No. 08-930

In The
Supreme Court of the United States

CHRISTOPHER COOK and LEIDRA COOK,

Petitioners,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

The Arizona Court of Appeals affirmed disposition of the claims of Petitioners Cook based solely upon the state law ground of lack of personal jurisdiction which presents no federal question for review by certiorari pursuant to this Court's Rule 10. The state court properly determined that there was a lack of personal jurisdiction.

PARTIES TO THE PROCEEDINGS

The caption to the case contains the names of all parties remaining in the case.

DISCLOSURE STATEMENT PER RULE 29.6

Aví Casino Enterprises, Inc. is a corporation formed pursuant to the authority of an ordinance of the Fort Mojave Indian Tribe and wholly owned by the Tribe. There is no parent nor any publicly held corporation owning any of its stock.

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The trial court decision granting Respondents' motion to dismiss on grounds of sovereign immunity and lack of personal jurisdiction is unpublished, *Cook v. Aví Casino*, No. CV 2005-0646 (Ariz. Mohave Super. Ct. Sept. 26, 2006). The Arizona Court of Appeals decision affirming the trial court solely on the ground of lack of personal jurisdiction also is unpublished, *Cook v. Aví Casino*, No. 1 CA-CV 07-0110 (Ariz. Ct. App. Mar. 20, 2008). App. A.[1] The Arizona Supreme Court entered an order denying discretionary review of the Arizona Court of Appeals decision on October 28, 2008. App. B.

JURISDICTION

The case was disposed of in the Arizona Court of Appeals on state law grounds not invoking any of the bases for jurisdiction of this Court as set forth in 28 U.S.C. § 1257(a).[2] Similarly, none of the

[1] All of the references herein to the Appendix are to the Petitioners' Appendix.

[2] Rule 14.1(g)(i) requires a petitioner to show where the federal question sought to be reviewed was raised in the lower courts. Petitioners identify 18 U.S.C. § 1161 as the statutory provision involved for the first time in their Petition here. This Court has stated that no jurisdiction for certiorari exists with respect to federal question issues not properly raised,

(Continued on following page)

considerations set forth in this Court's Rule 10 exist here, nor does Petitioners' citation to Rule 13.1 provide a ground for jurisdiction. Petitioners have not properly cited any basis for jurisdiction to review the subject Arizona Court of Appeals decision.

STATUTORY PROVISION INVOLVED

There are no federal constitutional, statutory, or regulatory provisions, nor any other federal laws at issue. Petitioners' reference to 18 U.S.C. § 1161 occurs in these proceedings for the first time in the Petition filed with this Court. That statute was never argued or considered in any of the lower court proceedings and was not involved in the disposition by the Arizona Court of Appeals.

STATEMENT OF THE CASE

As stated in his superior court complaint, Petitioner Christopher Cook ("Cook") lives in California. He works in California. Superior Court Clerk's Record 1, ¶¶ 2, 10. He happened to be returning to California on his motorcycle from visiting his mother-in-law in Bullhead City, Arizona during the early morning hours of May 25, 2003. *Id.* ¶¶ 11-12. Plaintiffs allege

considered, and decided in the state court. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

that an off-duty employee (Christensen) was over-served alcohol and left the Aví Casino intoxicated. She used an Aví Resort & Casino shuttle bus to get to her car. While driving her personal car on a tribal road on the reservation Christensen crossed the center line, colliding with Cook on his motorcycle, causing him serious, permanent injuries. Clerk's Record 1. The accident occurred on "a part of the Fort Mojave Indian Reservation, along Aztec Road." *Id.* ¶ 12.

The Aví Resort & Casino facility is operated by Aví Casino Enterprises, Inc., which is a corporation of the Fort Mojave Indian Tribe (the "Tribe"), a federally recognized tribe. *Id.* The Tribe's reservation (the "Reservation") straddles three states: California, Arizona, and Nevada. As acknowledged by Cook, the Aví Resort and Casino facility is located "on the Nevada side of the Nevada-Arizona border." *Id.*, ¶ 14. As noted in the corporate articles (Sixth Article), the casino's gaming compact is not with Arizona, but with Nevada. Clerk's Record 20, Exhibit 2; Clerk's Record 24, Exhibit B. Although never cited to in the record below, Cook's Petition (at 4, n.11) herein also notes that Aví Resort & Casino operates with a liquor license issued by the State of Nevada.[3]

[3] The public record Petitioners for the first time now cite is for a liquor license issued by the State of Nevada two years *after* Cook's accident.

Petitioners Cook filed an Arizona dram-shop action in the Mohave County Arizona Superior Court.[4] Clerk's Record 1. Respondents filed a motion to dismiss grounded upon both sovereign immunity and lack of personal jurisdiction. Clerk's Record 18. The trial court granted the motion on both grounds. Clerk's Record 28. Although both grounds were also asserted as bases to affirm in the Arizona Court of Appeals, the appellate court affirmed based solely upon the state law ground of lack of personal jurisdiction. "Because our review of personal jurisdiction is dispositive, we address only that issue." App. A at 4a. The Arizona Supreme Court denied discretionary review. App. B.

REASONS FOR DENYING THE PETITION

I. The Purported Difference Between the Ninth Circuit Opinion and the Oklahoma Supreme Court Opinion Is Irrelevant to the State Law Disposition Based on Lack of Personal Jurisdiction

As stated above, the Arizona Court of Appeals affirmed dismissal of Cook's state law claims based

[4] Petitioners had previously also filed a diversity action in federal district court based upon the same events. The disposition of that case is reported in *Cook v. Aví Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), and is the subject of a separate petition for certiorari (the "Ninth Circuit Petition") by these Petitioners in this Court's case number 08-929.

solely upon the state law ground of lack of personal jurisdiction. "Because our review of personal jurisdiction is dispositive, we address only that issue." App. A at 4a. "[T]here is an insufficient basis 'to confer personal jurisdiction over a Tribal entity or its employees for an accident that occurred on the Reservation.'" *Id.* at 7a. The Arizona Court of Appeals did not reach the issue of sovereign immunity. Accordingly, the lengthy argument on sovereign immunity Petitioners repeat from their Ninth Circuit Petition is of no relevance here.[5]

II. The Arizona Court Properly Determined That There Was No Personal Jurisdiction Over Respondents Where the Alleged Negligence and the Accident Occurred Entirely on the Tribe's Reservation

A. A State Court Determination That There Is a Lack of Personal Jurisdiction Should Not Be a Federal Issue

"Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Concepts of federalism as well as judicial economy favor restraint when considering

[5] Dismissal of the state court claims would also have been proper based on sovereign immunity, although the Arizona Court of Appeals did not reach that issue. Respondents will address sovereign immunity in responding to the Ninth Circuit Petition, No. 08-929.

whether Supreme Court jurisdiction may properly be exercised.

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law.

Michigan v. Long, 463 U.S. 1032, 1040 (1983). A state court's determination of the extent of its long arm jurisdiction is initially a state law determination, although if it is to be applied, then Constitutional due process concerns impose limits upon the long arm jurisdiction a state court may assert. *Mitrano v. Hawes*, 377 F.3d 402, 406 (4th Cir. 2004) ("To establish personal jurisdiction over a nonresident defendant through a state long arm statute, a court must ***first*** determine that jurisdiction is authorized by state law."). The Constitution, however, does not mandate the exercise of personal jurisdiction by a state court over state law claims. Thus, the decision here by the Arizona Court of Appeals that Arizona lacks personal jurisdiction with respect to Cook's state law claims may be viewed as one determined solely by state law and, whether it is correct or not under state law, it does not invoke any federal question. If such determination is viewed as one based

upon both federal and state grounds, however, then the following sections address why there was no error here.

B. Petitioners Merely Allege General Jurisdiction Without Ever Having Shown the Pervasive Contacts Necessary

A non-resident defendant is subject to "general jurisdiction" if the contacts are "substantial" or "continuous and systematic" such that the defendant can be haled into court in the forum, even for claims unrelated to the contacts. *See Batton v. Tenn. Farmers Mut. Ins. Co.*, 152 Ariz. 268, 270, 736 P.2d 2, 4 (1987). In addressing personal jurisdiction in a dram-shop case brought by Arizona residents against a Nevada casino for injuries that occurred in an accident in Arizona, the Arizona Supreme Court ruled in *Williams v. Lakeview Co.*, 199 Ariz. 1, 3, 13 P.3d 280, 282 (2000), that the casino on the Arizona-Nevada border did ***not*** have sufficient contacts to confer general jurisdiction. The *Williams* court recognized that: "The level of contact required to show general jurisdiction is quite high," and that regular advertising in Arizona, and the fact that many patrons or employees of the casino were Arizona residents, was not sufficiently "substantial" or "continuous and systematic" to confer general jurisdiction. The defendant casino in *Williams* did not regularly conduct business in Arizona and did not have any agents, offices, or property in the state. *Id.* at 472. *See also*, *Westphal v. Mace*, 671 F. Supp. 665, 667-68 (D. Ariz.

1987) (Arizona did not have general jurisdiction over Nevada casino that advertised in Arizona, sponsored travel packages through Arizona travel agents, and published a toll-free telephone number in Arizona directories).

In this case, Petitioners argue that Aví Casino Enterprises is a separate entity which is distinct from the Tribe, at least when it comes to trying to avoid sovereign immunity, yet the Petitioners fail to establish how defendant Aví Casino Enterprises, as distinct from the Tribe, had *any* substantial or continuous and systematic contacts with the Arizona forum. There is no evidence Aví Casino Enterprises owns any property, has any offices or agents, or has *any* significant ties in Arizona, let alone the degree of *substantial or continuous and systematic* contacts that could justify haling a "foreign" tribal entity into Arizona based on general jurisdiction principles.

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), the plaintiffs argued for jurisdiction in Texas over a Colombian corporation pertaining to a helicopter crash that occurred in Peru. The defendant corporation had negotiated the subject contracts in Texas, and over the course of several years had purchased almost 80% of its helicopters and parts in Texas. It had trained helicopter pilots in Texas and it had sent other personnel to Texas for technical consultation. The defendant also had received checks drawn on a Texas bank account of the paying party. Even still, this Court held that the foregoing were not "the kind of continuous and

systematic general business contacts" necessary to confer general jurisdiction.

> Beyond the foregoing, there have been no other business contacts between Helicol and the State of Texas. *Helicol never has been authorized to do business in Texas and never has had an agent for the service of process within the State*. It never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas, never signed any contract in Texas, *never had any employee based there*, and never recruited an employee in Texas. In addition, *Helicol never has owned real or personal property in Texas and never has maintained an office or establishment there*. Helicol has maintained no records in Texas and has no shareholders in that State. None of the respondents or their decedents were domiciled in Texas. . . .
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> . . . .
>
> It is undisputed that *Helicol* does not have a place of business in Texas and *never has been licensed to do business in the State*.

Id. at 411-16 (emphasis added). "[M]ere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id.* at 418. This Court found the contacts insufficient to warrant general jurisdiction. *Id.* at 418-19.

In the underlying state court action, Petitioners cannot point to any of the traditional indicia of "substantial" or "continuous and systematic" activities to confer general jurisdiction.[6] In fact, most of the purported "contacts" are attributable only to "Aví Casino" or the Tribe, rather than any named defendant, and are the same types of incidental business contacts that the Arizona Supreme Court concluded were insufficient to confer general jurisdiction over a Nevada entity in the *Williams v. Lakeview* case. The sum and substance of the "contacts" of Aví Casino Enterprises (as distinguished from the Tribe itself) is the observation that the Aví Casino & Resort has some Arizona employees,[7] a website, and advertises in Arizona. To the extent any such activities or contacts are traceable directly to Aví Casino Enterprise as a

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[6] *Helicopteros*, 466 U.S. at 411-12. *See also Bohreer v. Erie Insurance Exchange*, 216 Ariz. 208, 212-13, 165 P.3d 186, 190-91 (Ct. App. 2007) (not authorized as a foreign corporation nor consent to jurisdiction); *A. Uberti & C.V. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358 (1995) (indicia are agents, personal presence, offices, or property in state); *Armstrong v. Aramco Services Co.*, 155 Ariz. 345, 350, 746 P.2d 917, 922 (Ct. App. 1987) (recruiting Arizona employees, assigning some employees to Arizona on a temporary basis, contracting with some Arizona entities, and purchasing from some Arizona vendors deemed "sporadic and insignificant when viewed in the context of [defendant's] overall corporate activity").

[7] There is no evidence that the casino has employees performing work in Arizona. That some of the employees who work for the casino on the Reservation choose to live in and commute from Arizona is irrelevant and does not show any business contacts of the Respondent casino with Arizona.

named defendant, it would scarcely meet the threshold for the "minimum contacts" to be considered for purposes of specific jurisdiction, and falls far short of the continuous and systematic business activities required for general jurisdiction to exist.

C. There is No Nexus Between the Claim and the Forum-Related Activities to Confer Specific Jurisdiction

Specific jurisdiction exists when a defendant purposely avails himself of the privilege of conducting activities in the state, the claim arises out of those activities, and the exercise of jurisdiction would be reasonable. *In re Consolidated Zicam Product Liability Cases*, 212 Ariz. 85, 127 P.3d 903 (Ct. App. 2006). This nexus requirement "goes to the very heart of minimum contacts," and has been the basis for dismissing dram-shop claims for lack of personal jurisdiction over out-of-state casinos.

In *Westphal v. Mace*, 671 F. Supp. 665 (D. Ariz. 1987) the court unequivocally concluded that there was no personal jurisdiction in Arizona over the Nevada defendants who owned and operated the Riverside Resort hotel in Laughlin, Nevada because the claim itself did not arise out of any of the defendants' activities in Arizona. "The actual damage causing event must occur in the forum. Feeling the effect of an out-of-state event in the forum is not

enough for personal jurisdiction to exist." *Id.* at 668.[8] In *Westphal*, the district court rejected the notion that "dependency" of a Nevada casino on Arizona residents, and advertising in the forum state was sufficient to confer jurisdiction:

> The fact a plaintiff's claim comes to fruition in the forum state is irrelevant for purposes of determining whether personal jurisdiction exists if the injury causing event occurred in another state. The actual damage causing event must occur in the forum. Feeling the effect of an out-of-state event in the forum is not enough for personal jurisdiction to exist.

Id. at 667-68.

In *Williams v. Lakeview Co.*, 199 Ariz. 1, 13 P.3d 280 (2000), the Arizona Supreme Court determined that there was no personal jurisdiction over the Nevada partnership that operated the Gold Strike Inn and Casino in Laughlin, again because the accident itself did not arise out of the casino's forum-related activities. Although the casino had some contacts with Arizona, such as advertising, employing Arizona residents, and the fact that many of the guests were from Arizona, the plaintiffs' claims did not result from any of those activities.

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[8] *Accord Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 369, 542 P.2d 24, 28 (1975); *Rowell Laboratories, Inc. v. Superior Court*, 117 Ariz. 400, 402, 573 P.2d 91, 93 (Ct. App. 1977).

> [T]he plaintiffs do not assert that their visit to the casino resulted from any of Lakeview's contacts with Arizona. They did not visit the casino after seeing or in response to an advertisement, and they never traveled to Nevada on a tour bus. Their injuries did not arise out of or relate to Lakeview's employment relationship with or hotel service to Arizona residents. The failure to show any causal connection between Lakeview's Arizona activity and their claim is fatal to the plaintiffs' argument.

Id. at 4-5, 13 P.3d at 283-84.[9] Clearly, if there was no personal jurisdiction over a Nevada casino in the *Williams v. Lakeview* case, even though those plaintiffs actually visited the casino and the accident occurred in Arizona, there is even less of an argument here to confer personal jurisdiction over a Tribal entity or its employees for an accident that occurred on the Reservation.

While the Petitioners overstate the record to suggest that Aví Casino Enterprises knew or should

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[9] *See also ALS Scan Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) ("specific jurisdiction in the Internet context may be based only on an out-of-state person's Internet activity directed at [the forum state] and causing injury that gives rise to a potential claim cognizable in [the forum state]"); *GTE New Media Services Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000) ("Access to a website reflects nothing more than a telephone call . . . mere receipt of telephone calls . . . does not constitute persistent conduct . . . within the meaning of the long-arm statute").

have known that this accident would occur, this is only an exaggerated foreseeability argument that has been repeatedly rejected by Arizona courts in the jurisdiction analysis. "Foreseeability, however, does not confer jurisdiction." *Williams*, 199 Ariz. at 6, 13 P.3d at 285.

Petitioners stretch this foreseeability argument further by contending that "knowingly" overserving a patron and allowing her to drive toward Arizona can confer personal jurisdiction under the *Calder v. Jones* "effects test." *See Calder v. Jones*, 465 U.S. 783 (1984). In contrast to this case, the *Calder* case involved an intentional tort (defamation) where this Court determined that the defendant journalists knew their conduct would have a "devastating impact" that would not only be felt in California where the plaintiff lived and worked, but most importantly where the defendant tabloid had its largest circulation. *Id.* at 789-90. The Court reasoned that it was not a case of "mere untargeted negligence, but rather intentional action expressly aimed at the [forum state.]" *Id.* Here, the casino's acts of serving alcohol on the Reservation and operating a shuttle on the Reservation, by contrast, were not targeted toward Cook nor deliberately aimed at the forum state of Arizona. It was at most nothing more than "mere untargeted negligence." In fact, it did not actually "impact" Arizona or any Arizona resident (Cook is a California resident) because the alleged negligence and the accident itself occurred entirely within the boundaries of the Reservation.

"The requirement that a nexus exist between a defendant's activities in the forum state and a plaintiff's cause of action provides the key to exercising specific jurisdiction." *Williams*, 199 Ariz. at 4, 13 P.3d at 283. Here again, the accident did not arise out of the advertising or any of the alleged contacts the casino may have had in Arizona. Aví Casino Enterprises is a Tribal entity; it is not incorporated in Arizona (or any other state) and is not authorized to do business in Arizona. Aví Casino Enterprises is wholly owned and operated by the Tribe to operate a casino on the Reservation, pursuant to a gaming compact between the Tribe and the State of Nevada. The alleged overservice of alcohol occurred on the Reservation. The shuttle transport occurred on the Reservation. The California-resident Cook left Arizona and was on the Reservation en route to California when the accident occurred. None of those purported jurisdictional contacts/activities had any nexus with Cook being on Aztec Road on the Reservation. Cook had not been at the casino, nor was he on his way to the casino; he was returning to California. In this case, there is virtually no relationship among the Respondents, the Arizona forum, and the cause of action. *See Williams v. Lakeview Co.*, 199 Ariz. 1, 13 P.3d 280 (2000). Accordingly, the trial court and the court of appeals correctly concluded that specific personal jurisdiction did not exist.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March 26, 2009