No.

IN THE
Supreme Court of the United States

AVIS BUDGET GROUP, INC.,
F/K/A CENDANT CORPORATION, AND
AVIS BUDGET CAR RENTAL, LLC,
F/K/A CENDANT CAR RENTAL GROUP, LLC,
F/K/A CENDANT CAR RENTAL GROUP, INC.,

Petitioners,

v.

ALASKA RENT-A-CAR, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the erroneous deprivation of a peremptory challenge in federal court, which allows a prospective juror who should have been stricken to sit on the jury, is subject to harmless-error review.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Avis Budget Group, Inc., formerly known as Cendant Corporation, states that it is a publicly held Delaware corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Avis Budget Car Rental, LLC, formerly known as Cendant Car Rental Group, LLC and Cendant Car Rental Group, Inc., is a wholly owned subsidiary of Avis Budget Holdings, LLC, which is a wholly owned subsidiary of Cendant Finance Holding Company, LLC, which is a wholly owned subsidiary of Petitioner Avis Budget Group, Inc.

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INTRODUCTION

For more than a century, federal statutes and rules have entitled both civil and criminal litigants in federal court to a certain number of peremptory challenges. And for more than a century, this Court has recognized that the proper remedy for an erroneous deprivation of that right, which allows a prospective juror who should have been stricken to sit on the jury, is reversal of the judgment. *See, e.g.*, *Harrison v. United States*, 163 U.S. 140, 142 (1896); *Gulf, Colorado & Santa Fe Ry. v. Shane*, 157 U.S. 348, 351 (1895); *Lewis v. United States*, 146 U.S. 370, 376 (1892); *Mutual Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285, 294 (1892). That remedial rule makes sense, because it is impossible to assess after the fact whether the participation of a particular juror had any effect on the jury's deliberations and ultimate verdict. Not surprisingly, in light of that venerable rule, "every … circuit to address this issue agree[d] that the erroneous deprivation of a … peremptory challenge requires automatic reversal." *United States v. Annigoni*, 96 F.3d 1132, 1141 (9th Cir. 1996) (*en banc*) (citing cases).

That unanimity has now been shattered. In a series of recent decisions, including the decision below, the First, Seventh, Eighth, and Ninth Circuits have rejected the traditional rule, and held that the erroneous deprivation of a peremptory challenge in federal court is subject to harmless-error review. These decisions assert that this Court abandoned the traditional rule in *Rivera v. Illinois*, 556 U.S. 148 (2009), and *United States v. Martinez-Salazar*, 528 U.S. 304 (2000), so that longstanding precedent applying the rule is no longer binding.

These courts have vastly overread *Rivera* and *Martinez-Salazar*, and thereby created a conflict with decisions of other circuits and this Court applying the traditional rule. *Rivera* holds only that the Federal Constitution does not prohibit *state* courts from applying harmless-error review to erroneous deprivations of *state*-authorized peremptory challenges. And *Martinez-Salazar* holds only that the erroneous deprivation of a for-cause challenge in federal court, which leads a litigant to use a peremptory challenge to remove a particular prospective juror, does not deprive the litigant of a peremptory challenge at all. Neither case remotely purports to overrule the traditional rule that the erroneous deprivation of a peremptory challenge in federal court, which allows a prospective juror who should have been stricken to sit on the jury, is not subject to harmless-error review.

The upshot of the decision below, and the other recent decisions that have similarly overread *Rivera* and *Martinez-Salazar*, is that an area of federal law that had long been settled is now a mess. These decisions have not only created disuniformity among the federal courts of appeals on an important and recurring question of federal law, but have usurped this Court's exclusive prerogative to overrule its decisions. This Court alone may disavow the venerable line of cases regarding the proper remedy for erroneous deprivations of peremptory challenges in federal court. And this Court certainly should not allow the lower courts to overrule its precedents based upon a manifest misinterpretation of its own decisions. Accordingly, this Court should grant this petition.

OPINIONS BELOW

The Ninth Circuit's opinion, as amended on June 16, 2013 in response to a petition for rehearing *en banc*, is reported at __ F.3d __, and reprinted in the Appendix ("App.") at 1-34a. As thus amended, the opinion supersedes the Ninth Circuit's original opinion reported at 709 F.3d 872. The district court's unreported decision denying petitioners' peremptory challenge is reprinted at App. 59-60a.

JURISDICTION

The Ninth Circuit rendered its original decision on March 6, 2013. Petitioners filed a timely petition for rehearing *en banc* on March 20, 2013, which the Ninth Circuit denied on June 19, 2013. App. 35-36a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTES AND RULES

28 U.S.C. § 1870 provides in relevant part:

> In civil cases, each party shall be entitled to three peremptory challenges.

Federal Rule of Civil Procedure 47(b) provides:

> The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

STATEMENT OF THE CASE

A. Background

Petitioners Avis Budget Group, Inc. and Avis Budget Car Rental, LLC (collectively "ABG") own both the Avis and Budget car rental brands. Respondent Alaska Rent-A-Car ("ARAC") is the Avis licensee in Alaska. ARAC filed this lawsuit against

ABG in January 2003, alleging myriad claims arising from ABG's simultaneous operation of the Avis and Budget brands. Pretrial proceedings narrowed the case to a single claim for breach of contract. On that claim, the district court granted ARAC summary judgment on liability and ordered a jury trial limited to determining the amount of damages, if any, caused by the breach.

ABG's theory at trial was that ARAC had not been harmed by the breach, and thus could not prove any damages. In keeping with that approach, ABG questioned prospective jurors about their inclination to punish breaches of contract even when the non-breaching party had not been harmed. *See* App. 41-52a. Several prospective jurors expressed a willingness to do so, although most also said that they would nonetheless be willing to abide by the court's instructions. *See id.* One prospective juror (No. 6) indicated that she "disagree[d]" with the legal measure of damages. App. 44a. Another (No. 15) stated that she might punish a party for breach of contract "depend[ing] on how the promises were made and what's been broken," and ABG's attorney did not have time before the *voir dire* clock expired to ascertain whether she would follow the court's instructions. App. 51-52a. ABG accordingly exercised two of its three peremptory challenges to exclude Prospective Jurors 6 and 15.

Both of those prospective jurors happened to be Alaska Natives, and ARAC challenged ABG's exercise of its peremptory strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986), arguing that striking prospective jurors based on affirmative answers to *voir dire* questions had a disparate impact on Alaska

Natives. *See* App. 53-55a. ARAC did not contend that ABG had intentionally sought to exclude Alaska Natives from the jury on the basis of race. *Id.* To the contrary, ARAC's counsel stated that "I'd be the last person to accuse [ABG's counsel], of all people, of being racially motivated." App. 56a. (ABG's trial counsel, Howard Trickey, has a long history of advocating on behalf of Alaska Native institutions and causes. *See, e.g.*, *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176 (9th Cir. 2003); *Schmitz v. Yukon-Koyukuk Sch. Dist.*, 147 P.3d 720 (Alaska 2006).) Responding to ARAC's *Batson* challenge, ABG's counsel articulated racially-neutral justifications for striking those jurors—specifically, that he thought they might be willing to punish for breach of contract rather than award the proper legal measure of damages. *See* App. 56-58a.

The district court, for its part, did not find that ABG had acted with racial motivation. To the contrary, the court recognized that "[n]obody's making [an] allegation" of purposeful racial discrimination, and that "nobody has done anything that I've ever seen that would indicate that they have some racial bias." *See* App. 56a, 60a. But instead of overruling ARAC's *Batson* challenge, the court attempted to craft a Solomonic solution: the Court upheld ABG's strike of Prospective Juror 6 but seated Prospective Juror 15 over ABG's objection. The court explained that Prospective Juror 15's answers to the *voir dire* questions had not provided sufficient basis to think that she would be unable to decide the case fairly, App. 59a—the standard for rejecting a for-cause challenge, not a peremptory challenge.

The jury, including Prospective Juror 15, ultimately returned a verdict of $16 million in damages—even more than plaintiff's own expert had estimated—and the district court entered judgment on the jury verdict. ABG appealed on several grounds, including the district court's rejection of ABG's peremptory challenge to Prospective Juror 15.

B. The Ninth Circuit Decision

A panel of the Ninth Circuit affirmed the judgment in all relevant respects. With respect to the *Batson* issue, the panel originally held that (1) the district court had not erred by disallowing ABG's peremptory challenge to Prospective Juror 15, and (2) any such error was in any event harmless. *See* App. 8-15a.

As to the validity of the peremptory challenge, the panel acknowledged that the district court had made an "explicit finding that [ABG's] lawyer did *not* act with a racial motivation." App. 11a (emphasis added); *see also* App. 13a ("In this case, the trial judge found the absence of subjective racial bias."). The panel did not disturb that finding. *See* App. 13a. Instead, the panel held such a finding is immaterial to the *Batson* inquiry. What matters, the panel declared, is not whether a peremptory challenge was actually motivated by race, but whether "an *objective observer* would infer from the facts … that there was purposeful discrimination." App. 12a (emphasis added). Thus, according to the panel, even in the conceded "absence of subjective racial bias," the "*appearance* of purposeful discrimination … suffices" to establish an Equal Protection violation. App. 13a (emphasis added).

In the alternative, the panel held that any error in sustaining the *Batson* challenge was harmless. *See* App. 13-15a. At the time of trial, the Ninth Circuit followed the traditional rule that the erroneous deprivation of a peremptory challenge, which allows a prospective juror who should have been stricken to sit on the jury, is not subject to harmless-error review. *See Annigoni*, 96 F.3d at 1134. While ABG's appeal was pending, however, another Ninth Circuit panel held that this rule had been "effectively overruled" by this Court's subsequent decision in *Rivera*. *United States v. Lindsey*, 634 F.3d 541, 544, 556 (9th Cir. 2011). The panel in this case followed *Lindsey*, and held that any error by the district court in disallowing the peremptory challenge to Prospective Juror 15 had not affected ABG's substantial rights and was thus harmless. App. 13-15a.

ABG timely petitioned for rehearing *en banc*, explaining that both of the panel's *Batson* holdings were erroneous.

With respect to the validity of the peremptory challenge, the petition pointed out that there could be no *Batson* violation as a matter of law in light of the district court's undisturbed finding that the disputed peremptory challenge was not motivated by race. A *Batson* violation, like any other violation of the Equal Protection Clause, requires proof of *purposeful* discrimination. *See*, *e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Rice v. Collins*, 546 U.S. 333, 338 (2006); *Miller-El v. Dretke*, 545 U.S. 231, 239-40 (2005); *Johnson v. California*, 545 U.S. 162, 168-72 (2005); *Miller-El v. Cockrell*, 537 U.S. 322, 338-41 (2003); *Purkett v. Elem*, 514 U.S.

765, 767-68 (1995) (*per curiam*); *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) (plurality); *id.* at 373, 375 (O'Connor, J., joined by Scalia, J., concurring in the judgment); *Batson*, 476 U.S. at 93-94; *see generally Washington v. Davis*, 426 U.S. 229, 240 (1976) (holding that a party alleging a violation of Equal Protection under the Fourteenth Amendment must prove *purposeful* racial discrimination). By holding that there may be an Equal Protection violation—even in the conceded absence of purposeful discrimination—where "an objective observer would infer from the facts … that there was purposeful discrimination," App. 12a, the Ninth Circuit effectively opened the door to disparate-impact claims under the Equal Protection Clause.

And with respect to harmless error, the petition pointed out that this Court's decision in *Rivera* had nothing to do with the remedy for the erroneous deprivation of a peremptory challenge in federal court. Rather, *Rivera* simply held that the Due Process Clause did not prevent States from deeming such errors harmless in their own courts. *See* 556 U.S. at 162.

In response to the petition, the Ninth Circuit panel substantially amended its opinion. In particular, the court excised its holding that the district court had properly upheld the *Batson* challenge to ABG's peremptory strike of Prospective Juror 15. The court again acknowledged that the district court had made an "explicit finding that [ABG's] lawyer did not act with a racial motivation," and "did not expressly find the evil to which *Batson* is directed, purposeful racial discrimination." App.

13a (internal quotation omitted). But this time, the Ninth Circuit declared that "[w]e need not decide … whether denying the peremptory challenge was error," App. 13-14a, because any such error was harmless, App. 14-15a. The panel order entering the amended opinion denied ABG's petition for rehearing *en banc*, and stated that "[n]o future petitions for rehearing or petitions for rehearing en banc will be entertained." App. 36a.

This petition follows.

REASON FOR GRANTING THE WRIT

The Erroneous Deprivation Of A Peremptory Challenge In Federal Court, Which Allows A Prospective Juror Who Should Have Been Stricken To Sit On The Jury, Is Not Subject To Harmless-Error Review.

This petition involves the right to peremptory challenges in federal court—a right enshrined in federal law since the first Congress. *See* Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119. In particular, since 1872 the U.S. Code has entitled federal litigants to three peremptory challenges in civil cases. *See* 28 U.S.C. § 1870; *see also* Act of June 8, 1872, 17 Stat. 282. Such challenges help preserve the actual and perceived fairness of federal judicial proceedings by allowing litigants to remove a limited number of prospective jurors based on no more than a hunch or gut feeling about those jurors' partiality that would not support a for-cause challenge. *See, e.g.*, *Holland v. Illinois*, 493 U.S. 474, 484 (1990); *Swain v. Alabama*, 380 U.S. 202, 212-20 (1965); 4 William Blackstone, *Commentaries* *346-48, *353. Although the right to peremptory challenges is rooted in statutes and rules, not the Constitution,

see, e.g., *Batson*, 476 U.S. at 91; *Stilson v. United States*, 250 U.S. 583, 586 (1919), they have long been described by this Court as "an essential part of [a] trial," *Lewis*, 146 U.S. at 376, and "one of the most important of the rights" afforded to federal litigants, *Pointer v. United States*, 151 U.S. 396, 408 (1894).

In its landmark ruling in *Batson*, this Court "recognize[d] … that the peremptory challenge occupies an important position in our trial procedures," and did not call that position into question. 476 U.S. at 91 & n.15, 98. Rather, the Court held only that a litigant could not use a peremptory challenge to discriminate against prospective jurors in violation of the Equal Protection Clause. *See id.* at 84-99. *Batson* emphasized that, to establish a violation of the Equal Protection Clause in this context (as in any other), the party challenging a peremptory strike must ultimately show a "'discriminatory *purpose*.'" *Id.* at 93 (emphasis added; quoting *Davis*, 426 U.S. at 240); *see also Snyder*, 552 U.S. at 477; *Rice*, 546 U.S. at 338; *Miller-El II*, 545 U.S. at 239-40; *Johnson*, 545 U.S. at 168-72; *Miller-El I*, 537 U.S. at 338-41; *Purkett*, 514 U.S. at 767-68; *Hernandez*, 500 U.S. at 359-60 (plurality); *id.* at 373, 375 (O'Connor, J., joined by Scalia, J., concurring in the judgment).

It follows that where, as here, the district court makes an undisturbed finding that a particular peremptory challenge was *not* motivated by race (or some other characteristic subject to heightened scrutiny under the Equal Protection Clause), *see* App. 13a, 59-60a, there can be no *Batson* violation as a matter of law. To the extent that the Ninth Circuit suggested otherwise in its original opinion in this

case, it was manifestly incorrect, as the panel implicitly recognized by stripping any such suggestion from its amended opinion in response to ABG's petition for rehearing. *See* App. 12-13a.

In the amended opinion, the Ninth Circuit held that it "need not decide" whether the district court erred by seating Prospective Juror 15 in this case because any such error was harmless. *See* App. 13-14a. By thus applying harmless-error review to the erroneous deprivation of a peremptory challenge in federal court, the Ninth Circuit not only deepened a conflict among the federal courts of appeals, but strayed from this Court's longstanding and binding precedents.

As noted above, this Court has recognized for more than a century that "[t]he denial of the right of [peremptory] challenge, secured to the defendants by the statute, entitles them to a new trial." *Hillmon*, 145 U.S. at 294; *see also Harrison*, 163 U.S. at 142; *Gulf, Colorado & Santa Fe*, 157 U.S. at 351; *Lewis*, 146 U.S. at 376; *cf. Ross v. Oklahoma*, 487 U.S. 81, 89 (1988) (acknowledging traditional federal rule that "'[t]he denial or impairment of the right [to the peremptory strikes established by law] is reversible error without a showing of prejudice'") (quoting *Swain*, 380 U.S. at 219). That rule makes sense, because the seating of a juror who should not have been seated "is simply not amenable to harmless-error analysis." *Annigoni*, 96 F.3d at 1144; *see also Rahn v. Hawkins*, 464 F.3d 813, 819 (8th Cir. 2006); *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998). Given "the dearth of information concerning what went on in the jury room," there is no way for a reviewing court to "quantitatively

assess[]" the effect of a juror's presence "in the context of [the] evidence presented in order to determine whether [it] was harmless." *Annigoni*, 96 F.3d at 1144-45 (emphasis and internal quotation omitted); *see also id.* at 1150 (Kozinski, J., dissenting) ("[W]e can never figure out what would have happened if one member of the jury had been struck and replaced by some other, unknown, person."); *McIlwain v. United States*, 464 U.S. 972, 975-76 (1983) (Marshall, J., dissenting from denial of certiorari) ("Given the delicate dynamics of jury deliberations, it is simply impossible to know the effects [one] juror had on her fellow jurors."); *cf. United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008) (McConnell, J.) ("Jury decision-making is designed to be a black box: … the inner workings and deliberation of the jury are deliberately insulated from subsequent review.").

Harmless-error review in this context would thus "require appellate courts to do the impossible: to reconstruct what went on in jury deliberations through nothing more than post-trial hearings and sheer speculation." *Annigoni*, 96 F.3d at 1145. Under these circumstances, as this Court has recognized, harmless-error review is neither necessary nor appropriate. *See*, *e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (erroneous deprivation of Sixth Amendment right to counsel not subject to harmless-error review, in part because of "the difficulty of assessing the effect of the error"); *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993) (erroneous reasonable-doubt instruction not subject to harmless-error review in part because of the "necessarily unquantifiable and indeterminate" effects of such an error); *Vasquez v. Hillery*, 474 U.S.

254, 263 (1986) (erroneous exclusion of jurors opposed to death penalty not subject to harmless-error review, in part because the impact of such an error "cannot be ascertained"); *see also United States v. Curbelo*, 343 F.3d 273, 281-82 (4th Cir. 2003) (erroneous deprivation of right to trial by 12-person jury not subject to harmless error review in part because "[a]ttempting to determine [the effect of an individual juror] would involve pure speculation"). Indeed, "[t]o apply a harmless-error analysis in this context would be to misapprehend the very nature of peremptory challenges," which are "used precisely when there is no identifiable basis on which to challenge a particular juror for cause." *Annigoni*, 96 F.3d at 1144.

Until recently, every federal court of appeals to address the issue—including the Ninth Circuit—adhered to this venerable rule. *See, e.g.*, *Annigoni*, 96 F.3d at 1141 (citing, *inter alia*, *United States v. Broussard*, 987 F.2d 215, 221 (5th Cir. 1993); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990); *United States v. Cambara*, 902 F.2d 144, 147 (1st Cir. 1990); *United States v. Ruuska*, 883 F.2d 262, 268 (3d Cir. 1989); *United States v. Mosely*, 810 F.2d 93, 96 (6th Cir. 1987); *United States v. Ricks*, 802 F.2d 731, 734 (4th Cir. 1986) (*en banc*); *Carr v. Watts*, 597 F.2d 830, 832-33 (2d Cir. 1979)). Indeed, as the Sixth Circuit noted in 1998, the suggestion the erroneous deprivation of a peremptory challenge could be considered harmless error "has been resoundingly rejected by every circuit court that has considered the issue." *McFerron*, 163 F.3d at 955-56; *see also United States v. Kimbrel*, 532 F.3d 461, 468-69 (6th Cir. 2008); *Rahn*, 464 F.3d at 819; *Central Ala. Fair*

Hous. Ctr., Inc. v. Lowder Realty Co., 236 F.3d 629, 638-39 & n.3 (11th Cir. 2000); *United States v. Taylor*, 92 F.3d 1313, 1325 (2d Cir. 1996); *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 162 & n.16 (3d Cir. 1995); *United States v. Vargas*, 606 F.2d 341, 346 (1st Cir. 1979); *Signal Mountain Portland Cement Co. v. Brown*, 141 F.2d 471, 476-77 (6th Cir. 1944); *Butler v. Evening Post Pub. Co.*, 148 F. 821, 824 (4th Cir. 1906); *Betts v. United States*, 132 F. 228, 240-41 (1st Cir. 1904).

In recent years, however, four federal circuits—the First, Seventh, Eighth, and Ninth—abandoned that venerable rule, not because they concluded it was wrong, but because they interpreted *this* Court's decisions in *Rivera* and *Martinez-Salazar* to abrogate it. *See Avichail ex rel. T.A. v. St. John's Mercy Health Sys.*, 686 F.3d 548, 552-53 (8th Cir. 2012); *Lindsey*, 634 F.3d at 549-50; *United States v. Gonzalez-Melendez*, 594 F.3d 28, 33-34 (1st Cir. 2010); *United States v. Patterson*, 215 F.3d 776, 779-82 (7th Cir. 2000). As a result, there is now a clear conflict between those circuits that continue to follow the traditional rule and those that do not, and whether the erroneous deprivation of a peremptory challenge in federal court is subject to harmless-error review now depends on the circuit in which the issue arises. This conflict is unnecessary and unwarranted, because neither *Rivera* nor *Martinez-Salazar* remotely purported to overrule the long line of cases holding that the erroneous deprivation of a peremptory challenge in federal court is not subject to harmless-error review.

Rivera considered the question whether "[t]he Due Process Clause of the Fourteenth Amendment

… requires reversal whenever a criminal defendant's peremptory challenge is erroneously denied" in state court. 556 U.S. at 156. This Court unanimously answered that question in the negative, holding that States are allowed to apply harmless-error review to "[t]he mistaken denial of a *state-provided* peremptory challenge" in state court. *Id.* at 158, 161 (emphasis added). As the Court explained, States are not constitutionally required to provide peremptory challenges in the first place, and thus are not constitutionally required to provide any particular remedy for the erroneous deprivation of such challenges. *See id.* at 156-62. As long as the defendant "is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." *Id.* at 157. In other words, the Constitution does not impose the traditional automatic reversal rule on the States.

But that is a far cry from saying that *Rivera* "superseded," *Avichail*, 686 F.3d at 552, "effectively overruled," *Lindsey*, 634 F.3d at 544, 556, or "disavowed," *Gonzalez-Melendez*, 594 F.3d at 33, the traditional rule in the *federal* system. *Rivera* did not hold that the Federal Constitution *requires* state courts—much less federal courts—to conduct harmless-error review in this context. To the contrary, *Rivera* emphasized that "States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*," 556 U.S. at 162, and indeed many States continue to apply the traditional automatic-reversal rule, *see*, *e.g.*, *Hardison v. State*, 94 So.3d 1092, 1101-02 & n.37 (Miss. 2012); *State v.*

Mootz, 808 N.W.2d 207, 225-26 (Iowa 2012); *People v. Hecker*, 942 N.E.2d 248, 271-73 (N.Y. 2010); *Commonwealth v. Hampton*, 928 N.E.2d 917, 926-27 (Mass. 2010); *see generally Rodriguez v. AT&T Mobility Servs. LLC*, __ F.3d __, 2013 WL 4516757, at *4 (9th Cir. Aug. 27, 2013) ("*Rivera* only addressed peremptory challenges in state, not federal, court, and it did not foreclose the possibility that automatic reversal could be held appropriate in a federal prosecution."). Because *Rivera* said nothing about the proper remedy for the erroneous deprivation of a peremptory challenge in federal court, there is no basis for interpreting that case to overturn more than a century of non-constitutional precedent on this point. *But see Avichail*, 686 F.3d at 552-53; *Lindsey*, 634 F.3d at 550; *Gonzalez-Melendez*, 594 F.3d at 33-34.

Like this Court's decision in *Rivera*, its decision in *Martinez-Salazar* did not remotely purport to give the lower courts license to abandon the traditional rule. *Martinez-Salazar* considered the question whether a federal-court litigant could invoke the traditional rule of automatic reversal where the district court erroneously denied a for-cause challenge, and the litigant thereafter used a peremptory challenge to keep a particular juror off the jury. *See* 528 U.S. at 314-17. The litigant there argued that the court's error had "forced" him to use a peremptory challenge, and thus effectively deprived him of the full complement of peremptory challenges duly authorized by law. This Court rejected that argument, explaining that the litigant had received all of the peremptory challenges to which he was entitled, and had chosen how to use them. *See id.* at 315-16 ("In choosing to remove [the

disputed juror] rather than taking his chances on appeal, [the litigant] did not lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury."). Because the litigant had received all the peremptory challenges to which he was entitled, and the disputed juror in that case did *not* sit on the jury, this Court found "no impairment" of the statutory right to peremptory challenges. *Id.* at 317 n.4; *see also id.* at 317 ("[A] defendant's exercise of peremptory challenges … is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause."). Accordingly, *Martinez-Salazar* had no occasion to decide—and expressly "d[id] not decide"—"what the appropriate remedy for a substantial impairment [of the right to a peremptory challenge in federal court] would be." *Id.* at 317 n.4.

To be sure, *Martinez-Salazar* went on to "note … that the oft-quoted language in *Swain*" describing the traditional rule that the erroneous deprivation of a peremptory challenge in federal court is not subject to harmless-error review "was not only unnecessary to the decision in that case—because *Swain* did not address any claim that a defendant had been denied a peremptory challenge—but was founded on a series of our early cases decided long before the adoption of harmless-error review." *Id.* The Seventh Circuit has asserted that "this language pulls the plug on the *Swain* dictum and requires us to address the harmless-error question as an original matter." *Patterson*, 215 F.3d at 781; *see also Avichail*, 686 F.3d at 552-53; *Lindsey*, 634 F.3d at 549; *Gonzalez-Melendez*, 594 F.3d at 33.

That assertion is incorrect. The language in *Martinez-Salazar* on which these courts relied is itself dictum (in a footnote, no less), given that the traditional rule was not implicated in that case. But even more to the point, the dictum in *Swain* that the dictum in *Martinez-Salazar* called into question is not the source of the traditional rule. Rather, that rule stems from a long line of holdings of this Court reversing judgments and remanding cases for a new trial as the remedy for the erroneous deprivation of a peremptory challenge in federal court. *See, e.g.*, *Harrison*, 163 U.S. at 142; *Gulf, Colorado & Santa Fe*, 157 U.S. at 351; *Lewis*, 146 U.S. at 376; *Hillmon*, 145 U.S. at 294; *see generally Kimbrel*, 532 F.3d at 469 (recognizing that *Martinez-Salazar* "does not pull the legs out from under [the traditional rule]"). *Martinez-Salazar*'s holding is entirely consistent with the traditional rule, and indeed *Martinez-Salazar* based that holding on this Court's prior holding in *Ross*, *see* 528 U.S. at 313-14, which specifically acknowledged the traditional rule, *see* 487 U.S. at 89.

Whether this Court's precedents applying the traditional rule survived the advent of harmless-error review is a question for *this* Court, not the lower courts, to decide. A lower court is constrained to follow this Court's precedents even where their doctrinal underpinnings may be open to question, "leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989); *see also Tenet v. Doe*, 544 U.S. 1, 10-11 (2005); *United States v. Hatter*, 532 U.S. 557, 567 (2001); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). *Rivera* and *Martinez-Salazar*, which at most suggest that

this Court might be open to reconsidering the traditional rule in an appropriate case, provided no basis for the lower courts "to address the harmless-error question as an original matter." *Patterson*, 215 F.3d at 781.

There is accordingly no reason for this Court to leave in place the current split among the federal courts of appeals on the harmless-error question presented by this petition. Because this Court has already answered that question, *only* this Court has the authority to change that answer. Further percolation in the lower courts will not elucidate the issue. Rather, to deny this petition is to condemn lower courts and litigants to years of dispute over the effect, if any, of this Court's decisions in *Rivera* and *Martinez-Salazar* on this Court's earlier decisions applying the traditional rule.

As a practical matter, moreover, it is hard to see how harmless-error review would work in this context. This case underscores the point. Because no one knows what happened in the jury room, all anyone knows is that a prospective juror who expressed a willingness to impose punishment for a breach of contract, and did not avow that she could or would follow the court's instructions, improperly sat on a jury that returned a $16 million breach-of-contract verdict against ABG.

The Ninth Circuit nonetheless offered three reasons for concluding that the error in this case was harmless. *First*, the Ninth Circuit declared that "[t]his case involved nothing bearing on race or ethnicity." App. 15a. But the notion that minority jurors are likely to affect a jury's deliberations only in cases involving race or ethnicity is baseless and

offensive. Indeed, *Batson* teaches that is it constitutionally impermissible to draw inferences about juror behavior based on race or ethnicity. *See* 476 U.S. at 87; *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991). *Second*, the Ninth Circuit declared that "at least two other jurors" expressed views "substantially identical" to those of Prospective Juror 15, and ABG did not exercise a peremptory challenge against those other jurors. But those other jurors, in sharp contrast to Prospective Juror 15, specifically avowed that they could and would follow the district court's instructions. *See* App. 42-47a; *see also* App. 10a (acknowledging that Prospective Juror 15 was unlike those other jurors insofar as "both of the unchallenged jurors assured counsel they would obey the court's instructions regardless of their feelings"). In any event, a cold transcript reveals neither the intangible factors on which a peremptory challenge is based nor the relative impact of Prospective Juror 15 and these other jurors on the jury's deliberations and verdict. *See, e.g., Gomez v. United States*, 490 U.S. 858, 875 (1989) ("[O]nly words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire*."). And *third*, the Ninth Circuit declared that "[t]he verdict was unanimous." App. 15a. But a jury is a dynamic body, and there is simply no way to assess Prospective Juror 15's effect on her fellow jurors.

As this case underscores, thus, the real choice here is between "two all-or-nothing rules: the error is *always* harmless or it is *never* harmless." *Annigoni*, 96 F.3d at 1150 (Kozinski, J., dissenting) (emphasis in original). By choosing the former option, the First, Seventh, Eighth, and Ninth Circuits not only departed from the traditional rule laid down by this

Court and followed by the Second, Third, Fourth, Fifth, Sixth, and Eleventh Circuits, but also effectively deprived federal litigants of any remedy for the erroneous deprivation of a peremptory challenge to which they are entitled by law.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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Appendix

APPENDIX CONTENTS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALASKA RENT-A-CAR, INC.,

Plaintiff-Appellee,

v.

AVIS BUDGET GROUP, INC., FKA Cendant Corporation; AVIS BUDGET CAR RENTAL, LLC, FKA Cendant Car Rental Group, Inc., FKA Cendant Car Rental Group, LLC,

Defendants-Appellants.

No. 10-35137 - D.C. No. 3:03-cv-00029-TMB

ALASKA RENT-A-CAR, INC.

Plaintiff-Appellee,

v.

AVIS BUDGET GROUP, INC., FKA Cendant Corporation; AVIS BUDGET CAR RENTAL, LLC, FKA Cendant Car Rental Group, Inc., FKA Cendant Car Rental Group, LLC,

Defendants-Appellants.

No. 10-35615 - D.C. No. 3:03-cv-00029-TMB

Appeal from the United States District Court for the District of Alaska
Timothy M. Burgess, District Judge, Presiding

Argued and Submitted
July 25, 2011 – San Francisco, California

Filed March 6, 2013
Amended June 19, 2013

Before: Andrew J. Kleinfeld,
Johnnie B. Rawlinson,* and
Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Kleinfeld

COUNSEL

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* The original panel, consisting of Judge B. Fletcher, Judge Kleinfeld, and Judge Callahan, heard oral argument on July 25, 2011. Judge B. Fletcher died on October 22, 2012, while the decision was pending, and Judge Rawlinson was drawn to replace her. Judge Rawlinson has read the briefs, reviewed the record, and listened to the tape of oral argument.

OPINION

KLEINFELD, Senior Circuit Judge:

Several state law questions arise in this appeal, and three federal law questions, whether expert testimony should have been excluded under *Daubert*[1], whether disallowance of a peremptory challenge was *Batson*[2] error and if so whether it was harmless, and whether Alaska "English Rule" attorneys fee awards[3] may be awarded in a diversity action where Alaska is the forum state but another state's law governs the dispute.

FACTS[4]

Alaska Rent-A-Car's predecessor began doing business as an Avis licensee in 1956, three years before Alaska attained statehood. Most other Avis licensees had a defined territory in a locality, not an entire state, within which they had the exclusive right to rent cars on behalf of Avis. Avis reasonably considered Alaska different.

In its 1959 agreement, the Alaska Avis licensee was entitled to operate in the "entire State of Alaska," about 20% of the entire United States, but a negligible percentage of the nation's roads. The license was renewed in 1965, this time giving Alaska Rent-A-Car exclusive rights in specific locations within Alaska. A 1976 amendment added additional

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[1] *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

[2] *Batson v. Kentucky,* 476 U.S. 79 (1986).

[3] Alaska Civil Procedure Rule 82.

[4] "We recount the relevant facts in the manner most favorable to the jury's verdict." *United States v. Hicks,* 217 F.3d 1038, 1041 (9th Cir. 2000), cert. denied, 531 U.S. 1037 (2000).

locations to the license agreement, and gave Alaska Rent-A-Car a right of first refusal for control of any license Avis planned to grant anywhere in Alaska. It also gave Alaska Rent-A-Car the right to expand into new territory, such as temporary camps during the construction of the oil pipeline from Prudhoe Bay to Valdez during the 1974-1977 period. The 1976 amendment stated:

> It is additionally agreed: (a) That Alaska conditions of terrain and weather as well as changing and cyclical economic conditions may result in customer demands for quick service in new and even temporary locations or camps. It is understood that Licensee may utilize his floating fleet to meet such demands, with full reporting of such circumstances to Avis.

Avis bought a company called Agency Rent-A-Car in 1995. Some of Avis's licensees claimed that Avis was breaching their license agreements by operating another rental car company in their territories. To protect itself against these claims, Avis sued thirteen of its licensees, and sought class certification, to obtain a judgment that its purchase of Agency Rent-A-Car and its changed operations did not violate licensee rights. Avis and named defendants settled in 1997, without ever litigating to class certification or judgment. Our case arises out of that settlement, which allows Avis to purchase additional rental car companies, but requires that "the sales, marketing and reservation activities, operations and personnel of and for the Avis System will not be utilized to market, provide, and/or make available car rental

services" for any additional rental car company purchased by Avis.[5] The settlement agreement protected Avis licensees from the risk of Avis using its personnel to steer customers and potential customers towards another brand. Licensees would typically only rent Avis cars, but Avis might own a competitor operating in the same locality under a different name.

Avis bought Budget Rent-A-Car out of bankruptcy in 2002. It then restructured its central operations, putting the Avis and Budget marketing teams under unified management, creating a single team to answer calls to both Avis and Budget reservation lines, and combining the Avis and Budget national corporate sales forces. The obvious threat from these actions to Avis's licensees was that Budget would bleed off some of their customers and potential customers. People typically rent cars online or by telephone from a national site or 800 number, and governments and big corporations typically negotiate with the national entity, because they typically rent cars for use away from home.

Alaska Rent-A-Car sued Avis claiming that Avis had indeed breached the settlement agreement, causing Alaska business to be switched to Budget Rent-A-Car, its local competitor. The district court granted a partial summary judgment, establishing that Alaska Rent-A-Car was a party to the

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[5] The two appellants in this litigation are Avis Budget Car Rental LLC and its parent company, then HFS Car Rental, later Cendant, now Avis Budget Group, Inc. We refer to appellants collectively here as Avis, but note that the settlement agreement's restrictions on buying an additional car rental company were restrictions on the parent company.

settlement agreement, and that Avis had breached the agreement by using the same personnel to sell and market both Avis and Budget cars. Damages were left for jury trial. The jury returned a verdict in favor of Alaska Rent-A-Car for $16 million. Avis appeals.

ANALYSIS

I. Was Alaska Rent-A-Car a promisee under the settlement agreement?

The question whether the 1995 settlement agreement included Alaska Rent-A-Car was decided by partial summary judgment, so we review de novo.[6] Avis argues on appeal that Alaska Rent-A-Car was not a party.

First, Avis argues that Alaska Rent-A-Car could not be embraced by the settlement agreement, because the agreement protected only licensees with "exclusive" license agreements, that is, with exclusive territories within which Avis could not promote competitors to the licensee except to the extent the settlement agreement allowed. This argument is entirely without merit. One reason why is that Alaska Rent-A-Car plainly did have exclusive territories, the designated and permitted locations within the State of Alaska. Were Alaska Rent-A-Car to use the Avis brand to open a counter at the Seattle airport, it would violate its licensing agreement, just as any other Avis licensee would if it opened a counter at the Anchorage airport. The other reason is that we can find no language limiting permission to join in the settlement agreement to licensees with

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[6] *See Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 776 (9th Cir. 2010).

exclusive licensing agreements. The settlement agreement was offered to "all Avis System licensees/franchisees," which Alaska Rent-A-Car indisputably was.

Avis also makes the more substantial argument that Alaska Rent-A-Car's joinder was untimely. What color this argument has arises from the fact that Alaska Rent-A-Car did not send in a signed joinder to the settlement agreement until July 2001, almost four years after the settlement and three and a half years after Avis had sent its licensees a letter inviting them to join in the settlement.

Avis's letter was an offer, and Alaska Rent-A-Car's response was an acceptance. The parties do not dispute that New York law controls on the timeliness of acceptance, and New York law establishes the usual rule, that acceptance must be within a "reasonable" time.[7] Under New York law, reasonableness is normally a question for a jury. However, a court may decide it as a matter of law when rational jurors could reach only one conclusion.[8]

Three or four years might well be unreasonable in many circumstances, but not in this one. First, the offer stated no time limit on acceptance, though Avis could easily have expressly limited the duration of its offer. The reasonable inference from Avis's failure to impose a time limit is that it did not intend for there to be a time limit, because it saw advantage to

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[7] *See, e.g., Sterngass v. Maisel,* 519 N.Y.S.2d 569, 570 (N.Y. App. Div. 1987).

[8] *Cf. id.* at 570; *B/R Sales Co. v. Krantor Corp.,* 640 N.Y.S.2d 204, 205 (App. Div. 1996).

joinders whenever they came in. Second, four and a half years after Alaska Rent-A-Car joined, eight years after the offer was made, Avis asked the court overseeing the Agency settlement to declare the offer terminated, implying that Alaska Rent-A-Car's joinder came in plenty of time. Third, Avis's intent that no time limit should apply may be inferred from its written confirmation of acceptances by six other licensees who sent in their acceptances after Alaska Rent-A-Car did. Fourth, Avis's previous representations in this litigation that Alaska Rent-A-Car had joined in the settlement imply that it too interpreted its own offer to be open to acceptance and timely accepted by Alaska Rent-A-Car. Avis has cited no New York case involving anything like parallel facts where an acceptance was deemed untimely, and a rational juror could only conclude from Avis's actions that Alaska Rent-A-Car's acceptance was made within a reasonable time. The district court was correct in ruling that Alaska Rent-A-Car was a party to the settlement agreement by virtue of its sufficiently timely joinder.

II. *Batson*.

During jury selection, Avis made peremptory challenges of the only two Alaska Natives on the panel.[9] The district court accepted one but denied the other, applying *Batson v. Kentucky*.[10] Avis

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[9] Ever since the many aboriginal peoples in Alaska, including Inupiat, Yupik, several groupings of Athabaskans, Haida, Tsimshian, Tlingit, Aleut, and many others united during the struggle for what became the Alaska Native Claims Settlement Act, their and others' custom has been to refer to "Alaska Natives" as a uniting term.

[10] *Batson v. Kentucky,* 476 U.S. 79 (1986).

argues that denial of its peremptory challenge of the second Alaska Native juror, who sat on the trial jury, was a *Batson* error requiring reversal. We reject ~~the argument on alternative grounds, that there was no error, and that even if there had been, it would be harmless.~~this argument. Even if the trial court erred, the error was harmless.

Since liability was established by summary judgment, the only issue for the jury was whether Alaska Rent-A-Car had proved damages, and if so, how much. Avis had to start off on the wrong foot, that it had made a promise to Alaska Rent-A-Car and broken it. Faced with the problem of justifying a zero or low damages award despite having broken its promise, Avis needed a jury willing to deny an award to the victim of a broken promise. Avis's attorney used voir dire to try to avoid jurors who would punish the broken promise even if no damages were proved.

Avis asked prospective jurors whether any of them had "a strong belief or hold a strong opinion that if someone breaks a promise that they should be punished for that by having to pay damages?" The first of the two Native veniremen, Number 6, said she agreed that someone who breaks a promise should be punished by having to pay damages, even if there was no proof of any loss. But at a sidebar, Number 6 said she would nevertheless follow the judge's instructions if they were to the contrary. Avis exercised a peremptory challenge against her. Despite a *Batson* challenge from Alaska Rent-A-Car, the judge allowed Avis to use that peremptory challenge. The judge accepted Avis's lawyer's representation that he was not satisfied that her

feelings, about how damages ought to be awarded for breach of contract regardless of whether actual loss was proved, would not affect her verdict. No issue has been raised in this appeal about allowing that challenge.

The issue goes to the challenge of the other Native venireman, Number 15. When informed that he was almost out of time to question prospective jurors, Avis's counsel chose to question Number 15, who said that whether she would punish someone who broke a promise without harming anyone "would depend on how the promises were made and what's been broken." Two non-minority jurors said substantially the same thing. But both of the unchallenged jurors assured counsel they would obey the court's instructions regardless of their feelings. Number 15 did not say she would obey the instructions despite her personal views, but because the court's time limit ran out, she was not asked.

Responding to Alaska Rent-A-Car's *Batson* challenge, Avis's lawyer said his gut feeling was that Number 15 viewed punishment as appropriate for breach of contract regardless of whether there was any harm. He pointed out that there were no racial issues in this commercial dispute, and said his challenge was not based on race. Alaska Rent-A-Car's lawyer and the judge both expressed their confidence that Avis's lawyer was not racially motivated (the trial was in Alaska, where the lawyers and judges often have substantial professional experience with, against, and before each other). But the judge disallowed the challenge. ~~The court~~He acknowledged that Avis's lawyer had not had sufficient time for a dialogue on voir dire

with Number 15, to see whether she would follow instructions about damages despite her views to the contrary, but ~~the court~~he was not satisfied with striking both Native jurors on the record before him. He said that he thought that Avis's lawyer had articulated sufficient non-discriminatory reasons to strike Number 6, but that he did not "feel the same way in regard to [Number 15]."

~~This *Batson* issue is difficult because of the explicit finding that Avis's lawyer did not act with a racial motivation. The court did not expressly find the evil to which *Batson* is directed, "purposeful racial discrimination."[11] The judge merely indicated that he was uncomfortable in this case with a jury from which all Natives had been excluded by peremptory challenges.~~

Batson applies to civil as well as criminal cases~~.~~,[11] so Avis was entitled to its peremptory challenge unless it exercised it in a manner violative of *Batson*. The ~~troubling issue~~dispute here ~~is~~arises at step three of the three-part *Batson* test (prima facie case, race-neutral explanation, finding of pretext).[12] ~~Were it not for the express agreement by the judge and counsel that Avis's lawyer, whom they likely all knew, was not personally motivated by ethnic discrimination, pretext would strongly suggest itself. Venireman 15 said just what two unchallenged non-~~

~~[11] *United States v. Collins*, 551 F.3d 914, 919 (9th Cir. 2009) (quotations and citations omitted); *accord Batson*, 476 U.S. at 86, 98.~~

[11] *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

[12] *Batson*, 476 U.S. at 93–98; *Collins*, 551 F.3d at 919.

~~Native jurors said, so "comparative juror analysis"[13] would support an inference of "purposeful racial discrimination." And when Avis's lawyer saw that time was running out, he chose to question Number 15 instead of another venireman.~~

~~We are nevertheless not persuaded that the district court erred. We review application of *Batson* law to facts deferentially[14] and note that part three of the *Batson* test~~The step three inquiry is a difficult one. It "asks judges to engage in the awkward, sometimes hopeless, task of second-guessing a [lawyer's] instinctive judgment—the underlying basis for which may be invisible even to the [lawyer] exercising the challenge."[13] ~~It seems evident that although the district judge believed that Avis's lawyer had no subjective purpose of racial discrimination, he was concerned that an objective observer would infer from the facts comparative analysis of the substantially similar responses from two unchallenged non-Native jurors, skipping over other veniremen to get to Number 15 — that there was purposeful discrimination. Such a concern is~~

~~[13] *See Lewis v. Lewis*, 321 F.3d 824, 830–31 (9th Cir. 2003); *see also Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).~~

~~[14] *Batson*, 476 U.S. at 98 n.21 ("[A] finding 15 of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing court. Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.") (quotations and citations omitted); *United States v. Bauer*, 84 F.3d 1549, 1555 (9th Cir. 1996) (noting that a trial court's findings regarding purposeful discrimination are entitled to great deference).~~

[13] *Miller-El,* 545 U.S. at 267-68 (2005) (Breyer, J., concerning).

~~among the reasons for *Batson*. "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude [minorities] from juries undermine public confidence in the fairness of our system of justice."[15]~~ In this case, step three is particularly difficult because of the explicit finding that Avis's lawyer did not act with a racial motivation. The court did not expressly find the evil to which *Batson* is directed, "purposeful racial discrimination."[14]

~~Objective analysis is also more reliable than subjective analysis. A judge, like any person, is ill-equipped to see into peoples' hearts.[16] Trial judges are generally very reluctant to call a lawyer a liar, by finding that the justification for a peremptory challenge is not credible. But a trial judge is in a very good position to evaluate objectively and impartially what the record would establish, from the point of view of a reasonable observer. In this case, the trial judge found the absence of subjective racial bias, but the presence of an appearance of purposeful discrimination. That suffices to justify denial of a peremptory challenge, at least in a civil case.~~

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[15] ~~*Batson*, 476 U.S. at 87.~~

[14] *United States v. Collins*, 551 F.3d 914, 919 (9th Cir. 2009) (quotations and citations omitted); *accord Batson*, 476 U.S. at 86, 98.

[16] ~~*See, e.g.*, *United States v. Vance*, 62 F.3d 1152, 1158 (1995).~~

~~Even if there were error, we~~We need not decide, however, whether denying the peremptory challenge was error. We held in *United States v. Lindsey*[15] that an erroneous denial of a peremptory challenge does not require automatic reversal. We held that *Rivera v. Illinois*[16] overruled our holding in *United States v. Annigoni*[17] that denial of a peremptory challenge required reversal, and stated that "the *Rivera* Court directly undercuts our precedent by determining that the erroneous denial of a peremptory challenge may indeed be subject to harmless-error review."[18] We concluded that *Rivera* allowed us to "apply the standard of review that is appropriate under the circumstances of the district court's error."[19] In *Lindsey,* we applied plain error review, as Lindsey failed to object to the district court's error depriving him of a peremptory challenge. Here, Avis did object.

The right to peremptory challenges in civil cases exists by virtue of Federal Rule of Civil Procedure 47(b) and 28 U.S.C. § 1870, three challenges per

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[15] *United States v. Lindsey,* 634 F.3d 541 (9th Cir. 2011), *cert. denied,* 131 S. Ct. 2475 (2011).

[16] *Rivera v. Illinois,* 556 U.S. 148 (2009).

[17] *United States v. Annigoni,* 96 F.3d 1132 (9th Cir. 1996) (en banc).

[18] *Lindsey,* 634 F.3d at 549. The 1st and 8th circuits have also concluded that *Rivera* effectively overruled previous cases that had adopted an automatic reversal rule when a trial court's error impaired the right to exercise peremptory challenges. *Avichail ex rel. T.A. v. St. John's Mercy Health Sys.,* 686 F.3d 548, 552-53 (8th Cir. 2012); *United States v. Gonzalez-Melendez,* 594 F.3d 28, 33-34 (1st Cir. 2010).

[19] *Id.* at 550.

party or side, not by virtue of the Constitution. Erroneous denial of a challenge is therefore subject to Federal Rule of Civil Procedure 61 on harmless error, requiring us to disregard error not affecting "substantial rights."

This case involved nothing bearing on race or ethnicity. Number 15 was not challenged for cause, and the feelings she expressed about damages were substantially identical to at least two other jurors' feelings. The district court allowed Avis's attorney to use his third peremptory challenge on another juror if he wished, but counsel waived the opportunity, thereby allowing three people with the same uneasiness about breach without damages to stay on the jury instead of two. The verdict was unanimous. We are unable to see any way that "substantial rights," that is, rights affecting the substance of the case as opposed to the procedural right to three peremptory challenges, could have been affected by erroneous denial of this challenge.

III. *Daubert.*

Each side put on testimony of an expert witness on damages. Avis objected under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*[20] and its progeny to allowing Alaska-Rent-A-Car's expert to testify.

Before it allowed Alaska Rent-A-Car's expert to testify about his opinion on damages, the court gave Avis the opportunity to conduct a lengthy voir dire to inquire into the facts and data underlying the expert's conclusions. After that voir dire, the court made a *Daubert* gateway determination. It

[20] *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

concluded that "there's enough underlying data and ... a sufficient causal connection to allow [the expert's] testimony.... I think he's qualified to give the testimony. I think his testimony will assist the trier of fact and I think his opinion is the result of reliable principles and methods....

[C]learly, [Avis has] areas for cross examination, and that's what it's going to be subject to."

The task, for both sides, was to figure out how much business and how much profit Alaska Rent-A-Car had lost on account of Avis's breach of the settlement agreement. Avis had breached when it bought Budget Rent-A-Car out of bankruptcy in 2002 and then merged much of the two companies' national sales and marketing staffs into one.

As in any damages case, the calculation had to address a hypothetical world that never existed, one in which other things remained the same but the breach had not occurred. To calculate damages from the breach, as opposed to damages from competition, Alaska Rent-A-Car's expert witness compared Avis's and Budget's experience with Alamo-National's (Alamo) experience after Cerberus bought Alamo out of bankruptcy at around the same time. His theory was that Alamo and Budget both got infusions of capital and management enabling them to compete, but differed in that Cerberus did not rent cars through any other company, and Avis did, through Budget. Thus Alamo could not benefit from merging sales and marketing activities because Cerberus had no other car rental company, but Budget could. His assumption was that Budget would have performed much like Alamo but for the benefit of a unified Avis-Budget sales and marketing effort.

Budget rebounded much faster than Alamo. The witness in effect treated the faster rebound of Budget as attributable to the breach of the settlement agreement. He used Alamo's national rate of rebound as a rough approximation of how Budget, had it not had the benefit of the breach, would have performed in Alaska. He then projected how much market share Budget gained each year due to the breach. He testified that he used Alamo's national rate of rebound as an approximation for how Budget in Alaska would have performed. He reasoned that the rental car market is a national market, and that national rebound rates would not be skewed by idiosyncratic local factors.

According to Alaska Rent-A-Car's witness, Alamo's national market share dropped 35% after it went into bankruptcy, slowly recovering after Cerberus bought it. Budget was in bankruptcy a shorter time, and recovered faster after Avis bought it. The witness, saying that he wanted to be conservative in his estimates, assumed that Budget would have lost 32.5% of its market share (slightly less than Alamo) had Avis bought it out of bankruptcy but not breached the settlement agreement.

Because the revitalized Budget would draw customers from other car rental companies too, not just Avis, the witness picked the Juneau airport to approximate how much of the bite would come out of Alaska Rent-A-Car. Juneau had the advantage of simplicity, because he could examine a market before Budget entered and after Budget entered, to approximate how much business it took from Alaska-Rent-A-Car. Over the first three years of its entry

into the Juneau market, Budget got an average of 23.3% of the Juneau rental car market. About 48% of that market share gain came from Alaska Rent-A-Car customers, 52% from Hertz and other competitors. So to get a statewide figure, the witness made the assumption that after the breach, Budget got about half its customers from Alaska Rent-A-Car statewide. He calculated Budget's market share after the bankruptcy, assumed that but for the breach Budget's rate of market share recovery would have been similar to Alamo's national rate of recovery, and assumed that about half of its faster recovery came at the expense of Alaska Rent-A-Car. These assumptions and inferences generated lost profits calculations of $4.079 million from 2003 to 2008 due to the breach, and futurc lost profits, discounted to present value, of $11.708 million.

Avis challenges the expert's assumptions and comparisons. It argues that differences between Alamo and Budget, such as the much longer duration of Alamo's bankruptcy, and many other factors, made Alamo an invalid comparison. Avis also argues that applying a national market share comparison to Alaska overlooked very significant differences in how the national and Alaska markets worked. And it argues that Alaska Rent-A-Car's extrapolation from the Juneau market experience ignored the differences between this small market, only 5% of the statewide rental car market, and the market elsewhere in the state, where roads connected towns (unlike Juneau), and doing business more often required a rental car. Of course, Alaska Rent-A-Car's expert gave reasons for his use of all these comparisons, such as by pointing out the clarity with which the Juneau market could be examined.

Because Budget entered Juneau in 2000, Juneau could clearly show how much business Budget took from Avis there.

All of Avis's challenges to Alaska Rent-A-Car's expert are colorable, but none go to admissibility. They amount to impeachment. Under Federal Rule of Evidence 702 the trial court may exercise discretion to allow expert testimony if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue," (1) it is "based upon sufficient facts or data;" (2) it is "the product of reliable principles and methods;" and (3) the expert "has applied the principles and methods reliably to the facts of the case."[21] This list of requirements makes the task of determining admissibility sound more mechanical and less judgmental than it really is. Under *Daubert v. Merrell Dow Pharmaceuticals*[22] and its progeny,

> [T]he court must assess [an expert's] reasoning or methodology, using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance, but the inquiry is a flexible one. Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion. In sum, the trial court must assure that the expert testimony "both

[21] Fed. R. Ev. 702 (2009). Stylistic changes were made to Rule 702 in 2011, after this case had gone to trial. The changes were not substantive. We use the language as it was when this case was decided.

[22] *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

> rests on a reliable foundation and is relevant to the task at hand."[23]

"Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline."[24]

The *Daubert* reliability requirement "is flexible" and *"Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case."[25] "The 'list of factors was meant to be helpful, not definitive' and the trial court has discretion to decide how to test an expert's reliability as well as whether the testimony is reliable, based on 'the particular circumstances of the particular case.'"[26]

Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable. The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury. Avis does not challenge Alaska Rent-A-Car's expert's credentials and qualifications. Nor does it challenge

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[23] *Primiano v. Cook,* 598 F.3d 558, 564 (9th Cir. 2010) (quoting *Daubert,* 509 U.S. at 597) (footnotes and citations omitted).

[24] *Id.* at 565 (quoting *United States v. Sandoval-Mendoza,* 472 F.3d 645, 654 (9th Cir. 2006)).

[25] *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

[26] *Primiano,* 598 F.3d at 564 (quoting *Kumho Tire,* 526 U.S. at 151, 150).

his general methodology, comparing the unknown to an analogous known experience. Instead, Avis challenges three aspects of the witnesses testimony: using Alamo as the comparator, using the national rather than the Alaska market as a baseline, and extrapolating from the Juneau market to the entire Alaska market. None of these challenges make the district judge's decision to admit the testimony an abuse of discretion. They all go to the weight of the testimony and its credibility, not its admissibility. Avis gave the jury good arguments for rejecting the testimony, but the district court did not abuse its discretion by allowing the jury to listen to Alaska Rent-A-Car's expert as well as Avis's. "Given that the judge is 'a gatekeeper, not a fact finder,' the gate could not be closed to this relevant opinion offered with sufficient foundation by one qualified to give it."[27]

IV. Certainty of damages.

The jury returned a unanimous $16 million verdict for Alaska Rent-A-Car, slightly more than the $15,787,182 in damages that Alaska Rent-A-Car's expert witness calculated. Avis's expert witness offered no total number at all to the jury, just critiques of the other expert's assumptions and calculations, with some numbers differing from his for component parts. Avis thus presented the case to the jury as a $16 million or nothing choice. Avis argued in its close that the burden of proof on damages was on Alaska Rent-A-Car, and that its expert was effectively impeached by theirs, so no damages should be awarded.

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[27] *Id.* at 568 (quoting *Sandoval-Mendoza,* 472 F.3d at 654).

The district court found, and neither side disputes, that New York law controls on the standard of certainty required for damages for breach of contract. Avis moved unsuccessfully for judgment as a matter of law that damages had not been proved with sufficient certainty or for a new trial. We review denial of a motion for judgment as a matter of law de novo, but draw all inferences in favor of the verdict.[28] "The test is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury."[29] We review a ruling on a motion for new trial for abuse of discretion, and reverse "only if the record contains no evidence in support of the verdict or if the district court made a mistake of law."[30]

Under New York law, in order to recover lost profits Alaska Rent-A-Car must prove that "(1) the damages were caused by the breach; (2) the alleged loss must be capable of proof with reasonable certainty, and (3) the particular damages were within the contemplation of the parties to the contract at the time it was made."[31] "Damages resulting from the loss of future profits are often an approximation. The law does not require that they be determined with mathematical precision. It

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[28] *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1005 (9th Cir. 2004).

[29] *White v. Ford Motor Co.,* 312 F.3d 998, 1010 (9th Cir. 2002) (quotation omitted).

[30] *E.E.O.C. v. Go Daddy Software, Inc.,* 581 F.3d 951, 962 (9th Cir. 2009) (quotation omitted).

[31] *Ashland Mgmt. Inc. v. Janien,* 604 N.Y.S.2d 912, 916 (N.Y. 1993).

requires only that damages be capable of measurement based upon reliable factors without undue speculation."[32] Avis's argument is a continuation of its *Daubert* attack on Alaska Rent-A-Car's expert's testimony.

New York courts generally reject lost profits for (1) new business ventures as being based on impermissible speculation, such as profits from a contemplated stadium that was never built[33] and

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[32] *Id.* at 915; *see also* 36 N.Y. Jur. 2d Damages § 107 ("The plaintiff must supply some basis of computation for ascertaining the loss with certainty.... The plaintiff must offer some reasonable basis for ascertaining the amount of profit lost; an allowance therefor cannot be made on the basis of guesswork or conjecture. Absolute certainty of data upon which loss of future profits are to be estimated is not required, but some fairly definite basis for computation must be supplied.... No hard and fast rule in this regard can be laid down because such losses are determined according to the circumstances of each particular case. But lost profits cannot be proved where a multitude of assumptions underlying the plaintiff's claim makes it impossible to satisfy the 'reasonable certainty' test, even if the business were considered to be an existing business").

[33] *See, e.g., Kenford Co. v. County of Erie,* 502 N.Y.S.2d 131, 133 (N.Y. 1986) (claim for lost profits for stadium too speculative because the stadium had not been built yet, and lost profits calculation assumed successful operation of the stadium, attracting sporting events, meetings, conferences, and other forms of entertainment over a 20 year span); *Blinds to Go (U.S.), Inc. v. Times Plaza Development, L.P.,* 88 A.D.3d 838, 841 (N.Y. App. Div. 2011) (reversing an award of lost profits because, "[i]n light of the tenant's admission that it leased the subject premises to break into a new market, and its own expert's testimony demonstrating the differences between the subject premises and the allegedly comparable stores, the evidence on lost profits was so lacking that the verdict could not have been reached on any fair interpretation of the evidence.").

(2) established businesses projecting future profits without a past history of profits, such as one that in its five years of existence had never made a profit.[34] Alaska Rent-A-Car was neither. It had been operating a successful business since before statehood. And New York courts have upheld the award of lost profits, where, as here, past performance combined with some indicia of likelihood of future success were presented to the jury.[35] This case is analogous to *Greasy Spoon,*

We note, however, that "[T]here is no per se rule precluding a new business from recovering lost profits." *Cifone v. City of Poughkeepsie,* 650 N.Y.S.2d 797, 798 (N.Y. App. Div. 1996) ("A claim based on the loss of anticipated profits in connection with a thwarted business venture may be proved by methods other than by reference to the actual past profit-making 'experience' of the enterprise in question, provided that the future profits can be calculated with reasonable certainty.") (quotation and citation omitted).

[34] *See, e.g., LifeWise Master Funding v. Telebank,* 374 F.3d 917, 932 (10th Cir. 2004) (applying New York law and rejecting lost profits as too speculative because "[elven assuming that LifeWise could show lost profits damages despite never having been profitable, it has not done so here in a manner that satisfies New York's prohibition of speculative damages. In its damages report, LifeWise has failed to connect its past losses with its proposed future earnings. It remains a fact that LifeWise sustained losses in every year of its over five years of existence, and frequently experienced capitalization problems, yet the damages model predicted only uninterrupted future growth.").

[35] *See, e.g., Greasy Spoon, Inc. v. Jefferson Towers, Inc.,* 552 N.Y.S.2d 92, 94 (N.Y. 1990) ("Plaintiff established at trial that it was already operating a successful restaurant business at a commercially desirable site. Further, plaintiff's witnesses gave evidence, based upon experience, as to the level of profits that could reasonably be anticipated.... Unlike in *Kenford,* where lost profits from a municipality's decision not to construct a

where the plaintiff was already operating a successful restaurant (despite the name) and the projection of lost profits was from adding a sidewalk cafe.[36]

A jury might have been persuaded by the impeachment testimony, rejected Alaska Rent-a-Car's expert's damages analysis and calculation, and awarded nothing. But it was not, and the jury was entitled to decide. Drawing all inferences in the favor of the non-moving party, as we must, the evidence—including but not limited to the expert testimony—sufficed to establish reasonable certainty for the damages awarded.

V. Attorney's Fees

Alaska has, since Congress applied the general laws of Oregon to the Territory of Alaska in 1884, followed the English Rule rather than the American Rule on attorney's fees.[37] Alaska is the only state that follows the English Rule,[38] that the prevailing

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stadium were denied in part because there were too many undetermined variables, in this case most of the variables that would affect the success of the thwarted business venture, i.e., location, capitalization and existing or potential clientele, were established through competent proof. Thus, the evidence at trial was sufficient to remove plaintiff's lost profit claim from the realm of impermissible speculation."); *cf. Wathne Imports, Ltd. v. PRL USA, Inc.,* 953 N.Y.S.2d 7 (N.Y. App. Div. 2012).

[36] *Greasy Spoon,* 552 N.Y.5.2d at 94.

[37] Susanne Di Pietro & Teresa W. Carns, Alaska's English Rule: Attorney's Fee Shifting in Civil Cases, 13 Alaska L. Rev. 33, 38-39 (1996) (citing Frederic E. Brown, The Sources of the Alaska and Oregon Codes Part II: The Codes and Alaska, 1867-1902, 2 UCLA-Alaska L. Rev. 87, 88 (1973)).

[38] *Edwards v. Alaska Pulp Corp.,* 920 P.2d 751, 755 (Alaska 1996); Benjamin J. Roesch, Erie Similarities: Alaska Civil Rule

party is generally entitled to an attorney's fees award, though many federal and state statutes provide for awards in designated circumstances.[39] Though sometimes criticized,[40] the rule remains robustly in force.

Present Alaska practice is set out in Alaska Rule of Civil Procedure 82, which generally requires the award of attorney's fees to the prevailing party in civil cases.[41] The Alaska Supreme Court has promulgated Rule 82 pursuant to its constitutional authority to "make and promulgate rules governing practice and procedure in civil and criminal cases in all courts."[42]

The United States District Court for the District of Alaska has itself for many years treated Alaska Rule 82 as generally applicable in civil proceedings where federal law did not provide otherwise.[43] The

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68, "Direct Collisions," and the Problem of Non-Aligning Background Assumptions, 23 Alaska L. Rev. 81, 81 (2006).

[39] *See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 261-62 (1975).

[40] *See, e.g.,* Andrew J. Kleinfeld, Alaska: Where the Loser Pays the Winner's Fees, 24 Judges' J. 4 (1985).

[41] Alaska Civil Procedure Rule 82(a) ("Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.").

[42] Alaska Const. art. IV, § 15; *see also State v. Native Village of Nunapitchuk,* 156 P.3d 389, 395 (Alaska 2007).

[43] Although District of Alaska Local Rule 54.3(b) no longer provides expressly, as it did until 2006, that "In a diversity case the court will apply Rule 82, Alaska Rules of Civil Procedure," it appears to assume that such fees will still be awarded, since it provides that motions for attorney's fees must "set forth the

district court followed its usual practice in this case, awarding $1,605,000 in attorney's fees based upon the Rule 82 formula. As the district court held in *Ryan v. Sea Air,* "Alaska follows the English Rule, by virtue of which the prevailing party always recovers a portion of its fees from the losing party," and the United States District Court treats this Alaska practice as "binding in diversity cases" brought there.[44] *Ryan* cites our 1979 decision in *Klopfenstein v. Pargeter,* in which we upheld an Alaska Rule 82 attorney's fees award in a diversity case, because "[i]n a diversity action the question of attorneys fees is governed by state law."[45]

Two issues arise in this case. First, should federal law or state law apply to an attorney's fees award? Second, if state law applies, should Alaska law or New York law control?

The first question is easily answered. As both parties agree, state law applies. The Supreme Court held in *Alyeska Pipeline Service Co. v. Wilderness Society*[46] that for *Erie Railroad Co. v. Tompkins*[47] purposes, state law on attorney's fees is substantive, so state law applies in diversity cases. "[I]n an ordinary diversity case where the state law does not

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authority for the award, whether Rule 82, Alaska Rules of Civil Procedure" or some other source.

[44] *Ryan ex rel. Syndicates and Ins. Companies Subscribing to Policy PHP91-4699 v. Sea Air Inc.*, 902 F. Supp. 1064, 1070 (D. Alaska, 1995).

[45] *Klopfenstein v. Pargeter,* 597 F.2d 150, 152 (9th Cir. 1979).

[46] 421 U.S. 240 (1975).

[47] 304 U.S. 64 (1938).

run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."[48] We have of course said the same thing.[49]

The second question, Alaska law or New York law, is more intricate. The rule is that the federal court in which the case is litigated should apply the forum state's choice of law rules.[50] The parties agree that Alaska choice of law rules apply.

Though federal law establishes that attorney's fees law is substantive for *Erie* purposes, it is not necessarily substantive for choice of law purposes.[51] Whether it is substantive or procedural for choice of law purposes depends on how the Supreme Court of

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[48] *Alyeska Pipeline,* 421 U.S. at 259 n.31 (quoting 6 J. Moore, Federal Practice 54.77(2), pp. 1712-1713 (2d ed. 1974)).

[49] *See, e.g., MRO Communications, Inc. v. American Tel. & Tel. Co.,* 197 F.3d 1276, 1282 (9th Cir. 1999) ("In an action involving state law claims, we apply the law of the forum state to determine whether a party is entitled to attorneys' fees, unless it conflicts with a valid federal statute or procedural rule.").

[50] *See, e.g., Klaxon Co. v. Stentor Electric Manufacturing Co.,* 313 U.S. 487, 496 (1941) ("The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts.... Any other ruling would do violence to the principle of uniformity within a state upon which the *Tompkins* decision is based.").

[51] *See, e.g., Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 108-10 (1945); *Sun Oil Co. v. Wortman,* 486 U.S. 717, 726 (1988) *("Guaranty Trust* itself rejects the notion that there is an equivalence between what is substantive under the *Erie* doctrine and what is substantive for purposes of conflict of laws.").

the forum state would characterize it. Some state Supreme Courts consider their rules governing attorneys fees to be procedural for choice of law purposes.[52] If the Alaska Supreme Court would consider its attorney's fees rule procedural, then Alaska law, the English Rule, would apply. If, however, the Alaska Supreme Court would consider its attorney's fees rule substantive, then New York law, the American rule, would apply.

And that too is intricate. The Alaska Supreme Court has never held that Alaska Rule of Civil Procedure 82 is procedural for Alaska choice-of-law purposes. However, it has stated in dicta in *Ehredt v. DeHavilland* that "attorney's fee are not an item of damage," and that it would thus apply Rule 82 even if another state's substantive law applied.[53] We must follow the considered dicta, as well as the holdings, of the Alaska Supreme Court when applying Alaska law.[54] The Alaska Supreme Court

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[52] *See, e.g., Kirwan v. Chicago Title Ins. Co.,* 624 N.W.2d 644, 653 (Neb. 2001) (applying a Nebraska statue on attorney's fees in insurance actions, despite the fact that South Dakota law governed the underlying dispute, because Nebraska deems its attorney's fees statute to be procedural); *North Bergen Rex Transport, Inc. v. Trailer Leasing Co.,* 730 A.2d 843, 848 (N.J. 1999) (applying New Jersey law on attorney's fees despite the fact that another state's substantive law governed the underlying dispute, because "attorneys' fees are a matter of practice and procedure, rather than of substantive law.").

[53] *Ehredt v. DeHavilland Aircraft Co. of Canada, Ltd.,* 705 P.2d 446, 452 n.8 (Alaska 1985) ("Thus, even if we applied Florida law, Civil Rule 82 would control an award of attorney's fees.").

[54] *See Aceves v. Allstate Ins. Co.,* 68 F.3d 1160, 1164 (9th Cir. 1995) ("The district court, like us, is bound to follow the

has also held, in *State v. Native Village of Nunapitchuk,*[55] that Rule 82 is procedural, not substantive, though not in the choice of law context.[56] *Nunaptichuk* dealt with whether Rule 82 is procedural for purposes of the Alaska Constitution, which "commits the enactment of all substantive law—that is all law *except* rules of practice and procedure—to the legislature" but authorizes the Supreme Court to "promulgate 'rules governing practice and procedure in civil and criminal cases in all courts.'"[57]

In analyzing *Nunapitchuk,* we note that Alaska generally follows the Restatement (Second) of Conflict of Laws,[58] which says that "[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."[59] Avis urges us to hold that Rule 82 is not a rule "prescribing how litigation shall be conducted" because the Alaska Supreme Court has said that Rule 82 has a partially compensatory purpose. We reject this argument because *Nunapitchuk* deemed Rule 82 to be "primarily

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considered dicta as well as the holdings of the California Supreme Court when applying California law.").

[55] 156 P.3d 389 (Alaska 2007).

[56] *Id.* at 395, 402.

[57] *Id.* at 395-96 (quoting Alaska Const. art. IV, § 15) (emphasis in original).

[58] *See, e.g., Savage Arms, Inc. v. Western Auto Supply Co.,* 18 P.3d 49, 53 (Alaska 2001) ("We look to the Restatement (Second) of Conflict of Laws for guidance in resolving choice-of-law issues.").

[59] Restatement (Second) Conflict of Laws § 122.

concerned with ... an effective and efficient system for the administration of justice" despite its compensatory purpose.[60]

Based on the dicta in *Ehredt* and the holding and analysis in *Nunapitchuk,* we conclude that the Alaska Supreme Court would hold, for purposes of choice of law, that its attorney's fees rule is procedural. Rule 82 is thus substantive for *Erie* purposes, procedural for Alaska constitutional purposes of allocating authority as between the courts and the legislature, and procedural for choice of law purposes. We therefore hold that the law of the forum, Alaska, properly applies to diversity cases brought in or removed to the United States District Court for the District of Alaska. The district court did not err by applying Alaska Rule of Civil Procedure 82 to the attorney's fee award.

VI. Prejudgment Interest.

The district court awarded prejudgment interest pursuant to New York law of 9% per annum.[61] The court used Alaska Rent-A-Car's expert's analysis to separate lost profits before judgment, 2003 to 2008, from lost profits projected to occur after the 2009 judgment. The court then applied the New York interest rate to the profits lost before the verdict on a year by year basis (approximately 6 years interest on 2003 profits, 5 years interest on 2004 profits, and so forth). The total interest awarded was $1,478,519.23. The court awarded an additional $57,739.51 as interest on lost profits from the date of the verdict to the date of judgment, plus $86,480.17

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[60] *Nunapitchuk,* 156 P.3d at 398.

[61] N.Y. C.P.L.R. § 5004.

in interest on the entire judgment from the date of the verdict through the date of judgment. The parties agree that the $57,739.51 was an error, double counting, and that the judgment should be reduced by that amount.

Avis argues that the district court erred in one additional respect, making its own judgment on how to separate past from future lost profits, because the jury was not asked to do so by special verdict. The argument is unpersuasive.

New York law[62] provides for the court to make just such a calculation as the district court made. By statute, prejudgment interest "shall" be awarded for breach of contract.[63] The statute provides that where damages "were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date."[64] The statutory language does not require juries to determine these various dates or the "single reasonable intermediate date." Instead, "[i]f a jury is discharged without specifying the date, the court upon motion shall fix the date."[65] The New York practice appears to be for the trial court to make a reasonable calculation based on the evidence, as provided in the statutory language, directing the court to choose a "reasonable intermediate date" or to "upon motion ... fix the date" implies.

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[62] The parties do not dispute that New York law applies to this issue.

[63] N.Y. C.P.L.R. § 5001(a).

[64] N.Y. C.P.L.R. § 5001(b).

[65] N.Y. C.P.L.R. § 5001(c).

Avis argues that two New York decisions establish that prejudgment interest cannot be awarded on a verdict that includes both past and future damages. These cases, *Helman v. Markoff*[66] and *Brandt Corporation v. Warren Automatic Controls Corporation,*[67] should be distinguished. In *Brandt,* the plaintiff recovered a general verdict on two theories, one of which was reversed on appeal, so there was no reasonable way to tell whether much or all of the damages were on the invalid theory. In *Helman,* plaintiff recovered a general verdict on two causes of action, only one of which would allow an award of prejudgment interest. By contrast, in this case, no theory of recovery on which the damages award was based is reversed, and the theory of recovery, breach of contract, is one for which New York requires a prejudgment interest award.

The district court had a reasonable basis in the record for allocating portions of the judgment to different years and calculating interest as it did. Alaska Rent-A-Car's expert provided precisely such a breakdown, with a year by year table that the court used. The jury's verdict was so close to the expert witness's calculation that the court could reasonably infer that the jury accepted the substantial correctness of his testimony, especially since Avis's expert witness provided no alternative calculation. Avis's alternative, no prejudgment interest, assumes that "the jury may have awarded *no* damages at all

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[66] *Helman v. Markoff,* 8 N.Y.S.2d 448 (App. Div. 1938), *aff'd per curiam,* 20 N.E.2d 1012 (N.Y. 1939).

[67] *Brandt Corp. v. Warren Auto. Controls Corp.*, 322 N.Y.S.2d 291 (App. Div. 1971).

subject to prejudgment interest,"[68] an assumption unsupportable on the record.

Denial of prejudgment interest would be contrary to the New York statute providing that it "shall" be awarded for breach of contract. Since the breach and damage began about six years before the verdict, some sort of calculation of prejudgment interest was required by New York law. Though Avis essentially faults Alaska Rent-A-Car for not obtaining a special verdict to facilitate the calculation, Avis also did not request a special verdict separating out past and future damages. Avis gambled on an all or nothing argument, the jury awarded all, and Avis had not asked for an instruction requiring the jury to break out the pre and post-verdict amount. It cannot now fault the court for making a reasonable allocation based upon evidence in the record that provided good support for the calculation it made.

CONCLUSION

The judgment is AFFIRMED, except that we remand for the district court to reduce the prejudgment interest award by $57,739.51. Costs are awarded to Alaska Rent-A-Car.

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[68] Avis Reply Brief at 13 (emphasis in original).

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALASKA RENT-A-CAR, INC.,

Plaintiff-Appellee,

v.

AVIS BUDGET GROUP, INC., FKA Cendant Corporation; AVIS BUDGET CAR RENTAL, LLC, FKA Cendant Car Rental Group, Inc., FKA Cendant Car Rental Group, LLC,

Defendants-Appellants.

No. 10-35137 - D.C. No. 3:03-cv-00029-TMB

ALASKA RENT-A-CAR, INC.

Plaintiff-Appellee,

v.

AVIS BUDGET GROUP, INC., FKA Cendant Corporation; AVIS BUDGET CAR RENTAL, LLC, FKA Cendant Car Rental Group, Inc., FKA Cendant Car Rental Group, LLC,

Defendants-Appellants.

No. 10-35615 - D.C. No. 3:03-cv-00029-TMB

ORDER

The opinion filed March 6, 2013, and appearing at 709 F.3d 872 (9th Cir. 2013), is hereby amended. The amended opinion is filed concurrently with this Order.

With these amendments, Judges Rawlinson and Callahan have voted to deny the petition for rehearing en banc, and Judge Kleinfeld has so recommended. The full court has been advised of the

petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED. No future petitions for rehearing or petitions for rehearing en banc will be entertained.

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

ALASKA RENT-A-CAR, INC.,

Plaintiff,

vs.

AVIS BUDGET GROUP, INC., ET AL.,

Defendants.

Case No. 3:03-cv-00029-TMB

Anchorage, Alaska
Monday, September 21, 2009 8:39 a.m.

TRIAL BY JURY—DAY 1/ JURY SELECTION

VOLUME I

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

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* * *

THE CLERK: All rise. His Honor the Court, the United States District Court is again in session. Please be seated.

THE COURT: All right. Good morning. Let's try that again. Good morning.

THE COUNSEL: Good morning.

THE PROSPECTIVE JURORS: Good morning.

THE COURT: All right. That's better. How's everybody this morning? All right. We're here for a trial today in the case of *Alaska Rent-A-Car vs. Avis Budget Group, Inc. and Avis Budget Rent-A-Car, LLC*. It's case number 3:03-29. Now you've been summoned here this morning by the clerk so that we could select a jury to hear that trial. My name's Timothy Burgess. I'm a United States district judge. I'm going to be presiding over this trial today. And I want to thank you for taking time out of your busy lives to participate in this process.

Let me have a chance now to introduce you to the parties in this case. Plaintiff is represented by Mr. Jeffrey Feldman. Mr. Feldman, if you could please stand and introduce co-counsel and your client as well, please.

MR. FELDMAN: Thank you, Your Honor. As the Judge said, my name is Jeff Feldman. I'm here this morning with my co-counsel, Ralph Palumbo, and we represent the plaintiff, Alaska Rent-A-Car. And seated with us is Bob Halcro, the founder of Alaska Rent-A-Car here in Anchorage. Thank you, Judge.

THE COURT: Thank you. All right. And defendants are represented by Howard Trickey. Mr. Trickey, if you would please stand and introduce your colleagues, as well as your client representatives.

MR. TRICKEY: Thank you, Your Honor. I'm Howard Trickey. This is John Dienelt and Scott McIntosh. They will be my co-counsel in this case. My legal assistant is sitting back there. She has the plaid—plaid on. And our client representative is

David Blaskey. He's standing with the gentleman in the back with the—almost the same color tie as I have on. We didn't coordinate. This is completely by accident. Thank you.

THE COURT: All right. Thank you very much. All right. Ladies and gentlemen, as I mentioned before, I appreciate your willingness to take time from your busy lives to perform this civic duty as—in acting as prospective jurors. I—I hope those of you who are selected to sit on the jury in this case will find your service rewarding. It is a function of the judge to determine matters of law which arise during the trial. It is the function of the jury to ascertain the facts and apply the law as I will explain it to you, and to then render a verdict.

It is vital that you be generally qualified and that you have an unbiased state of mind, so that you may return a completely impartial decision. Before I begin questioning you about your qualifications to serve as jurors, I'd like to give you an idea of what this case is about so that you can understand the questions and put them into context as we go through this jury selection process.

As I mentioned before, this is a—a civil matter that's being tried today, and the case involves a lawsuit between two companies. The plaintiff, that is, the company that brought the lawsuit, is Alaska Rent-A-Car, which owns Avis Rent-A-Car, the Avis Rent-A-Car franchise that—that authorizes it to operate Avis Rent-A-Car locations in Alaska. The defendant—the defendants, the companies that—that have been sued, are Avis Budget Group, Inc. and one of its subsidiaries. In bringing a lawsuit, Alaska Rent-A-Car brought several claims, including

a claim that the defendants breached a contract between the parties called an Agency Settlement Agreement by the manner in which they managed Budget Rent-A-Car after they purchased it.

I have already determined that the defendants breached a provision of the Agency Settlement Agreement. As jurors in this trial, you will be asked to decide what financial losses, if any, Alaska Rent-A-Car sustained as a result of that breach.

At this time, we're going to begin the jury selection process, and I'd ask all of you to please stand so that the clerk can administer the oath.

THE CLERK: Please raise your right hands.

* * *

MR. TRICKEY: … I'm going to call on a few of you just because some of you have been—not had the opportunity to say much today. But here's the—here's the—the context of my questions. This case, as you heard, is about a breach of contract, and a breach of contract is really a breach of promise. So I'd like to know how many of you have a strong belief or hold a strong opinion that if someone breaks a promise that they should be punished for that by having to pay damages? Does anyone have a strong opinion or strong belief that if someone breaks a promise to you they should be punished for that, have to pay? Can you raise your hand if you have a strong opinion about that?

(No audible reply)

MR. TRICKEY: How about [Prospective Juror No. 2 name]? I haven't—we haven't heard from [Prospective Juror No. 2 name]. Can you just raise your hand, [Prospective Juror No. 2 name], so we

know where you are? Could you pass the mike to [Prospective Juror No. 2 name]? Thank you. So do you feel that—I'm sure you don't feel it's all right for people to break a promise, but would you feel that someone who broke a promise ought to be punished for that? Do you have a strong feeling one way or the other, [Prospective Juror No. 2 name], about that?

PROSPECTIVE JUROR NO. 2: I don't really have a strong feeling. I feel there's definitely, you know, some wrong in breaking a contract, but as far as being punished, don't have a strong—I think it depends on the issue.

MR. TRICKEY: Okay. So how would you feel if a party who broke a promise under a contract had not caused any damage? Would you be open-minded to the fact that they should not, under those circumstances, be awarded damages?

PROSPECTIVE JUROR NO. 2: Yes.

MR. TRICKEY: Okay. Now I'm going to ask [Prospective Juror No. 4 name]. [Prospective Juror No. 4 name]. Can we pass the mike to [Prospective Juror No. 4 name]. Okay. So just heard those two questions I asked [Prospective Juror No. 2 name]. Do you have a different opinion or a strong opinion one way or the other?

PROSPECTIVE JUROR NO. 4: Not really. But if they do sign a contract, they should stick with it, you know.

MR. TRICKEY: All right. Now if the Judge instructs you that under the law, the party who claims they have been harmed by breach must prove that—they must prove damages, if any occurred as a result of the breach. Do you think that if you got

that instruction, you could set aside any desire to punish somebody who breaches a contract, breaks a promise?

PROSPECTIVE JUROR NO. 4: Yeah.

MR. TRICKEY: You think you could. Okay. All right. Let me ask if we could pass the mike to [Prospective Juror No. 5 name].

PROSPECTIVE JUROR NO. 5: Over here.

MR. TRICKEY: [Prospective Juror No. 5 name], you just heard the questions I asked of—

PROSPECTIVE JUROR NO. 5: I did.

MR. TRICKEY:—the other people on the panel. Would you have a different answer? Do you have a strong opinion that someone who breaks a promise ought to be punished in some way by an award of damages for breaking that promise?

PROSPECTIVE JUROR NO. 5: If there was no—let's see. If they broke the promise—

MR. TRICKEY: Would you want to just punish them for the fact that they broke the promise even when they didn't cause any damage?

PROSPECTIVE JUROR NO. 5: Well, if they didn't cause any damage, then no.

MR. TRICKEY: Okay. Well, let me ask you this. Would you feel comfortable in a case where a party broke a promise and the judge instructed you that where no damages are awarded, all you can do—where no damages of actual loss have been proven, all you can do in that case is award $1, would you be comfortable—do you have a strong opinion or belief that would make it hard for to you follow that instruction from the judge?

PROSPECTIVE JUROR NO. 5: No, I'd be fine with it.

MR. TRICKEY: You'd be fine with that. Okay. All right. I'd like you to pass the mike, if you would, to [Prospective Juror No. 6 name]. Good afternoon, [Prospective Juror No. 6 name]. You've been listening carefully all day long. I have watched you. The questions that I just asked the other jurors, would you have a different answer to any of those questions?

PROSPECTIVE JUROR NO. 6: Oh, I don't know. Well, if they promise, why didn't they keep, you know, I don't—I don't know. I—

MR. TRICKEY: Do you have a—do you have a strong feeling or opinion that someone who does break a promise should be punished for that by awarding damages against them, even if they should not prove they suffered any actual loss of damages?

PROSPECTIVE JUROR NO. 6: Yeah.

MR. TRICKEY: You think they should be punished?

PROSPECTIVE JUROR NO. 6: Mm hmm (affirmative).

MR. TRICKEY: Okay. All right. So you would disagree, then, with the idea in the law that you can't punish one by awarding damages if there is no proof of a loss caused by the breach of promise?

PROSPECTIVE JUROR NO. 6: Mm hmm (affirmative).

MR. TRICKEY: Okay. All right. Could you, [Prospective Juror No. 6 name]—could we pass the

mike to [Prospective Juror No. 7 name]. Good afternoon.

PROSPECTIVE JUROR NO. 7: Good afternoon.

MR. TRICKEY: We got called on in my class.

PROSPECTIVE JUROR NO. 7: I know.

MR. TRICKEY: You've been very quiet back there. Can you tell me whether you personally, after listening to the questions I've been asking, do you have a strong belief or opinion that someone who breaks a promise ought to have to pay some damages for that?

PROSPECTIVE JUROR NO. 7: I believe it depends on the situation. I think I would have to know more about it rather than just answering it generally.

MR. TRICKEY: Okay. You'd—you'd want to know more?

PROSPECTIVE JUROR NO. 7: Mm hmm (affirmative).

MR. TRICKEY: Okay. Do you feel comfortable that if there is no proof of any actual damages in this case as a result of the breach, with following the Judge's instruction that you would only be permitted to award damages in the amount of $1, do you feel that you could do that if somebody breached a promise?

PROSPECTIVE JUROR NO. 7: Yeah, I feel—I feel like I could do that.

MR. TRICKEY: Okay. And you understand that based on the description we've given you approved by the Court today—the Judge has already found that

there was a breach of the promise in this case? You—you already understand that?

PROSPECTIVE JUROR NO. 7: Yes.

MR. TRICKEY: So this case is just about whether the plaintiffs have suffered any damages, if any—if any, and it's their burden of proof to prove that there are damages. Okay. You understand that?

PROSPECTIVE JUROR NO. 7: I do.

MR. TRICKEY: Okay. And do you feel comfortable, even though you know going in that they breached their promise, that you would be instructed by the Judge that you can only award $1? Do you feel comfortable with that?

PROSPECTIVE JUROR NO. 7: Yes, I do feel—

MR. TRICKEY: Okay. Okay.

PROSPECTIVE JUROR NO. 7:—comfortable with that.

MR. TRICKEY: And you're not going to get back in the jury room when none of us are there—the Judge won't be back there, the lawyers won't be back there, it'll just be you and the other jurors with the instructions—you're not going to say, 'Oh, yeah, we can ignore this Judge. We'll just go ahead and punish these people because they breached their promise?' You're—

PROSPECTIVE JUROR NO. 7: I'm comfortable in answering that. I would not do that.

MR. TRICKEY: You would not do that? Okay. Okay. Thank you. And you're [Prospective Juror No. 7 name]?

PROSPECTIVE JUROR NO. 7: Yes.

MR. TRICKEY: Okay. I'd like to pass the mike way over here to [Prospective Juror No. 8 name]. She's spoken several times. But [Prospective Juror No. 8 name], did you have a reaction as you were listening to my questions to the other jurors about—

PROSPECTIVE JUROR NO. 8: Well, I did.

MR. TRICKEY:—a party who breaches a promise?

PROSPECTIVE JUROR NO. 8: I, too, feel that there would need to be—each—each case is individual. You need to know more. That brought to mind my husband sold a piece of equipment to somebody and they gave us a bad check and we were going to go after them, but we didn't. I mean, you know, I was just thinking, we decided maybe he needed it more than us. I don't know. But anyway, you know, I think in each case it's individual and you just have to go with how you feel individually.

MR. TRICKEY: Okay. So if the Judge's instructions—instructions in this case are that you cannot award damages just because you feel a desire or need to punish my client because they breached the promise, you will follow that instruction of law?

PROSPECTIVE JUROR NO. 8: Yeah.

MR. TRICKEY: Okay. You won't go off on your own and say, 'You know, Judge, I don't care what you say the law is. I think because this is a big corporation, they should have to pay damages because they breached a promise.'

PROSPECTIVE JUROR NO. 8: Yeah. Yeah, I—I could follow that instruction.

MR. TRICKEY: Okay.

PROSPECTIVE JUROR NO. 8: Yeah.

MR. TRICKEY: All right. The next student on my list here is [Prospective Juror No. 9 name]—I think.

PROSPECTIVE JUROR NO. 9: [Prospective Juror No. 9 name.]

MR. TRICKEY: [Prospective Juror No. 9 name.] Same song, second verse, [Prospective Juror No. 9 name]. Would you—first of all, I know you're not reticent about speaking up. You've already spoken several times today. Is there any of the questions I have asked about a party who breaks a promise, whether they should be punished or not, do you have a strong feeling or an opinion that they should, a party should be punished for breaking a promise?

PROSPECTIVE JUROR NO. 9: Yes, they should be.

MR. TRICKEY: Okay. Now would you feel that if the Court instructs you that—that you can only—you can't award damages for that reason, you can only award damages if there is proof that they were caused, if any damages were actually caused by a breach of the contract, could you set aside that opinion and follow that instruction?

PROSPECTIVE JUROR NO. 9: Yes. What the judge says, yes, I would follow it.

MR. TRICKEY: Okay. And if the Judge also says, as I've indicated his instructions will indicate, if there's a breach of contract but the party fails to prove—meet their burden to prove that any damages were caused by that breach, you can only award $1 of damages, would you be willing to follow that

instruction, sir? Could you—or would you want to stick it to them anyhow?

PROSPECTIVE JUROR NO. 9: No, I'd follow that instruction.

MR. TRICKEY: Okay. All right. [Prospective Juror No. 10 name]. Could we—yes, sir.

PROSPECTIVE JUROR NO. 10: [Prospective Juror No. 10 name.]

MR. TRICKEY: [Prospective Juror No. 10 name.] Oh, excuse me, sir. I'm sorry. I'm sorry I got it backwards. We've already talked a little bit at side bar here. You have—

PROSPECTIVE JUROR NO. 10: So some clarification on your—on your question. It seems to range from some personal—

THE COURT: Oh, wait. I'm sorry, sir. Why don't—why don't you let him ask the question first? You haven't posed a question yet, have you?

MR. TRICKEY: Well, I was going to—my question was going to be, did he have any different response—

THE COURT: All right. I'm sorry. Go ahead, sir.

MR. TRICKEY:—to the questions I have already asked, yeah.

PROSPECTIVE JUROR NO. 10: So—so as I was saying, your phraseology seems to range from a personal commitment to a contractual commitment, and I think we're talking strictly about a contract here. With some of the responses, it sounds like it's something else. You're trying to get a character. No, I would have no problem if those were the instructions and—and the case was demonstrated

with a preponderance of evidence. No, I'd have no problem following instructions.

MR. TRICKEY: Okay. Well, thanks for that clarification. I was asking the question that way because the way most of us personally feel about contractual commitments, written contract obligations, is that they are promises. So those are—when there is a breach, it's felt very personally often by people and some people feel that it may be appropriate to punish for breach of a promise in a contract. You don't feel that way?

PROSPECTIVE JUROR NO. 10: Just on the basis of a breach of—of—of a promise?

MR. TRICKEY: Yes.

PROSPECTIVE JUROR NO. 10: Well, I mean, the—the—I've sort of become inarticulate. The—the Judge said that there is a—it's already been demonstrated that there was a breach of—of a contract.

MR. TRICKEY: Right. He said that—

PROSPECTIVE JUROR NO. 10: And what we're doing is evaluating the—the punishment, if there is, for that, or losses and what should be the retribution?

MR. TRICKEY: Right. Well, that's the distinction I'm making with my questions. The Judge will instruct you that you can only award damages if they've been caused by the breach. It's not—

PROSPECTIVE JUROR NO. 10: Oh, sure, if—if that's—

MR. TRICKEY: Okay. It's not your—

PROSPECTIVE JUROR NO. 10:—the extent of your question, the answer is yes.

MR. TRICKEY: It's not—not your purpose to punish to punish simply because there was a breach. You have to find that there were damages caused by the breach.

PROSPECTIVE JUROR NO. 10: Right.

MR. TRICKEY: Do you understand that? And you would make that distinction in your mind that it's not appropriate to punish simply because there's been a breach of contract? There would have to be proof of actual damages caused as a result—

PROSPECTIVE JUROR NO. 10: Right.

MR. TRICKEY:—of the breach?

PROSPECTIVE JUROR NO. 10: Yes, I understand that—that—

MR. TRICKEY: Okay.

PROSPECTIVE JUROR NO. 10:—aspect of it. Yes.

MR. TRICKEY: All right. With that clarification, any of you who answered earlier, would you change what any of your answers were to my questions?

THE COURT: You have about one minute left.

MR. TRICKEY: Those of my students I called on. The last student I'm calling on is [Prospective Juror No. 15 name] from Bethel. Hi. How are you—I know—well, actually, I'm a very shy person myself, even though I've overcome some of that. But would your change your answers to any—would your answers be different to any of the questions I've been asking the other jurors?

PROSPECTIVE JUROR NO. 15: I think it would depend on how the promises were made and what's been broken.

MR. TRICKEY: Okay. All right. It would depend. So you—

PROSPECTIVE JUROR NO. 15: Yeah.

MR. TRICKEY:—might consider punishing someone who broke a promise, whether they

PROSPECTIVE JUROR NO. 15: It—

MR. TRICKEY:—harmed anyone or not?

PROSPECTIVE JUROR NO. 15: It depends.

MR. TRICKEY: It would depend?

PROSPECTIVE JUROR NO. 15: Yeah.

MR. TRICKEY: Okay.

PROSPECTIVE JUROR NO. 15: On the situation.

MR. TRICKEY: All right. Okay. Thank you very much. I think my time is up.

THE COURT: Yes. Thank you. All right.

* * *

THE COURT: … I'm assuming it's not an issue, but there are no *Batson* issues that anybody wants to—

MR. FELDMAN: No what?

THE COURT: No *Batson* issues anybody wants to raise. It's generally excluding a juror because of race, you know—

UNIDENTIFIED SPEAKER: No racial issues.

THE COURT: Okay. I just wanted to make sure. Nobody raised it, so—

UNIDENTIFIED SPEAKER: No—no problem.

THE COURT: Okay. Okay, great. Thank you very much.

MR. DIENELT: Give me one second with Mr. Feldman.

THE COURT: All right.

(Side conversing)

MR. PALUMBO: I think the only concern is that: we've—they've—they've taken both the Native Alaskans—

THE COURT: Okay. Hold on. I'm sorry.

MR. PALUMBO: Is that they—they have done their peremptories on both the Native Alaskans. I think that might be an issue.

THE COURT: Okay. So what I'm going to do is, before I swear this jury, I'm going to excuse everybody and we're going to take it up. And you're going to have to—you're going to have to indicate a non-race based reason for striking those jurors. He's raising a racially-based challenge to the peremptories that you've exercised. That's the issue we're going to have to take up. Okay. All right.

(End of discussion at side bar)

THE COURT: All right. Ladies and gentlemen, before we complete this process, there's a matter that I'm going to have to take up with the parties outside of your presence. So I'm going to excuse all of you and ask you to go back to the jury assembly room, if

you would, please. That—that's everybody. So nobody's free to go yet.

(Side conversing)

(Jury panel out at 3:13 p.m.)

THE COURT: All right. Mr.—Mr. Feldman, I—don't know who's going to be speaking to this from your side, but what we have, as I understand it, is a *Batson* challenge has been raised in regard to the peremptory challenges exercised by the defendants in this case, so I'd ask you to—to—to speak to that at this point.

MR. PALUMBO: Your Honor, the—the concern I think is that both [Prospective Juror No. 6 name] and [Prospective Juror No. 15 name] indicated in response to Mr. Trickey's questions that they would—that they felt that someone who had broken a promise should be punished. And then when you asked [Prospective Juror No. 6 name] about those opinions, I think it was clear that she was capable of following your instructions and following the law and—and understood. And certainly her employment and education would indicate that she can tell the difference between breaking a promise and being punished and a commercial relationship where we're seeking compensatory damages.

And so my concern is that—and I—and I understood at the time that we didn't ask the same questions of [Prospective Juror No. 15 name] because they were satisfied they would get similar answers from her. So I think the—the concern that we have is that these are both jurors who answered questions in a way that concerned the defendants, they were examined by the parties and the Court, determined

that they would be fair jurors, and they both happen to be Native Alaskans, and—and both of them were stricken.

THE COURT: Mr. Trickey.

MR. PALUMBO: And I guess what I should say is, I'm—I'm concerned that we're—that there's a perception of a cultural bias in the way they would look at compensatory damages, and I don't think there's—I don't think that there's been any showing here that their Native culture would cause them not to judge these issues fairly.

THE COURT: All right. Thank you. Mr. Trickey.

MR. TRICKEY: Well, two things, Your Honor. First, as to this case, there's no racial issue in the case and there's—this is not a race case. It's not a race discrimination case. There's simply no racial issues in the case. As to—

THE COURT: I think the allegation isn't that the case itself has a racial issue. I think the challenge is to the method in which—well, the perception—I mean, they—they're—they're—they're trying to make a prima facie case that the way your peremptories were used were done in such a way as to exclude Alaska Natives. That's their argument, as I understand it.

MR. TRICKEY: Right.

THE COURT: So—

MR. TRICKEY: I think we had—

THE COURT:—what—what you need to do is, you need to explain why those were—some non-racial basis for it, if—if you can.

MR. TRICKEY: Yes. As to [Prospective Juror No. 6 name], as you know, we had a side bar. I felt that her answers to the questions during the—the open voir dire were such that she would use an award of damages as a method for punishing for breach of contract. And we asked for a side bar on that. We did examine her on that and I felt that rather than challenge her for cause, we would use our perempt because I'm not satisfied in my judgment that she would not use this case as a means to punish for breach of contract whether or not damages had been awarded—had—had been proven or not. That was our reason. I don't think that her answers to the questions in open court and at the side bar satisfied us that she would not view punishment as an appropriate—an award of damages as appropriate to—to punish someone for breach of contract, and that's the reason we perempted her.

And a similar exchange took place with—with [Prospective Juror No. 15 name]. And my—and—and my gut feeling of it is that she also viewed punishment as an appropriate—the desire to punish as an appropriate penalty to—to someone who had breached a contract. So that's the concern. That's the reason for exercising those—those perempts. Race is just not an issue in this case, Your Honor.

MR. FELDMAN: Race is not an issue in the case, and I'd be the last person to accuse Mr. Trickey, of all people, of being racially motivated.

THE COURT: I don't think anybody's—

MR. FELDMAN: But—but when—

THE COURT: Nobody's making that allegation.

MR. FELDMAN: But when we, you know, when we—when we inquire of Native jurors, prospective jurors—and they come from, in this instance, you know, both of these jurors, they come from a different place geographically, a different culture, and they have not always the same associations with words that we do. And as a consequence, if you frame the question in a certain way and then secure an assent, which a Native Alaskan is—is much more inclined to give than—than those of us from non-Native cultures—so you secure their consent to the leading question that you asked, or the prompting question you asked.

It's a subtle way of basically effectuating the removal of Native jurors. I mean, they don't know—they don't understand the nuances of the question and the nuances of their answer. They are trying to be helpful, as is the nature of their custom. And as a consequence, you know, if the question is framed a certain way, that it dooms them to non-participation in this process and requires—it admittedly requires a more sensitive ear and a more thoughtful assessment to—to assess whether there is a—a very subtle racial aspect to the process. But the reason why race creeps in here is because the questions were presented in a way that secured certain answers, and then that then becomes the grist for, first, an exercise of a challenge of cause. And then when that doesn't work, of course, then—then the—the peremptory disqualification.

And it's a process that really does require a lot of care on the part of not just the court, but, quite honestly, on—on the part of lawyers as well. You have to ask these questions in a more open-ended

way or else you're going to put these people in a place where they give you answers that doom them to non-participation.

MR. TRICKEY: I answered the que—I asked the questions the best I could under the time pressures of the selection process, Your Honor, and I did not feel comfortable with the answers. The answers indicated, in my judgment, a willingness—a desire to, or a willingness to, be willing to consider punishment as a justification for awarding damages, even absent the proof of actual loss. That's my—that's the reason for our perempting of those two potential jurors.

THE COURT: What—my memory in regard to [Prospective Juror No. 6 name] is a little clearer than my memory in regard to [Prospective Juror No. 15 name]. What is it that [Prospective Juror No. 15 name] said in particular that caused you some concern?

MR. TRICKEY: It was—it was—I got to her, there was one minute left. There was one minute left. And she answered the question almost, at least as I heard the answer, almost the same as [Prospective Juror No. 6 name] did initially when I asked the question about whether it would be appropriate to award damages just to punish someone for breach of contract.

THE COURT: All right.

MR. FELDMAN: And what—and what she said in response to that is that it depends on how the promises were made and how they were broken. That was her response. It depends.

THE COURT: All right. We're going to take a brief recess. I want to give this some thought and I'll be back in about 15 minutes.

THE CLERK: All rise. This matter is now in a brief recess.

(Recess at 3:22 p.m., until 3:46 p.m.)

(Jury panel out)

THE CLERK: All rise. His Honor the Court, the United States District Court is again in session. Please be seated.

THE COURT: All right. Here are my thoughts. You know, after establishing—as I mentioned before, after establishing a prima facie case, then the burden is going to be on the defendants to show a non-discriminatory basis for the exclusion of the witness [sic]. And ultimately, the burden is on the moving party to show purposeful discrimination. I think in regard to [Prospective Juror No. 6 name], I—I think Mr. Trickey has—in spite of the side bar we had, I think he has—has offered some non-discriminatory reasons for electing to strike her. I mean, I think—I'll be honest with you, I think it's a close call in regard to her. But from a strategic standpoint, I think he's—I think he's offered sufficient reasons.

I don't feel the same way in regard to [Prospective Juror No. 15 name], and I—I—I think part of it may be a function of the situation we had and the limited time you had to answer—you had to ask her questions and she had to answer. But I do think it's a problem and here is my proposal for resolving this problem. I'm going to eliminate that challenge. I'm going to eliminate that strike. I'm not going to allow you to strike her.

* * *

THE COURT: … [L]ook, let's be clear about one thing here.

MR. DIENELT: Okay.

THE COURT: Nobody has accused anybody of being a racist. However, the way this played out was that the only two Native Alaskans—

MR. DIENELT: I understand that.

THE COURT: —were—were stricken. I understand the limitation Mr. Trickey was working under, under the time constraints he had. But you know what? That's the rules we set when we started this dance, and he had 15 minutes and the plaintiffs had 15 minutes, so his time was short. That being said, unfortunately for him and for defendants, maybe enough of a record wasn't established to my satisfaction. And you can blame me if you want, but I—I—I've been back there wrestling with this same issue.

I—I understand the folks involved here—nobody has done anything that I've ever seen that would indicate that they have some racial bias. But it is what it is. The issue was raised and I need to deal with it.

* * *