No. _____

In The
Supreme Court of the United States

CHRISTOPHER COOK and LEIDRA COOK,
Petitioners,

v.

AVI CASINO ENTERPRISES, INC., a corporation; IAN DODD; JUAN MAJIAS; STEPHANIE SHAIK; and DEBRA PURBAUGH,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Arizona, Division 1

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

First question—tribal immunity. Congress lets Indian tribes and their corporations provide alcoholic beverages in Indian country, subject to complying with state laws and with verified, published tribal ordinances.[1] There is, however, no tradition of tribal sovereignty in this area.[2] A tribal-incorporated casino over-served its own employee, who caused a motor-vehicle collision resulting in amputation of a motorcyclist's leg and other life-threatening injuries. Does the tribal sovereign-immunity doctrine bar a dram-shop lawsuit against the tribal corporation and its employees?

Second question—general personal jurisdiction. The tribal-incorporated casino's systematic contacts with Arizona included employing 500 Arizonans (about 5/6's of its entire staff), advertising regularly in Arizona, and soliciting business from and catering to Arizonans. The casino is located on the Arizona-Nevada border—with its main vehicle access only through Arizona. Thus, minimum contacts support general personal

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[1] 18 U.S.C. § 1161 (Federal laws banning sale and possession of liquor in Indian country "shall not apply . . . to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.").

[2] *Rice v. Rehner*, 463 U.S. 713, 725 (1983) (This Court found "no tradition of sovereign immunity that favors the Indians in this respect.").

jurisdiction in Arizona. Did Arizona courts erroneously hold that there was no general personal jurisdiction?

Third question—specific personal jurisdiction. The tribal-incorporated casino negligently served so much liquor to a casino employee that she could not drive safely. Casino workers even took her to her car in the casino parking lot—knowing that she lived in Arizona and would drive there on Arizona roads. Those acts, aimed at people within Arizona, caused life-threatening injuries in Arizona. Did Arizona courts erroneously hold that there was no specific personal jurisdiction?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding before this Court are:

The petitioners: Christopher Cook and Leidra Cook.

The respondents: Avi Casino Enterprises, Inc., a corporation, Ian Dodd, Juan Mejia, Stephanie Shaik, Debra Purbaugh, and Andrea Christensen.

Under Rule 29.6, Rules of the Supreme Court, Petitioners state that they and all Respondents are individuals and not corporations, with the exception of Avi Casino Enterprises, Inc.—a corporation that the Fort Mojave Indian Tribe wholly owns and that was incorporated under its tribal ordinance.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a Writ of Certiorari to review the Arizona Supreme Court's and the Arizona Court of Appeals' incorrect dismissal of this case under the doctrine of tribal sovereign immunity—and for an alleged lack of personal and general jurisdiction.

OPINIONS AND ORDERS BELOW

Petitioners ask this Court to review:

(1) The Arizona Court of Appeals' March 20, 2008 memorandum decision affirming dismissal of Petitioners' complaint. *Cook v. Avi Casino Enters., Inc.*, Ariz. Ct. App. Case No. 1 CA-CV 07-0110, 2008 WL 4108121 (March 20, 2008).

(2) The Arizona Supreme Court's October 28, 2008 Order denying the petition for review of the Arizona Court of Appeals' March 20, 2008 memorandum decision.

JURISDICTION

On October 28, 2008, the Arizona Supreme Court denied the Petitioners' petition for review of the Arizona Court of Appeals' March 20, 2008 memorandum decision affirming dismissal of the Petitioners' complaint. That dismissal was made under the federal doctrine of tribal sovereign immunity—and for an alleged lack of personal

jurisdiction.[3] This Court has jurisdiction under 28 U.S.C. § 1257(a) and under Rules 10 and 13(1), Rules of the Supreme Court.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1161 – The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

STANDARD OF REVIEW

For two separate reasons, review is de novo. First, federal courts review de novo questions of tribal sovereign immunity.[4] Second, appellate courts review de novo dismissal for lack of subject-matter jurisdiction.[5]

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[3] *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008).

[4] *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002).

[5] *Rattlesnake Coal. v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1100 (9th Cir. 2007).

STATEMENT OF THE CASE

1. Introduction.

For this Court, the Petition presents a tribal sovereign-immunity case of first impression and great importance. It tests whether a tribal corporation subject to state liquor laws is immune from common-law, dram-shop liability under the tribal sovereign-immunity doctrine. The Arizona appellate courts—and the Ninth Circuit—say "Yes." But federal statutes and this Court's prior cases indicate "No." And, in September 2008, the Oklahoma Supreme Court emphatically said "No."[6] Resolving this important question of federal law—and ending the conflict between the Ninth Circuit and the Arizona appellate courts on one hand, and the Oklahoma Supreme Court on the other—are the main reasons why this Court should grant the Petition for Writ of Certiorari.

Although not as dramatic, the Arizona appellate-court rulings on personal jurisdiction also raise important issues of federal law on personal jurisdiction—especially on how to implement the often overlooked *Calder v. Jones* personal-jurisdiction "effects test."[7]

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[6] *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008).

[7] *Calder v. Jones*, 465 U.S. 783 (1984).

2. The Tribe incorporated Avi Casino. Under an agreement with Nevada, Avi Casino gained the right to serve liquor in Indian country.

Fort Mojave Indian Tribe ("Tribe") incorporated Avi Casino Enterprises, Inc. ("Avi Casino") to run a casino in Nevada.[8] A tribal business-corporation ordinance empowered Avi Casino as a for-profit, separate corporation that could sue and be sued—and that could function within and without tribal borders.[9] A separate tribal liquor ordinance that the Tribe published in the *Federal Register* made it unlawful for the casino to sell liquor to any person apparently under the influence of alcohol.[10] Nevada granted licenses letting Avi Casino sell liquor in Nevada subject to state law.[11] That set the stage for the May 25, 2003 collision.

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[8] "Restated Articles of Incorporation of Avi Casino Enterprises, Inc." (filed with Arizona Court of Appeals on Oct. 29, 2007).

[9] Fort Mojave Indian Tribe Corp. Ord., § IV(b) ("Each corporation shall have power: (b) To sue and be sued, complain and defend, in its corporate name."); § IV(j) (April 24, 1986) ("Each corporation shall have power: To conduct its business, carry on its operations and have offices and exercise the powers granted by this Ordinance, within or without the tribal reservation boundaries.") (filed with Arizona Court of Appeals on Oct. 29, 2007).

[10] Fort Mojave Indian Tribe, Liquor Ord. No. 52, 60 FED. REG. 54078, 54082, § 3.1(A)(3) (Oct. 19, 1995) ("It shall be a violation of this Ordinance: . . . For any person to sell liquor to a person apparently under the influence of alcohol, or other deleterious substances.").

[11] "Liquor Licensing Intergovernmental Agreement by and between the Fort Mojave Indian Tribe and Clark County, Nevada (Sept. 29, 2005)."

3. Avi Casino negligently over-served its own employee, took her to her car, and sent her out onto the highway—where she caused the accident.

Andrea Christensen was an Avi Casino cocktail waitress.[12] In the evening of May 24—and into the morning of May 25, 2003—she attended another casino employee's birthday party at the casino. Ian Dodd and Debra Purbaugh were among the casino employees encouraging drinking at the party. Dodd, the on-duty manager, announced that drinks were "on the house." Christensen was off-duty. Purbaugh and other employees violated state and tribal law by serving alcoholic beverages to Christensen after she was obviously intoxicated.

Casino employees then placed Christensen on a casino-run shuttle bus to the employee parking lot, so she could drive to her Arizona home. She headed north on Aztec Road within Arizona. Moments after leaving the lot, Christensen swerved across the center line and slammed her car into Chris Cook, who was driving his motorcycle south on the same road. The accident caused amputation of Cook's left leg and over $1 million in medical bills. At about 4:30 in the morning of May 25, 2003—shortly after the

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[12] The facts are taken directly from the complaint (Index of Record ("IR") 01), and from the summary set out in *Cook v. Avi Casino Enters., Inc.*, Ariz. Ct. App. Case No. 1 CA-CV 07-0110, 2008 WL 4108121, slip op. at ¶¶ 1-3 (March 20, 2008), and in *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718, 720-22 (9th Cir. 2008). For a motion to dismiss, the facts are presumed to be true. *Wah Chang v. Duke Energy Trading and Mktg.*, 507 F.3d 1222, 1224 n. 1 (9th Cir. 2007).

crash—Christensen had a 0.25% blood-alcohol reading. In Arizona's Mohave County Superior Court, Christensen pled guilty to aggravated assault and driving under the influence. The Arizona superior court sentenced her to four years in Arizona state prison.

4. The many contacts with Arizona—and the specific acts aimed at Arizona—support personal jurisdiction.

Since the superior court granted the motion to dismiss, courts will presume the truth of the jurisdictional facts alleged in the state-court complaint and in the materials opposing the motion to dismiss. The facts support personal jurisdiction in Arizona. After all, Avi Casino continuously advertised and marketed its goods and services in Arizona—soliciting and conducting substantial business with Arizona residents.[13] The casino is a few hundred yards from Arizona.[14] And the main roads serving it are in Mohave County: Aztec Road (which Mohave County maintains), and Arizona State Highway 95.[15] The casino operated a shuttle bus to a local Arizona airport and one taking employees from the casino to their cars in an employee parking lot. The employees travelled from there onto Arizona roads and highways.[16] (That was the same shuttle that delivered the alcohol-

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[13] Complaint ¶¶ 3, 14; Opp. to Mot. to Dismiss at 3, ¶ 4 (IR 01, 20).

[14] Complaint ¶ 14 (IR 01).

[15] Complaint ¶ 14; Opp. to Mot. to Dismiss at 6, ¶ 29 (IR 01, 20).

[16] Opp. to Mot. to Dismiss at 4, ¶ 9 and 7, ¶ 35 (IR 20).

besotted casino employee to her car before she crashed it into Chris Cook's motorcycle.)

Avi Casino employed 645 people—500 of them non-Indians—and most of whom lived in Arizona.[17] Moreover, the casino operated an interactive website letting Arizonans play casino games, get directions, check, make and pay for hotel reservations, check "player's club" accounts, reserve space in the RV park, take a golf-course virtual tour, reserve tee times, buy movie tickets, check job openings, and get job applications.[18] Further, the casino belonged to two Arizona municipal Chambers of Commerce.[19] And it regularly organized Jet Ski caravan and other boat tours and rentals from its casino site to reciprocal vendors in Arizona.[20]

An overarching fact is Avi Casino's regular practice of letting its employees become intoxicated with cheap or free liquor, and then encouraging or letting them drive on Arizona roads and highways to their Arizona homes.[21] The casino's practice repeatedly endangered Arizona motorists. And for Chris Cook, the danger turned into tragedy.

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[17] Opp. to Mot. to Dismiss at 4, ¶ 8 (IR 20).

[18] Opp. to Mot. to Dismiss at 3-4, ¶ 5, at 6, ¶ 30 (IR 20).

[19] Opp. to Mot. to Dismiss at 4, ¶¶ 6-7 (IR 20).

[20] Complaint ¶ 15 (IR 01).

[21] Opp. to Mot. to Dismiss at 7, ¶ 39; Complaint ¶ 25 (IR 20, 01).

5. The superior-court case against the casino corporation and its employees ended in dismissal based on the doctrine of tribal sovereign immunity.

Cook and his wife sued Avi Casino and its employees in Arizona superior court. (The Cooks also sued the same defendants in Arizona federal district court, which dismissed that complaint under the tribal sovereign-immunity doctrine. And the Ninth Circuit affirmed.[22] They are contemporaneously filing a Petition for Writ of Certiorari in the Ninth Circuit case. They ask that the Court consolidate and grant both Petitions.).

The Arizona Court of Appeals affirmed the dismissal, reasoning that tribal sovereign immunity barred the lawsuit, and finding that there was no personal jurisdiction—either general or specific.[23] The Arizona Supreme Court denied the Cooks' petition for review on October 28, 2008, leading to the Petition for Writ of Certiorari.[24]

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[22] *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008).

[23] *Cook v. Avi Casino Enters., Inc.*, Ariz. Ct. App. Case No. 1 CA-CV 07-0110, slip op. at ¶¶ 9-10 (March 20, 2008) ("That the damage causing event occurred on the reservation is a critical factor. . . . Here, though the party involved in the collision was a non-Indian, the entities being sued are a tribal entity and its employees. This raises a clear issue of subject matter jurisdiction.").

[24] *Id.*

REASONS FOR GRANTING THE PETITION

1. The *Cook* decisions in the Arizona appellate courts and in the Ninth Circuit conflict with the Oklahoma Supreme Court's 2008 decision in *Bittle v. Bahe*. That conflict creates a difference in tribal-entity law that supports accepting the Petition for Writ of Certiorari.

On March 20, 2008, the Arizona Court of Appeals filed its memorandum decision in this case, which, on October 28, 2008, the Arizona Supreme Court declined to review.[25] The Arizona courts effectively found that the casino and its employees were immune under the tribal sovereign-immunity doctrine.[26] Then, on November 14, 2008, the Ninth Circuit upheld dismissal of the parallel federal case—also based on the doctrine of tribal sovereign immunity.[27]

But on September 16, 2008, the Oklahoma Supreme Court denied rehearing in a decision reaching the opposite conclusion on the tribal-immunity doctrine—but on the same operative facts. That decision is *Bittle v. Bahe*.[28] There, the Absentee-Shawnee Tribe of Oklahoma incorporated Thunderbird Entertainment to own and operate Thunderbird Casino under Oklahoma state gambling and liquor licenses. The plaintiff sued the casino and the Tribe in

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[25] *Id.*

[26] *Id.*

[27] *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008).

[28] *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008).

Oklahoma state court—seeking damages for personal injuries suffered in a motor-vehicle accident caused by a casino customers. As in *Cook*, the impaired customer's car swerved over the center line. And as in *Cook*, casino personnel had served liquor to the customer despite obvious intoxication. And so the plaintiff asserted state-law dram-shop liability against both the tribal corporation and the Tribe. The trial court and the Oklahoma Court of Appeals held that the tribal corporation and Tribe were immune from suit under the tribal sovereign-immunity doctrine.[29]

But the Oklahoma Supreme Court held that "laws of the state" in 18 U.S.C. § 1161 included laws providing for state common-law dram-shop liability. It also held that, in any event, the tribal casino corporation, by obtaining an Oklahoma state license to serve alcoholic beverages at the casino, had waived any tribal sovereign immunity it might have had to suit in state courts—including a common-law negligence action for dram-shop liability.[30]

The conflict between Arizona appellate courts (and the Ninth Circuit) on the one hand—and the Oklahoma Supreme Court on the other—matters because of the large number of federally-recognized Indian tribal entities in their respective jurisdictions. As of April 4, 2008, the Bureau of Indian Affairs

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[29] *Id.* at 812-14.

[30] *Id.* at 816-28.

recognized 562 tribal entities.[31] And Oklahoma contains 37 of them:

Absentee-Shawnee Tribe of Indians of Oklahoma
Alabama-Quassarte Tribal Town, Oklahoma
Apache Tribe of Oklahoma
Caddo Nation of Oklahoma
Cherokee Nation, Oklahoma
Cheyenne and Arapaho Tribes, Oklahoma (formerly the Cheyenne-Arapaho Tribes of Oklahoma)
Chickasaw Nation, Oklahoma
Choctaw Nation of Oklahoma
Citizen Potawatomi Nation, Oklahoma
Comanche Nation, Oklahoma
Delaware Nation, Oklahoma
Eastern Shawnee Tribe of Oklahoma
Fort Sill Apache Tribe of Oklahoma
Iowa Tribe of Oklahoma
Kaw Nation, Oklahoma
Kialegee Tribal Town, Oklahoma
Kickapoo Tribe of Oklahoma
Kiowa Indian Tribe of Oklahoma
Miami Tribe of Oklahoma
Modoc Tribe of Oklahoma
Muscogee (Creek) Nation, Oklahoma
Osage Nation, Oklahoma (formerly the Osage Tribe)
Ottawa Tribe of Oklahoma
Otoe-Missouria Tribe of Indians, Oklahoma
Pawnee Nation of Oklahoma

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[31] *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 73 FED. REG. 18553-01 (April 4, 2008).

Peoria Tribe of Indians of Oklahoma
Ponca Tribe of Indians of Oklahoma
Quapaw Tribe of Indians, Oklahoma
Sac & Fox Nation, Oklahoma
Seminole Nation of Oklahoma
Seneca-Cayuga Tribe of Oklahoma
Shawnee Tribe, Oklahoma
Thlopthlocco Tribal Town, Oklahoma
Tonkawa Tribe of Indians of Oklahoma
United Keetoowah Band of Cherokee Indians in Oklahoma
Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie), Oklahoma
Wyandotte Nation, Oklahoma[32]

On the other hand, the nine states within the Ninth Circuit have 421 tribal entities—229 in Alaska, and 192 in Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington.[33] (Hawaii apparently has no tribal entities.) Moreover, 21 of the Ninth Circuit's tribal entities are partially or wholly based in Arizona.[34]

Because of the Oklahoma Supreme Court's decision in *Bittle*, state dram-shop common law will apply to the 37 tribal entities in Oklahoma, but will *not* apply to the 421 tribal entities in the Ninth Circuit—which also includes the 21 Arizona-based tribal entities.

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[32] *Id.*

[33] *Id.*

[34] *Id.*

That is the kind of direct conflict that Supreme Court Rule 10(a) identifies as a reason to accept a Petition.

2. The Arizona *Cook* decision—and the Ninth Circuit *Cook* opinion—have decided an important question of federal law concerning the limits of the doctrine of tribal sovereign immunity over liquor transactions. The Court has not yet settled that question—but should settle it now.

The Arizona state appellate courts—and the Ninth Circuit—decided that tribal corporations are immune from state common-law dram-shop liability under the tribal sovereign-immunity doctrine. This Court has never directly addressed and settled that important question of federal law. It should do so now. Indeed, Supreme Court Rule 10(c) indicates that this sort of unresolved, important federal legal question supports accepting a Petition.

This Court's 1983 decision in *Rice v. Rehner* is key for applying the tribal sovereign-immunity doctrine to tribal corporations furnishing liquor.[35] In *Rice*, Eva Rehner—a Pala Tribe member and federally-licensed Indian trader—ran a general store on the Pala Reservation in San Diego, California. Under 18 U.S.C. § 1161, a Pala Tribe ordinance allowed sale of liquor on the reservation. California denied Rehner's request for an exemption from its license requirement to sell liquor for off-premises consumption. Rehner filed a declaratory-judgment action in federal district court, which dismissed the petition, holding that 18 U.S.C.

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[35] *Rice v. Rehner*, 463 U.S. 713 (1983).

§ 1161 actually required a state license.[36] The Ninth Circuit affirmed.[37]

This Court recognized that the judiciary had consistently construed federal statutes as reserving the tribal right to self-government and also recognized the recent trend toward a preemption analysis to determine whether a state could regulate activity within an Indian reservation.[38] *Rice* held that tradition had *not* recognized an inherent sovereign right of Indians or Indian tribes to regulate liquor.[39] In fact, the tradition, since early colonial times, had been a complete prohibition against liquor in Indian country. That prohibition was still in place subject to suspension conditioned on compliance with state law and tribal ordinance.[40] Thus, *Rice* recognized state and federal concurrent jurisdiction over alcoholic beverages in Indian country and *no* tradition of tribal sovereignty with respect to alcoholic beverages.[41]

According to *Rice*, the state interest in controlling liquor justified the "historical tradition of concurrent state and federal jurisdiction over the use and

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[36] *Id.* at 715-17.

[37] *Rehner v. Rice*, 678 F.2d 1340 (9th Cir. 1982).

[38] *Rice v. Rehner*, 463 U.S. 713, 718-20 (1983).

[39] *Id.* at 722.

[40] *Id.*

[41] *Id.*

distribution of alcoholic beverages in Indian country."[42] After all, a state has an "unquestionable interest" in liquor traffic inside its borders.[43] In fact, a "'state's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention.'"[44] (The state regulatory interest in the Cooks' case was substantial. As this case confirmed, negligent service of alcohol can cause terrible off-reservation effects.)

Rice concluded that there was "no doubt that Congress has divested the Indians of any inherent power to regulate in this area."[45] Indeed, Congress had passed no laws "demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development."[46] Thus, for regulating liquor transactions, Indian tribes lack "'the usual accouterments of tribal self-government.'"[47] Thus, there is no "*single* notion of tribal sovereignty" serving to direct any preemption analysis involving Indians.[48] Since there is no tradition of sovereign immunity

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[42] *Id.* at 724.

[43] *Id.*

[44] *Id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973)).

[45] *Id.* at 724.

[46] *Id.*

[47] *Id.* (quoting *McClanahan v. Ariz. St. Tax Comm'n*, 411 U.S. 164, 167-68 (1973)).

[48] *Id.* at 724.

favoring Indians in the regulation of liquor—and the sale of liquor potentially has a substantial impact beyond the reservation—*Rice* accorded "little if any weight to any asserted interest in tribal sovereignty" in this area.

As for 18 U.S.C. § 1161, *Rice* found a congressional intent (1) to remove the discriminatory federal prohibition against intoxicating liquor in Indian country, (2) to have state laws of their own force govern tribal liquor transactions, and (3) to require Indians to comply with state liquor laws in every regard.[49] *Rice* explained that Congress wanted to legalize Indian liquor transactions, but only if they conformed both with tribal ordinance *and* state law. Thus, the tribes, the states, and the federal government share concurrent jurisdiction over tribal liquor sales. And so Congress had authorized—and *not* preempted—state regulation over Indian liquor transactions.

The point is that Congress knew that Indians never enjoyed a tradition of tribal self-government for liquor transactions. Congress also knew that the states had concurrent authority over regulating and prohibiting liquor transactions. By passing 18 U.S.C. § 1161, Congress meant to delegate part of *its* authority to the tribes and to the states. That would "fill the void" created when the federal ban on Indian liquor ended. As this Court held in *Rice*, "Congress did *not* intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but

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[49] *Id.* at 726-27.

self-imposed regulations."[50] Thus applying state law to liquor transactions does not interfere with federal policies concerning reservations.

Applying the doctrine of sovereign tribal immunity here would make the tribal corporation a "super citizen" trading in heavily-regulated alcoholic beverages—but free from state judicial oversight and, indeed, free from all but self-imposed regulation.[51] *Rice*'s concern was whether a reservation retail outlet had to have a state license to sell liquor. But *Rice* is the controlling authority, since it held that Indians lack inherent attributes of sovereignty to regulate alcoholic beverages. *Rice* held that Indians had *no* tribal immunity from state alcoholic beverage law. While the parties in *Cook* are *not* seeking to nullify the Tribe's sovereign immunity, *Rice* stands for the proposition that there are limits when applying sovereign immunity. This case goes beyond those limits. Here, *Rice* supports exercising state dram-shop common law against a negligent tribal corporation and its employees.

3. State common-law dram-shop liability forms part of the "laws of the State" to which Indian-country sales of liquor must conform.

Avi Casino may contend that 18 U.S.C. § 1161 does not apply because it fails to mention common law. But 18 U.S.C. § 1161 requires that Indian-country liquor

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[50] *Id.* at 733 (quoting *Rehner v. Rice*, 678 F.2d 1340, 1352 (9th Cir. 1982) (Goodwin, J., dissenting) (emphasis added)).

[51] *Id.* at 734.

transactions must conform both with the "laws of the State" where the act or transaction occurs and with a valid tribal ordinance. Assuming the truth of the complaint, Avi Casino and its employees violated the tribal ordinance by serving liquor to an obviously-intoxicated tribal-employee driver.[52]

That leaves the question whether state dram-shop common law falls within the "laws of the State" that 18 U.S.C. § 1161 mentions. The phrase "laws of the State" in that statute is comprehensive and unqualified. Moreover, this Court's *Rice* opinion held that the words "laws of the State" in 18 U.S.C. § 1161 "include state authority over alcoholic beverages whether it is legislative, executive, or adjudicative in nature."[53] State courts recognizing dram-shop liability have held that the common law supports and reinforces control of liquor.[54] Indeed, dram-shop liability is part of state law—just as state conflict-of-law principles.

Avi Casino and its employees will probably argue that Nevada recognizes no common-law dram-shop liability.[55] But that involves a conflict-of-law question

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[52] *See* Fort Mojave Indian Tribe, *Liquor Ord. No. 52*, 60 Fed. Reg. 54078, 54082, § 3.1(A)(3) (Oct. 19, 1995) ("It shall be a violation of this Ordinance: . . . For any person to sell liquor to a person apparently under the influence of alcohol, or other deleterious substances.").

[53] *Bittle v. Bahe*, 192 P.3d 810, 823 (Okla. 2008).

[54] *See, e.g.*, *Rappaport v. Nichols*, 156 A.2d 1, 10 (N.J. 1960).

[55] *Snyder v. Viana*, 916 P.2d 170, 178 (Nev. 1996).

to resolve under Nevada and Arizona conflict rules. Three things are clear: First, this case is in Arizona state court. Second, those courts will resolve any conflict-of-law issues.[56] Third, Arizona recognizes common-law dram-shop liability.[57] In fact, Arizona has a substantial interest in applying its laws to a case: (1) that occurred within its jurisdiction; (2) where its criminal courts sentenced the drunk driver and its prisons incarcerated her; (3) that concerned an Arizona motorist; (4) that involved medical care and treatment provided in Arizona; and (5) that implicated a wider problem of unsafe liquor service impacting Arizona residents and visitors. Applying conflict-of-law rules is a problem for the trial judge to resolve *after* this case is remanded.

4. This Court's 1998 *Kiowa Tribe* opinion does not require applying the doctrine of tribal sovereign immunity to this liquor-liability case.

Arizona courts believed that the 1998 *Kiowa Tribe* opinion required applying the tribal sovereign-immunity doctrine in favor of the tribal corporation.[58]

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[56] *See, e.g., General Motors Corp. v. Eighth Judicial District Court of State of Nevada ex rel. County of Clark*, 134 P.3d 111 (Nev. 2006) (For conflict of laws, Nevada applies law of state with most significant relationship to the relevant issue.); *Winsor v. Glasswerks PHX, L.L.C.*, 204 Ariz. 303, 307, 63 P.3d 1040, 1044 (App. 2003) (Arizona follows same rule.).

[57] *Ontiveros v. Borak*, 136 Ariz. 500, 511, 667 P.2d 200, 211 (1983).

[58] *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718, 725-26 (9th Cir. 2008) (discussing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998)).

In *Kiowa Tribe*, the tribe—and not a tribal corporation—executed a promissory note to buy stock in a commercial enterprise. A clause in the note stated that it did not subject or limit the tribe's sovereign rights. When the tribe defaulted, the note-holder sued the tribe in state court. *Kiowa Tribe* held that (1) tribal immunity is a matter of federal law not subject to state-law diminution; (2) under federal law, an Indian tribe is subject to suit only where Congress has authorized or the tribe has waived immunity; and (3) Congress had not dispensed with or limited the rule of tribal immunity from suit. *Kiowa Tribe* held: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case."[59]

But *Kiowa Tribe* does not apply here, because this case does not: (1) concern a lawsuit against a tribe; (2) involve a contract; (3) affect tribal membership; (4) affect a tribe's right to govern its members; (5) interfere with a tribe's internal affairs or with tribal government. The Cooks have simply alleged that a tribal corporation caused terrible injuries by negligently serving an obviously-intoxicated casino employee-patron and then taking her to her car to drive onto the highway.

Indeed, in *Kiowa Tribe*, both the majority and the dissent disparaged the reasoning and the result. And

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[59] *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).

that shows why sovereign immunity should not go beyond the limits this Court has set. The *Kiowa Tribe* majority noted that this Court had retained the tribal sovereign-immunity doctrine "on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency."[60] But aside from abrogation, this Court retains the right to define and limit a doctrine that it alone developed. Indeed, the majority itself found "reasons to doubt the wisdom of perpetuating the doctrine."[61] After all, immunity can harm and deny a remedy to those "who have no choice in the matter, as in the case of tort victims."[62] The dissent agreed that the rule was "unjust"—especially so for "tort victims who have no opportunity to negotiate for a waiver of sovereign immunity."[63] Governments *and* individuals "should be held accountable for their unlawful, injurious conduct."[64] That is particularly true for liquor control, where federal, state, and tribal authorities share jurisdiction and the duty to protect the public.

This Court has always advanced the strong interest in ensuring that all citizens have court access.[65] Under

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[60] *Id.* at 757.

[61] *Id.* at 757.

[62] *Id.* at 757-58.

[63] *Id.* at 766 (Stevens, J. dissenting).

[64] *Id.*

[65] *Three Affiliated Tribes of the Fort Berthold Res. v. Wold Eng'g*, 476 U.S. 877, 888 (1986) ("The federal interest in ensuring that all citizens have access to the courts is obviously a weighty one.").

our system of dual sovereignty, there is an historical and constitutional assumption of concurrent state and federal jurisdiction.[66] Neither *Kiowa Tribe* nor any other Supreme Court decision supports stretching the tribal sovereign-immunity doctrine to cover injury caused by a tribal corporation's violation of statutes, regulations, and common law.

5. The Fort Mojave Indian Tribe waived tribal sovereign Immunity which, in any event, does not apply to this separate, incorporated business entity.

The tribal sovereign-immunity doctrine does not apply to this dram-shop common-law lawsuit. But even if it did, the Tribe waived any immunity-based protection of Avi Casino and its employees. The Tribe incorporated Avi Casino to operate a casino—with an essential part of the operation being service of alcohol. After all, a casino unable to serve alcohol would operate at a vast disadvantage, because for casinos, liquor and gambling are inseparable. The incorporation occurred under a tribal ordinance empowering business operations anywhere—and granting to Avi Casino the power to sue and be sued.[67]

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[66] *Nevada v. Hicks*, 533 U.S. 353, 390 (2001).

[67] Fort Mojave Indian Tribe Corp. Ord., § IV(b) ("Each corporation shall have power: (b) To sue and be sued, complain and defend, in its corporate name."); § IV(j) (April 24, 1986) ("Each corporation shall have power: To conduct its business, carry on its operations and have offices and exercise the powers granted by this Ordinance, within or without the tribal reservation boundaries."); § XXV(c) ("The corporation, at any time during the liquidation of its business and affairs, may make application to a court of

The sue-and-be-sued clause was part of the tribal-incorporation ordinance, was part of the appellate record, and must have a part in the analysis here. The clause reinforces the tribal corporation's separate nature and its amenability to suit when it harms others.[68] But even ignoring that clause, the Tribe created a separate legal entity to obtain the legal right to furnish intoxicating beverages under the laws of the State of Nevada.

The Cooks did not sue the Tribe. They sued a separate corporation created to manage the casino and furnish liquor in Indian country. Under 18 U.S.C. § 1161, Indian tribes can *only* furnish liquor there in a way conforming both with a proper tribal ordinance and "with the laws of the [surrounding] State."[69] That was Nevada, which required that the alcohol service be made through a corporation.[70] And so the Tribe set up

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competent jurisdiction to have the liquidation continued under the supervision of the tribal court."), Exh. 3 to Docket No. 25.

[68] *See, e.g., Odgen v. Iowa Tribe of Kan. & Neb.*, 250 S.W.2d 822, 828 (Mo. App. 2008) ("In a typical corporate charter, the 'sue and be sued' language indicates that the corporation is an entity in and of itself that can sue and be sued if a dispute arises."); Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 AM. INDIAN L. REV. 41, 50 (2001) ("If a tribal corporation is not immune, it is because it has included a so called 'sue and be sued' clause in its corporate charter.").

[69] 18 U.S.C. § 1161.

[70] *See* Nevada Gaming Commission, *In the Matter of Avi Casino Enters., Inc.* (Licensure), File No. SD-125, Second Revised Order of Licensure at ¶ 4 (Nov. 20, 1997) (The Fort Mojave Tribal Council is registered "as a holding company for Avi Casino

that corporation. The Tribe may have controlled it for its benefit, but it was a separate legal entity—recognized as such by Nevada.

A corporation is a legal reality—not a legal fiction.[71] Even if the Tribe is immune, it created a separate corporation to secure the right to furnish alcohol on Indian country in Nevada—and to reap the resulting financial benefits. But the Tribe now wants to ignore that same corporate form—and equate the Tribe with the corporation and its employees. That mocks the separate corporate form that the Tribe so assiduously created—and denies any remedy to the Cooks.[72]

The American theory of sovereignty rejects the idea that a government can create an apparently independent corporation enjoying the ability "to injure others, confident that no redress may be had against it as a matter of right."[73] Indeed, cloaking Avi Casino and its employees with sovereign immunity violates the congressional policy of encouraging tribal enterprises to enter commerce on an *equal* footing with

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Enterprise, Inc."); NEV. REV. STAT. § 463.485(1) (defining holding company).

[71] *Klein v. Bd. of Tax Supervisors*, 282 U.S. 19, 24 (1930).

[72] *R.C. Hedreen Co. v. Crow Tribal Hous. Auth.*, 521 F. Supp. 599, 603 (D. Mont. 1981).

[73] *Namekagon Dev. Co., Inc. v. Bois Forte Res. Hous. Auth.*, 395 F. Supp. 23, 29 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975). *See also Parker Drilling v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1137 (D. Alaska 1978).

other businesses.[74] That sort of immunity shields corporations and their employees from any wrongs they may commit—such as negligent casinos over-serving patrons, incompetent hospitals killing their patients, shady manufacturers marketing deadly products, vicious newspapers defaming anyone they please, and banks defrauding their customers. If they are tribal corporations, they can commit any tort they want, and no one can sue. That cannot be what Congress or this Court ever envisioned for separate tribal-incorporated businesses. And as 18 U.S.C. § 1161 proves, that especially cannot be true for torts arising from negligently and illegally furnishing alcoholic beverages.

6. Arizona courts may assert general personal jurisdiction over the casino because of its extensive contacts with Arizona.

Arizona courts have general personal jurisdiction if a defendant has sufficient minimum contacts with the state that suing there "does not offend traditional notions of fair play and substantial justice."[75] A defendant need only have substantial—or continuous and systematic—contacts with Arizona.[76] Here, Arizona courts may constitutionally assert general jurisdiction over Avi Casino because it has substantial, continuous, and systematic contacts with Arizona.

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[74] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973).

[75] *Bohreer v. Erie Ins. Exch.*, 216 Ariz. 208, 213, 165 P.3d 186, 191 (App. 2007).

[76] *Batton v. Tenn. Farmers Mut. Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4 (1987).

Moreover, its conduct and connection with Arizona are so strong that it could reasonably anticipate suit here.[77] That is especially true because of its policy of serving employees too much alcohol, and then encouraging and letting them drive into Arizona. That invites death and injury—and litigation—in Arizona.

7. Because the casino and its employees targeted Arizona, that state's courts may assert specific personal jurisdiction over them under the *Calder v. Jones* "effects test."

Specific jurisdiction exists when a defendant purposefully creates contacts in the forum or purposefully directs its acts at people in that forum.[78] And that is what Avi Casino and its employees did. They over-served a casino employee, took her to her car, and aimed her at Arizona. Their acts targeted Arizona as surely as they had randomly fired a howitzer across the border.

But this terrible accident was not random. Avi Casino regularly let its employees become obviously intoxicated at the casino on cheap or free liquor. And it then regularly encouraged and enabled them to drive to Arizona homes.[79] And this time, its employee-driver maimed a motorist. Arizona's Mohave County Superior Court—not the tribal court—punished the drunken casino employee for the crime of "extreme" DUI. But the Arizona appellate courts barred the

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[77] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

[78] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

[79] Complaint at ¶ 25 (IR 01).

Cooks from using that *same* superior court for civil-tort relief.

The facts prove specific personal jurisdiction under this Court's *Calder v. Jones* "effects test."[80] In *Calder*, entertainer Shirley Jones sued the writer and editor of a libelous *National Enquirer* article in California state court. The defendants fought personal jurisdiction, arguing that they had written and edited the article solely in Florida.[81] But this Court unanimously held that California jurisdiction was proper because the defendants had not committed "mere untargeted negligence."[82] Rather, they "expressly aimed" their "intentional, and allegedly tortious, actions" at California."[83] After all, the defendants had written and edited "an article that they *knew* would have a potentially devastating impact upon respondent. And they *knew* that the brunt of that injury would be felt by respondent in [California where] she live[ed] and work[ed]."[84] And California courts had jurisdiction because of the Florida conduct's "effects" in California.[85]

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[80] *Calder v. Jones*, 465 U.S. 783 (1984).

[81] *Id.* at 785-86.

[82] *Id.* at 789.

[83] *Id.*

[84] *Id.* at 789-90 (emphasis added).

[85] *Id.* at 789.

Calder emphasized both the defendants' intentional and allegedly tortious actions, and their reasonable anticipation of being haled into court in California for those actions.[86] Here, the casino intentionally served alcoholic beverages to an obviously intoxicated casino employee who they *knew* was driving directly to Arizona. Thus, as in *Calder*, the casino targeted its acts and its effects at another state—and should have anticipated a lawsuit there.

Indeed, *Calder* shows that, under certain circumstances, an intentional act—even if not wrongful—suffices for personal jurisdiction. After all, *Calder* held that the jurisdictional acts were "intentional, *and* allegedly tortious"—not that the acts were an intentional tort.[87] As the Ninth Circuit has explained, "we do not read *Calder* necessarily to require in purposeful direction cases that all (or even any) jurisdictionally relevant effects have been caused by wrongful acts."[88] That is, "intent" in *Calder* possesses "specialized meaning" referring "to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or

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[86] *Id.* at 789-90.

[87] *Id.* at 789 (emphasis added).

[88] *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1208 (9th Cir. 2006) (partially overruling *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082 (9th Cir. 2000)).

consequence of that act."[89] The *Calder* intent is intent to act—not intent to commit an intentional tort.

Here, the casino intended to—and did—perform actual, physical acts. But even if *Calder* required a "wrongful" intentional act, the casino did that by over-serving an intoxicated casino employee—even taking her to her car and launching her into Arizona. Those acts were intentional wrongful conduct, since it was substantially certain that the driver would harm someone in Arizona. After all, "intent" is *not* limited to desired consequences.[90] That is, if a person acts knowing that the consequences pose a substantial risk—or that harm is substantially certain to result—the law treats that person as having "desired to produce the result."[91]

In fact, *Calder*'s intent requirement is broader than first appears. After all, while the *Calder* defendants meant to write an article with California as the focal point, their motive was surely only greater newspaper sales. No evidence ever implied that they wanted to

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[89] *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 806 (9th Cir. 2004).

[90] C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 639 (Spring 2006) (*Calder* "should at the most be interpreted to require the defendant to have committed a tortious act knowing to a substantial certainty that it will have its impact on the plaintiff in the forum state.").

[91] RESTATEMENT (SECOND) OF TORTS § 8A (1965); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 1(b) (Nov. 1, 2005 draft).

inflict *intentional* harm. And while they knew the article might cause harm in California, to them that was surely no more than a foreseeable side-effect. Here, the casino not only *knew* the likely harm to forum residents—it *intended* to serve the driver, take her to her car, and send her onto Arizona's public roads.[92] Under *Calder*, that intent supports jurisdiction.

Calder also emphasized that the defendants had "expressly aimed" conduct at California.[93] Some opinions hold that the expressly-aiming requirement is met when the defendant engages in "wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state."[94] Other opinions hold that the forum state itself must be the "focal point of the tort."[95] But the effects test applies either way, since: (1) the casino targeted Arizona residents by impairing the driver and sending her to Arizona and (2) the tortious focal point was Arizona.[96]

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[92] RESTATEMENT (SECOND) OF AGENCY § 5.01(3) (2006) (defining notice); RESTATEMENT (SECOND) OF TORTS § 12(2) (1965) (same).

[93] *Calder v. Jones*, 465 U.S. 783, 789 (1984).

[94] *Bancroft & Masters, Inc. v. Augusta Nat'l*, 223 F.3d 1082, 1087 (9th Cir. 2000).

[95] *See Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1080 (10th Cir. 1995).

[96] *See also Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (After *Calder*, there is "no serious doubt" that the state where a tort victim "suffers the injury may entertain a suit against the accused tortfeasor.").

In assessing "purposeful direction," *Calder* stressed that the *Enquirer* defendants "knew" the brunt of the injury "would be felt" in the forum state.[97] Moreover, in *Keeton v. Hustler Magazine*, filed the same day as *Calder*, this Court upheld jurisdiction in a New Hampshire libel case, although "the bulk of the harm done to petitioner occurred outside" the forum.[98] Here, *all* harm done to the Cooks occurred in Arizona. And, from the casino's viewpoint, that was a substantially-certain risk and an entirely-predictable result.[99]

In concluding that personal jurisdiction over the Florida defendants was proper because of the conduct's effects in California, this Court cited *World-Wide Volkswagen Corp. v. Woodson*, where an Audi sedan sold in New York to New York residents was struck in the rear by another car while the Audi's owners were driving through Oklahoma on their way to a new home in Arizona.[100] (The Audi's sellers had no idea that the car was destined for use in either distant state.) The Audi's gas tank and fuel system ruptured, causing severe burns to three of its passengers. *Calder* cited *World-Wide* because that case had held that a

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[97] *Id.* at 789-90.

[98] *World-Wide Volkswagen Corp. v. Woodson*, 465 U.S. 770, 780 (1984).

[99] *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993) ("*Calder* thus established that personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state.").

[100] *Keeton v. Hustler Magazine*, 444 U.S. 286 (1980).

defendant cannot be sued in a foreign forum unless it reasonably should know that the effects of its acts might cause injury there. In *Cook*, on the other hand, the casino and its staff *knew* where the effects would hit—in Arizona. Indeed, if they had helped make a defective car and sent it into Arizona, there would be no question of personal jurisdiction if the car injured people there. In this case, they helped make an impaired driver and sent her into Arizona. There should also be no question of personal jurisdiction based on that conduct's effects.

Calder also cited and relied on Section 37 of the Restatement (Second) of Conflicts, which supports personal jurisdiction for acts not done "with the intention of causing effects" in the forum state—*but* which could reasonably have been expected to do so.[101] The forum may assert jurisdiction over "the defendant if the effects which could have been anticipated and which actually occurred are of a sort highly dangerous to persons or things. This is so even though the defendant has no other relationship to the state."[102] Since an anticipated Arizona effect here was severe personal injury, Section 37's "effects" test anchors *Calder*'s analysis.

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[101] RESTATEMENT (SECOND) OF CONFLICTS § 37 cmt. a (1971).

[102] *Id. See also Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 629 (5th Cir. 1999) (Under "*Calder*, the effects of torts committed outside the forum state that cause death or serious physical harm may also serve as minimum contacts with the forum for purposes of personal jurisdiction.").

CONCLUSION

Petitioners respectfully ask the Court to grant their Petition for Writ of Certiorari, to vacate the contrary Arizona appellate decisions, to vacate the dismissal entered against them, and to remand this case to Arizona superior court for trial on the merits of the claims against Avi Casino and its culpable employees.

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