No. 10-1080

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

PEABODY WESTERN COAL COMPANY, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR CROSS-PETITIONER

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All parties agree that the court of appeals incorrectly decided what should happen *if* the Secretary of the Interior is a required party. The court held that the Secretary may be joined as a third-party defendant. As the government has recommended in its response to the petitions for a writ of certiorari, that decision should be vacated and the case remanded for further proceedings. If, however, the Court decides to grant plenary review of the questions how and whether the Secretary may be joined, the Court should also take up the predicate question, which the court of appeals also incorrectly decided: whether the Secretary is actually a required party who must be joined if feasible. Cross-respondents contend that this Court should instead decide how to dispose of this case on the *assumption* that the Secretary is a required party, and that the court of appeals correctly

decided that question in any event. Those contentions lack merit.

A. The Threshold Question Whether The Secretary Is A Required Party Should Be Decided First

Although the judgment below is erroneous, for the reasons already stated in the cross-petition and in the government's response to the petitions, the errors in that judgment do not warrant plenary review. But if the Court does grant plenary review, it should review those errors together: the erroneous ruling that the Secretary is a required party (the Rule 19(a) question) *and* the erroneous ruling that the Secretary may be added as a third-party defendant so that the action may proceed on that basis (the Rule 19(b) question).

Cross-respondents do not dispute that the Rule 19(a) question is logically antecedent to the questions that they raise about joining the Secretary. The Navajo Nation, however, contends (Br. in Opp. 29-32) that the Rule 19(a) question does not warrant plenary review in its own right because this case presents "unique" and "case-specific" issues. *Id.* at 29, 31, 32. That is not the standard for granting a conditional cross-petition. The issues that cross-respondents raise in their petitions—which involve a novel procedural holding that no party had urged the court of appeals to adopt—are certainly "unique," and for that reason an order summarily vacating and remanding this case for further proceedings will adequately dispose of those issues at this stage. Br. for Fed. Resp. 6-7, 9-10, 14-15, 29. If that holding is not summarily vacated and the Court instead grants plenary review, however, the Rule 19(a) question is both important in its own right, Cross-Pet. 10, and antecedent to the Rule 19(b) question cross-respondents ad-

vance. The Rule 19(a) and (b) questions should be reviewed together.

The Navajo Nation urges the Court to resolve the case—and, presumably, to order the case dismissed because the Secretary cannot be joined—while assuming *arguendo* that the Secretary is a required party. As already explained (Cross-Pet. 9), this is not a case where such an assumption is appropriate. By contrast, in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968), the Court could assume that the absent party, Dutcher, was a required party both because that assumption was reasonable (it was a common-fund case) and because, under Rule 19(b), the Court held that the action could proceed even in Dutcher's absence. *Id.* at 108-109. And in *Republic of Philippines* v. *Pimentel*, 553 U.S. 851 (2008), the parties agreed that the Philippines was a required party. *Id.* at 863-864. This case is different because it presents a serious dispute over whether the Secretary belongs in the case at all, and the Court should not bypass that issue before reaching the procedurally complex question whether a third-party claim is the right way to join the Secretary.

Reversing on the logically antecedent Rule 19(a) question would eliminate the incorrect holding that petitioners challenge. This Court has often taken up such an antecedent question even when that question might not warrant review in its own right. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 464-465 (2001); *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); see also *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 130 S. Ct. 1324, 1331 (2010) (Court granted government's petition to resolve circuit conflict and also granted cross-petition to resolve "threshold question" on which there was no conflict). The Court should do the same here: whether

it grants, denies, or summarily disposes of the petitions, it should do the same with the cross-petition.

B. The Secretary Is Not A Required Party

Both cross-respondents principally argue that the conditional cross-petition should be denied because the Secretary is a required party. Even if that argument were a sufficient basis for denying the cross-petition, it is not correct. The court of appeals erred in its application of all three prongs of Rule 19(a).

1. The court of appeals first held that the Secretary is a required party under Rule 19(a)(1)(A) so that defendant Peabody, not plaintiff EEOC, may obtain effective relief. Pet. App. 18a-19a.[1] Peabody itself barely defends the court's reasoning (Br. in Opp. 5 n.2); Peabody never states that it wishes to seek relief from anyone, let alone an "existing part[y], as the rule requires. Fed. R. Civ. P. 19(a)(1)(A); see 10-986 Pet. 16. As numerous courts of appeals have held, Rule 19(a)(1)(A) is not concerned with the possibility of litigation between a party and an "absent person." 4 Richard D. Freer, *Moore's Federal Practice—Civil* § 19.03, at 19-39 n.34 (3d ed. Supp. 2011) (citing cases). And the Secretary, of course, is not an "existing part[y]."

The court of appeals did not explain how its decision can be reconciled with the text of the Rule. And the court's assertion that securing "complete relief among the existing parties" includes allowing Peabody "to seek indemnification from the Secretary," Pet. App. 18a-19a, cannot be squared with this Court's decision in *Temple* v. *Synthes Corp.*, 498 U.S. 5 (1990) (per curiam). In that case, the defendant wanted to seek contribution from a

[1] References to "Pet." and "Pet. App." are to the petition for a writ of certiorari and appendix in No. 10-981.

potential joint tortfeasor, but the defendant's desire did not make the joint tortfeasor a necessary party. *Id.* at 7. Here, the only "existing part[y]" that has sought relief against another is the EEOC, and that relief can be "complete" even if Peabody wishes to seek indemnification or contribution from someone else, Cross-Pet. 12 & n.7,[2] or to bring a dispute with the Navajo Nation to tribal court, see Navajo Br. in Opp. 14-15. The Nation's suggestion (*id.* at 15-16) that an injunction against Peabody under Title VII would have no force and effect unless it also bound the Secretary is incorrect. A lease is not a sufficient ground to ignore a valid injunction. Finally, to the extent that Peabody would be subject to "inconsistent obligations" under Title VII and its lease, that is a matter that implicates not Rule 19(a)(1)(A), but Rule 19(a)(1)(B)(ii). See pp. 7-8, *infra*; Cross-Pet. 13.

2. a. The court of appeals next held that the Secretary "claims [a legally protected] interest" in this litigation that may be impaired if the case proceeds without him. Fed. R. Civ. P. 19(a)(1)(B)(i). The Secretary has not to this point sought to participate in this litigation, and the position of the United States as a whole, expressed through the Solicitor General, is that the Secretary is not a required party. See Cross-Pet. 15.

The court of appeals relied on two cases standing for the proposition that parties to a lease must be joined in "an action to set aside [that] lease." Pet. App. 20a (citation omitted). The Secretary is not a party to the leases, and this is not an action to declare the leases void *ab initio*. Compare *Lomayaktewa* v. *Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) (Tribe was a necessary party

[2] The court of appeals did not acknowledge that Title VII provides no right of action for contribution in any event. Navajo Br. in Opp. 17; Br. for Fed. Resp. 18 & n.12.

to action to "void" or "cancel" tribal lease), cert. denied, 425 U.S. 903 (1976). If Peabody is ultimately enjoined to refrain from making employment decisions in a particular way, Peabody's subsequent obligations under its leases may later become a matter of dispute among Peabody, the Navajo Nation, and conceivably the Secretary. See Cross-Pet. 16. But the possibility of such future disputes does not give the Secretary a direct interest "relating to the subject of [*this*] action" that may be "impair[ed]" within the meaning of Rule 19(a)(1)(B).

In particular, cross-respondents and the court of appeals err in asserting that any injunction in this case would conflict with a requirement, imposed by the Secretary, to afford tribal preferences. Cross-respondents rely on the Secretary's role in the formation of the original leases in 1964 and 1966, and they assert that the Secretary still requires leases to include tribal-preference provisions. Peabody Br. in Opp. 8-9; Navajo Br. in Opp. 8. Under regulations in effect today, the Tribes may negotiate and the Secretary may approve contractual commitments that deviate from the form lease, including with respect to tribal preferences. 25 C.F.R. 211.20(d), 211.57.[3] Thus, whether to negotiate for a tribal preference is the Tribes' decision in the first instance. And even in 1964 and 1966, the leases at issue here did not simply adopt the form, compare Pet. App. 127a with *id.* at 128a, 130a, and the tribal preferences were included at the Navajo Nation's request. *Id.* at 5a; Cross-Pet. 4.

b. The court of appeals' conclusion that the Secretary is a necessary party to an action that might cause modifications of a tribal lease (modifications that the

[3] The regulations were modified "to provide the tribes as much freedom as possible to make their own determination on issues affecting the development of their minerals." 61 Fed. Reg. 35,635 (1996).

Secretary must approve or reject), Pet. App. 20a; Peabody Br. in Opp. 10, threatens to embroil the Secretary in a wide variety of disputes over the lawfulness of individual lease provisions. Although the EEOC cannot join the Secretary under Rule 19 (and has never sought to do so), Pet. App. 22a; Navajo Br. in Opp. 22, under the reasoning of the court of appeals any other person seeking injunctive relief potentially might do so. See Pet. App. 25a-29a.

Even if the Secretary might wish to intervene in *some* such actions, that is no reason to treat him as a necessary party in *all* such actions. Contrary to the Navajo Nation's suggestion (Br. in Opp. 22-23, 25), the Secretary's ability to intervene does not turn on his being a required party. See, *e.g.*, Fed. R. Civ. P. 24(a)(1) and (b).[4] The Nation also suggests (Br. in Opp. 25-26) that anything less than full party status for the Secretary will be inadequate—even where, as here, the Secretary has not sought to participate as a party or otherwise. That concern is particularly misplaced here, where cross-respondents seek not the Secretary's participation, but his nonparticipation, so that the action may be dismissed in light of his absence.

3. Finally, the court of appeals concluded that Peabody would face inconsistent obligations if the Secretary is not made a party under Rule 19(a)(1)(B)(ii). Pet. App. 21a. Cross-respondents' defense of that conclusion is unavailing.

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[4] The Secretary does have a general interest in the underlying merits of this case, because of his role in approving numerous leases, contracts, and tribal ordinances containing tribal-preference provisions. Cross-Pet. 15. That interest does not make the Secretary a required party for purposes of Rule 19(a)(1)(B), but it would support intervention under Rule 24.

First, if an injunction were entered against Peabody and the lease were then terminated or modified, Peabody would face no inconsistent obligations. Cross-Pet. 16. The Navajo Nation's (incorrect) assertions (Br. in Opp. 8-9, 20-21) that it plays no role in termination decisions are beside the point.

Second, any holding in this case will be binding on the Navajo Nation in any subsequent litigation over Peabody's compliance with the existing leases, including litigation in tribal court. Compare Navajo Br. in Opp. 14 with Peabody Br. in Opp. 14 n.10. Thus, Peabody is already protected against any attempt by the Nation—the other party to the leases—to hold it to inconsistent legal obligations under the existing leases. Cross-Pet. 15-16.

Third, Peabody cannot show a genuine risk of inconsistent obligations by speculating (Br. in Opp. 12-13) that, if it is enjoined and complies with the injunction, the Secretary might seek to impose monetary penalties for noncompliance with the lease. Rule 19(a)(1)(B)(ii) requires that a risk be "substantial," not merely speculative. Even if the Secretary did take such a step and Peabody unsuccessfully sought judicial review, Peabody is not bound to the leases in perpetuity; it has the right to surrender and terminate its leasehold at any time. C.A. E.R. 144, 161. (Peabody also has discretion under one lease to extend the preference to Hopi Indians. Pet. App. 130a.)

C. The Judgment Should Be Vacated And The Case Remanded

As explained in the government's response to the petitions, the appropriate disposition of this case is to summarily vacate and remand for further consideration by the court of appeals. The court concluded that this action may continue, but only as to injunctive relief, based on a set of rulings about ability to bring a third-party claim against the Secretary. All parties agree that those rulings were erroneous and that the resulting judgment (a partial remand for proceedings in which the Secretary may be joined) is also erroneous.[5] If the court of appeals is given the opportunity to reconsider its decision, with the benefit of briefing on that issue, there is a reasonable probability that it will change its disposition. See Br. for Fed. Resp. 10-11, 14-15.

Because vacatur is appropriate on the questions presented by the petitions, the vacatur should extend to the Rule 19(a) question addressed in the cross-petition as well. When multiple petitions for a writ of certiorari seek review of the same judgment, and when this Court disposes of one such petition by vacating or reversing the judgment below, the Court's practice is to grant all other pending petitions arising from the same judgment and remand for reconsideration of the entire case. That is so even in the case of conditional cross-petitions or petitions presenting distinct questions. See, *e.g.*, *Sawyer* v. *Iqbal*, 129 S. Ct. 2431 (2009) (No. 07-1150) (granting conditional cross-petition and remanding); *Amara* v. *CIGNA Corp.*, 131 S. Ct. 2900 (2011) (No. 09-784)

[5] Cross-respondents seek outright affirmance of the district court's Rule 19(b) dismissal; the EEOC seeks to proceed without the Secretary's being made a party.

(granting cross-petition presenting distinct questions and remanding); *Estate of Roxas* v. *Pimentel*, 554 U.S. 915 (2008) (No. 06-1039) (same, in Rule 19 case). Adhering to that practice here will ensure that the court of appeals has every opportunity to correct its erroneous view that the Secretary should be impleaded, including by reconsidering its decision that the Secretary is a required party.

CONCLUSION

For the foregoing reasons, as well as those set forth in the conditional cross-petition, if the petition for a writ of certiorari in either No. 10-981 or No. 10-986 is granted, the conditional cross-petition should also be granted. If the Court denies the petitions in Nos. 10-981 and 10-986, the cross-petition should be denied.

Respectfully submitted.

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