

No. \_\_\_\_\_

~~U 1 17 02~~ MAY 30 2001

In The  
Supreme Court of the United States

OFFICE OF THE CLERK

HAROLD DAWAVENDEWA,  
*Petitioner,*

v.

SALT RIVER PROJECT AGRICULTURAL  
IMPROVEMENT AND POWER DISTRICT  
and THE NAVAJO NATION,  
*Respondents.*

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

PETITION FOR WRIT OF CERTIORARI

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**QUESTIONS PRESENTED**

Whether tribal sovereign immunity renders Title VII of the Civil Rights Act of 1964 impotent in claims between a non-member employee and a non-member employer engaged in business on a reservation where the tribe has passed legislation mandating discriminatory employment practices?

Whether tribal officials can be sued as indispensable and necessary parties for the purpose of prospective relief in situations where tribal nations pass and enforce legislation that conflicts with federal law regarding employment and exceeds the scope of a tribe's sovereign powers?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Harold Dawavendewa [hereinafter "Dawavendewa"] respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.



## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-24) is reported at 276 F.3d 1150 [hereinafter "*Dawavendewa II*"]. The opinion of the district court (App., *infra*, 25-38) is unreported.



## JURISDICTION

The Ninth Circuit entered its judgment and opinion on January 2, 2002. The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on March 1, 2002. (App., *infra*, 39-40). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).



## STATUTORY PROVISION INVOLVED

Civil Rights Act of 1964, § 703(i), 42 U.S.C. § 2000e-2(i):

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential

treatment is given to any individual because he is an Indian living on or near a reservation.

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### STATEMENT OF THE CASE

#### A. Essential Facts.

Dawavendewa, a member of the Hopi Nation, resides less than three miles from the Navajo Reservation. In late 1991, Dawavendewa applied for one of seven Operator Trainee Positions at the Navajo Generating Station ["NGS"]. The NGS is operated by Respondent Salt River Project ["SRP"] on the Navajo Reservation pursuant to a lease signed in 1969. Dawavendewa passed the test for the position as part of the application process. After the initial process, Dawavendewa ranked ninth out of the top twenty applicants. However, he was not interviewed for the position, nor did he receive any further consideration for the position when it was determined that he was not a member of the Navajo Nation or married to a member of the Navajo Nation.

The failure to interview Dawavendewa was based on the application of a lease provision entered into between SRP and the Navajo Nation relating to employment practices at the NGS. The lease expressly requires the Salt River Project to give employment preferences at the NGS to members of the Navajo Nation:

Lessees agree to give preference in employment to qualified local Navajos, it being understood that "local Navajos" means members of the Navajo Tribe living on land within the jurisdiction of the Navajo Tribe. . . . In the event sufficient qualified unskilled, semi-skilled and skilled local

Navajo labor is not available, or the quality of work of available skilled or semi-skilled workmen is not acceptable to Lessees, Lessees may than employ, in order of preference, first qualified non-local Navajos, and second, non-Navajos.

*Infra*, 2a-3a (n.2).

The lease's employment preference requirement is similar to the requirement in the Navajo Preference in Employment Act, 15 Navajo Nation Code § 601, *et seq.* (1995) ["NPEA"], which the Navajo Nation enacted in 1985. The tribal statute requires that "all employers doing business . . . [on or near the reservation] of the Navajo Nation . . . shall . . . [g]ive preference in employment to Navajos." *Id.* at § 604(A)(1).

Dawavendewa, thereafter, filed a charge of discrimination with the Equal Employment Opportunity Commission [hereinafter "EEOC"] alleging violation of 42 U.S.C. § 2000e *et seq.* ["Title VII"]. On or about May 28, 1993, the EEOC concluded that Dawavendewa was discriminated on the basis of his national origin with regard to SRP's failure to hire.

#### B. Proceedings Below.

##### 1. District Court and *Dawavendewa I*

Dawavendewa filed his Complaint against SRP on May 13, 1996 in United States District Court for the District of Arizona. Dawavendewa claimed that SRP violated Title VII as to him, as well as other non-Navajo Native Americans who applied for positions with SRP, non-Navajo Native Americans who may apply in the future with SRP, and non-Navajo Native Americans deterred

from seeking employment with SRP at the NGS. On September 19, 1996, SRP filed a Motion to Dismiss. The district court held a hearing on SRP's Motion on April 14, 1997. On April 16, 1997, the district court granted SRP's Motion. Judgment was entered in favor of SRP on that date. On April 30, 1997, Dawavendewa filed a timely Notice of Appeal to the Ninth Circuit.

The Ninth Circuit Court of Appeals reversed the district court's judgment on September 14, 1998. *See, Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 154 F.3d 1117 (9th Cir. 1998), *cert. denied*, 120 S.Ct. 843 (2000) [hereinafter *Dawavendewa I*]. On January 13, 1999, the Ninth Circuit denied a petition for rehearing and suggestion for rehearing *en banc*. On January 10, 2000, this Court denied SRP's *writ of certiorari*.

## 2. The District Court on Remand

On March 24, 2000, SRP filed another Motion to Dismiss. SRP claimed that Dawavendewa's Complaint should be dismissed as the Navajo Nation was a necessary and indispensable party. Due to its sovereign status, SRP claimed that the Navajo Nation could not be added as a party and that dismissal was appropriate. SRP also claimed that permitting the case to go forward would leave it with conflicting obligations under Title VII and its obligations to the Navajo Nation in the lease and by ordinance.

On August 17, 2000, the district court issued its Order dismissing Dawavendewa's case. The district court found that the Navajo Nation was a necessary and indispensable party. The court also found that the Navajo Nation could

not be joined for sovereignty reasons and that, since complete relief cannot be given to SRP for its potentially conflicting obligation, dismissal was appropriate. Judgment was entered the same date. A timely appeal was filed on September 12, 2000.

and indispensable party as SRP could be held to

### 3. Ninth Circuit Court of Appeals

The Ninth Circuit affirmed. *See* App. 1-24. Specifically, the Court held that the Navajo Nation was a necessary and indispensable party as SRP could be held to multiple conflicting obligations unless the Navajo Nation was added as a party. The Court then recognized that the Navajo Nation enjoyed sovereign immunity from suit. Even though the Ninth Circuit recognized that the addition of tribal officials may be appropriate in certain circumstances where the officials violate federal law, it held that tribal officials could not be added to supplant tribal sovereign immunity.

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## REASONS FOR GRANTING THE PETITION

This case raised important issues with regard to the enforceability of Title VII on tribal lands throughout the country. The Ninth Circuit's decision will grant private employers the right to discriminate freely and victimized employees will have no practical redress to remedy that discrimination that violates Title VII. The decision contains significant legal errors on issues of national and exceptional importance under Title VII that will lead to significant conflicts with existing statutory and case law throughout the country. Finally, the Ninth Circuit's decision creates an irreconcilable conflict between the Ninth

Circuit decisions in *Dawavendewa I*. As both decisions were the first to address the issues regarding Title VII and its interaction with tribal sovereignty, this Court's review is critical.

Specifically, the result of The Ninth Circuit's decision will result in Title VII having **no** validity or effect on the Navajo Nation's Tribal land.<sup>1</sup> In light of the procedural aspect of the case, the Ninth Circuit's decision does not conform to its earlier decision in *Arizona Public Service v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995), because it failed to provide Dawavendewa the opportunity to join the appropriate tribal officials responsible for enforcing the illegal tribal preference provisions.

Based on these reasons, the petition for writ of certiorari should be granted.

#### I. TITLE VII WILL NO LONGER HAVE LEGAL EFFECT ON NAVAJO TRIBAL LAND

Title VII applies on Tribal lands. Specifically, the statute permits preferences to Native Americans on or near Indian Reservations. *See*, 42 U.S.C. § 2000e-2(i). The only restriction relative to Title VII applicability on Tribal land is that it does not apply to tribal governments. *See*, 42 U.S.C. § 2000e-(b)(1). However, the Ninth Circuit's decision changes the entire scope and applicability of Title VII. The practical effect of the decision is that Title VII will no longer apply on Tribal lands where discriminatory

<sup>1</sup> The decision will also lead to Title VII having no effect on any tribal land where a tribal nation seeks to enforce laws which are discriminatory or illegal contractual provisions on private employers doing business on tribal lands.

legislation is passed by tribal governments because there is no mechanism in place to challenge such legislation.

#### a. There Is No Mechanism In Place Where a Private Litigant Such As Dawavendewa Can Vindicate His Rights Under Title VII.

The Ninth Circuit's decision appears to rest on the faulty legal premise that Dawavendewa can somehow bring his Title VII discrimination suit in tribal court and could therefore vindicate his rights. This reasoning directly conflicts with this Court's decision in *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304 (2001), where the Court specifically held that tribal courts do not have jurisdiction over federal claims by holding that claims under 42 U.S.C. § 1983 cannot be adjudicated in tribal courts. In *Hicks, supra*, this Court noted that, unlike State courts, tribal courts are **not** courts of general jurisdiction and can only adjudicate federal claims when authorized under federal law. *Id.* at 2314. This Court also noted that tribes do not have the inherent powers to control the activities of non-members of the tribe, except to the extent "necessary to protect tribal self-government or to control internal relations." *Id.* at 2310 (also noting the limits of tribal control over activities of non-members).

Like other federal claims, jurisdiction under Title VII is granted only to state and federal courts. 42 U.S.C. § 2000e-5. Moreover, Title VII does not have a specific provision granting tribal courts jurisdiction of federal claims as required in *Hicks, supra*.<sup>2</sup> Consequently, the

<sup>2</sup> Moreover, the lease between SRP and the Navajo Nation has a dispute resolution provision that requires that disputes be resolved



Ninth Circuit's decision leaves Dawavendewa with no personal right of action to enforce his federal rights under Title VII against a private employer who is engaged in blatant discriminatory conduct that is in violation of this Court's decision in *Dawavendewa I*, if such conduct occurs on Tribal land.

**b. The EEOC Has No Mechanism To Enforce Title VII's Non-Discrimination Provision On Navajo Tribal Lands.**

The Ninth Circuit's decision also relies on the notion that the Equal Employment Opportunity Commission ["EEOC"] can somehow litigate the issues surrounding the discriminatory lease provisions and the Navajo Preference in Employment Act, Nation Code tit. 15, § 601, *et seq.* (1995) ["NPEA"] pursuant to the Ninth Circuit's decision in *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001). However, the *Karuk* decision provides further support for the proposition that the Navajo Nation, or any other tribal nation which passes a discriminatory law, can enforce such a discriminatory provision with impunity because the *Karuk* court recognized the limitations of having the tribe as a party to something as limited as enforcement of a subpoena.

The EEOC's enforcement powers apply to cases against employers. *See, General Telephone Company of Northwest v. EEOC*, 446 U.S. 318, 326 (1980). However, as noted above, Indian tribes are specifically excluded from coverage as employers under Title VII. 42 U.S.C.

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through the Department of Interior. Clearly, the Department of Interior does not have jurisdiction over Title VII claims.

§ 2000e-(b)(1). Consequently, the EEOC has absolutely no enforcement powers against the Navajo Nation for the discriminatory lease provision or the NPEA. *See Karuk, supra* (holding that EEOC has no regulatory power over a tribe for violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*)

**c. The Emasculation of *Dawavendewa I*.**

In *Dawavendewa I, supra*, the Ninth Circuit specifically held that private employers operating on or near Indian Reservations who provided preferences on the basis of tribal affiliation violated Title VII. In its current decision, the Ninth Circuit has completely emasculated its earlier decision. As noted above, there is no way that an employee or the EEOC can enforce the legal effects of this Court's decision where a tribe either enters into a lease provision with an employer on reservation land that discriminates, or passes a law that requires some type of discriminatory behavior, such as a tribal preference.

The Ninth Circuit made this decision notwithstanding significant case law which has previously held the tribe's attempt to regulate the conduct of two non-members beyond the scope of the tribe's legislative authority. *See Hicks, supra* (holding that tribal government's ability to regulate non-members of tribes cannot go beyond what is necessary to protect tribal self-government or to control internal relations). The Ninth Circuit also ignored case authority holding that tribal regulation of a private non-tribal employer that was engaged in a non-governmental activities' relationship with a non-tribal member does not involve tribal sovereignty and involves a tribe exceeding its authority. *See Karuk, supra; Lumber Industry Pension*

*Fund v. Warm Springs F. Products*, 939 F.2d 683 (9th Cir. 1991); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

Additionally, the Ninth Circuit was provided with authority that Salt River Project's [SRP] obligation was to follow federal law with regard to its treatment of employees since Title VII was a general act of Congress. See, *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 120, 80 S.Ct. 543 (1963). Moreover the applicability of Title VII to the Navajo Nations' land is even more clear, since the applicability of the statute on Tribal lands and for tribal government is specifically discussed. See, 42 U.S.C. § 2000e-(b)(1), -2(i). See *Karuk, supra*.

Consequently, the Ninth Circuit's decision ignores legal precedent that restricts the tribe's authority to regulate the conduct of non-tribal members and has left the Ninth Circuit with law that essentially nullifies and emasculates its decision in *Dawavendewa I* and renders Title VII impotent with regard to its applicability on tribal lands.

#### d. Conclusion.

Granting the writ of certiorari is critical due to the implications that the present action will have throughout the nation. As noted above, Title VII's purpose to eradicate discrimination in the workplace will have a new exception: it will not apply to a private workplace on tribal lands where discriminatory and illegal preference statutes are in place. Such a result does not serve the purpose of Title VII and immediate action should be taken.

### III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH LEGAL PRECEDENT PERMITTING CLAIMS AGAINST TRIBAL OFFICIALS FOR INJUNCTIVE/EQUITABLE RELIEF.

In the Ninth Circuit, Dawavendewa argued that the issues with regard to the necessity and indispensability of the Navajo Nation as a party could be rectified by the addition of various tribal officials that could protect whatever interest the tribal nation has in the present litigation. Dawavendewa relied specifically on the Ninth Circuit's earlier decision in *Aspaas, supra*, to support his position that tribal officials clothed with the authority to enforce the NPEA or lease provision were appropriate parties that could be added for the purpose of prospective relief. In holding that the tribal officials were appropriate parties, the Ninth Circuit relying on the Court's authority in *National Farmer Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2247 (1985) held in *Aspaas*:

As a final jurisdictional contention, [the tribal officials] argue that they enjoy sovereign immunity from suit. See *Chemehuevi Indian Tribe v. California St. Bd. Of Equalization*, 757 F.2d 1047, 1051 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985) (noting that question of tribal sovereign immunity is jurisdictional in nature). Indian tribes may not be sued absent an express and unequivocal waiver of immunity by the Tribe or abrogation of tribal immunity by Congress. (cite omitted) Tribal sovereign immunity, however, does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. (cite omitted) Here, APS has alleged that certain Navajo officials violated federal law by acting beyond the scope of their authority. See

*National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2247, 2248 (1985) (noting that in all cases before the Supreme Court involving questions as to the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians, "the governing rule of decision has been provided by federal law"). That is essentially all that this case involves at the present stage. Injunctive relief is sought; damages are not.

*Aspaas*, *supra* at 1032.

Dawavendewa as well as the *Aspaas* Court recognized that questions involving whether a tribe has exceeded the lawful limits of its authority were questions of federal law ripe for decision in the federal courts. *See National Farmers*, *supra* 851-853. Even though the Ninth Circuit recognized the fact that tribal officials can be appropriate parties where their actions violate federal laws, the *Dawavendewa II* Court attempted to minimize the attempt to add the officials as some "13th hour" attempt by Dawavendewa to rescue his case. *See, Dawavendewa II* App. at 1-24. The Ninth Circuit's reasoning defies the law and logic in light of the procedural posture of the case.

As a general rule, Indian tribes have been recognized as possessing common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670 (1978); *see, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S.Ct. 905 (1991). However, tribal sovereignty is subject to Congress' plenary control, and thus "Congress [is] always . . . at liberty to dispense tribal immunity or to limit it." *Oklahoma*, 111 S.Ct. at 910. Absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non-members exists only in very

limited circumstances. *See Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 1409 (1997); *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981). Generally, tribes lack the "right of self governing every person within their limits except themselves." *See Montana, supra*, citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209, 98 S.Ct. 1011, 1021 (1978). The inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. *Id.* at 565, 101 S.Ct. at 1258. As noted by *Montana*, tribal power is very limited:

In addition to the power to punish tribal offenders, Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation.

*Id.* at 564, 101 S.Ct. 1257-58 (citation omitted); *see also, Strate, supra* (noting the limitations regarding the power of tribes to only punish tribal offenders, determine tribal membership, regulate domestic relations among members, and prescribe rules for inheritance for members). Moreover, federal law does not give way to a tribal ordinance unless the federal law encroaches on exclusive rights of self-governance, abrogates treaty rights or was intended by Congress not to apply to Indians. *U.S. v. Baker*, 63 F.3d 1478 (9th Cir. 1995); *Donovan v. Coeur d'Alene*, 751 F.2d 1113 (9th Cir. 1985). In the area of employment law, federal law regularly is involved in areas governing the employment relationship in tribal territories. *See, Lumber Industry Pension Fund v. Warm Springs F. Products*, 939

F.2d 683 (9th Cir. 1991) (applying provisions of ERISA to tribal lumber mill); *Coeur d'Alene, supra* at 1115-1116 (applying OSHA standards to a tribal farm). Finally, sovereign immunity does not apply in situations where prospective relief is sought through tribal officials. *See, Aspaas, supra*.

As demonstrated herein, the Navajo Nation's lease provision and its NPEA do not involve issues of sovereign immunity because they attempt to legislate conduct of non-members of the tribe and does not override the requirements of Title VII. Moreover, the present action deals with prospective relief relative to the continuing practice of giving preferences to non-Navajo Native Americans<sup>3</sup> and, therefore, does not involve or encroach on the powers of the Navajo Nation.

This is a Title VII failure to hire case between a private individual and against his potential private employer. Neither party is a member of the Navajo Nation. Additionally, the contention that the Navajo Nation would be an indispensable party to the present case occurred where SRP was permitted to file a **second** motion to dismiss after the reversal in *Dawavendewa I.*<sup>4</sup> For the first time, Dawavendewa was then confronted with the notion that the Navajo Nation and/or Navajo officials were acting beyond the scope of their authority and violating federal

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<sup>3</sup> Dawavendewa and class members are also seeking monetary damages against SRP.

<sup>4</sup> The Ninth Circuit's decision implies that Dawavendewa should have added the tribal officials in his initial Complaint as evidence that they are not an appropriate party. However, that logic fails to take into account the whole purpose of Rule 19, F.R.C.P.

law in enforcing their lease provision and the NPEA with regard to the conduct of two non-members of the tribe.

Because the Ninth Circuit acknowledged that tribal officials could be held responsible in certain circumstances, SRP and/or Dawavendewa should have been permitted or given the opportunity to craft pleadings or amend pleadings that would permit the legal inclusion of those parties.<sup>5</sup> *See, Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1506 (9th Cir. 1985); *Bonanno v. Thomas*, 309 F.2d 320 (9th Cir. 1962). The Ninth Circuit's decision does not permit such an amendment, notwithstanding its own acknowledgement and the holding in *Aspaas*, that such action would be appropriate. Consequently, this court should also consider the Ninth Circuit's failure to follow its own holding in *Aspaas* and this Court's decision in *National Farmers, supra* in allowing the parties to proceed with tribal officials as appropriate parties.

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## CONCLUSION

Based on the above, the Court should accept the writ of certiorari in light of the errors in the Ninth Circuit's decision which will effectively emasculate the anti-discriminatory provisions of Title VII on Tribal lands and lead to significant conflicts with existing statutory and

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<sup>5</sup> The Ninth Circuit states that Dawavendewa's suit would, in reality, be a suit against the Navajo Nation. Such an argument ignores the nature of such a claim – the claim would be against officials for requiring SRP, a non-member, to violate federal law, *i.e.* Title VII and the control of non-members' conduct. That is the same issue presented in *Aspaas* and should have been recognized and applied by the Ninth Circuit.

case law throughout the country and within the circuit. Moreover, permitting tribal nations to control the conduct of non-members on their land also violates the limit of their sovereign powers.

Respectfully submitted,  
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FOR PUBLICATION  
 UNITED STATES COURT OF APPEALS  
 FOR THE NINTH CIRCUIT

HAROLD DAWAVENDEWA,  
 a single man,  
*Plaintiff-Appellant,*

v.

SALT RIVER PROJECT AGRICULTURAL  
 IMPROVEMENT AND POWER  
 DISTRICT, an Arizona corporation,  
*Defendant-Appellee,*

THE NAVAJO NATION,  
*Appellee.*

No. 00-16787  
 D.C. No.  
 CV-96-01165-SMM  
 OPINION

Appeal from the United States District Court  
 for the District of Arizona  
 Stephen M. McNamee, Chief District Judge, Presiding

Argued and Submitted  
 October 17, 2001 – San Francisco, California

Filed January 2, 2002

Before: Robert R. Beezer, Stephen S. Trott, and  
 Richard C. Tallman, Circuit Judges

Opinion by Judge Trott