No. 20-15908

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMIEN JENSEN, et al.,
Plaintiffs-Appellants,

v.

EXC, INC., a Nevada corporation, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
STEVEN P. LOGAN, DISTRICT JUDGE • CASE NO. 3:15-cv-08019-SPL

APPELLANTS' REPLY BRIEF

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Table of Contents

Page

Table of Authorities

Page(s)

Cases

Statutes

Rules

Other Authorities

Argument

I. The District Court Committed Reversible Error in Allowing the Use of Inadmissible Police Report Evidence for its Truth, including Findings of Fault.[1]

EXC used inadmissible evidence from the police report not for impeachment, but for its truth, including the findings regarding fault, all while cloaking the "findings" with the aura of official, determinative law enforcement authority. These inadmissible "findings" and conclusions should never have been presented to the jury at all, much less for their truth, especially given their "ultimate issue" determination. Only a new trial can rectify this error.

Rule 703 allows an expert to rely on inadmissible evidence in forming opinions if experts in the field typically rely on such materials ("expert may base opinion on facts or data [that are inadmissible]…[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion…."). The Rule then says that inadmissible evidence relied upon by the expert may be disclosed only if the probative value outweighs the prejudice and then only for a limited purpose of evaluating the basis for the opinion.[2] *Christiansen v. Syverson,*

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[1] *De novo* review is applicable here where the district court allowed the evidence because Jensens "opened the door," a standard not in Rules 703, 705, or 802. Construction of the Rules is reviewed *de novo*. *United States v. Olafson,* 213 F.3d 435, 441 (9th Cir.2000).

[2] EXC argues, without authority, that Jensens waived any "more prejudicial than probative" or "limiting instruction" arguments. Answering Brief ("AB") 24. Jensens raised the issue in the motion in limine, ER-399, and it is a requirement of Rule 703.

___ F.Supp.3d ___, 2021 U.S. Dist. LEXIS 21501, *11-12 (D.Idaho, Feb. 2, 2021). The Advisory Committee Notes to the 2000 amendments emphasize Rule 703's applicability to inadmissible evidence an expert *relies upon* in forming opinions.

Neither Rule 703 nor 705 allows the introduction of inadmissible evidence *not* relied upon by a testifying expert under any circumstances. Rule 705 provides that an expert may give an opinion on a matter without prior disclosure of the facts or data *underlying his opinion*, but may "be required to disclose the *underlying facts or data* on cross-examination." *United States v. Adams,* 314 Fed.Appx. 633, 651 (5th Cir. 2009)(cleaned up)(upholding district court's refusal to allow cross of expert through use of hearsay, noting that "[w]hile revealing the basis for an expert's opinion is allowed, such disclosure does not facilitate the admission of otherwise inadmissible evidence"); *Christiansen,* 2021 U.S. Dist. LEXIS 21501 at 12-13 (limiting appraiser "to stating that he consulted with an asbestos expert and relied on that information in reaching his valuation opinion," but prohibiting reference to observations, conclusions, and opinions).

Where there is no reliance by the expert on the inadmissible evidence, it may not be disclosed in any way, either on direct or cross. *In re Hanford Nuclear*

Turner v. Burlington N. Santa Fe R. Co., 338 F.3d 1058, 1061-62 (9th Cir.2003). Furthermore, a limiting instruction is required under Rule 703. Advisory Comm. Notes, 2000 amend; *United States v. W.R. Grace,* 504 F.3d 745, 759 n.7 (9th Cir.2007). Here, the district court allowed the evidence for all purposes.

Reservation Litigation, 534 F.3d 986 (9th Cir. 2008), is instructive and decisive. After one of their experts' testimony was ruled inadmissible, plaintiffs put forth an endocrinologist expert. The testifying expert had used some of the inadmissible expert's dosage estimates in forming his own opinions, but had not read the deposition testimony of the inadmissible expert. Nonetheless, the defense used the inadmissible testimony of the prior expert to impeach the endocrinologist on cross.

This Court ruled: "Dr. Ruttenber's statements should not have been used to impeach Dr. Davies because they were inadmissible hearsay on which Dr. Davies did not rely…[and] Defendants should not have been allowed to use the testimony to impeach Dr. Davies' credibility." *Id.* at 1012. This Court noted the extensive use made of the cross by defendants during closing and reversed the jury verdict and remanded for a new trial. *Bryan v. John Bean Div. of FMC Corp.,* 566 F.2d 541 (5th Cir. 1978); *United States v. Barnes,* 979 F.3d 283, 301 (5th Cir. 2020)(upheld district court's refusal to admit hearsay consent forms not used as basis for opinion); *United States v. Stinson,* 647 F.3d 1196, 1214 (9th Cir. 2011)(inadmissible evidence not relied upon cannot be disclosed under 703 or 705).

EXC'S reliance on *Ratliff v. Schiber Truck Co.,* 150 F.3d 949 (8th Cir. 1998), is misplaced. The court upheld cross-examination of plaintiffs' expert with a report prepared by a police officer but on which the expert did not rely. The court cited Rule 703 but stated that the only inquiry that mattered was whether experts in the

field typically rely upon such data. The court ignored the requirement that the expert must actually rely on the inadmissible material before it possibly can be disclosed for a limited purpose and thus the opinion is of no consequence.[3]

EXC claims that it only brought out "facts" from the police report and did not question the experts about hearsay statements. AB 21, 22.[4] Defense counsel's own words belie EXC's assertions. "So the DPS officer who was at the scene of the accident that day, investigated the accident*, talked to witnesses*, took photographs, took measurements, *made the decision* that Mr. Johnson's vehicle was *the at-fault vehicle*, vehicle number one." Defense counsel repeated this multiple times, not for understanding the basis for Jensens' experts' opinions, but for the truth of the matters asserted. ER-119:11–120:11 (emphasis added), 130, 138-39. He included conclusions such as Mr. Johnson crossed the center line, he was speeding (based on nothing but multiple levels of hearsay), etc. There is nothing that separates out the hearsay from the non-hearsay as far as the conclusions go.[5] EXC used these

[3] The case relied upon by the *Ratliff* court and EXC, *Vodusek v. Bayliner Marine Corp.,* 71 F.3d 148 (4th Cir. 1995), does not even mention Rules 703 and 705. The other cases cited by EXC, *Stecyk v. Bell Helicopter Textron, Inc.,* 295 F.3d 408 (3th Cir. 2002), and *Hartley v. Dillard's, Inc.,* 310 F.3rd 1054 (8th Cir. 2002), say nothing about using un-relied upon inadmissible evidence during cross examination.

[4] EXC suggests that the report would be inadmissible if "based only on third-party hearsay." AB 24, a standard without any authority or support.

[5] The non-hearsay was already admitted in the form of photos and measurements as stipulated to by the parties.

unsubstantiated and inadmissible statements and conclusions as if they were established facts in closing for their truth. EXC cloaked this inadmissible evidence with the air of authority of law enforcement, implying the police had already decided the issue. The verdict was consistent with this negative effect.

And contrary to EXC's representations, there was no single officer who did all of the things attributed to him. The report, but for the measurements and photos that were already agreed upon, was a mishmash of various bits and pieces from many different officers and based on hearsay in addition to the measurements and observations agreed upon. The report was not, as EXCs claims, AB 23-24, independent and reliable.[6] It was based on self-serving hearsay statements, multiple hearsay statements of unknown origin (speeding assertion), and other unreliable bases. EXC did not call the officers to testify as to their observations, but chose the forbidden back-door route.[7]

EXC asserts that the questions at trial were based only on "boxes checked on

[6] EXC asserts the report was trustworthy, yet points to no record evidence in support. EXC also asserts that the motion in limine was limited to third-party statements, but it was not, *see* ER-397, *et seq*. It was directed at anything other than personal observations and measurements of the multiple officers involved.

[7] EXC also asserts that Jensens on redirect could have highlighted the differences between their experts' opinions and the inadmissible police report evidence or called the police officers. This is a red herring, as the inadmissible evidence should not have been allowed in the first place.

the report, not on hearsay statements." AB 24 n.13.[8] Not only does EXC fail to identify what "boxes" were supposedly used, it fails to cite anything in the record to support this bald assertion. Nonetheless, this argument does not help EXC one bit. Checked boxes provide no explanation or source or other indication of personal observation versus hearsay and no indication of reliability. The narrative portions show that hearsay and double or triple hearsay was a big part of the equation.

EXC tries to justify the ruling and its actions because the report itself was not admitted. AB 22-23. This misses the entire point as the substance is what matters. The substance was not admissible merely because experts reviewed, but did not rely on, the report or its content (other than the measurements and photos). EXC's counsel used the report in cross-examination, referred to the "report" in closing, and repeatedly emphasized the conclusions from the report regarding who was at fault. EXC used the substance for its truth, impermissibly.

Finally, EXC argues there was no prejudice, that the impeachment was just "cumulative." EXC runs from their own words. As discussed above and in Jensens' Opening Brief ("OB"), EXC used the inadmissible police report to introduce or solidify all sorts of conclusions and opinions and to give the stamp of official law enforcement authority and prestige to otherwise contested facts. EXC did not merely

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[8] In this same footnote, EXC asserts that Jensens omitted pages of the police report in their Excerpts of the Record. This assertion is bizarre, since every page that EXC says was omitted was in fact included in Jensens' Excerpts.

bring out these items for impeachment, it used them for the truth of the matters asserted, repeatedly. That the jury found no fault on behalf of EXC reinforces the influence the police report had on the process. As this Court has stated in *United States v. Sanchez,* 176 F.3d 1214, 1222 (9th Cir. 1999)(cleaned up), "It is improper under the guise of artful cross-examination, to tell the jury the substance of inadmissible evidence." Yet that is exactly what EXC did here. Reversal and new trial is the only way to correct this egregious error.

II. This Court Has Jurisdiction to Reverse the District Court's Denial of Jensens' Motion for Summary Judgment Because That Denial Pertained to a Matter of Pure Law, *i.e.*, the District Court's Misconception of the Legal Test for Establishing Causation

EXC argues that this Court may not review the district court's denial of Jensens' motion for summary judgment on negligence liability because "the denial of a motion for judgment for genuine issues of material fact is not appealable after trial." AB 25 However, the case that EXC invokes for this proposition, *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011), is distinguished when a district court's summary-judgment ruling is based on an error of law. *See Booker v. C.R. Bard, Inc.*, 969 F.3d 1067, 1072 (9th Cir.2020)(citation omitted)(holding that *Ortiz*'s "general rule does not apply to purely legal issues" and that "[p]urely legal issues…*are* reviewable after trial even if raised only in a motion for summary judgment").

Such is the case here: the district court's error in denying Jensens' summary judgment motion is "purely legal" in nature. The district court reasoned that the

negligent-per-se conduct of EXC's bus driver could not be a cause of the fatal collision if there was *another* cause as well—namely, the movement of the car of "[Plaintiffs'] decedent…into Defendant Conlon's traffic lane." ER-22-23 Thus, according to the district court, "a reasonable jury could determine that Defendant Conlon's [negligence per se] did not, *by itself*, proximately cause the accident." *Id.* (emphasis added).

The "purely legal" error in this reasoning consists of the district court's mistaken assumption that the existence of a *second* cause of the collision, such as the movement of decedent's car, could nullify the but-for causation of EXC's negligent-per-se conduct, *i.e.*, the bus driver's failure to keep the tour bus "on the right half of the roadway" as required by Arizona traffic safety statutes. Contrary to the district court's reasoning, Arizona law does *not* require a plaintiff to prove that a defendant's negligent conduct was the *sole* cause of harm (or, in the district court's words, that the defendant's negligence, "*by itself*, proximately cause[d] the accident," ER-23 (emphasis added));[9] *see, e.g., Gosewisch v. American Honda Motor Co.*, 737 P.2d 376, 383 (Ariz. 1987)("It is well settled that there may be more than one proximate cause of an injury and that those causes may act concurrently

[9] EXC exhibits the same flawed reasoning, asserting that the jury was at liberty to conclude that the bus driver's negligence per se "had nothing to do with the crash" if the jury were to characterize Jensens' decedent as the one "who solely caused the crash." AB 26 n.14.

and in combination to produce the injury."). Because the denial of Jensens' summary judgment motion is an instance "where the district court made an error of law that, if not made, would have required the district court to grant the motion," *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir.2004), *quoted in and followed by Booker*, 969 F.3d at 1073, the district court's denial is reviewable and must be reversed.[10]

III. The District Court Erred in Denying Jensens' Rule 50(b) Motion Because as a Matter of Law EXC's Negligent-Per-Se Conduct of Failing to Keep the Tour Bus in the Right Lane of Travel Was a Proximate Cause of the Resulting Death and Injuries, and No Jury Reasonably Could Conclude Otherwise

The district court denied Jensens' Rule 50(b) motion because it believed a jury question existed as to whether the movement of Jensens' decedent's car "constituted an intervening-superseding cause of the accident." ER 3:18–4:5 (citations omitted). Jensens have explained why the district court's position is foreclosed "by established Arizona law" regarding proximate cause, intervening cause, and superseding cause. *See* OB 28-35. EXC addresses neither the district court's position on "intervening-superseding cause" nor Jensens' extensive refutation of that position. *See* AB 26-28.

[10] EXC argues that because "the jury actually found that Conlon did not proximately cause the accident," "[t]hat, in and of itself, defeats any idea that no reasonable jury could find that Conlon did not cause the accident." AB 26. This argument merely implicates the question whether the district court erred in denying Jensens' post-verdict Rule 50(b) motion. It also improperly evades the controlling standard of review for denials of summary judgment motions.

Indeed, EXC advises this Court to do likewise. *See* AB 28 ("This Court need not even address intervening-superseding cause.").

Instead of engaging the district court's reasoning or attempting to rebut Jensens' refutation thereof, EXC posits a straw argument: "Plaintiffs [sic] argument erroneously rests on the assumption that Conlon's negligence per se was a failure to stay out of Johnson's lane of travel. Not so." AB 27. In reality, of course, Jensens' argument on appeal "rests on" no such "assumption." Rather, Jensens' Rule 50(b) argument isolates the relevant negligence per se as EXC's bus driver's conduct of "driving out of his lane and into the left lane in violation of a highway safety statute [A.R.S. § 28-721] whose 'primary purpose is to avoid head-on collisions with oncoming traffic.'" OB 2 (citation omitted).

Responding further to its own straw argument, EXC opines that the bus driver "could have traveled completely safely in the left lane [in violation of A.R.S. § 28-721] if [the decedent] had not crossed the center line into the bus's lane of travel." AB 27. But this argument merely replicates the district court's erroneous reasoning with respect to the "purely legal issue[]," *Booker*, 969 F.3d at 1072, of actual causation, discussed *supra*.[11] EXC's speculation that the jury likewise must

[11] EXC's failure to reason according to Arizona law is demonstrated by the argument that the bus driver's admission "that if he had stayed in the right lane [as required by A.R.S. § 28-721], 'the bus wouldn't have been in the left lane to be in the accident with [Plaintiffs'] vehicle'" is *not* equivalent to admitting "that his merging into the left lane proximately caused the accident." AB 13 n.9 (citations omitted)(first

have approached causation as an either-or proposition, *see* AB 27 (opining that the collision would not have happened but for the alleged movement of decedent's car and that "[i]n rendering a defense verdict, that is exactly what the jury found") underscores the district court's error in denying Jensens' Rule 50(b) motion.[12]

IV. The District Court Erred in Granting EXC's Renewed Motion for Judgment on the Pleadings Because Indian Law Preemption Analysis and Arizona's Choice-of-Law Principles Prescribe Application of Navajo, Not Arizona, Substantive Law

In granting EXC's renewed motion for judgment on the pleadings, the district court dismissed parties and claims based on Navajo law. ER-31:10-16. This was error because Navajo substantive law applies in this diversity lawsuit pursuant to (1) federal preemption of state law and (2) proper application of Arizona's choice-of-law principles. EXC's arguments purporting to bolster the district court's grant of the motion evince numerous distortions of Jensens' arguments, misrepresentations of the facts and law of controlling precedent, reliance on inapposite cases, and other flaws.

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alteration added). *But see Ontiveros v. Borak*, 667 P.2d 200, 205 (Ariz. 1983)(citation omitted)("Arizona law holds that cause-in-fact exists if the defendant's act helped cause the final result and if that result would not have happened without the defendant's act.").

[12] EXC's argument would have this Court ignore the standard of review for denials of Rule 50(b) motions.

A. Indian Law Preemption

1. Federal Courts Sitting in Diversity Are Precluded from Applying State Substantive Law Where, As Here, That Law is Federally Preempted and Thus Could Not Be Applied in a State Court Proceeding Either

The district court quoted *Geico Gen. Ins. v. Tucker*, 71 F.Supp.3d 985, 987 (D. Ariz. 2014), for the proposition that "[w]here a federal court has jurisdiction by virtue of diversity of citizenship of the parties, the court must follow state law." ER-30:15-18. *Tucker* in turn relies on *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), *see Tucker*, 71 F.Supp.3d at 987, pinpointing *Erie*'s core instruction that "*[e]xcept in matters governed by the Federal Constitution or by Acts of Congress*, the law to be applied in any case is the law of the State." *Erie*, 304 U.S. at 78 (emphasis added). Because the question of the applicable substantive law in this case is a "matter[] governed…by Acts of Congress," *id.*, and because those controlling federal statutes—namely, the Navajo-Hopi Rehabilitation Act, Act of Apr. 19, 1950, ch. 92, § 1, 64 Stat. 44, as amended, 25 U.S.C. §§ 631 and 636 (1958 ed.), and Public Law 280, Act of Aug. 15. 1953, 67 Stat. 588—preempt Arizona substantive law, the district court should have applied Navajo law instead. EXC's argument that *Erie* "required the [district] court to apply Arizona substantive law to [Jensens'] claims," AB-28, is thus incorrect and unavailing.

2. EXC's Reliance on *Begay v. Kerr-McGee Corp.* is Unavailing Because *Begay* is a Delegation-of-State-Authority Case, Not an Indian Law Preemption Case

Purporting to explain why "Arizona substantive law applies in this diversity case," AB 28, EXC invokes *Begay v. Kerr-McGee Corp*, 499 F.Supp. 1325 (D. Ariz. 1980)("*Begay I*"), a case that does not exhibit Indian law preemption analysis at all. The *Begay* litigation generated two decisions by the district court, sitting in diversity, in response to a lawsuit brought by Navajo employees and the surviving spouses of deceased Navajos, alleging injury and wrongful death through exposure to radiation because of the uranium mining operations of the workers' employer on the Navajo Reservation. *See id.* at 1327. When the Navajo plaintiffs' appeal from district court's adverse rulings finally reached the Ninth Circuit, this Court affirmed the district court's order dismissing the Navajos' federal-court action. *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1313 (9th Cir.1982). This Court explained that a federal statute of general applicability authorized application of the particular body of state law at issue in *Begay*:

> The language of 40 U.S.C. § 290 unambiguously permits application of state workers' compensation laws to all United States territory within the state. Claims by Indians against non-Indian employers are not matters of "self-governance in purely intramural matters" sufficient to avoid the rule that Indians are subject to such federal laws of general application, and the exercise of state jurisdiction over such claims [by Indians against non-Indian employers] does not, even minimally, infringe upon or frustrate tribal self-government.

Id. at 1319 (citations omitted). By force of the general federal statute that was construed to authorize application of Arizona's workers' compensation laws on the Navajo Reservation, this Court concluded that the Navajo plaintiffs had "fail[ed] to state a claim upon which relief could be granted" and "[o]n this basis" affirmed the district court's dismissal order. *Id.* at 1320.

The fact that this Court's *Begay* holding rested solely on a particular federal statute of general applicability that *delegated* Arizona authority to impose "state workers' compensation laws," *id.* at 1319, on the Navajo Reservation illuminates EXC's misrepresentations. For instance, EXC quotes from *Begay I* for the uncontroversial proposition that "[w]hen an Indian plaintiff invokes the diversity jurisdiction of the federal courts the action will be subject to the same limitations that would have applied if the action had been filed in state court." 499 F.Supp. at 1327; *see* AB 28. Far from supporting EXC's argument that "*Erie R.R. v. Tomkins* require[s] the court to apply Arizona substantive law, regardless of the fact that Plaintiffs are Navajo," *id.*, the quote supports Jensens' position that limitations prescribed by federal statutes pursuant to the Supreme Court's Indian law preemption doctrine apply in this federal-court diversity action just as they would have applied if Jensens had filed their suit in state court instead.[13]

[13] Accordingly, the Navajo-Hopi Rehabilitation Act preempts state law whether the action is brought in state or federal court, and it does not matter if "[t]he Act did not

Likewise, Jensens' position is ironically reinforced when EXC purports to paraphrase the following passage from *Begay I*:

> In cases where there is no interference with federal interests or infringement upon an Indian Tribe's right of self-government, state law can be applied to transactions taking place on Indian reservations. It is also clear that a state court may exercise jurisdiction in cases involving an Indian plaintiff and a non-Indian defendant where the transaction took place on the reservation. When Indian plaintiffs invoke the jurisdiction of the state courts, they are bound by the laws of the forum.

499 F.Supp. at 1325 (citations omitted). In the context of Jensens' lawsuit, these principles stand for (1) Jensens' right to sue EXC in state or federal court and (2) the mandate that the forum (whether state or federal) must conform to the requirements of preemptive federal law when applying state law would entail "interference with federal interests," *id*.

EXC's treatment of this Court's *Begay* decision isolates the following single quote without explanatory context:

> Claims by Indians against non-Indian employers are not matters of "self-governance in purely intramural matters" sufficient to avoid the rule that Indians are subject to such federal laws of general application, and the exercise of state jurisdiction over such claims does not, even minimally, infringe upon or frustrate tribal self-government.

Begay, 682 F.2d at 1319 (citations omitted). However, as explained above, that quote merely distinguishes *Begay* as relying on a particular federal statute of general

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address what law should apply to diversity cases by Navajos against non-Navajos in federal court," AB 36.

applicability that authorized "application of state workers' compensation laws," *id.*, on the Navajo Reservation, a narrow subject-matter context that has no relevance to Jensens' suit.

3. EXC's Main Preemption Arguments Are Flawed Because They Misrepresent Precedents and Rest on Principles That Do Not Apply in the Indian Law Preemption Context

Apart from its misleading invocation of *Begay*, EXC addresses the preemption issue with a confusion of relevant and irrelevant precedents and doctrine. In purporting to discuss "preemption in the field of Indian law," AB 32, EXC states that the seminal case of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 139 (1980), "held that a state could not exercise regulatory authority…over *an Indian logging company* doing business on an Indian reservation…," AB 32-33 (emphasis added). But in *Bracker*, "[t]he State of Arizona [sought] to apply its…taxes to…an enterprise consisting of two *non-Indian corporations*…operating…on the…Reservation." 448 U.S. at 137 (emphasis added). EXC's efforts to deny the relevance of the Indian law preemption doctrine by misstating the legally controlling facts of a leading Supreme Court case are thus unavailing.

So too is EXC's further misrepresentation in stating that *Bracker* "noted that the unique origins of tribal sovereignty make it unhelpful to apply the 'traditional notions of preemption' to federal enactments regulating Indian tribes," AB 33 (purporting to quote *Bracker*, 448 U.S. at 143), faulting Jensens by asserting that

"that is exactly what Plaintiffs are trying to do by arguing that the 1950 Act 'preempts' the application of Arizona substantive law here," AB 33-34. In actuality, the phrase "traditional notions of preemption," which EXC places in quotation marks, does not appear in *Bracker*. Rather, EXC conflates the following sentences:

> Traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop" against which vague or ambiguous federal enactments must always be measured.
>
> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law.

Bracker, 448 U.S. at 143 (citation omitted). The Indian law preemption doctrine thus is separate and distinct from preemption analysis outside the field of Indian law because it reflects the historically enduring principle that "[t]ribal sovereignty has operated as a shield against intrusions of state law into Indian country." William C. Canby, Jr., *American Indian Law in a Nutshell* 89 (6th ed. 2015). Accordingly, assessing the preclusive effect of the Navajo-Hopi Rehabilitation Act and Public Law 280—both "federal enactments regulating Indian tribes," *Bracker*, 448 U.S. at 143—requires exclusive application of Indian law preemption

principles. EXC's extensive discussion of "standards of pre-emption that have emerged in other areas of the law," *id.*; *see* AB 34-38,[14] is wholly misplaced.[15]

4. EXC's Denial of the Preemptive Effect of the Navajo-Hopi Rehabilitation Act Is Unavailing

Its misapprehension of controlling preemption principles explains why EXC finds "unclear" Jensens' reliance on *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *see* AB 37-38 & n.16 (quoting OB 39)(noting Jensens' citation to that case for the proposition that the Navajo-Hopi Rehabilitation Act together with the Navajo Nation's promulgation of touring regulations "reflects 'a broad joint tribal and federal commitment to promoting tribal self-government and encouraging economic development which preempts the application of Arizona law'"). As the Supreme Court explained with respect to the preemptive effect of a similar tribal-

[14] *Compare*, *e.g.*, AB 34 ("There is a presumption against implied preemption.") *with Cohen's Handbook of Federal Indian Law* § 6.03[2][a], at 526-27 (Nell Jessup Newton et al., eds., 2012 ed.)(cleaned up)("The usual preemption approach in other fields presumes that state jurisdiction will prevail unless sufficient contrary intent can be found. But the opposite presumption prevails in Indian law because '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history'….").

[15] In arguing that the highway where the fatal collision occurred was not "on the Navajo Reservation," was "on non-tribal land," and was on "non-tribal property," AB 36-38—factually false assertions—EXC cites *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *see* AB 37, suggesting that in *Strate* the highway likewise was neither on the reservation nor on tribal land. *But see Strate*, 520 U.S. at 443 (observing that the accident happened on a "state highway running through the Fort Berthold Indian Reservation" and that "the right-of-way lies on land held by the United States in trust for the Three Affiliated Tribes…and their members").

federal program in *Mescalero Apache Tribe*, "when a tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against any interference with the successful accomplishment of the federal purpose." 462 U.S. at 336.

EXC's unsupported assertion that the "history of the 1950 Act is irrelevant" to the preemption question because that legislative history "has nothing to do with a traffic accident that occurred on a U.S. highway," AB 38-39, ignores the fact that the highway where the collision occurred was constructed pursuant to the 1950 Act. *See* Navajo-Hopi Rehabilitation Act § 631(7) (appropriating funding for "construction and improvement of the roads designated as route 1 and route 3 on the Navajo and Hopi Indian Reservations"). Accordingly, Congress's compliance with the demands of the President's veto of a 1949 precursor bill to the 1950 Act—*i.e.*, the President's objection that the bill would have brought about "a broad-scale extension of State laws to the Navajo" Reservation, 95 Cong. Rec. 14,784 (1949)(veto message)—establishes that the Navajo-Hopi Rehabilitation Act preempts application of Arizona law to Jensens' suit for death and injuries suffered by Navajos stemming from the fatal highway collision on the Navajo Reservation.

5. EXC's Denial of the Preemptive Effect of Public Law 280 Is Unavailing

EXC's attack on Jensens' use of *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g Co.*, 476 U.S. 877 (1986), to reinforce Jensens'

preemption argument also misses the mark. EXC's statement purporting to differentiate *Wold* as a case where "there was no tribal forum available to the Indian tribe plaintiff," AB 39, is especially ironic; for, as EXC knows, *see* AB 6, Jensens brought the present action in federal court precisely because this Court held that the Navajo courts lacked jurisdiction over Jensens' lawsuit and hence no tribal forum was available. Moreover, EXC's description of *Wold* as a case that concerned state law that "would have required [an] Indian tribe to waive its sovereign immunity and consent to the application of state law in all cases to which it might be a party," AB 39 (citation omitted), neglects to mention *Wold*'s identical solicitude for *individual Indian plaintiffs*. *See Wold,* 476 U.S. at 888 (criticizing and ultimately voiding state-law provision that barred individual Indians from "enjoy[ing] state jurisdiction as plaintiffs absent consent to suit as defendants"). Errant too is EXC's mislabeling of *Wold* as a "field preempt[ion]" and "conflict preempt[ion]" case, *see* AB 39-40, a deflection from the actual analysis in *Wold,* an analysis that designates the case as the Supreme Court's signature *Indian law preemption* precedent cabining state law as applied to state-court adjudications of civil actions brought by Indian plaintiffs against non-Indian defendants on reservations. *See Wold,* 476 U.S. at 889 (describing the unique and "comprehensive pre-emption inquiry in the Indian law context" that the Court proceeds to apply).

Notwithstanding EXC's diversions, *Wold*'s analysis of the preemptive effect of Public Law 280 is controlling here, where Navajo law is available for the federal court's use in a diversity suit brought by Navajo plaintiffs for tortious conduct by non-Indian defendants on the Navajo Reservation. The steps in the federal Indian law preemption analysis are as follows:

a) Before 1953, states generally could hear claims brought by Indian plaintiffs against non-Indian defendants because, absent any "governing Acts of Congress," such state authority does not "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

b) However, with regard to the Navajo Reservation the 1950 Navajo-Hopi Rehabilitation Act precluded Arizona from subjecting Navajo Indians to substantive state law because that Act was passed pursuant to a presidential veto demanding that Navajo Indians remain exempt from state law and free to govern themselves under tribal laws instead. *See* 95 Cong. Rec. 14,784 (1949)(veto message).

c) With enactment of Public Law 280 in 1953, Arizona arguably had an opportunity to impose its substantive laws in civil actions involving Indians as parties and stemming from on-reservation events. *See Bryan v. Itasca County*, 426 U.S. 373, 384-85 & n.11 (1976)(emphasis omitted)(concluding that Section 4 of Public Law 280 gave effect to Congress's "primary intent …to grant jurisdiction over private civil litigation involving reservation Indians in state court" and noting that "this interpretation is buttressed by § 4(c), which provides that 'any tribal ordinance or custom…adopted by an Indian tribe…in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section'").

d) Arizona did not accept Congress's offer to extend state substantive law to civil proceedings involving Indians as parties pursuant to Public Law 280, *see McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164, 177 n.17 (1973)(noting that Arizona "declined to assume full responsibility for the

Indians [pursuant to Public Law 280] during the period when it had the opportunity to do so"); therefore Public Law 280 precludes application of Arizona's substantive law as applied in such proceedings because imposition of that law "cannot be reconciled with the congressional plan embodied in Pub. L. 280 and thus is pre-empted by it," *Wold*, 476 U.S. at 887.

e) Accordingly, the preemptive effect of Public Law 280 and the Navajo-Hopi Rehabilitation Act precludes application of Arizona substantive law with respect to Jensens' lawsuit against EXC and requires application of Navajo substantive law instead.

f) This conclusion is "reinforce[d]" by consideration of "state, tribal, and federal interests," *id.* at 893, including Congress's having exempted Navajo Indians on the Navajo Reservation from "State civil…laws" so that the Navajo people could continue exercising "tribal self-determination" without any state-law displacement of tribal laws and customs promulgated via "their own political and social institutions," 95 Cong. Rec. 14,784 (1949)(veto message).

6. EXC's Other Preemption-Related Arguments Are Unavailing

EXC's argument that "[t]ribal jurisdiction is coextensive with tribal law," AB 31, is misleading. EXC cites no case supporting this argument, and the implication that federal and state courts do not apply tribal law is contradicted by numerous instances to the contrary.[16] Indeed, the applicability of tribal law in a

[16] Thus EXC's assertion that Jensens "have not cited any case that did, in fact, apply tribal law…in any…federal case," AB 16, is false. *See* OB 44 (observing that "[t]he United States Supreme Court…has both modeled and confirmed the propriety of federal and state courts' applying tribal law" and citing the example of *Jones v. Meehan*, 175 U.S. 1 (1899)); *see also Cohen's Handbook*, *supra*, § 7.06[2], at 652-53 & n.441 (collecting cases that illustrate state and federal courts' application of "tribal law to disputes arising in Indian country"). Elsewhere EXC contradicts its argument. *See* AB 41-42 (emphasis added)(quoting *Jones*, 175 U.S. at 29)(conceding that the federal court in *Jones* held that the matter before the court

federal-court case premised on diversity is exhibited by a modern-era Supreme Court decision, *Iowa Mut. Ins. Co. v. LaPlante*, 490 U.S. 9 (1987). There, the Court held that "[r]egardless of the basis for jurisdiction [*i.e.* federal-question or diversity], the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court [in a concurrent proceeding] a full opportunity to determine its own jurisdiction." *Id.* at 16. But the Court *also* intimated that (1) the preemptive effect of Public Law 280 would have "precluded" the state from exercising authority over the civil action that the plaintiff insurance companies had brought against Indian defendants in federal court instead, *id.* at 13 & n.4, and (2) before a federal court with diversity jurisdiction adjudicates "matters" involving *the application of tribal law* that are pending in a tribal forum, the federal court must, as a matter of comity, "stay its hand" until "exhaustion of tribal remedies" is complete, *see id.* at 16 (noting that "[a]dudication of such matters" as the one brought before the federal district court by the plaintiff insurance companies was properly subject to the tribal-remedies exhaustion requirement because "tribal courts are best qualified to interpret and apply tribal law"); *accord*, *id.* at 22 & n. (Stevens, J., concurring in part and dissenting in part)(emphasis added)(observing that that the "controversy concerning the coverage of the insurance policy" that the

"'*was controlled by the laws, usages, and customs of the tribe*'" and adverting to *Jones* as illustrating "matters that should be governed by tribal law").

plaintiff insurance companies' lawsuit had initiated was "properly before the Federal District Court" and that the Supreme Court "seems to assume that *the merits of this controversy are governed by 'tribal law'*"). Thus both the majority and concurring/dissenting opinions contradict EXC's assertion that "*LaPlante* did not address what law might apply…." AB 43.

Accordingly, EXC's argument that there is "not…one legal authority that applied a federal preemption analysis so as to require the application of tribal law in a federal tort case based on diversity," AB 32, is belied by *LaPlante*, where the Supreme Court (1) acknowledged the preemptive effect of Public Law 280 and (2) approved application of tribal law in the "matter[]" properly brought before the federal-diversity court but not yet exhausted in tribal court, *see id.* at 13 n.4 & 16. In *LaPlante*, had the tribal-court plaintiffs *themselves* invoked diversity jurisdiction by suing the non-Indian defendants in *federal* court, the analysis would have been the same: Public Law 280 would have preempted state law, requiring application of *tribal* law to the Indians' tort claims instead. This observation further underscores the district court's fundamental error in opining that this Court's's previous decision denying the Navajo Nation's judicial jurisdiction over Jensens' lawsuit *ipso facto* forecloses application of Navajo substantive law in the suit as refiled in federal court under diversity jurisdiction. As the leading treatise in the field of Indian law observes, "when there is no tribal jurisdiction under…*Montana*, it is possible that

application of the preemption/infringement test may preclude state authority…." *Cohen's Handbook*, *supra*, § 6.03[2][c], at 537 (adverting to *Montana v. United States*, 450 U.S. 544 (1981)). That is the situation here: notwithstanding the absence of tribal jurisdiction, the use of state law to adjudicate Jensens' lawsuit as refiled in federal court is preempted by federal Indian law, and hence *tribal* law must be applied instead.

By the same token EXC's parallel argument—*i.e.*, that the Ninth Circuit's reliance on *Strate* to deny Navajo judicial jurisdiction *ipso facto* mandates application of Arizona substantive law in this federal-court diversity lawsuit, *see* AB 46—is wrong. Unlike the present case, *Strate* did not involve *Indian* parties and hence if *Strate*'s tribal-court plaintiff had refiled in state or federal court the proceeding would not have been constrained by Public Law 280 and the Navajo-Hopi Rehabilitation Act. *Cf. Cohen's Handbook*, *supra*, § 6.03[2][c], at 537 (emphases added)(noting that in *Strate*, "after finding that the tribal court lacked jurisdiction over a personal injury action *between non-Indians*, the Court opined that the suit could be brought in state court" and that "[t]he absence of discussion may reflect the Court's belief that *if only non-Indians are involved*, a tribe's right to govern its reservation presumably is not infringed by the application of state law").[17]

[17] Here, it is *statutory preemption* that precludes state law, but the principle vis-à-vis infringement is analogous. *Cf id*., § 6.04[3][e], at 573 ("Once state jurisdiction is deemed preempted by Public Law 280, it makes no difference whether the exercise

B. Arizona's Choice-of-Law Principles Favor Applying Navajo Substantive Law

EXC's brief exhibits conclusory analyses regarding application of Arizona's choice-of-law principles, as well as unsupported assertions, references to inapposite cases, and other defects that overlap with, and are similar to, EXC's errors regarding the preemption issue. *See*, *e.g.*, AB 41 ("This case…did not arise on tribal land."); AB 43 ("*LaPlante* did not address what law might apply…."); AB 46 ("*Strate* …implied…that tribal law would not apply [in a non-tribal forum]"). Especially erroneous is EXC's pronouncement that "the *Strate* jurisdictional test is co-extensive with the *Begay*…substantive law test," AB 46-47; *see also* AB 49 (further citing *Begay*), endeavoring to infuse this Court's *Begay* decision regarding *delegation* to Arizona (via a general federal statute) of workers'-compensation authority on reservations with precedential force in the entirely unrelated arena of preemption/choice-of-law.

Federal and state courts' choosing to apply tribal law is a nascent substratum of law and policy at the crossroads of tribal, state, and federal relations. *See generally* Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 Am. U. L. Rev. 1627 (2005-2006). But important inroads already have been made. Most recently, in

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of that jurisdiction would pass any test based on infringement of tribal sovereignty.").

Cooper v. Las Vegas Metro Police Dep't, 2020 U.S. Dist. LEXIS 18545 (D. Nev. 2020), a magistrate judge addressed the matter of federal courts' applying tribal law in appropriate cases. The court observed that "[f]ederal courts have occasionally considered tribal law as part of a conflicts-of-law inquiry," *id.* at *11 (citations omitted), and noted *Cohen's Handbook*'s position that the "'[a]pplication of modern choice-of-law principles should sometimes lead state and federal courts to apply tribal law,'" *id.* n.1 (citation omitted); *see also* Canby, *supra*, at 263 ("State courts applying normal choice of law principles should frequently apply tribal law to issues arising in Indian country."). In light of the mutually respectful inter-sovereign relationship between Arizona and the Navajo Nation, this case presents an optimal context for acknowledging that Arizona's choice-of-law rules clearly favor choosing Navajo law to resolve this dispute, in harmony with already-operant principles of comity, *see*, *e.g.*, *Tracy v. Superior Court*, 810 P.2d 1030, 1041 (Ariz. 1991)(stating that "tribal laws are entitled to recognition on the basis of comity if they are otherwise in accord with Arizona's public policy"), and as Jensens justify in detail, *see* OB 43-53.

Conclusion

For the above reasons and those in the Opening Brief, Jensens request that this Court grant their prayer for relief. *See* OB 54.

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I hereby certify that, on March 19, 2021, the foregoing **Appellants' Reply Brief** was electronically transmitted to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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