No.

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

PEABODY WESTERN COAL COMPANY
AND NAVAJO NATION

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Secretary of the Interior is a "required party," within the meaning of Rule 19(a)(1) of the Federal Rules of Civil Procedure, to an action by the Equal Employment Opportunity Commission against a private employer, where the challenged conduct was undertaken pursuant to a federally approved mining lease between the employer and an Indian Tribe, but no federal agency is a party to the lease.

PARTIES TO THE PROCEEDING

The parties are listed in the caption.

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The Acting Solicitor General, on behalf of the Equal Employment Opportunity Commission, respectfully files this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-32a[1]) is reported at 610 F.3d 1070. The opinion of the district court (Pet. App. 33a-66a) is unreported, but is available at 2006 WL 28166033. The previous opinion of the court of appeals (Pet. App. 67a-87a) is reported at

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

400 F.3d 774. The opinion of the district 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 within which to file a petition for a writ of certiorari for both petitioners to and including January 29, 2011. The petition in No. 10-981 was filed on January 28, 2011, and placed on the Court's docket on February 1, 2011. The petition in No. 10-986 was filed on January 31, 2011 (Monday), and placed on the Court's docket on February 2, 2011. This conditional cross-petition is being filed pursuant to Rule 12.5 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 19(a)(1) of the Federal Rules of Civil Procedure provides:

Rule 19. Required Joinder of Parties

(a) PERSONS REQUIRED TO BE JOINED IF FEASIBLE.

(1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.[2]

STATEMENT

1. Cross-respondent Peabody Western Coal Company mines coal at the Black Mesa Complex and Kayenta Mine on the Navajo and Hopi Reservations in northeastern Arizona. Pet. App. 4a. At issue are two leases that Peabody's predecessor entered into with cross-respondent 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 and Hopi Nations. *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 (IMLA), 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

[2] Rule 19 was revised in 2007, while this case was pending in the court of appeals, but the changes were stylistic only. See *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 855-856 (2008). This cross-petition therefore uses the terminology of the amended version of the Rule. See *id.* at 855-857.

has been a violation of the terms of a lease, they may cancel the lease after a notice and cure period. 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. *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.*; E.R. 81. A tribal ordinance, the Navajo Preference in Employment Act, Navajo Nation Code tit. 15, § 601 *et seq.*, separately requires "[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, cross-petitioner, the Equal Employment Opportunity Commission, 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. Cross-petitioner 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 origin, and 42 U.S.C. 2000e-8(c), which imposes certain record-

keeping requirements. Cross-petitioner 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(a) of the Federal Rules of Civil Procedure, the Navajo Nation was a required party, *id.* at 104a-105a, and that it could not be joined because Title VII precludes cross-petitioner 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"). The court further 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. *Id.* at 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 cross-petitioner may not sue the Nation under Title VII. *Id.* at 76a-78a. The court held, however, that the suit need not be dismissed, because cross-petitioner 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).

5. Cross-petitioner amended its complaint to name the Navajo Nation as a defendant. The district court then granted summary judgment for both cross-respondents on three alternative grounds. Pet. App. 33a-66a. As relevant here, the court concluded that the Secretary was a required party who could not be joined, and that the action could not proceed without the Secretary. *Id.* at 54a-65a.[3]

6. The court of appeals again reversed. Pet. App. 1a-32a.

The court of appeals agreed with the district court that the Secretary is a party required to be joined if feasible. 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 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

[3] The district court also granted summary judgment for cross-respondents on two alternative theories: (1) that cross-petitioner had impermissibly sought affirmative relief against the Navajo Nation; and (2) that cross-petitioner'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 4, *infra*.

"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 the Secretary, not bound by that judgment, decided to cancel or modify the leases or maintain them in their current form. *Id.* at 21a.

The court further agreed with the district court that cross-petitioner cannot join the Secretary as a defendant because it cannot sue a governmental agency. Pet. App. 22a. The court therefore affirmed the dismissal of cross-petitioner's claim for monetary relief against Peabody. *Id.* at 23a-25a.

The court held, however, that Rule 19(b) does not require the dismissal of the cross-petitioner's claim for injunctive relief. The court concluded that cross-respondents can mitigate any prejudice they might experience from the 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.[4]

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The petitions for a writ of certiorari in Nos. 10-981 and 10-986 seek review of the portion of the court of appeals' decision that reads Rule 14 to permit cross-respondents to implead the Secretary of the Interior as a

[4] 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. Cross-respondents have not raised any question related to the underlying merits in this Court.

third-party defendant, and therefore reverses in part the dismissal of the action under Rule 19(b). The government will respond to those petitions in a separate filing. If the Court does grant those petitions (or either of them), however, its review should encompass the antecedent question whether the Secretary is a party required to be joined to this action under Rule 19.[5]

1. Under Rule 19, an inquiry into whether an action must be dismissed for failure to join a required party proceeds in three steps. First, the court determines whether a person is "required to be joined if feasible." Fed. R. Civ. P. 19(a)(1). Next, if the person is required to be joined, the court must consider whether joinder is feasible, and if so, order that the person be made a party. Fed. R. Civ. P. 19(a)(2). Finally, if joinder is not feasible, the court must determine whether the action should proceed among the existing parties or should be dismissed, based on the specified factors. Fed. R. Civ. P. 19(b).

Here, the court of appeals reached the third step, and considered whether the Secretary could be impleaded as a third-party defendant under Rule 14, only because it concluded at the earlier steps that the Secretary was a required party and that he could not be joined conventionally, by being named as a defendant. The court then had to examine whether dismissal was

[5] The petition filed by the Navajo Nation also seeks review of the court of appeals' 2005 ruling that joinder of the Nation was feasible. Pet. i, 25-35. Both questions presented by that petition, however, encompass the question whether the Secretary may be joined in this action under Rule 14. See Pet. i. If the Court were to grant certiorari on a narrower question than either of those presented by the Navajo Nation, limited to whether the Nation could be joined in this action and not encompassing whether the Secretary must or may be joined, the government would not seek to pursue this cross-petition.

warranted under Rule 19(b), and it concluded that the ability to implead the Secretary under Rule 14 was a sufficient basis to reverse the dismissal.

2. The petitions in Nos. 10-981 and 10-986 focus on the third step of the analysis and contend that the court of appeals erred by holding that cross-respondents could implead the Secretary under Rule 14. But if the court of appeals erred at the first step, and the Secretary is not a required party *at all*, then the district court's Rule 19 dismissal would be reversed irrespective of whether the Secretary can be made a party and, if so, how.

Accordingly, this Court should not take up the question whether impleader under Rule 14 is available and makes dismissal under Rule 19(b) unwarranted without also taking up the antecedent question whether the Secretary is a required party under Rule 19(a). As this Court has made clear, "no inquiry under Rule 19(b) is necessary [where] the threshold requirements of Rule 19(a) have not been satisfied." *Temple* v. *Synthes Corp.*, 498 U.S. 5, 8 (1990) (per curiam). And this is not the sort of case in which it would be appropriate for the Court simply to "assume, at the outset," that the third party is a required one, *e.g.*, *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 108 (1968). As discussed further below, the court of appeals' conclusion that the Secretary was a required party was both novel and incorrect.

Furthermore, reviewing only the Rule 14 holding, while leaving undisturbed the court of appeals' antecedent holding about required-party status, would artificially broaden the significance of the Rule 14 question. The court of appeals has already concluded that the damages claim cannot proceed in the absence of the Secretary. Pet. App. 25a. If this Court were to reverse the

court of appeals' holding that the Secretary may be impleaded, then the court of appeals might well conclude that the remainder of the case must be dismissed under Rule 19(b). Similarly, in any future case in which the Secretary is a required party under the court of appeals' reasoning, the plaintiff will have to either name the Secretary (if that is possible, as it is not here) or suffer dismissal under Rule 19(b). And there could be many such cases: in concluding that the Secretary was a required party, the court of appeals relied on the fact that the Secretary had drafted and approved the leases in question and had authority, in conjunction with the Navajo Nation, to terminate the leases. But the Department of the Interior has similar approval authority over most leases and contracts concerning economic activity on reservation land. Thus, under the court of appeals' reasoning, the Secretary could be a required party to most or all lawsuits seeking to challenge the validity of a provision of one of those contracts. To avoid the possibility that any holding on the Rule 14 question might spill over to a class of cases that should not be affected, the Court should review the Rule 14 question only in conjunction with the question whether the Secretary actually is a required party to cases like this one.

3. The court of appeals' conclusion that the Secretary is a required party under Rule 19(a)(1) is incorrect. Rule 19(a)(1) sets out three circumstances in which a person is required to be joined:

(1) If, "in that person's absence, the court cannot accord complete relief among existing parties," Fed. R. Civ. P. 19(a)(1)(A);

(2) If the person "claims an interest relating to the subject of the action" and "disposing of the ac-

tion in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest," Fed R. Civ. P. 19(a)(1)(B)(i); or

(3) If the person claims such an interest and "disposing of the action in the person's absence may * * * leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest," Fed R. Civ. P. 19(a)(1)(B)(ii).

None of these three circumstances is present here.

a. The court of appeals reasoned that Peabody would be prejudiced by the absence of the Secretary because under those circumstances adequate relief could not be accorded to Peabody as against the Secretary, and that the Secretary therefore was a required party under Rule 19(a)(1)(A). Pet. App. 19a-20a. That reasoning was incorrect, and Rule 19(a)(1)(A) by its terms does not apply here.

Rule 19(a)(1)(A) applies where, in the absence of the person, the court cannot accord complete relief *among existing parties*. The court must determine whether it can grant the entirety of the relief sought or if it "would be obliged to grant partial or 'hollow' rather than complete relief." Fed. R. Civ. P. 19 advisory committee's note (1966). At the time the court of appeals ruled, the only relief sought among the existing parties was that prayed for by cross-petitioner: monetary damages and injunctive relief against Peabody.[6] The district court is

[6] Following the decision below, cross-petitioner amended its complaint to eliminate any prayer for monetary relief. See 2d Am. Compl. 5-6 (Dec. 27, 2010).

empowered to award that relief in full in the absence of the Secretary.

Indeed, the court of appeals did not conclude otherwise. Rather, the court of appeals concluded that the Secretary must be made a party not so that cross-petitioner might win effective relief, but so that Peabody might seek *indemnification* for any monetary relief that cross-petitioner might win. Pet. App. 19a. That conclusion is inconsistent with this Court's decision in *Temple*, which reaffirmed a long line of cases holding that a potential joint tortfeasor is not a required party. 498 U.S. at 7. That is so even if the existing defendant could file a Rule 14 third-party claim for contribution, or defend on the ground that the joint tortfeasor was the true cause of the injury. See *id.* at 5; accord, *e.g.*, *Askew* v. *Sheriff of Cook County*, 568 F.3d 632, 637 (7th Cir. 2009); *Universal Reins. Co.* v. *St. Paul Fire & Marine Ins. Co.*, 312 F.3d 82, 88 (2d Cir. 2002). Peabody's desire to seek contribution from the Secretary therefore does not make the Secretary a required party.[7] Moreover, the court of appeals overlooked that *no* Title VII defendant has a right to seek contribution. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 98-99 (1981). And as the court of appeals recognized in a subsequent portion of its opinion, Peabody could not pursue any damages action against the Secretary in any event, because there is no applicable waiver of sovereign immunity. Pet. App. 24a-25a; see also *Navajo Nation*,

[7] The court of appeals repeatedly stated that it would be "profoundly unfair" if Peabody were required to pay damages without the ability to seek contribution or other reimbursement. Pet. App. 17a, 25a; see *id.* at 18a-19a. But the court's concerns provide no basis for dismissing a damages claim under Rule 19 unless the defendant shows that an absent party is *required* to be joined *in the same litigation.*

537 U.S. at 501 n.9 (noting Court of Federal Claims ruling that the United States could not be held liable for breach of contract for an alleged violation of Lease 8580 because the Secretary is not a party to the lease).

The court of appeals also thought that the Secretary's presence was required so that Peabody could ensure that any injunction obtained by cross-petitioner does not subject it to inconsistent obligations. Pet. App. 19a. That reasoning implicates not Rule 19(a)(1)(A), but Rule 19(a)(1)(B)(ii), and it is incorrect for the reasons discussed below. See pp. 15-17, *infra*.

b. Nor does the Secretary have a legally protected interest "relating to the subject of the action" that would be "impair[ed] or impede[d]" by the disposition of this action in his absence. Fed. R. Civ. P. 19(a)(1)(B)(i).[8] The court of appeals relied on cases in which the required party was a signatory to a challenged contract, or the promulgator of a challenged regulation or ordinance. But as the court of appeals acknowledged, the Secretary

[8] Both Rule 19(a)(1)(B)(i) and (ii) require as a predicate that the absent person have "an interest relating to the subject of the action." "Interest" has been read by the courts of appeals to mean a "legally protected interest." *E.g.*, *Northern Alaska Envtl. Ctr.* v. *Hodel*, 803 F.2d 466, 468 (9th Cir. 1986). Broadly understood, the Secretary may have a legally protected interest in the leases at issue in the case because, for example, the leases confer on him certain legal rights and responsibilities, such as a right to suspend mining operations under some circumstances and a right to an accounting. E.R. 141-142, 157-158. But the existence of a "legally protected interest" is not sufficient by itself to establish that the Secretary is a required party who must be joined: the Secretary's interest must also specifically "relat[e] to the subject of the action," Fed. R. Civ. P. 19(a)(1)(B), *and* the requirements of either clause (i) or clause (ii) of Rule 19(a)(1)(B) must be satisfied. As explained in the text, no legally protected interest of the Secretary is "the subject of th[is] action," nor is the Secretary so situated as to satisfy the requirements of either clause of Rule 19(a)(1)(B).

is not a party to the leases, Pet. App. 20a, and neither the IMLA nor the Secretary's regulations thereunder require adoption of tribal-preference provisions.[9] The court instead sought to extend the "underlying principle" of the cases it cited, *ibid.*, to the facts of this situation. The court was in error.

To the extent that the leases themselves grant the Secretary certain powers or anticipate that he will undertake certain duties, those rights or duties are not the subject of this action, nor would they be impaired by the action's adjudication. This suit is a Title VII action that incidentally concerns a single clause of the leases. The Secretary holds no legally protected interest in that particular clause that would be "impair[ed] or impede[d]" by disposition of this action in his absence. Fed. R. Civ. P. 19(a)(1)(B)(i). Moreover, there is no possibility that this action will call into question the Secretary's approval of the leases. If cross-petitioner ultimately prevails, that victory would at most establish that the Navajo Nation cannot insist on the continued enforcement of the tribal-preference provision of those leases. If the final determination of this action results in a second suit by either the Navajo Nation or Peabody to reform or void the lease, the court entertaining that separate suit would be free to consider whether the Secretary's role

[9] The court of appeals did not address the merits of the validity of the leases' employment-preference provisions under Title VII. Accordingly, there is no occasion to consider the extent to which the IMLA, the economic-development and tribal-self-determination purposes that the IMLA furthers, or the Secretary's approval of such employment-preference provisions as part of his approval of mineral leases under the IMLA should inform the analysis of the validity of such preference provisions under Title VII.

in approving the lease makes him a required party to such an action.

To be sure, the Secretary is interested in a more general sense in the underlying merits of this case, because the Secretary has approved hundreds of leases and contracts containing similar tribe-specific preference provisions and has approved numerous tribal ordinances adopting tribal preferences in hiring on reservations. That general interest, however, does not make him a required party for purposes of Rule 19(a)(1)(B); if it did, numerous federal and state agencies and officials would become required parties to a wide variety of suits. See p. 10, *supra*. And in any event, the Department of the Interior has other means of protecting that interest, such as seeking to intervene or filing a brief as amicus in an appropriate case, or by resolving any important legal or policy disagreements with a sister federal agency within the Executive Branch.

c. The court of appeals also concluded that there was a sufficient possibility of prejudice to Peabody to justify treating the Secretary as a required party under Rule 19(a)(1)(B)(ii). The court erred in concluding that Peabody faces a genuine risk of incurring "double, multiple, or otherwise inconsistent obligations" that would justify (or could be avoided by) joining the Secretary as a party.

The court of appeals' brief analysis of this prong of Rule 19(a)(1)(B) focused on the possibility that, if the district court enters (and Peabody obeys) an injunction precluding Peabody from adhering to the Navajo tribal preference, Peabody would "risk[] cancellation of the leases." Pet. App. 21a; see also *id.* at 17a, 19a. That rationale is incorrect, for several reasons. First, the court of appeals overlooked that the termination provi-

sions in the leases must be *jointly* exercised by the Navajo Nation and the Secretary. E.R. 144-145, 161. And the Nation is already a party (for the limited purpose of binding the Nation to the judgment). Accordingly, to the extent that a binding judgment would protect Peabody against inconsistent obligations, Peabody already has such protection because the Nation will be bound by any judgment.

Second, Peabody has not shown how making either the Navajo Nation or the Secretary a party would preclude termination of the leases. If cross-petitioner obtains a judgment that Peabody has violated Title VII by preferring qualified Navajo applicants over qualified non-Navajo applicants, then presumably the Nation would be precluded from arguing in court that the tribal-preference provision is consistent with Title VII—*e.g.*, by suing Peabody for specific performance of the provision. But simply because the Nation cannot enforce one term does not establish that the Nation must leave the rest of the leases in place. If Peabody can no longer comply with a term of the leases,[10] the Secretary and the Nation might well be able to exercise their authority to modify the leases or terminate them and negotiate new ones. If the leases were terminated or modified, they could hardly be said to impose any obligation on Peabody that would be inconsistent with the hypothetical injunction that cross-petitioner might obtain. In any event, this Title VII action against Peabody is not a forum for resolving any broader contractual issues be-

[10] Even if the tribal-preference terms were held invalid, the Nation could argue that those terms were essential and that the leases were formed on the mutually mistaken assumption that the terms were lawful.

tween Peabody and the Navajo Nation, much less the Secretary's role with respect to any such issues.

Third, even if the prospect of terminating the leases were viewed as an "inconsistent obligation[]," and even if joining the Secretary in addition to the Navajo Nation were thought to provide Peabody with some incremental protection against that obligation, the risk of termination is entirely speculative, not "substantial." Fed. R. Civ. P. 19(b)(1)(B)(ii).[11] The leases provide substantial economic benefit to the Navajo Nation. See generally *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1552 (2009). Accordingly, it is speculative whether both the Nation and the Secretary would, unless restrained by a judgment that binds them both, seek to terminate the leases altogether based on actual or anticipated noncompliance with the tribal-preference provisions. A more likely outcome instead would be for the Nation to renegotiate with Peabody the consideration paid under the leases to compensate for the elimination of the tribal-preference provisions, which are a significant part of the parties' current bargain.

[11] Peabody would not be in breach of its leases unless it actually failed to give preference to a qualified tribal member over a nonmember. Title VII expressly permits Peabody to give preference, in its business "on or near an Indian reservation," to "any individual because he is an Indian living on or near a reservation." 42 U.S.C. 2000e-2(i). One of the two leases permits Peabody, at its election, to give preference to Hopi Indians. Pet. App. 5a. And of the three non-Navajo individuals on whose behalf cross-petitioner filed suit, two are now deceased, and the third, who is Hopi, sought employment more than a decade ago. Thus, Peabody might well be able to comply with a hypothetical injunction directing Peabody not to give preference except to Indians *living on or near the reservation land in question* without violating the leases.

CONCLUSION

If the petition for a writ of certiorari in either No. 10-981 or No. 10-986 is granted, this conditional cross-petition should also be granted. If the Court denies the petitions in Nos. 10-981 and 10-986, this cross-petition should be denied.

Respectfully submitted.

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