

No. 05-353

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IN THE  
Supreme Court of the United States

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Peabody Western Coal Company and  
Peabody Coal Company, LLC,  
*Petitioners,*

v.

Equal Employment Opportunity Commission.

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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**BRIEF OF AMICI CURIAE BASHAS' INC. AND SALT  
RIVER PROJECT AGRICULTURAL IMPROVEMENT  
AND POWER DISTRICT IN SUPPORT OF  
PETITIONER ON THE PETITION FOR A WRIT OF  
CERTIORARI**

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**QUESTION PRESENTED**

Whether a plaintiff may join as an involuntary defendant under Federal Rule of Civil Procedure 19 a party who the plaintiff is prohibited from suing directly. In this brief, *amici*, Bashas' Inc. and Salt River Project Agricultural Improvement and Power District explain the compelling reasons for the Court to grant the writ.

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## INTEREST OF THE AMICI<sup>1</sup>

*Amicus*, Bashas' Inc. ("Bashas'"), was founded in 1932 in Chandler, Arizona. The company started as a family supermarket with one location, and has grown to over 150 stores with various store formats all in Arizona, except one store on a Native American Reservation in New Mexico and one store in Needles, California. The store formats called Diné Markets are located on the Navajo Nation in Arizona and New Mexico. Bashas' also has Bashas' stores on the Tohono O' odham, White Mountain Apache and San Carlos Apache Nations.

Bashas' is currently involved in parallel litigation with the Equal Employment Opportunity Commission ("EEOC"), *E.E.O.C. v. Bashas' Inc.*, Case No. 2:05-cv-02382 PHX SMM, pending in United States District Court for the District of Arizona. Simultaneously, the Navajo Nation has directed Bashas' immediately to come into full compliance with the Navajo Preference in Employment Act ("NPEA"), which requires Bashas' to give a preference in hiring to Navajos and to adopt a written Navajo Affirmative Action Plan.

*Amicus*, Salt River Project Agricultural Improvement and Power District ("SRP") is a municipal corporation and political subdivision of the State of Arizona. *See* Ariz. Const. Art. 13, §7; A.R.S. §48-2302; *see also* *Ball v. James*, 451 U.S. 355 (1981). SRP has an ownership interest in, and operates on behalf of all the owners, the Navajo Generating Station ("NGS"), located on reservation land of the Navajo Nation. NGS is located on the Navajo Nation's land pursuant to a lease between the owners and the Navajo Nation, entered into in 1969 and approved by the United States Secretary of the

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<sup>1</sup> No person or entities other than *amici* and their counsel participated in the writing of this brief or made a financial contribution to the brief. Letters signifying the parties' consent to the filing of this brief are on file with the Court.

Interior. The lease obligates SRP to give preference in employment to qualified local Navajos.

SRP was the defendant in *Dawavendewa v. Salt River Project Agr. Improvement & Power Dist.*, 276 F.3d 1150 (9<sup>th</sup> Cir. 2002), in which the EEOC unsuccessfully attempted to intervene. Because SRP is a political subdivision of the State of Arizona, the EEOC may not bring, or intervene in, a civil action against SRP, but the United States Attorney General may do so. 42 U.S.C. §2000e-5(f)(1).

## **INTRODUCTION**

Petitioner Peabody Coal is not the only employer caught in a battle between governmental entities - the EEOC and Native American Nations. Bashas' operates on three reservations. Bashas' is being sued simultaneously by the EEOC for following Navajo law and the Navajo Nation Labor Commission and The Navajo Nation Office of Navajo Labor Relations have ordered Bashas to comply fully with Navajo employment law. Similarly, SRP operates a large power plant on the Navajo reservation. The EEOC has, in the past, attempted to intervene in an action challenging SRP's obligation to give Navajo employment preference under its lease with the Navajo Nation. The Court should grant certiorari to resolve whether the EEOC may use Rule 19 and a suit against a private entity as a method to litigate the legality of tribal preference laws.

## **REASONS FOR GRANTING THE WRIT**

Bashas' and SRP (and other employers) have significant operations on tribal lands. Both the White Mountain Apaches and Navajo Nation require Bashas' to comply with lease provisions and laws that require preferences in employment be given to their tribal members.

Tribal laws and leases with the tribes conflict with the EEOC's interpretation of Title VII. Employers are put in the untenable position of having to choose whether to violate Title VII or tribal law and leases.

### **I. FACTUAL INFORMATION RELEVANT TO AMICI PETITION**

Bashas' operates seven stores on the Navajo Nation. These stores employ over 400 employees. The stores are located in Chinle, Arizona; Crown Point, New Mexico; Dilkon, Arizona; Kayenta, Arizona; Pinon, Arizona; Tuba City, Arizona; and Window Rock, Arizona. For each of these stores, Bashas' has a lease with the Navajo Nation.

### **A. PREFERANCE PROVISIONS OF TRIBAL LEASES**

Each lease requires Bashas' to give preference in hiring to Navajos. Each of these leases was approved by the United States government, through the Department of the Interior, Bureau of Indian Affairs.

For example, a lease approved in 2002 which governs the Dilkon store requires:

#### **NAVAJO EMPLOYMENT.**

Lessee agrees to comply with the Navajo Preference in Employment Act in conducting its operations from the Leased Premises. In addition to satisfying the requirements of the aforementioned Act, Lessee agrees to use reasonable efforts to (a) employ a minimum of seventy percent (70%) persons entitled to preference under the Navajo Preference in Employment Act in its Dilkon store at all times during the first three years of its operation, eighty percent (80%) during the fourth through sixth years of its operation, and ninety percent (90%) during the seventh through tenth years of its operation; (b) employ a minimum of ninety-five percent (95%) person [sic] entitled to preference under the Navajo Preference in Employment Act in its Dilkon store at all times after the first ten (10) years of the Lease; and (c) prepare an affirmative action program for submittal to Lessor within one (1) year after opening for business which will define Lessee's plan for developing persons entitled to preference under the Navajo Preference in Employment Act to hold the positions of store manager, assistant manager and department manager positions in it Dilkon store. Such affirmative action plan will contain affirmative steps whereby Lessee will provide upward mobility such as training, job enrichment and other positive employee develop-

ment factors. Said plan is understood to provide for the benefit of the Navajo people in terms of job and advancement with a primary goal of having a Navajo store manager in Dilkon no later than the commencement of the sixth (6th) year of operation and Navajos represented proportionately in all levels of operation.

This lease was approved on August 21, 2002 by the Regional Director, Navajo Region, for the Bureau of Indian Affairs. (The leases for other stores were all signed long after Title VII went into effect.)

Bashas' operates stores on three other Native American Nations. Bashas' operates one store on the White Mountain Apache Nation (in White River, Arizona) employing over 50 employees and another store on the San Carlos Apache Nation (in San Carlos, Arizona) employing over 60 employees. Bashas' operates one store on the Tohono O' odham Nation (in Sells, Arizona) employing 45 employees.

## **B. TRIBAL PREFERENCE LAWS**

In addition to lease requirements, at least two nations require employers to give preference in hiring to tribal members. The Navajo Nation requires that:

All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation shall:

1. Give preference in employment to Navajos. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job clas-

sifications including supervisory and management positions.<sup>2</sup>

NPEA, 15 Nav. Nation Code §604 (A) (1). The White Mountain Apache Nation requires that:

All non-tribal employers operating within the exterior boundaries of the Fort Apache Indian Reservation are hereby required to give preference to Indians in hiring, promotion, training and all other aspects of employment. Said employers shall comply with the rules, regulations, and guidelines of the Labor Relations Department which set forth the specific obligations of the employer in regard to Indian Preference.

The White Mountain Apache Labor Code, Section 1.4(A), defines Indian Preference as:

Indian Preference means the following priority order of preference:

- (1) Enrolled member of the White Mountain Apache Tribe.
- (2) Indian spouse of an enrolled member of the White Mountain Apache Tribe.
- (3) Other Indians.

The White Mountain Apache preference applies to all employment activities, including those undertaken pursuant to the Indian Self Determination and Education Assistance Act, P.L. 93-638, as amended, except for em-

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<sup>2</sup> The preference also extends to Non-Navajos legally married to Navajos. NPEA, 15 Nav. Nation Code §614 (A).

ployment funded by government programs unrelated to the Indian Self Determination Act, which shall have the following priority order of preference:

- (1) Local Indian.
- (2) Other Indians.

White Mountain Apache Labor Code, Section 1.2. The White Mountain Apaches reaffirmed their preference act in 1995 as applying to all employers, except where certain federally funded programs are involved and acknowledged that some federal agencies did not agree to the use of tribal preferences:

WHEREAS, the Tribal Council established the TERO Code, as part of the Tribal Labor Code to regulate employment in construction activities on the Reservation; and

WHEREAS, the TERO Code grants a preference in the employment of members of the White Mountain Apache Tribe over members of any other Indian tribe; and

WHEREAS, such a preference scheme is recognized by contracting agencies, including the federal government, for purposes of the Indian Self-Determination Act; and

WHEREAS, other federal programs recognize an "Indian preference" in tribal employment preferences, but prohibit use of a "Tribal preference"; and

WHEREAS, the conflict over preference priorities in past construction projects has on occasion made it necessary for the Tribe to waive the current employment preference provision in the TERO Code; and

WHEREAS, the Tribal Council will continue to advocate recognition of a tribal preference in all federal grants and funding it receives, the Tribal Council has determined that until all federal agencies agree to the use of tribal preference requirements, the TERO Code should be amended to permit an alternative preference for certain federally-funded programs; and

WHEREAS, the Tribal Council has reviewed the proposed amendment to the TERO Code.

BE IT RESOLVED by the Tribal Council of the White Mountain Apache Tribe that it hereby directs the Tribal Council Secretary to post the proposed amendment to the TERO Code in each District for ten days as required by Constitution.

White Mountain Apache Ordinance No. 203. The White Mountain Apache Labor Code provides for sanctions against an employer who fails to comply with its provisions:

**SANCTIONS FOR NON-COMPLIANCE**

A. Any employer who fails to comply with the laws, rules, regulations, or guidelines on employment rights of the White Mountain Apache Tribe or who fails to obtain the necessary agreements from its signatory unions shall be subject to sanctions which shall include but are not limited to:

- (1) denial of the right to commence business on the Fort Apache Indian Reservation;
- (2) fines;
- (3) suspension of the employer's operation;

- (4) termination of the employer's operation;
- (5) denial of the right to conduct any further business on the Fort Apache Indian Reservation;
- (6) payment of back pay or other relief in order to correct any harm done to aggrieved Indians; and
- (7) the summary removal of employees hired in violation of the White Mountain Apache Tribe's employment rights requirements.

White Mountain Apache Labor Code 2.7.

### **C. TOLEDO v. BASHAS' INC.**

On December 28, 2004, Harrison Toledo, an enrolled member of the Navajo Nation, filed a complaint with the Navajo Nation Labor Commission alleging that his employment was terminated in violation of the NPEA. The Commission held an evidentiary hearing on this complaint on March 24, 2005. In an order dated July 12, 2005, the Commission upheld the termination, but ordered Bashas' to comply with the NPEA and criticized Bashas' for not having a written Affirmative Action Plan. (The Commission excused this deficiency noting that of 370 Bashas' employees on the Navajo Nation, 365 were Navajo.)

### **D. THE NAVAJO NATION OFFICE OF NAVAJO LABOR RELATIONS**

The Navajo Nation Office of Navajo Labor Relations recently required Bashas' to fully comply with the NPEA by implementing and following Affirmative Action Plans that include the preference for Navajos in hiring and "include and specify a Navajo employment preference policy statement in all job announcements and advertisements." NPEA, 15 Nav. Nation Code §604 (B) (1).

**E. E.E.O.C. v. BASHAS' INC.**

On August 17, 2005, the EEOC filed an action against Bashas' in the United States District Court for the District of Arizona. The EEOC also named the Navajo Nation as a Defendant, pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. EEOC v. Bashas' is currently stayed, pending the outcome of this proceeding.

The EEOC alleges Bashas' violated Title VII by giving hiring preferences to members of the Navajo Nation. The EEOC alleges that such preferences violate federal law because Title VII permits only preferences to Native Americans and not members of a specific tribe. The basis of the EEOC's lawsuit is Bashas' alleged decision not to hire Randy Honahni ("Honahni") and Dale Lucero ("Lucero") because neither individual was a member of the Navajo Nation.

Over five years ago, on August 27, 2000, Honahni filed an EEOC Charge of Discrimination ("the Honahni Charge"), alleging that Bashas' discriminated against him on the basis of national origin by giving hiring preferences to members of the Navajo Nation. The EEOC issued a final Determination on September 21, 2001 that Bashas' violated Title VII. Efforts between the EEOC and Bashas' to conciliate the matter failed on December 20, 2001. The EEOC informed Bashas', "No further efforts to conciliate this case will be made by the EEOC. Accordingly, we are at this time reviewing the case for possible litigation."

On December 5, 2001, Lucero filed an EEOC Charge of Discrimination ("the Lucero Charge"). Lucero, like Honahni, alleged Bashas' discriminated against him on the basis of national origin discrimination by giving hiring preferences to members of the Navajo Nation. On February 25, 2003, the EEOC issued a final determination on the Lucero Charge. On June 11, 2003, conciliation efforts failed. The EEOC notified Bashas', "No further efforts to conciliate this case will be made by the EEOC. Accordingly, we are at this time reviewing this case for possible litigation."

**II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE WHETHER THE EEOC MAY JOIN A PARTY UNDER RULE 19 WHO IS PROHIBITED FROM SUING DIRECTLY**

The EEOC has mounted a vigorous campaign against preference laws by suing employers conducting business on tribal lands. The EEOC unsuccessfully attempted to intervene in *Dawavendewa v. Salt River Project Agr. Improvement & Power Dist.*, 276 F.3d 1150 (9<sup>th</sup> Cir. 2002), has brought the instant matter against Peabody Coal, and now has brought an identical action against Bashas' seeking to change Native American policies endorsed by the Bureau of Indian Affairs, for employers doing business with these sovereign nations.

Bashas' and SRP urge this Court to accept review of this case because the EEOC disagrees with the laws of another nation and is attempting improperly to use Rule 19 to accomplish its ends. Joining a sovereign nation with a private employer will not resolve the irreconcilable conflict between federal law and the laws of a sovereign nation. The Attorney General, as a politically accountable office, would more likely strive to resolve this dispute through sovereign to sovereign negotiations rather than suing a private entity, acting in good faith, for punitive damages as a means for solving a perceived wrong with the laws of another nation.

Bashas' and SRP encourage this Court to review this conflict and resolve whether the EEOC's use of Rule 19 is appropriate.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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