, safety and welfare of Navajo workers. 15 N.N.C. § 602. The Navajo Nation's economic interests and it sovereign governmental interests thus are at stake in this case.

The same law that denies the EEOC the authority to litigate against the Navajo Nation, 42 U.S.C. § 2000e-5(f)(1), also denies the EEOC the authority to litigate against the individual States. However, the Ninth Circuit Court of Appeals, whose decision is at issue here, has allowed the EEOC to skirt that Congressional withdrawal of authority by allowing the EEOC to employ the device of joinder under Rule 19 of the Federal Rules of Civil Procedure. Using this device permitted by the Ninth Circuit Court of Appeals in its decision, the EEOC will join the Navajo Nation as party defendant to the EEOC's suit against Petitioner. Allowing the EEOC to circumvent Congressional will in this manner, by employing a joinder device, imperils the sovereign governmental interests of

the Navajo Nation, as well as the sovereign governmental interests of the State of New Mexico because the court's ruling has application to all the individual States, including the State of New Mexico.

New Mexico, acting by and though her Attorney General, is interested in preserving and protecting the governmental interests and economic well being of all her people from the usurpation of authority that contravenes settled Congressional law and policy.

The joining States, while not necessarily sharing, to the same degree, the privileges and obligations of representing Native People, respect the sovereignty those Nations and Tribes enjoy, and voice their disagreement, as well, with the result reached by the Ninth Circuit Court of Appeals in this case. That result also threatens the sovereignty of the States and most importantly eviscerates Congress' express delegation to the United States Attorney General of the sole authority to determine when and under what circumstances litigation will be undertaken by the United States government against a governmental entity, including the States.

ARGUMENT

I. 42 U.S.C. § 2000e-5(f)(1) prohibits suit by the EEOC against a governmental entity. Allowing the EEOC to join a governmental entity, in this case, the Navajo Nation, under Fed. R. Civ. P. 19 contravenes this prohibition.

A. The plain language of 42 U.S.C. § 2000e-5(f)(1) prohibits suit by the EEOC against a governmental entity, whether by joinder under Rule 19 or otherwise.

"Congress 'says in a statute what it means and means in a statute what is says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). *See also U.S. v. Great Northern*, 343 U.S. 562, 575 (1952) ("It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written"). In the case at bar, Congress has plainly written in its laws that the EEOC cannot litigate against the Navajo Nation or any other government. 42 U.S.C. § 2000e-5(f)(1) provides that if the EEOC is unable to secure an acceptable conciliation agreement from a governmental entity, then the EEOC "*shall take no further action* and *shall refer the case to the Attorney General* who may bring a civil action." (Emphasis added). The device of joinder under Rule 19 of a government, if allowed to be used by the EEOC, would illegally circumvent and evade the express directive of Congress, thus disrespecting and disavowing the considered Congressional policy choices and legitimate policy underpinnings to the express prohibition with respect to the EEOC's authority.

In the case at bar, the EEOC alleges that Petitioner[2] has violated the prohibitions of Title VII of the Civil Rights Act of 1964 against discrimination by giving preference in hiring to Navajos over non-Navajo Native Americans in its coal mining operations on the Navajo and Hopi reservations in northeastern Arizona. Petitioner has mined coal on the reservations since 1964 pursuant to leases with the Navajo Nation. Those leases contain a Navajo hiring preference provision, which obliges lessee Petitioner to give preference in hiring to Navajos. One lease, entered into in 1966, allows the lessee Petitioner to extend the Navajo employment preference to Hopi Indians.[3]

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[2] In its petition for writ of certiorari, at footnote 1, Petitioner states that because the real party in interest is Petitioner Peabody Western Coal Company, the singular term "Petitioner" is used in the petition.

[3] *See* Article XVII of the 1966 lease entitled "Employment Preference":

> Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors where feasible.
>
> Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this Lease. Lessee may at its option extend the benefits of this Article to Hopi Indians.

Pet. App. 28a.

The 1961 Navajo Permit and the 1964 Navajo Coal Lease contain, as well, Navajo employment preference requirements. Pet. App. 21a-24a. The 1964 Joint Use Permit contained an employment preference for the Navajo and Hopi. Before execution, however, a dispute arose resulting in separate mining leases. The Hopi lease contained a preference for Hopi, which the tribe could extend to Navajo. The Navajo lease contained the Navajo preference, which lessee could extend to Hopi. Pet. App. 24a-28a.

Pursuant to the Indian Mineral Leasing Act of 1938, the Secretary of the Department of Interior has approved the leases. If the lease terms are violated, the Navajo Nation and the Secretary of the Interior have the right to declare the lease null and void.[4] According to Petitioner's general counsel from 1968 to 1985, "It is my understanding that the United States Secretary of the Interior required these [Navajo] employment preference provisions as a condition of the leases, as part of a standardized practice by the Secretary of the Interior at the time."[5]

These lease provisions with the Navajo Nation that require Navajo employment preference are consistent with the Navajo Preference in Employment Act ("NPEA"), which provides that: "All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation, shall . . . [g]ive preference in employment to Navajos . . . " 15 N.N.C. § 604.[6]

The Navajo Supreme Court emphasized the importance of NPEA to Navajo governance in *Manygoats v. Atkinson Trading Co., Inc.*, No. SC-CV-62-2000 (Navajo 08/12/2003): "We take judicial notice of the fact that Navajo Nation unemployment rates are very high. The Navajo Nation enacted the NPEA to ensure the economic growth of the Nation and the economic well being of the Navajo workforce." *Id*. ¶ 45.[7]

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[4] *See* the district court's order. Pet. App. 28a.

[5] *See* the district court's order. Pet. App. 29a-30a.

[6] *See* the district court's order. Pet. App. 30a.

[7] *Manygoats v. Atkinson Trading Co., Inc.* may be found at www.tribal-institute.org/opinions/2003.NANN.0000016.htm

Congress expressly exempts Indian tribes from the definition of employer under Title VII and indicates that tribal preference programs cannot serve as the basis for Title VII race discrimination claims. *See* 42 U.S.C. § 2000e(b) and § 2000e-2(i).[8] *See Taylor v. Alabama Intertribal Council Title IV*, 261 F.3d 1032, 1035 (11th Cir.), *cert. denied*, 535 U.S. 1066 (2002) (refusing to allow circumvention of Title VII's bar against race discrimination claims based on a tribe's employment preference by styling it a § 1981 claim); *Yashenko v. Harrah's NC Casino Co., LLC*, 352 F. Supp.2d 653, 663 (W.D. N.C. 2005) (in the context of specific tribal preferences applied by defendant company having a management agreement with the Cherokee: "[I]t would be contrary to Congress' expressed will to allow a plaintiff to circumvent the express provisions of Title VII and assert an employment discrimination claim against an Indian tribe or private business on an Indian reservation for the use of tribal preferences merely by reconfiguring the claim as one for relief under § 1981 instead of Title VII").

As described by the district court with respect to the case at bar, the EEOC seeks in effect to enjoin enforcement of the Navajo employment preference provisions agreed to by the Navajo Nation and Petitioner and approved by the Department of the Interior. The EEOC specifically requests in its complaint that the court

[8] 42 U.S.C. § 2000e(b) provides, in part that for purposes of Title VII, "[t]he term 'employer' . . . does not include (1) an Indian tribe." 42 U.S.C. § 2000e-2(i) exempts from Title VII "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."

"[g]rant a permanent injunction enjoining Peabody . . . and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin."[9] The EEOC has indicated that it intends not only to seek to void or rework the Navajo Nation's coal leases, but also to enjoin the Navajo Nation from enforcing its Navajo Preference in Employment Act.[10] The EEOC describes "the central issue in the case" as "whether the Navajo Nation can discriminate against non-Navajo Native Americans," although its position appears to be in direct contradiction to the position taken by the United States Department of the Interior through its approval of the leases containing the Navajo Employment Preference provisions at issue in this case.[11]

The district court dismissed the EEOC's case, concluding that the Navajo Nation was a necessary and indispensable party to the litigation, which could not be made a party to this litigation by the EEOC under the specific provision of Title VII, 42 U.S.C. § 2000e-5(f)(1) (prohibiting the EEOC from filing an action against a "government").[12] The Ninth Circuit Court of Appeals reversed, concluding that, because no relief against the Navajo Nation had formally been sought, Rule 19 of the Federal Rules of Civil Procedure allowed joinder of the Navajo Nation. In the opinion of the court, Rule 19's purpose was satisfied, because "by definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are so situated as a practical matter as to impair

[9] *See* the district court's order. Pet. App. 43a.

[10] *See Id*.

[11] *See* the district court's order. Pet. App. 44a.

[12] *See* the district court's order. Pet. App. 41a.

the effectiveness of relief or their own or present parties' ability to protect their interest."[13] The Ninth Circuit Court of Appeals also opined that joinder was necessary in order to ensure that "both Peabody and the Nation are bound to any judgment upholding or striking down the challenged lease provision."[14]

It strains credulity to assert that "relief is not sought" by the EEOC against the Navajo Nation. Moreover, becoming "bound" by a judgment, for a governmental entity, such as the Navajo Nation or a State, is a long, expensive, arduous, and worrisome road, and being "bound" clearly can have coercive consequences if adverse. Most importantly, the fact remains that the Navajo Nation, a government, is now, under the appellate court's decision, a defendant in a suit brought by the EEOC and will be required to defend in court its Navajo employment preference law and contractual provisions in response to a suit brought by the EEOC. But the EEOC is expressly without lawful power to institute and maintain such suit against the Navajo Nation.

42 U.S.C. § 2000e-5(f) provides, in part: "(1) . . . 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 . . . 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

[13] *See* the Ninth Circuit appellate court's opinion, quoting *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 440 F. Supp. 506 (N.D. Cal. 1977). Pet. App. 15a.

[14] *See* Pet. App. 14a.

United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. . . ."[15] The EEOC does not dispute that the Navajo Nation is a "government, governmental agency or political subdivision" for purposes of 42 U.S.C. § 2000e-5(f)(1). *See* Pet. App. 35a.

Consistently, 29 C.F.R. § 1601.29 provides, in part: "If the Commission is unable to obtain voluntary compliance in a charge involving a government, governmental agency or political subdivision, it shall inform the Attorney General of the appropriate facts in the case with the recommendations for the institution of a civil action. . . ."[16]

This exclusive role of the Attorney General in cases where governmental entities are involved reflects

> Congress' special concern that a federal administrative agency [the EEOC] could possibly issue orders directly to a non-federal governmental unit. Congress sought to reduce 'the possibility of friction that might be created by a Federal Executive

[15] *See also* 42 U.S.C. § 2000e-5(f)(2), which provides, in part: "Whenever . . . prompt judicial action is necessary . . . the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief. . . ."

[16] *See also* 29 C.F.R. § 1601.27, which provides, in part: "The Commission may bring a civil action against any respondent named in a charge not a government, governmental agency or political subdivision. . . ."; 29 C.F.R. § 1601.23(b), which provides, in part: "In a case involving a government, governmental agency, or political subdivision, any recommendation for preliminary or temporary relief shall be transmitted directly to the Attorney General. . . ."

> agency issuing administrative orders to sovereign states and their subdivisions.' 118 Cong. Rec. at 1170 (January 25, 1972). Congress responded to this concern by requiring that the Attorney General, rather than the EEOC, file civil actions . . . where the respondent was a government, governmental agency or political subdivision. *See* 1972 U.S. Code Cong. & Adm. News, p. 2182.

Minor v. Northville Public Schools, 605 F. Supp. 1185, 1191 (E.D. Mich. 1985). *See also U.S. Equal Employment Opportunity Comm'n v. Illinois State Tollway Authority*, 800 F.2d 656, 659 (7th Cir. 1986) (upholding EEOC's authority to issue subpoenas as not in conflict with the Attorney General's sole responsibility to litigate cases against governmental entities; observing that one Congressional objective to relegating sole responsibility to the Attorney General was that "by placing a cabinet-level head behind the lawsuit, Title VII enforcement would be more effective and [would] reduce friction between State and Federal governmental agencies." Moreover, explained the court:

> Congress uses the term 'civil action' in specific reference to a lawsuit in order to enforce Title VII, *i.e*. bringing a suit on the merits. To allow the EEOC the power of subpoena enforcement will not in any way hinder the Attorney General's authority and discretion in suing state and local governments for violations of Title VII.

Id. at 660.

Considering a Rule 19 joinder issue in light of the Attorney General's exclusive authority contained in 42 U.S.C. § 2000e-5(f)(1), the court, in *Equal Employment*

Opportunity Comm'n v. Elgin Teachers Assn, 658 F. Supp. 624 (N.D. Ill. 1987), focused the Rule 19 joinder issue in this manner: "[W]hether, because the statute precludes such joinder of the Board [of Education of the District] in this EEOC-initiated lawsuit (a classic example of joinder not being 'feasible,' as the caption of Rule 19(b) puts it), the action should be dismissed." *Id*. at 625. The court allowed the action to proceed in the Board's absence. In contrast to the case at bar, the EEOC's injunctive action there, which was based on a collective bargaining agreement that was later changed to eliminate the offending provision, was moot. Thus, no relief of any sort was expressly or necessarily sought by the EEOC against the governmental entity, the board. The only viable claim for relief was for damages, for which the defendant Association could be held solely liable. Thus, in that case, there existed no reason to join the Board. The EEOC sought no order of any sort against the Board. The Association's desire to share with the Board the monetary burden, the court found inadequate to defeat the plaintiff's entitlement to money damages.

Declining to allow the EEOC to "ferry-boat in" a governmental entity school district as an indispensable party to the EEOC's action against a teachers' union, the court, in *Equal Employment Opportunity Comm'n v. Oak Park Teachers' Ass'n*, 45 Fair Empl. Prac. Cases 444, 1985 WL 5220 (N.D. Ill. 1985), stated:

> Congress made a conscious decision to have any action against a governmental body initiated by the Attorney General, not EEOC. The Attorney General could have proceeded against both the [School] Board and OPTA [teachers' union] (the statute does not prohibit the Attorney General from suing private parties; it only prohibits the EEOC from suing governmental entities). . . .

> The responsible governmental unit having decided not to sue the Board, it would directly contradict that congressional decision if the EEOC were now free to proceed against the Board under the guise of Rule 19.

Eschewing the notion that the EEOC *must* be able to join governmental entities or enforcement of the statute will be frustrated, the court stated: "The Attorney General is, after all, part of the federal government also and if he decides to sue a public body he will necessarily have to make the converse decision to join the indispensable private party."

Rebuking the EEOC for its repeated and unsuccessful attempts to circumvent the statutory prohibition of 42 U.S.C. § 2000e-5(f)(1) by suing a governmental entity as a "necessary party" under Fed. R. Civ. P. 19, the court, in *U.S. Equal Employment Opportunity Comm'n v. American Federation of Teachers, Local # 571*, 761 F. Supp. 536 (N.D. Ill. 1991), awarded attorneys' fees to the sued school district, which was dismissed on motion to dismiss. The court found that the EEOC's suit against the district was "not only 'without foundation,' but was frivolous in view of the unambiguous statutory and case law authority which prohibited the EEOC from naming District 205 as a defendant to the suit." *Id*. at 539. While acknowledging that plaintiffs, generally, should not be penalized merely for advancing novel arguments because of the chilling effect that might have, nonetheless, "some litigation deserves to be chilled and this case presents a good example of such litigation." *Id*. at 540.

With respect to the EEOC's argument that it was not seeking relief from the district but was only naming it as a

"necessary party" under Rule 19, the court, in *American Federation of Teachers, Local # 571*, stated:

> [T]he EEOC argues that Congress intended to preclude the EEOC from suing governmental entities for some purposes but not for others. This position is entirely unsupported by the language of the statute, case law, and by any reasonable policy justification.

Id. at 539. Moreover,

> [w]hen the statute uses the term 'no further action' it really has to be read to mean exactly that. It does not permit naming the governmental agency . . . as a defendant and then saying in a sense . . . 'We are not threatening you because we are not seeking relief.' For a party to have to defend against litigation . . . is something that plainly the statute does not impose on the governmental body, except at the instance of the Attorney General and not the EEOC.

Id. at 541.

The EEOC's joinder tactic, allowed by the Ninth Circuit Court of Appeals, is contrary to the plain and unambiguous language of 42 U.S.C. § 2000e-5(f). Neither the Navajo Nation nor any other sovereign government, including the State of New Mexico, should be compelled to defend itself at the instance of one not authorized to sue it.

B. It is especially important in this case that the United States Attorney General be accorded his lawful and exclusive authority and discretion to decide whether to litigate against the Navajo Nation with respect to its employment preference law and its mining leases, which embody that preference. It is equally important that, in all cases involving governments, such as the individual States, the United States Attorney General be accorded this exclusive authority, as Congress has ordained.

For over forty years, Petitioner has mined coal on the Navajo reservation under leases and permits which require that Petitioner adhere to Navajo employment preference requirements. The leases have been amended at various times during this period of time, the most recent amendment occurring in 1999, and each time without any changes to the employment preference provisions.[17] The Secretary of Interior has approved these leases and the Navajo employment preference requirements.[18] This approval by the Secretary of Interior, in the context of this case, bespeaks a classic conflict among federal agencies requiring resolution or control by the United States Attorney General to assure that the federal government speaks with one, and only one, voice in deciding whether to bring a lawsuit against a governmental entity.

Congress intended that disputes between sovereigns be resolved through litigation only in accordance with the

[17] *See* the district court's order. Pet. App. 29a.

[18] *See* the district court's order. Pet. App. 20a-21a; 29a-30a; 44a-47a.

judgment of a politically accountable official, the United States Attorney General, who is institutionally situated to take into account the views of the various federal agencies and to assess the impact and value that litigation may or may not have in the broader context of the relationship that the United States government has with the States of the Union and with its Indian Nations and Tribes. The Attorney General is better positioned and better suited to determine whether reasoned discourse between the United States government and the State or Tribal governments is a better approach to reaching a resolution on a particular issue rather than litigation.

The Attorney General is better suited to assess the relative merits of a litigious issue, both legally and from a broad policy perspective, than is the EEOC. Moreover, Congress has so determined, and that ends any policy debate on the matter from a judicial perspective. *See Hartford Underwriters Ins. Co. v. Union Planters Bank*, N.A., 530 U.S. 1, 13-14 (2000) (observing, in the context of construction of a bankruptcy statute: "[W]e do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that a natural reading of the text produces the result we announce. Achieving a better policy outcome – if what petitioner urges is that – is a task for Congress, not the courts)." The EEOC promotes the idea that, by joinder, it may evade the requirement of referral to the Attorney General for suit, if any, against a governmental entity, but that idea amounts to "a fundamental revision of the statute . . . [and] was not the idea Congress enacted into law. . . ." *MCI Telecommunications Corp. v. American Telephone and Telegraph, Co.,* 412 U.S. 218, 232 (1994).

The Navajo employment preference provisions contained in Petitioner's leases that the EEOC believes are discriminatory go to the heart of Navajo governmental sovereignty, as does the Navajo Preference in Employment Act. Those lease provisions and the Act address critical employment needs of the Navajo People as well as the need to advance skill levels of the Navajo workforce.

The importance of these coal mining leases and the Navajo employment preference provisions to the Navajo Nation, from both an economic and governmental perspective, is explained in *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002) ("*Dawavendewa II*"). There, the plaintiff Hopi member sued, under Title VII, complaining of the Navajo employment preference provisions contained in the defendant district's leases with the Navajo Nation pursuant to which it operated a power plant. Because the Navajo Nation was an indispensable party which could not be joined based on sovereign immunity, the plaintiff's case was dismissed, and the Ninth Circuit appellate court upheld the dismissal. Explaining the reasons for concluding that the Navajo Nation was a necessary party to the action, the court stated:

> [T]he instant litigation threatens to impair the Nation's contractual interests, and thus, its fundamental economic interest with SRP [power plant]. The Nation strenuously emphasizes the importance of the hiring preference policy to its economic well-being. In fact, the Nation asserts that '[without the hiring preference provision], the Navajo Nation would never have approved this lease agreement.'

Id. at 1157.

Continuing, the appellate court stated:

> Because Dawavendewa challenges the Nation's ability to secure employment opportunities and income for the reservation – its fundamental consideration for the lease with SRP – the Nation . . . claims a cognizable economic interest . . . which may be grievously impaired. . . . In addition, a judgment rendered in the Nation's absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation.

Id. Quoting the Navajo Nation's *amicus* brief, the court stated:

> [The lease] has cost Navajo water, Navajo coal, Navajo prime land, and the inevitable pollution of the Navajo homeland. It is a bargained for price that the Navajo Nation alone paid in return for jobs for the Navajo people. . . . Undermining the Nation's ability to negotiate contracts also undermines the Nation's ability to govern the reservation effectively and efficiently.

Id.

In a prior decision involving these parties, *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1124 (9th Cir.), *cert. denied*, 528 U.S. 1098 (2000) ("*Dawavendewa I*"), the Ninth Circuit Court of Appeals reversed the lower court's dismissal of plaintiff's complaint, believing that the Indian preference exemption, 42 U.S.C. § 2000e-2(i) does not include preferences based on tribal affiliation. In *Dawavendewa II*, the court explains its earlier ruling:

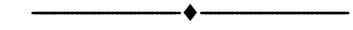
> In *Dawavendewa I*, we held only that a hiring preference policy based on tribal affiliation . . .

> stated a claim upon which relief could be granted. . . . As pointed out by the Solicitor General's amicus brief, however, we did not address the merits of the Nation's proffered legal justifications in defense of the challenged hiring preference policy. In particular, we declined to consider whether the Nation's 1868 Navajo Treaty, the federal policy fostering tribal self-governance, the NPEA, or any other legal defense justified SRP's hiring preference policy.

Dawavendewa II, 276 F.3d at 1158. *Dawavendewa II*, however, in upholding the final dismissal of plaintiff's case for failure to join, and inability to join, the Nation, an indispensable party, may have, at least arguably, opened the door to the present litigation by observing that "nothing precludes Dawavendewa from refiling his suit in conjunction with the EEOC." *Id*. at 1163.

Dawavendewa II erroneously extended this arguable invitation to the EEOC. In no circumstance under 42 U.S.C. § 2000e-5(f)(1) can the EEOC square off as plaintiff in a lawsuit against a government. Only the United States Attorney General may sue a government. The court's very description of matters it has yet to consider in determining the validity of the Navajo employment preference amply demonstrates why Congress has chosen to confide to the United States Attorney General's sole discretion and authority the judgment whether to litigate against a government, the Navajo Nation here.

This Court should firmly shut the door to any attempt to circumvent 42 U.S.C. § 2000e-5(f)(1) by the device of joinder of a government under Rule 19. This Court, therefore, should reverse the Ninth Circuit Court of Appeals below.



CONCLUSION

Amicus Curiae State of New Mexico and the other *Amici Curiae* joining States respectfully submit that the case at bar is extremely important to the preservation of Congress' power to enact and enforce its laws and its policies as established by Congress. *Amicus Curiae* State of New Mexico and the other *Amici Curiae* joining States respectfully pray that the Petition for Writ of Certiorari be granted; that the lower court be reversed; that the lawful and exclusive authority of the United States Attorney General be acknowledged and restored; and that the Court grant such further relief as the Court deems just and proper.

Dated: December 16, 2005

Respectfully submitted,

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