Nos. 10-981 and 10-986

In the Supreme Court of the United States

NAVAJO NATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

PEABODY WESTERN COAL COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

This case involves an allegation by the Equal Employment Opportunity Commission (EEOC) that petitioner Peabody Western Coal Co. discriminated against job applicants based on their national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. Under the terms of its mining leases with petitioner Navajo Nation, which are approved by the Secretary of the Interior, and in accordance with a tribal ordinance of the Nation, Peabody affords a preference to members of the Nation in hiring for operations under the leases. The questions presented are as follows:

1. Whether the court of appeals, having held that the Secretary of the Interior is a required party under Rule 19 of the Federal Rules of Civil Procedure and that the EEOC may not join the Secretary, erred in holding that the action should nonetheless proceed on the theory that petitioners may implead the Secretary as a third-party defendant.

2. Whether the court of appeals correctly held that the EEOC could join the Navajo Nation as a party, where it seeks no affirmative relief against the Nation but seeks only to ensure that any preclusive effect of the litigation between the EEOC and Peabody would bind the Nation as well.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-32a) is reported at 610 F.3d 1070.[1] The opinion of the district court (Pet. App. 33a-66a) is not published in the *Federal Supplement* but is available at 2006 WL 2816603. An earlier opinion of the court of appeals (Pet. App. 67a-87a) is reported at 400 F.3d 774. The opinion of the dis-

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

trict court that formed the basis of that appeal (Pet. App. 88a-121a) is reported at 214 F.R.D. 549.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2010. Petitions for rehearing were denied on September 1, 2010 (Pet. App. 1a). On November 22, 2010, Justice Kennedy extended the time for both petitioners to file a petition for a writ of certiorari to January 29, 2011. The petition for a writ of certiorari in No. 10-981 was filed on January 28, 2011. The petition for a writ of certiorari in No. 10-986 was filed on January 31, 2011 (Monday). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Peabody Western Coal Co. mines coal at the Black Mesa Complex and Kayenta Mine on the Navajo and Hopi Reservations in northeastern Arizona. Pet. App. 4a. At issue in this case are two leases that Peabody's predecessor entered into with petitioner Navajo Nation: a 1964 lease (Lease 8580) that permits Peabody to mine on the Navajo Reservation, and a 1966 lease (Lease 9910) that permits it to mine on the Navajo portion of land jointly used by the Navajo Nation and Hopi Tribe. *Ibid.*; see *United States* v. *Navajo Nation*, 537 U.S. 488, 495, 498 n.5 (2003). The Secretary of the Interior is not a party to the leases, although pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*, the Secretary must approve such leases and any amendments and extensions. Pet. App. 5a; *Navajo Nation*, 537 U.S. at 494. If both the Nation and the Secretary determine that there has been a violation of the terms of a lease, they may cancel the lease after a notice and cure period. C.A. E.R. 144-145, 161.

Both leases include a provision requiring Peabody to grant an employment preference based on tribal membership. Lease 8580 provides that Peabody "agrees to employ Navajo Indians when available in all positions for which, in the judgment of [Peabody], they are qualified," and that Peabody "shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with * * * this Lease." Pet. App. 5a (brackets in original). Lease 9910 contains a similar term, but permits Peabody to extend the hiring preference to Hopi Indians at its discretion. *Ibid.* The Department of the Interior drafted the leases and, at the Navajo Nation's request, required the inclusion of the Navajo employment preferences. *Ibid.*; C.A. E.R. 81. In addition, since 1985, a tribal ordinance, the Navajo Preference in Employment Act, Navajo Nation Code Ann. tit. 15, § 601 *et seq.*, has separately required "[a]ll employers doing business within the territorial jurisdiction * * * of the Navajo Nation" to "[g]ive preference in employment to Navajos." *Id.* § 604(A)(1); Pet. 10 & nn.1-2.

2. In June 2001, the Equal Employment Opportunity Commission (EEOC), the federal respondent here, filed this suit against Peabody. The complaint identified three Indians from Tribes other than the Navajo Nation and alleged that Peabody had refused to hire them (and unspecified others) based on their national origin.[2] The EEOC asserted that Peabody was in violation of two provisions of Title VII of the Civil Rights Act of 1964: 42 U.S.C. 2000e-2(a)(1), which prohibits employers from refusing to hire applicants because of their national ori-

[2] Two charging parties were members of the Hopi Tribe, and the third was a member of the Otoe Tribe. Pet. App. 3a, 6a.

gin, and 42 U.S.C. 2000e-8(c), which imposes certain record-keeping requirements. Pet. App. 6a.

The EEOC sought three forms of relief: (1) injunctive relief prohibiting Peabody from discriminating on the basis of national origin; (2) monetary relief, including backpay with interest, compensatory damages, and punitive damages; and (3) an order requiring Peabody to make and preserve records in compliance with Title VII. Pet. App. 6a-7a.

3. The district court granted summary judgment for Peabody. Pet. App. 88a-121a. The court concluded that, under Rule 19 of the Federal Rules of Civil Procedure, the action could not proceed.

Rule 19(a)(1) provides that a person who is a "[r]equired [p]arty" must be "[j]oined if [f]easible." A person may be a required party if, "in that person's absence, the court cannot accord complete relief among existing parties," or if "that person claims an interest relating to the subject of the action" and other conditions are met requiring that person's participation in the action. If a required party cannot be joined, Rule 19(b) requires that the court determine, based on specified factors, whether the action should be dismissed rather than proceed in the required party's absence.[3]

The district court concluded that the Navajo Nation was a required party. Pet. App. 104a-105a.[4] The court

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[3] Rule 19 was revised in 2007, while this case was pending in the court of appeals, but the changes were stylistic only. See Pet. App. 10a-11a & n.1. This brief therefore uses the terminology of the amended version of the Rule. See *id.* at 11a; accord *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 855-857 (2008).

[4] The EEOC conceded that, under then-recent precedent of the Ninth Circuit, the Nation was a required party. See Pet. App. 105a; *Dawavendewa* v. *Salt River Project Agric. Improvement & Power*

further concluded that the Nation could not be joined because Title VII precludes the EEOC from suing a tribal government, *id.* at 104a-111a (citing 42 U.S.C. 2000e-5(f)(1), which gives the Attorney General exclusive authority to sue "a respondent which is a government," and 42 U.S.C. 2000e(b), which excludes Indian Tribes from the definition of the term "employer"). The court then concluded that, under Rule 19(b), the action could not proceed without the Nation. *Id.* at 111a-113a.

The court held in the alternative that the action presented a nonjusticiable political question. Pet. App. 113a-120a.

4. The court of appeals reversed. Pet. App. 67a-87a. The court agreed with the district court that the Navajo Nation is a required party under Rule 19(a) and that the EEOC may not sue the Nation under Title VII regarding the Nation's own employment practices. *Id.* at 76a-78a.[5] The court held, however, that the suit need not be dismissed, because the EEOC could join the Nation as a party under Rule 19 without actually stating a claim against it. *Id.* at 78a-83a. The court also held that the case does not present a nonjusticiable political question. *Id.* at 84a-86a.

This Court denied certiorari. *Peabody W. Coal Co.* v. *EEOC*, 546 U.S. 1150 (2006) (No. 05-353).

Dist., 276 F.3d 1150, 1155-1159 (9th Cir.) (holding that the Navajo Nation was a required party in a Title VII action brought by a private plaintiff to challenge a tribal preference that the employer was required to apply pursuant to its lease with the Nation and the Navajo Preference in Employment Act), cert. denied, 537 U.S. 820 (2002).

[5] As in the district court, the EEOC did not dispute that the Navajo Nation was a required party, in light of the court of appeals' precedent in *Dawavendewa*. Pet. App. 76a; see note 4, *supra*.

5. On remand, the EEOC amended its complaint to name the Navajo Nation as a defendant. Pet. App. 8a, 15a. The district court then granted summary judgment for both petitioners on three alternative grounds. Pet. App. 33a-66a. As relevant here, the court concluded that the Secretary of the Interior was a required party to the action; that the Secretary could not be joined; and that the action could not proceed without the Secretary. *Id.* at 54a-65a.[6]

6. The EEOC appealed. On appeal, the EEOC contended that the Secretary was not a required party and that, even if he were, the litigation should be allowed to proceed without him under the factors set out in Rule 19(b). The EEOC did not challenge the district court's ruling that the Secretary could not be joined in the litigation; rather, it stated that even if the Secretary's participation might be useful, the case should proceed "given that the Secretary cannot be joined." EEOC C.A. Br. 36; accord EEOC C.A. Reply Br. 22-23 ("[T]he district court abused its discretion in dismissing EEOC's lawsuit rather than proceeding without the Secretary.").

In its reply brief, in explaining why the Secretary's presence was not needed to relieve Peabody from inconsistent obligations, see Fed. R. Civ. P. 19(a)(1)(B)(ii), the EEOC noted Peabody's contention that it should be able to bring a claim for prospective relief against the Secre-

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[6] The district court also granted summary judgment for petitioners on two alternative theories: (1) that the EEOC's amended complaint impermissibly sought affirmative relief against the Navajo Nation; and (2) that the EEOC's claim failed on the merits because the Navajo-Hopi Rehabilitation Act, 25 U.S.C. 631 *et seq.*, authorizes the tribal preference. Pet. App. 45a-54a. Those alternative grounds are not at issue here. See *id.* at 8a, 31a; note 8, *infra*.

tary. The reply brief observed: "If Peabody had such a cross-claim against the Secretary, however, nothing prevented it from filing a third-party complaint under Rule 14(a)" of the Federal Rules of Civil Procedure. EEOC C.A. Reply Br. 23.

7. The court of appeals reversed in part and vacated in part. Pet. App. 2a-32a.

a. The court of appeals agreed with the district court that the Secretary is a party required to be joined if feasible.[7] The court relied on all three prongs of Rule 19(a): First, the court concluded that the Secretary's presence is required under Rule 19(a)(1)(A) to "accord complete relief among the existing parties," on the theory that if Peabody is subject to money damages it may seek contribution from the Secretary, and if Peabody is subject to an injunction against the tribal-preference provisions it may seek to prevent the Secretary from insisting that Peabody honor the tribal-preference provisions on pain of termination of the leases. Pet. App. 18a-19a. Second, the court concluded that under Rule 19(a)(1)(B)(i), the Secretary has an interest in the action that may be impaired if he does not participate, because the court perceived the Secretary's role in approving the leases as akin to actually being a signatory. See *id.* at 20a (same "underlying principle" applies to Secretary as to an actual signatory). Finally, the court concluded that under Rule 19(a)(1)(B)(ii), Peabody might be subject to inconsistent obligations if it lost this case and if the Secretary, not bound by that judgment, then decided to cancel or modify the leases or maintain them in their current form. *Id.* at 21a.

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[7] The EEOC has filed a conditional cross-petition for a writ of certiorari (No. 10-1080) seeking review of that holding.

b. The court further agreed with the district court that the EEOC cannot join the Secretary as a defendant because the EEOC cannot sue a governmental agency. Pet. App. 22a (citing 42 U.S.C. 2000e-5(f)(1)). The court therefore affirmed the dismissal of the EEOC's claim for monetary relief against Peabody. *Id*. at 23a-25a.

c. The court held, however, that Rule 19(b) does not require the dismissal of the EEOC's claim for injunctive relief. The court concluded that petitioners can mitigate any prejudice they might experience as a result of the EEOC's inability to join the Secretary as a defendant, because they can implead the Secretary as a *third-party* defendant under Rule 14. Pet. App. 25a-31a.

Rule 14 allows a defending party (or a plaintiff, if defending against a counterclaim) to "[b]ring in" a third-party defendant—"a nonparty who is or may be liable to [the defendant] for all or part of the [plaintiff's] claim against [the defendant]." Fed. R. Civ. P. 14(a)(1); see Fed. R. Civ. P. 14(b). "Bringing in" a third party is also known as "impleader." See Fed. R. Civ. P. 14 advisory committee's note (1937).

The court of appeals concluded that under Rule 14(a), petitioners could bring the Secretary into this litigation and assert against him a third-party claim for declaratory and injunctive relief. Pet. App. 25a-31a. The court stated that the sovereign immunity of the United States does not bar an action against the Secretary under the Administrative Procedure Act (APA), 5 U.S.C 551 *et seq.*, because that statute waives sovereign immunity for challenges to "final agency action" by the Secretary. Pet. App. 25a-29a; see 5 U.S.C. 702. The court, however, did not analyze whether such a claim could be brought under Rule 14(a), either as a general matter or in the context of this litigation. Rather, the

court merely stated without elaboration that "Rule 14(a) would permit Peabody and the Nation to file a third-party complaint seeking [prospective] relief against the Secretary." Pet. App. 25a.

The court then held that the ability to bring in the Secretary under Rule 14(a) precluded petitioners from obtaining dismissal under Rule 19(b) based on the Secretary's absence. "To the degree that Peabody and the Nation may be prejudiced by the absence of the Secretary as a plaintiff or defendant," the court stated, "that prejudice may be eliminated by a third-party complaint against the Secretary under Rule 14(a)." Pet. App. 30a; see *id.* at 29a-31a. Thus, the court of appeals concluded, "in equity and good conscience" the EEOC's action against petitioners should proceed. *Id.* at 31a (quoting Fed. R. Civ. P. 19(b)).[8]

8. On remand, after the mandate issued, the EEOC amended its complaint to eliminate the demand for monetary relief. Petitioners filed answers. The district court has stayed the case pending this Court's disposition of the petitions.

DISCUSSION

Reaching a conclusion not urged by any party below, the court of appeals incorrectly held that Rule 14(a) may properly be used to bring a federal agency into a case brought by another federal agency and presenting no

[8] The court of appeals also disagreed with the district court's conclusion that the amended complaint impermissibly sought affirmative relief against the Navajo Nation under Title VII. Pet. App. 12a-16a. The court remanded the underlying merits question, whether the tribal preference violates Title VII, for further development once the Secretary has been brought in as a third-party defendant. *Id*. at 31a. Petitioners have not raised any question related to the underlying merits in this Court.

claims for monetary relief. Although that decision does not warrant plenary review by this Court, the government agrees that further proceedings on that question are warranted. Because the court of appeals only cursorily examined the scope of proper claims under Rule 14(a), and because all parties agree that the decision on that issue should be reconsidered, this Court should grant the petitions for a writ of certiorari, vacate the judgment of the court of appeals, and remand for further consideration by that court.

Petitioners' remaining contentions do not warrant further review. Indeed, this Court has already declined to review the question whether the Navajo Nation was properly joined in this case. Accordingly, in all other respects, the petitions should be denied.

Should the Court grant certiorari on one or more of the questions involving whether the Secretary may properly be joined in this case, it should also grant certiorari on the predicate question whether the Secretary is a required party in this case at all, for the reasons stated in the EEOC's conditional cross-petition for a writ of certiorari (No. 10-1080).

A. The Case Should Be Remanded For Further Proceedings On The Rule 14 Question

1. The court of appeals' holding that the EEOC's injunctive claims could go forward rested on several steps of reasoning: (1) the Secretary does not have sovereign immunity against a claim challenging final agency action and seeking only prospective relief; (2) petitioners can assert such a claim against the Secretary; (3) therefore, petitioners can assert such a claim against the Secretary *in this litigation*, by filing a third-party complaint under Rule 14; and (4) petitioners' abil-

ity to implead the Secretary justifies denying their motion to dismiss under Rule 19(b). The court discussed the second and third steps only briefly, and its analysis of both steps was flawed.

Essentially, the court of appeals appears to have reasoned that because petitioners could file a freestanding complaint against the Secretary under the APA, they could also file a *third-party* complaint against the Secretary under the APA and bring the Secretary into this action under Rule 14(a). But simply because petitioners might be able to sue the Secretary somewhere does not mean that they may join the Secretary here. The court gave scant attention to whether the posited APA action against the Secretary would meet the requirements of Rule 14(a).

The government agrees with petitioners that Rule 14(a) does not permit the Secretary to be impleaded under these circumstances. Because this issue was not adequately developed in the briefs below, because the panel did not thoroughly analyze it, and because all parties agree that the panel erred, the appropriate course is to remand the case to the court of appeals for further consideration of this issue. Plenary review, however, is not warranted: the court of appeals considered a unique set of facts and considered the Rule 14(a) issue only briefly, and as a result, its decision does not create any circuit conflict that calls for resolution by this Court.

a. First, as Peabody points out (10-986 Pet. 16), Rule 14 on its face does not give defendants who may face an injunction a way to seek their own injunction against someone else. Rule 14(a)(1) allows a party to bring in a third-party defendant only if the third-party defendant "is or may be liable to [the original defendant/third-party plaintiff] for all or part of [the original plaintiff's]

claim against [the original defendant/third-party plaintiff]." Accord Fed. R. Civ. P. 14(a) (2006) (version before non-substantive restyling). The Rule was amended many years ago to specify that a nonparty who is potentially liable only to the original *plaintiff*, not the original defendant, cannot be brought in through impleader. Fed. R. Civ. P. 14(a) advisory committee's note (1946). Impleader, therefore, can occur only when, if the plaintiff succeeds on the claim that is already in the action, the defendant will have a right to recover some or all *of that liability* from someone who is not yet a party. But merely being able to state a claim against the third-party defendant is not enough; the third-party claim must be sufficiently related to the original claim that they belong in the same case, not different ones.

Here the court of appeals held that the Secretary could be impleaded into a Title VII action seeking injunctive relief.[9] Even if, as the court of appeals supposed, petitioners could bring an APA claim against the Secretary to challenge his approval of the leases, that APA claim would not belong in this case under Rule 14. Impleader is usually invoked when a plaintiff seeks money damages and the defendant seeks indemnity or contribution from someone else. Although impleader may also sometimes be appropriate even when the plaintiff seeks only injunctive relief, Rule 14 makes clear that impleader is proper only when the third-party defendant allegedly must somehow compensate or indemnify the original defendant for his liability on the plaintiff's claim. See, *e.g.*, *Lehman* v. *Revolution Portfolio L.L.C.*,

[9] The court of appeals affirmed dismissal of the EEOC's claims for monetary relief on the ground that the Secretary is a required party with respect to those claims but is not subject to suit for money damages. Pet. App. 23a-25a.

166 F.3d 389, 394 (1st Cir. 1999) (impleader was proper because the plaintiff might recover damages instead of the equitable relief he sought).

Here, the Secretary is not "liable to" petitioners "for all or part of" the EEOC's Title VII claim. If Peabody were enjoined, it could not transfer its liability or obtain relief from that injunction by suing the Secretary. Rather, the court of appeals contemplated that Peabody could use its third-party claim under the APA to ensure that, if it were ordered to abandon its tribal preference, it would not be in breach of its lease. But Rule 14 is used to apportion liability on existing claims; it is not a vehicle for a defendant to avoid contingent *future* liability.

As for the Navajo Nation, the court of appeals has twice held that the EEOC may not seek affirmative relief against it, Pet. App. 16a, 81a, and the EEOC is not seeking such relief. *Id.* at 15a; 2d Am. Compl. 5-6. Because the Navajo Nation faces no liability in this action, it can have no claim under Rule 14 against anyone.

As the Navajo Nation correctly states (Pet. 22), Rule 14 is not "a sort of equitable interpleader rule" that allows a nonparty to be brought in whenever desirable to avoid conflicting obligations. It is Rule 19, not Rule 14, that addresses the situation in which a party may face conflicting obligations unless another person is brought into the litigation. The court of appeals hypothesized a third-party claim against the Secretary without applying the appropriate standard to decide whether such a claim would be proper under Rule 14.

b. Furthermore, even if an APA claim could ever be asserted under Rule 14(a), the court of appeals did not adequately explain why petitioners would be able to bring such a claim in the circumstances of this case. An

APA plaintiff is "[a] person * * * adversely affected or aggrieved by agency action." 5 U.S.C. 702. To bring the action that the court of appeals hypothesized, petitioners would have to establish that they were adversely affected when the Secretary *granted* their request to approve the lease that they themselves negotiated and signed—and, indeed, wish to continue. See, *e.g.*, Pet. 23 n.6. Although the court of appeals explained why petitioners are "persons," it did not explain why they have been "aggrieved" by the Secretary's approval of their lease.

The court of appeals suggested that petitioners' putative APA claim would take the form of a claim for "prospective relief preventing the Secretary from enforcing the [tribal-preference] provision" of the leases. Pet. App. 25a. But a suit to set aside the Secretary's approval of the leases in the 1960s—the "final agency action" to which the court alluded, *id.* at 29a—is not the same thing as a suit to restrain the Secretary from taking some *future* action to *enforce* the lease. The latter type of suit is not cognizable under the APA at all, because it does not challenge final agency action. And the court of appeals did not suggest that petitioners could find a cause of action for their third-party claim under some source other than the APA, such as the Constitution.

2. a. Because the parties did not advocate or brief the Rule 14 theory on which the court of appeals relied, see pp. 6-7, *supra*, and because no party now contends that that theory is correct, this Court should grant the petitions, vacate the judgment of the court of appeals, and remand for further consideration (GVR) in light of the position expressed in this brief. As explained above, the court of appeals gave only brief attention to essential

points of its analysis: what petitioners' putative APA claim might be and how that putative claim would satisfy Rule 14(a)(1)'s requirement that a third-party claim seek to apportion liability on the plaintiff's underlying claim, which under the court of appeals' holding is not a monetary claim at all but a claim for injunctive relief under Title VII. See 2d Am. Compl. 5-6. In light of that explanation, and given the opportunity for further briefing specifically directed to this subject, there is a reasonable possibility that the court of appeals will reconsider its erroneous decision. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam); accord, *e.g.*, *Wellons* v. *Hall*, 130 S. Ct. 727, 731-732 (2010) (per curiam).[10]

b. Although the decision below is flawed, it does not satisfy the Court's criteria for plenary review. A GVR order would resolve petitioners' claims of a conflict, and in any event the highly unusual decision below does not conflict with any decision of another court of appeals or of this Court. Accordingly, if the Court determines that a GVR order is not warranted, it should decline further review of the Rule 14 issue at this time.

The Navajo Nation asserts (Pet. 22-23) that the decision below conflicts with holdings of several other circuits. That contention is not well taken. In *Malone* v. *United States*, 581 F.2d 582 (6th Cir. 1978), cert. denied, 439 U.S. 1128 (1979), the court of appeals affirmed dismissal of a third-party claim against the United States, but it did not suggest that the claim was improper under

[10] Although the court of appeals' conclusion that the Secretary is a required party is not an independent basis for a GVR order, the court of appeals could also reconsider that threshold issue if this Court were to grant, vacate, and remand as recommended above. To ensure that the court of appeals was able to do so, the Court may wish to include the EEOC's conditional cross-petition in any GVR order.

Rule 14. In fact, the third-party claim sought indemnity, just the sort of monetary claim that may proceed under Rule 14. Rather, the claim failed under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, because it turned on performance of a discretionary function and because the third-party complaint failed to allege negligence by the government. *Id.* at 583-584. And in *Southeast Mortgage Co.* v. *Mullins*, 514 F.2d 747 (5th Cir. 1975), the court held that Rule 14 cannot be used to assert a claim that is "separate and independent" from the plaintiff's underlying claim. *Id.* at 749, 750 (citation omitted). The defendant's third-party complaint sought to sue a federal agency for failing to prevent the injury that led to the underlying suit (a foreclosure action). *Id.* at 748-749. Here, the court of appeals evidently thought the claims were not "separate and independent" because an injunction against Peabody would create a risk (breach of the lease) that the third-party claim would alleviate. See Pet. App. 25a. There is no reason to conclude, from the court of appeals' brief discussion of Rule 14 in this case, that *Mullins* would come out differently under the decision below.

Both petitioners rely extensively on the Seventh Circuit's decision in *City of Peoria* v. *General Electric Cablevision Corp.*, 690 F.2d 116 (1982). That case devoted only a single sentence to Rule 14 and does not create a circuit conflict. The Federal Communications Commission (FCC) promulgated a rule limiting cable franchise fees. Peoria had an agreement with its cable franchisee, known as GECCO, that imposed fees in excess of the limit, and it sued GECCO asserting that the FCC rule was invalid and demanding that the franchisee continue to pay the full fee. GECCO, in turn, sought to implead the FCC to allow the court to decide whether

the FCC rule was invalid (an issue on which GECCO was agnostic). The court of appeals held that neither Peoria's suit nor GECCO's third-party claim was cognizable in federal district court, because both challenged the validity of FCC rules that can be reviewed only in the courts of appeals. See *id.* at 119-120. That jurisdictional ground was the court's principal holding. The court also noted in passing that, "since GECCO cannot seriously be contending that if it loses to Peoria in the original suit the FCC 'may be liable to [GECCO] for all or part of [Peoria's] claim against [GECCO],' GECCO's third-party complaint is in any event outside the impleader jurisdiction that has been conferred on the federal courts." *Id.* at 120 (brackets in original; citation omitted). But that single sentence of alternative dictum, which was unnecessary in light of the jurisdictional holding, creates no square conflict with the decision here. Peoria's suit asked GECCO to continue doing what it was doing, and GECCO's third-party claim asked the court to declare whether that practice was lawful. Under the court of appeals' holding here, by contrast, Peabody could face liability (injunctive relief) for unlawful conduct, and the third-party claim would be brought against the federal officer who had approved the lease that required the allegedly unlawful conduct. Although that reasoning does not comport with Rule 14, as discussed above, it is not squarely contrary to *Peoria*.[11]

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[11] One reported appellate decision has allowed a federal agency to be impleaded in a case involving the validity of a state regulation that was adopted pursuant to a federal statute. See *Kozera* v. *Spirito*, 723 F.2d 1003 (1st Cir. 1983). The court of appeals in that case, however, addressed only standing, sovereign immunity, and exhaustion, not whether the impleader was proper; the impleader was initiated in state court under state procedural rules, before the agency removed the

Furthermore, because the court of appeals relied on the waiver of federal sovereign immunity and cause of action under the APA, the Rule 14 issue in this case simply does not present any question concerning abrogation of immunity (Pet. 18-21) or the need for a statutory cause of action (Pet. 21-22). The Navajo Nation is correct in stating that success on a third-party claim (like any other claim) requires a cause of action, such as a state-law right to recover contribution, and that this Court has held that Title VII does not create such a right of action. Pet. 21-22 (citing *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 90-99 (1981)). But those principles have no relevance here: the court of appeals identified a cause of action under the APA, which does not exist in private-party litigation like *Northwest Airlines*.[12] Contrary to the Navajo Nation's suggestion (Pet. 21), this Court has not held that "impleader is proper only if the federal statute on which the main claim is based confers a right of contribution." In *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), this Court held only that the Sherman Act and Clayton Act do not create a cause of action for

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case. *Id.* at 1005-1011. Thus, although the court noted in dictum the benefits of having a plaintiff, a state defendant, and a federal third-party defendant all in one proceeding, *id.* at 1011, that policy rationale does not amount to a holding on the propriety of impleader under federal Rule 14.

[12] The court of appeals did suggest that, but for the government's sovereign immunity, Peabody could also properly bring a third-party claim against the Secretary for indemnification, Pet. App. 23a-24a, and it did not explain how such a claim could survive in light of this Court's holding in *Northwest Airlines*. That statement, however, was dictum in light of the court's conclusion that the government has not waived its sovereign immunity against a damages action by a Title VII defendant. *Id.* at 24a-25a.

contribution. See *id.* at 638-647. Thus, the defendant's third-party action failed because it did not state a claim, *id.* at 633, 647, not for any reason relating to the scope of Rule 14 or permissible third-party claims.

Petitioners also contend (Pet. 23-24; 10-986 Pet. 21-22) that the decision below conflicts with other decisions stating that impleader is discretionary and that the defendant may always opt instead to pursue the nonparty in a separate action. But petitioners have not been *forced* to implead the Secretary; indeed, the Navajo Nation states (Pet. 23 n.6) that it will not do so. Rather, the court of appeals held that petitioners' supposed ability to implead the Secretary *if they wish* is a reason not to dismiss the action against petitioners under Rule 19(b). Although the court of appeals' premise was flawed, the court did not adopt a rule allowing impleader to be compelled or precluding separate actions.

c. Furthermore, as petitioners note (Pet. 23-24; 10-986 Pet. 24-25), further proceedings in the district court may reveal that the Rule 14 path is in fact blocked for additional reasons left open by the court of appeals. The interlocutory posture of this issue (not to mention the case as a whole) is a further reason why plenary review is not warranted.

Any APA claim must be filed within six years after the claim accrues. 28 U.S.C. 2401(a). The court of appeals expressly stated that the APA claim it contemplated would be one challenging "final agency action," Pet. App. 29a, but the final agency action it appears to have had in mind was complete in 1966, when the second lease was approved. Also, as noted above, any APA claim must explain why the plaintiff is aggrieved by the agency action, and neither Peabody nor the Navajo Nation can likely establish that it is aggrieved by the Secre-

tary's decision to grant approval of their leases, at their request, in 1964 and 1966. Because any impleader would require leave of court at this point in the litigation, see Fed. R. Civ. P. 14(a)(1), it is possible that the district court would conclude that any impleader would be futile, decline to permit it, and re-evaluate the propriety of dismissal under Rule 19(b) accordingly.

A GVR order returning the case to the court of appeals would allow that court to re-examine its Rule 14 analysis, including these obstacles to the APA claim it hypothesized. But even if this Court were to deny further review, these questions would remain open in the district court. In this posture, therefore, this case presents no reason for this Court to grant plenary review and decide the Rule 14 question itself.

B. The Remaining Questions Presented Do Not Warrant Further Review

Petitioners also seek review of a question decided by the court of appeals in 2005, *i.e.*, whether the EEOC could properly join the Navajo Nation in litigation of this nature. Pet. 25-31; see 10-986 Pet. 15 n.4 (adopting the Navajo Nation's arguments). This Court declined to review that question at that time, and there is no reason for a different result now. The court of appeals' decision allowing the EEOC to name the Nation as a party, without seeking affirmative relief, was correct and does not implicate any conflict warranting further review.[13]

1. The EEOC explained in its 2005 brief in opposition to certiorari that, for a plaintiff to join a required party under Rule 19(a) and thereby avoid dismissal un-

[13] Petitioners do not argue that the court of appeals erred in holding that the Navajo Nation is a required party under Rule 19(a), and that question therefore is not presented here.

der Rule 19(b), there is no requirement that the plaintiff have a statutory cause of action against the required party. See Br. in Opp. at 11-14, *Peabody W. Coal Co.*, *supra* (No. 05-353). Peabody responded by acknowledging that Rule 19 imposes no such requirement and that the absence of "an explicit cause of action is not, in itself, sufficient grounds for concluding that Congress has precluded a party from litigating a claim against another through Rule 19." Reply Br. at 7, *Peabody W. Coal Co.*, *supra* (No. 05-353). Rather, Peabody stated, its claim depended on the notion that Title VII expressly forbids the EEOC from joining a Tribe in any way. The Navajo Nation, likewise, now premises its argument on the notion that Title VII "explicitly precluded" the EEOC from joining it. Pet. 25; see Pet. 27. That premise is incorrect.

As the court of appeals has twice made clear, the EEOC seeks no affirmative relief from the Navajo Nation. Pet. App. 16a, 81a. EEOC has joined the Nation under Rule 19 solely to ensure that if the EEOC ultimately prevails on the merits, preclusion principles will prevent the Nation from collaterally attacking any judgment against Peabody.

This action remains one under Title VII against a private employer, which the EEOC is statutorily authorized to bring. Under 42 U.S.C. 2000e-5(f)(1), the EEOC "may bring a civil action against any respondent * * * named in the charge" that is "not a government, governmental agency, or political subdivision." As the Navajo Nation states, only the Attorney General may bring a civil action against "a respondent which is a government, governmental agency, or political subdivision." *Ibid.* Thus, Section 2000e-5(f)(1) divides authority between the EEOC and the Attorney General not based on

parties generally, but based on the identity of the "respondent," which clearly refers to the entity "named in the charge" that is filed with the EEOC alleging a violation of Title VII. *Ibid;* see 42 U.S.C. 2000e-5(b) (employer that, according to the charge, has engaged in an unlawful employment practice is "hereinafter referred to as the 'respondent'"). Peabody, not the Navajo Nation, is the respondent named in the charge and in the complaint; the EEOC has not alleged that the Navajo Nation itself has violated Title VII. The mere joinder of the Navajo Nation as a *party* does not trigger Section 2000e-5(f)(1) because the EEOC seeks no relief against the Nation under Title VII.

The Navajo Nation asserts (Pet. 28-31) that for the EEOC to join it in this action implicates its tribal sovereign immunity, and it contends that Title VII should be read to forbid such joinder absent a clear statement permitting it. That contention lacks merit. "Tribal sovereign immunity does not act as a shield against the United States, even when Congress has not specifically abrogated tribal immunity." *E.g.*, Pet. App. 78a (citation and internal quotation marks omitted); accord *Cohen's Handbook of Federal Indian Law* § 7.05[1][a], at 636 (Nell Jessup Newton et al. eds., 2005 ed.); cf. *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999) (suits by a federal agency against States are not barred by sovereign immunity). Because the EEOC is a federal agency, it may join the Navajo Nation in this action without implicating the Nation's sovereign immunity. And where sovereign immunity simply does not apply, there is no need to apply principles of waiver or abrogation (including any associated clear-statement rules): where there is no immunity to waive or abrogate, Congress is not obliged to make any express statement about waiver or abroga-

tion. See, *e.g.*, *Board of Trs.* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001) (although provisions of federal civil-rights statute did not validly abrograte state sovereign immunity, those provisions could still be enforced through an *Ex parte Young* action, which does not implicate sovereign immunity); *Jinks* v. *Richland County*, 538 U.S. 456, 466-467 (2003) (clear-statement rule that applies to statute in actions against States does not apply to same statute in actions against municipalities). Title VII does not forbid the EEOC from joining the Nation as a party in a case in which Peabody is the respondent and the relief is sought solely against Peabody.[14]

Thus, this case simply does not present petitioners' narrow question about whether Rule 19 authorizes joining a party when a statute precludes joining that party. Title VII is not such a statute, and petitioners point to no appellate authority holding that it is.[15]

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[14] The Navajo Nation *does* have tribal sovereign immunity against being joined in a private Title VII action. *Dawavendewa*, 276 F.3d at 1159-1163 (dismissing a Title VII action challenging a tribal preference because the Navajo Nation was a required party whose sovereign immunity precluded the plaintiff from joining it). That point further underscores the extremely narrow context in which the questions presented here can arise and counsels against this Court's review of the question whether the EEOC could properly join the Navajo Nation under Rule 19.

[15] Contrary to the Navajo Nation's contention (Pet. 27), the Seventh Circuit did not address any such question in *EEOC* v. *Elgin Teachers Ass'n*, 27 F.3d 292 (1994), but merely mentioned a ruling of the district court. *Id.* at 293. Even the district court decision in that case involved joining a governmental employer based on its unlawful conduct *as an employer covered by Title VII*. See *EEOC* v. *Elgin Teachers Ass'n*, 45 Fair Empl. Prac. Cas. (BNA) 446, 447 (N.D. Ill. 1986)); see also *EEOC* v. *American Fed'n of Teachers, Local No. 571*, 761 F. Supp. 536, 539-540 & n.5 (N.D. Ill. 1991)). Here, by contrast, the Navajo Nation is not

2. Petitioners again contend that this case implicates a circuit conflict concerning whether a plaintiff may join a required party under Rule 19 and then seek to *enjoin* that party without having a cause of action. That contention continues to lack merit. The court of appeals correctly explained in 2005 that this case simply does not present the question on which the circuits have disagreed. Pet. App. 80a-81a.

The cases on which petitioners rely all involved attempts by a plaintiff to name multiple defendants, in the initial complaint, including a defendant against whom the plaintiff had no cause of action, and nonetheless to seek injunctive relief against that defendant on the ground that the defendant is "required" under Rule 19(a). But each of those cases turned on the impropriety of awarding an *injunction* without a cause of action. See *Davenport* v. *International Bhd. of Teamsters*, 166 F.3d 356, 366 (D.C. Cir. 1999) ("It 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."); *Vieux Carre Prop. Owners, Residents & Assocs., Inc.* v. *Brown*, 875 F.2d 453, 456, 457 (5th Cir. 1989) (jurisdiction to review the federal defendant's actions under the APA did not "give[] the district court jurisdiction to enjoin such nonfederal entities as the [other defendants]," or allow the plaintiff to "reach a [nonfederal] defendant even without having a cause of action against that party"), cert. denied, 493 U.S. 1020 (1990).[16]

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covered by Title VII, see 42 U.S.C. 2000e(b), and the lawfulness of its conduct is not the basis for the Title VII claim.

[16] The Tenth Circuit held in one case that the plaintiff could obtain such an injunction without a cause of action because the *agency defendant* had a duty to enforce the relevant statute by impleading and

Although the courts of appeals in *Davenport* and *Vieux Carre* did briefly state that Rule 19 contemplates "that before a party will be joined . . . as a defendant the plaintiff must have a cause of action against it," *Davenport*, 166 F.3d at 366 (quoting *Vieux Carre*, 875 F.2d at 457), the courts of appeals made that statement in the context of actions in which the plaintiffs sought affirmative relief against a defendant without a cause of action. As the court of appeals explained in this case, those courts have not confronted "the situation presented here, in which [the EEOC seeks] no affirmative relief against the Navajo Nation." Pet. App. 81a. Petitioners' assertion (Pet. 25) that the court of appeals acknowledged a circuit conflict on the question presented here is incorrect. Furthermore, in neither *Davenport* nor *Vieux Carre* was the question whether the plaintiffs' *valid* cause of action against one defendant should be dismissed under Rule 19(b) because of inability to join the other defendant, against whom the plaintiff lacked a cause of action; the only question was whether Rule 19 gave the plaintiff the ability to seek injunctive relief from the additional defendant, which the EEOC expressly is not attempting to do here. The novel circumstances presented here have not arisen in the circuits on which petitioners rely.

Indeed, any holding that joinder under Rule 19 *always* requires a cause of action would be in tension with decisions of this Court contemplating that a nonparty

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enjoining the nonfederal defendant, so "if not joined originally, [the nonfederal defendant] would have been brought in under Rule 19." *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1077-1078 (1988), overruled on other grounds by *Village of Los Ranchos de Albuquerque* v. *Marsh*, 956 F.2d 970, 973 (10th Cir. 1992) (en banc). That situation is not implicated here. Accord *Vieux Carre*, 875 F.2d at 457.

would be brought into the case under Rule 19 notwithstanding the apparent absence of any grounds for seeking independent relief against that nonparty. See *Martin* v. *Wilks*, 490 U.S. 755, 764-765 (1989) (stating that parties to consent decree governing fire-department employment should have joined white firefighters in the case, but not suggesting that plaintiffs could have asserted a claim against those firefighters); cf. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 356 n.43 (1977) (citing Rule 19(a) and holding that a union would remain in on-going litigation as a defendant, notwithstanding the absence of any legitimate ground for holding the union liable under Title VII, "so that full relief may be awarded the victims of the employer's * * * discrimination").[17] This case does not call on the Court to apply those precedents, however, because as noted above, petitioners do not assert that a cause of action is always required.

C. This Case Involves Unique Issues That Do Not Call For This Court's Intervention At This Time

This case has not yet reached the merits of the Title VII question. Indeed, if the Court vacates the judgment below and remands for further proceedings, the court will reconsider on what terms the case might proceed and, in fact, whether it may proceed at all under Rule

[17] *Martin*'s interpretation of Rule 19 remains good law. Although Congress later amended Title VII to bar a collateral attack on consent decrees by anyone with a claim arising under the Constitution or federal civil rights laws, see 42 U.S.C. 2000e-2(n), that amendment does not apply here because any collateral attack by the Navajo Nation on a judgment in the EEOC's favor would not be a claim under federal civil rights laws. See, *e.g.*, *Steans* v. *Combined Ins. Co. of Am.*, 148 F.3d 1266, 1269-1270 & n.13 (11th Cir. 1998), cert. denied, 526 U.S. 1068 (1999).

19(b). Even if the case returns to district court on the terms already outlined by the court of appeals, substantial questions will remain before the case could be adjudicated on the merits. See pp. 13-14, 19-20, *supra*. Thus, it is possible that the case will be finally resolved before any court reaches the merits of the EEOC's Title VII claim.

Moreover, if the courts below were to reach the merits, the Navajo Nation has identified an issue that could, depending on its resolution, obviate any relief that would affect Peabody's obligations to the Navajo Nation or the Secretary. See Pet. 10 n.3. As a general matter, a private employer's unilateral decision to favor members of one Tribe over members of another Tribe constitutes national-origin discrimination within the meaning of Title VII. But as the government has previously suggested in briefs to this Court, the analysis may differ when an employer is complying with an Indian Tribe's law or ordinance that requires a preference for the Tribe's own members in employment on the Tribe's reservation, such as employment under a Secretary-approved lease for the utilization or exploitation of the Tribe's own land or resources held in trust by the United States for the Tribe. Under those circumstances, the issue identified by the Navajo Nation is whether the tribal preference should then be regarded as a political classification rather than a classification based on national origin—and thus beyond the scope of Title VII. See EEOC Br. in Opp. at 23 n.7, *Peabody W. Coal Co.*, *supra* (No. 05-353); U.S. Cert. Amicus Br. at 9-10, *Salt River Project Agric. Improvement & Power Dist.* v. *Dawavendewa* (No. 98-1628); cf. *Morton* v. *Mancari*, 417 U.S. 535, 553-555 (1974). That question has not yet been addressed in this litigation.

Thus, at this point it is not necessary for this Court to exercise plenary review over threshold procedural questions in this litigation. Those threshold questions do not warrant review in their own right; they arise in a narrowly confined context that has few analogues, if any; and they arise at a preliminary stage of litigation whose next steps are uncertain.

The court of appeals' ruling regarding Rule 14, however, was incorrect, was based on only cursory analysis of key issues, and was issued without the benefit of full briefing by the parties. If left in place, that ruling may have implications not only for further proceedings in this case, but potentially also for other cases in which a defendant seeks to implead a federal agency under Rule 14. For those reasons, the Court should grant the petitions for a writ of certiorari with respect to the Rule 14 issue, vacate the judgment of the court of appeals, and remand for further consideration in light of the position taken in this brief.

CONCLUSION

With respect to the Rule 14 questions, the petitions for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in light of the position set out in this brief. In all other respects, the petitions should be denied. In the alternative, the petitions should be denied in their entirety. If either petition is granted, however, the EEOC's conditional cross-petition should also be granted.

Respectfully submitted.

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