No. _____

In The Supreme Court of the United States

PINOLEVILLE POMO NATION, ANGELA JAMES, LEONA L. WILLIAMS, LENORA STEELE, KATHY STALLWORTH, MICHELLE CAMPBELL, JULIAN J. MALDONADO, DONALD WILLIAMS, VERONICA TIMBERLAKE, CASSANDRA STEELE, JASON EDWARD RUNNING BEAR STEELE, and ANDREW STEVENSON,

Petitioners,

v.

JW GAMING DEVELOPMENT, LLC, a California limited liability company,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an Indian tribe's governing body can be stripped of its sovereign immunity from suit for actions taken by its members in their official capacities, as long as a plaintiff merely names the members individually and those officials will be bound by any judgment entered.

PARTIES TO THE PROCEEDING

The parties to the proceeding are those listed on the front cover.

STATEMENT OF RELATED PROCEEDINGS

JW Gaming Dev., LLC v. James, et al., 778 Fed. Appx. 545 (9th Cir. 2019)

JW Gaming Dev., LLC v. James, et al., 3:18-CV-02669-WHO, 2018 WL 4853222, at *1 (N.D. Cal. Oct. 5, 2018), aff'd, 778 Fed. Appx. 545 (9th Cir. 2019)

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PETITION FOR A WRIT OF CERTIORARI

Pinoleville Pomo Nation, Angela James, Leona L. Williams, Lenora Steele, Kathy Stallworth, Michelle Campbell, Julian J. Maldonado, Donald Williams, Veronica Timberlake, Cassandra Steele, Jason Edward Running Bear Steele, and Andrew Stevenson respectfully petition this Court for a writ of certiorari to review the memorandum order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is unpublished, but is reported at 778 Fed. Appx. 545 and reprinted in the Appendix ("App.") at 1-3. The district court's order denying Petitioners' motion to dismiss under Fed. R. Civ. P. 12(b)(1) is reported at 2018 WL 4853222 and reprinted at App. 4-23.

JURISDICTION

The Ninth Circuit issued its opinion affirming the district court's denial of Petitioners' motion to dismiss on October 2, 2019. An application to extend the time to file a petition for a writ of certiorari was granted by Justice Kagan on December 27, 2019, making the Petition due on or before January 30, 2020. This Petition is

timely filed pursuant to Supreme Court Rules 13.1, 13.5, 22, and 30. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.

INTRODUCTION AND STATEMENT OF THE CASE

This case presents an important question regarding application of the real-party-in-interest test in the tribal sovereign immunity context. In denying Petitioners the protections of sovereign immunity below, the Ninth Circuit Court of Appeals improperly extended this Court's holding in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), beyond the personal tort context at issue there, to conduct involving the official acts of tribal officers, and engendering confusion over the real-party-in-interest test and the doctrine of tribal sovereign immunity in the process. Because sovereign immunity from suit is of paramount importance to the fundamental right of Indian tribes to self-govern, it is an issue of national importance and must be uniformly applied throughout the United States. This Court should grant this Petition to resolve the conflict between the Ninth Circuit's decision and decisions of this Court governing the real-party-in-interest test, and

the conflict between the Ninth Circuit and the Second Circuit regarding whether sovereign immunity bars suits against tribal officers acting within their official capacities.

At issue in the underlying litigation are allegations that the Pinoleville Pomo Nation, a federally recognized Indian tribe (the "Tribe"), breached a contract with Plaintiff JW Gaming Development, LLC ("JW Gaming" or "Plaintiff"), pursuant to which JW Gaming loaned the Tribe funds for a casino development project.[1] Relevant to this Petition, JW Gaming also named as defendants all sitting members of the Tribe's Tribal Council at the time the action was filed, as well as other tribal officials and employees (collectively the "Tribal Defendants"[2] and together with the Tribe, the "Petitioners"), alleging that they had committed fraud and RICO violations in connection with obtaining the loan.

Petitioners moved to dismiss the claims against the Tribal Defendants on grounds that the actions complained of had been taken by the Tribal Defendants in their official capacities and, therefore, were protected from suit by tribal sovereign immunity. Purporting to apply this Court's holding in *Lewis v. Clarke*, the district court denied the motion, ruling that the Tribal Defendants—and not the Tribe—were the real

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[1] The breach of contract claim was not part of the Ninth Circuit proceedings.

[2] The Tribal Defendants are those individuals named on the cover of this Petition.

parties in interest because "JW Gaming alleges that the individuals themselves engaged in fraud and that it suffered damages as a result." App. 12. The Ninth Circuit affirmed in a brief one-page opinion and appeared to base its holding solely on the manner in which the claims were pled against the Tribal Defendants. *See* App. 2 ("The claims are explicitly alleged against the tribal defendants in their individual capacities, and JW Gaming seeks to recover only monetary damages on such claims. If JW Gaming prevails on its claims against the tribal defendants, only they personally—and not the Tribe—will be bound by the judgment."). It also held that such claims were not shielded by tribal sovereign immunity "even though the tribal defendants have been sued for actions they allegedly took in the course of their official duties and even if the Tribe chooses to indemnify the tribal defendants for any adverse judgment against them." App. 3 n.1 .

This holding is in direct conflict with long-standing precedents of this Court concerning the real-party-in-interest test and the distinction between official- and personal-capacity suits. First, it ignores the rule that suits against government officials in their official capacity are in fact suits against the sovereign and thus subject to sovereign immunity's bar. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). It also conflicts with this Court's oft-repeated command that the interests served by sovereign immunity are not to be sacrificed to the mechanics of captions and pleading, and that courts must examine the nature of the claims based on the record as a whole to determine if the

sovereign is the real party in interest. *See Lewis*, 137 S. Ct. at 1290 ("courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign").

The holding also conflicts with the Second Circuit's decision in *Chayoon v. Chao*, 355 F.3d 141 (2d Cir. 2004), cert. denied *sub nom. Chayoon v. Reels*, 543 U.S. 966 (2004) [hereinafter "*Chayoon*"], which holds that "[a plaintiff] cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Id.* at 143.

Whereas the Second Circuit refuses to allow plaintiffs to circumvent tribal immunity through clever pleading, the Ninth Circuit's ruling in this case encourages it. Its decision thus conflicts with the settled law of this Court, a well-reasoned decision of the Second Circuit, and with numerous district court decisions within the Ninth Circuit and nationwide, which will only further muddle an area of law that "continues to confuse lawyers and confound lower courts." *Kentucky*, 473 U.S. at 165. Because no authority exists for denying tribal officials the protections of sovereign immunity in these circumstances, and to avoid the uncertainty that the Ninth Circuit's ruling invites, a writ of certiorari should issue.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is in tension with decisions of this Court and the Second Circuit Court of Appeals concerning application of the real-party-in-interest test, is an unwarranted expansion of this Court's holding in *Lewis v. Clarke*, and threatens to undermine Congress's directive that tribal sovereign immunity must be preserved in order to promote Indian self-government, self-sufficiency, and economic development by shielding tribes from the costs and burdens of litigation.

A. Certiorari Should Be Granted to Resolve a Conflict Between the Ninth Circuit's Decision and this Court's Cases Governing Application of the Real-Party-In-Interest Test.

In the context of lawsuits against tribal officials or employees, this Court directs courts to "look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis*, 137 S. Ct. at 1290 (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). Whether the sovereign is the real party in interest often turns on whether the suit is an individual- or official-capacity claim. *Id*. Individual or "[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of . . . law," and in the course of his official duties. *Kentucky*, 473 U.S. at 165. By contrast, official-capacity suits ultimately seek to hold the entity of which the officer is an agent liable, rather than the official himself: they "'generally represent [merely]

another way of pleading an action against an entity of which an officer is an agent.'" *Id*. at 165-66 (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

Here, the Ninth Circuit held that although the Tribal Defendants were "sued for actions they allegedly took in the course of their official duties," they were not shielded by sovereign immunity because "[t]he claims are explicitly alleged against the tribal defendants in their individual capacities, and JW Gaming seeks to recover only monetary damages on such claims." App. 2, 3 n.1. This holding ignores the long-standing rule that "courts may not simply rely on the characterization of the parties in the complaint," *Lewis*, 137 S. Ct. at 1290, but must examine "the essential nature and effect of the proceeding" to determine whether "the action is in essence" a suit against the sovereign. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945); *see also Alden v. Maine*, 527 U.S. 706, 756 (1999) (holding that officials may cloak themselves in the government's sovereign immunity if a suit naming them "in fact" seeks relief from the sovereign); *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 687 (1949) (holding that a suit "must fail, whether or not the officer might otherwise be suable," if it is, "in effect, a suit against the sovereign"). The court below failed to consider any factor other than the manner in which the Tribal Defendants were named and the fact that the plaintiff sought monetary damages against them. It thus unquestionably misstates

the applicable test for determining the real party in interest under this Court's precedents.

In addition to misstating the test, the court erred in applying it because the complaint in this case confirms that the Tribe, not the individual Tribal Defendants, is the real focus of JW Gaming's fraud and RICO claims. The complaint does so by requesting that the court appoint a receiver over "all business and affairs" of the Tribe. (ER[3] 154). To the extent a judgment imposes a receiver to oversee the Tribe's affairs such a remedy would unquestionably bind the Tribe as opposed to the individual Tribal Defendants. Thus, "[t]he real party in interest is the government entity, not the named official," *Lewis*, 137 S. Ct. at 1291, and the court below fundamentally erred in failing to consider this dispositive factor.

The complaint furthermore confirms that the Tribe is the real party in interest because it names all sitting members of the Tribal Council as defendants on the fraud and RICO claims and thus, in effect, names the official body through which the Tribe acts. The complaint alleges "[e]ach of the Tribal Council defendants actively participates in the management and direction of the association-in-fact enterprise" through their service on council. (ER 130). It further alleges those defendants were instrumental to the RICO enterprise because they "vote[d] on and approve[d] resolutions" they knew, or reasonably should have known,

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[3] Cites to "ER" refer to the Excerpts of Record filed with the Petitioners' opening brief in the Ninth Circuit.

would be used by Chairperson Williams and Vice-Chairperson James to perpetrate frauds against third parties such as JW Gaming. (ER 138). As an example, the complaint alleges the Tribal Council defendants "voted to create the Business Board which they then voted to charge with authority to create bank accounts and make expenditures of proceeds of the Company Loan[.]" (ER 138). Voting on and approving tribal resolutions is the very definition of action in an official capacity. *See Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (holding that claims against tribal officials are barred by sovereign immunity because "the only action taken by those officials was to vote as members of the Band's governing body against permitting Imperial to use the road. Without more, it is difficult to view the suit against the officials as anything other than a suit against the Band.").

As a consequence of naming the entire Tribal Council as defendants, JW Gaming named Members-at-Large Cassandra Steele and Andrew Stevenson on the fraud and RICO claims. Ms. Steele and Mr. Stevenson were not even on Tribal Council at the time the alleged wrongful conduct occurred. (ER 76) ("Cassandra Steele served as Tribal Secretary for 3 years, having been appointed in 2014"; and "Andrew Stevenson . . . has served as a Tribal Council Member for 9 months, having been elected to that office in September of 2017"). There is no reason for them to be named other than the fact they now hold official positions within the Tribe. This is incontrovertible evidence

defendants were sued because of the power they possessed in their official roles, not because of personal conduct committed in the course of carrying out those duties. *See Lewis*, 137 S. Ct. at 1291 ("In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself.").

Additionally, and unlike the allegations of negligent driving in *Lewis v. Clarke*, the complaint alleges no actions by any of the officials or employees of the Tribe that are solely personal in nature. In fact, all of the Tribal Defendants' alleged wrongful acts were taken within their representative capacity as chairpersons, council members, or employees of the Tribe. As noted above, Tribal Council members voted on and approved resolutions creating the Business Board and vesting it with authority to make expenditures of the JW Gaming loan proceeds. (ER 138). They held roles on subordinate Tribal entities such as the Gaming Commission, Gaming Authority, Business Board, and Pinoleville Economic Development, LLC. (ER 138). The decisions they made in these capacities—decisions Plaintiff labels as "fraudulent" with little to no factual support for its claims (ER 57-59)—were for the purpose of administering the Tribe's business, not for personal reasons.

The same is true for the two main targets of Plaintiff's RICO claims, thirty-year Tribal Chairperson Leona Williams and Vice-Chairperson Angela James. Although the complaint states Chairperson Williams is being sued "as an individual," it prominently notes her positions as "chairperson of the Tribe's seven-member tribal council," "vice-president of the Pinoleville Business Board," and "member of Pinoleville Economic Development, LLC." (ER 83). It then describes a multitude of acts taken by Chairperson Williams that fall within her official duties as Chairperson of the Tribe or other official positions, rather than her individual capacity. Those include: signing a 2008 promissory note between Pinoleville Economic Development, LLC and the Canales Group (ER 90); serving as an authorized signatory on bank accounts (ER 97, 113); receiving an accounting of the Tribe's expenditures (ER 98); receiving and sending emails relating to the Tribe's business with JW Gaming (ER 100, 101, 108); signing a notice of contract default (ER 103); signing the 2012 promissory note with JW Gaming and 2012 promissory note with Canales Group (ER 109, 113); "pursu[ing] development of the Pinoleville Casino Project" (ER 113); enacting the Pinoleville Business Board Ordinance (ER 113); and serving on the board of the Pinoleville Business Board (ER 113). The complaint includes numerous, ranging allegations purporting to establish fraudulent intent and conspiratorial motives on the part of Chairperson Williams. (*See*, *e.g.*, ER 116-125; 126-149). However, Plaintiff fails to allege any facts showing Chairperson Williams acted

in a strictly personal rather than representative capacity as Chairperson of the Tribe.[4]

Similarly, although the complaint states Vice-Chairperson Angela James is being sued "as an individual," it then immediately notes her positions as "vice-chairperson of the Tribe's tribal council," "chairperson of the Pinoleville Gaming Commission," "chairperson of the Pinoleville Gaming Authority," and "member, chairperson and tax matters member of [Pinoleville Economic Development, LLC]." (ER 83). Then, as with Chairperson Williams, the complaint describes numerous acts taken by Vice-Chairperson James that fall within her official duties as Vice-Chairperson of the Tribe or other official positions, rather than her individual capacity. Those include: chairing the Gaming Commission (ER 96); serving as an authorized signatory on bank accounts (ER 97); signing a notice of contract default (ER 103); signing the 2012 promissory note with JW Gaming and 2012 promissory note with Canales Group (ER 109, 113); and "pursu[ing] development of the Pinoleville Casino Project." (ER 113). As with Chairperson Williams, the complaint includes allegations purporting to establish fraudulent intent and conspiratorial motives on the part of Vice-Chairperson

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[4] For example, there are no specific allegations in the complaint that Chairperson Williams directed loan proceeds to a personal bank account or used any of the funds for personal expenditures. It only references vague and speculative "personal uses." (*E.g.*, ER 132-132). If the Chairperson simply directed the funds to other Tribal needs, that is action taken in her official—not personal—capacity and JW Gaming's remedy would lie in contract against the Tribe, not in tort against her individually.

James. (*See*, *e.g.*, ER 116-125; 126-149). However, Plaintiff fails to allege any facts showing defendant James acted in a strictly personal rather than representative capacity as Vice Chair.

The complaint also confirms the tribal employee defendants were acting in a representative capacity. For instance, it alleges Michelle Campbell and Kathy Stallworth, fiscal directors of the Tribe, "had a prominent role in the creation of" the allegedly misleading 2011 accounting the Tribe prepared at the request of JW Gaming. (ER 136). As the Tribe's accountants, preparing an accounting clearly falls within the scope of their authority. Lenora Steele, the Tribe's chief administrator and supervisor of the Tribe's accounting staff, is alleged to have "had significant involvement with" the 2011 accounting. (ER 138). This falls within the scope of her Tribal authority, too.

The allegations that JW Gaming's investment was diverted to "personal uses" and that there was some sort of kick-back scheme involving defendants Mike Canales and Canales Group, LLC do not affect the conclusion the Tribal Defendants acted in representative capacities. These allegations are speculative and unsupported by specific facts. (ER 57-59). In other words, there are no clear allegations showing that Tribal Defendants acted independently of the Tribe or for a purpose unrelated to Tribal administration. The district court appeared to recognize as much when it denied Plaintiff's request to certify this interlocutory appeal as frivolous. (ER 12). ("Although JW Gaming sues the defendants in their individual capacities, they were

acting in their roles as members and leaders of the Tribe during the course of their allegedly fraudulent dealings with JW Gaming. This case is not so clear-cut that an appeal would be frivolous.") When, as here, tribal officials act in their official capacity and within the scope of their authority, they are immune. *See Imperial Granite Co*., 940 F.2d at 1271 (claims against tribal officials barred because complaint alleges no individual actions by any of the officials named as defendants); *see also United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981) (immunity extends to tribal officials acting in their official capacity and within their scope of authority).

B. Certiorari Should Be Granted Because the Ninth Circuit's Holding is a Dangerous Expansion of *Lewis v. Clarke* and Creates a Circuit Split that Requires Resolution by this Court.

1. *Lewis v. Clarke* Concerns a Simple Negligence Claim Against a Tribal Employee, Not Actions of Tribal Officials Carrying Out Official Decisions of the Tribe.

At issue in *Lewis v. Clarke* was an "ordinary negligence action brought against a tribal employee in state court under state law" for an automobile accident caused by defendant in the course of his employment with the Mohegan tribe. *See Lewis*, 137 S. Ct. at 1288. Defendant Clarke's claim of entitlement to the tribe's sovereign immunity was based on two theories: (1) that, simply because he was acting within the scope of his employment at the time of the accident, he should

enjoy the tribe's immunity and (2) that the tribe was obligated to indemnify him and, therefore, would ultimately bear the financial burden of any judgment. *Id*. This Court declined to extend sovereign immunity for tribal employees beyond that afforded to state and federal actors, holding that the fact that an employee was acting within the scope of his employment at the time a tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity. *Id*. It further held that the tribe's agreement to indemnify the employee does not extend a tribe's sovereign immunity where it otherwise would not reach. *Id*.

This limited holding does not support the Ninth Circuit's decision here. In denying the Tribal Defendants the protections of sovereign immunity, the Ninth Circuit ignored this Court's admonition that "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id*. at 1290 (citing *Ex parte New York*, 256 U.S. 490, 500-02 (1921). In doing so, it proceeded contrary to the Second Circuit's holding in *Chayoon* that a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege that they acted outside the scope of their authority." *Chayoon*, 355 F.3d at 143. That is precisely what happened here. The complaint, though drafted as claims against the individual members of the Tribal Council and tribal employees,

concerns actions of those defendants taken in the course of implementing official decisions of the Tribe.

Nor does *Lewis v. Clarke* support the court's conclusion that the Tribal Defendants are the real parties in interest because they are named individually and any adverse judgment will bind them and not the Tribe. If that were the rule, the mere act of naming a tribal official personally would automatically transform the action into a personal capacity suit. *Chayoon* rightly rejects this categorical approach, holding that a plaintiff may not circumvent sovereign immunity by simply naming tribal officials instead of the tribe. *Chayoon*, 355 F.3d at 143.

The distinction between the simple negligence alleged in *Lewis v. Clarke* and the fraud scheme alleged here should not be ignored, as it was by the district court and the Ninth Circuit. As so aptly put by the Lewises in their Petition to this Court for a writ of certiorari: "The court below did not attempt to justify its [application of sovereign immunity] on the basis of considerations of tribal sovereignty or self-government, nor could it have done so. . . . Petitioners have asserted garden-variety state-law negligence claims based on respondent's off-reservation conduct, and there is no reason why tribal employees should enjoy immunity in that context." Petition for Writ of Certiorari, *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) (No. 15-1500), 2016 WL 3254181, at *3. Because Clarke was either legally liable for a car accident he caused on non-tribal land, or he was not, the tribe's sovereignty was not implicated.

By contrast, the Tribal Defendants' liability depends entirely on decisions those defendants made while acting as chairperson, vice-chairperson, and members of the Tribal Council in administering the business of the Tribe.

The decision to deny Tribal Defendants the protection of sovereign immunity for their official acts simply because the complaint names them personally is an unjustified expansion of *Lewis v. Clarke* and stands to gut sovereign immunity for tribal officials in the Ninth Circuit.[5] All any plaintiff would need to do to avoid sovereign immunity's bar is allege that a tribal officer committed fraud while carrying out the business of the tribe, even if the actions in question were of a legislative or executive nature—*i.e.*, voting on tribal resolutions or implementing tribal policies.[6] The Ninth

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[5] This is true notwithstanding that the decision below is unpublished. Ninth Circuit Rule 36-3 permits citation to unpublished orders of the circuit issued on or after January 1, 2007 in accordance with Fed. R. App. P. 32.1. Because the decision below is the first appellate-level decision in the Ninth Circuit to interpret *Lewis v. Clarke*, lower courts and litigants are likely to rely on it despite its lack of precedential force. This is a reason to grant review rather than deny it. *See Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari and asserting that the Fourth Circuit's decision not to publish a decision on an important question of federal law over which courts disagreed was "yet another reason to grant review").

[6] *See* Allison Hester, Maxwell, Lewis v. Clarke, *and the Trail Around Tribal Sovereign Immunity*, 88 U. Colo. L. Rev. 721, 722-64 (2017) (criticizing Ninth Circuit's decision in *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013), as "offer[ing] plaintiffs a way to plead around tribal sovereign

Circuit made no findings that the actions complained of in this litigation were taken by the Tribal Defendants outside of their official capacities or that they were ultra vires. Nor could the court have done so, as demonstrated above. The conduct alleged in the complaint relates solely to administration of the Tribe's internal business matters. The propriety of such decisions is not for a district court to decide.

2. The Decision Below Conflicts with the Second Circuit's Holding in *Chayoon.*

Where a non-precedential decision by one circuit creates a conflict with other circuits, as the Ninth Circuit's decision does here, this Court may grant certiorari to resolve the conflict. *See Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (resolving conflict created by an unpublished decision).

In *Chayoon*, the Second Circuit held that sovereign immunity barred a suit alleging violations of the Family Medical Leave Act ("FMLA") by tribal council members and employees of a tribe. 355 F.3d at 143. In reaching its holding, the court found that Congress had not expressly authorized FMLA suits against Indian tribes, and that sovereign immunity barred plaintiff's FMLA claims because plaintiff could not "circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions

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immunity" and urging this Court not to adopt its reasoning when deciding *Lewis v. Clarke*).

taken in defendants' official capacities and the complaint does not allege they acted outside the scope of their authority." *Id.*[7]

The Ninth Circuit's holding here is in direct conflict with the holding of the Second Circuit. The district court below did not find that the complaint concerned actions taken by the Tribal Defendants in excess of their official capacity or that the Tribal Defendants had acted outside the scope of their authority. Nonetheless, apparently accepting Plaintiff's argument on appeal that "[t]he capacity in which [the individual defendants] acted while engaged in the allegedly wrongful conduct is irrelevant" (Ninth Circuit Dkt. No. 17, p. 26), the court held that the Tribe is not the real party in interest because "[t]he claims are explicitly alleged against the tribal defendants in their individual capacities, and JW Gaming seeks to recover only monetary damages on such claims." App. 2. And it held sovereign immunity was not a bar "even though the tribal defendants have been sued for actions they allegedly took in the course of their official duties. . . ." App. 3 n.1.

In support, the court purported to rely on *Lewis v. Clarke* and the Ninth Circuit's decisions in *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) and *Pistor v. Garcia*, 791 F.3d 1104, 1112-14 (9th Cir. 2015). App. 2-3. But, as with *Lewis v. Clarke*, both

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[7] *Chayoon* has been cited 23 times for this proposition, including by the Ninth Circuit. *See Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008).

Maxwell and *Pistor* involve personal injury claims with no relationship to tribal governance or administration. Those cases involve unwitting tort victims with demonstrable personal injuries who would be left without a remedy if sovereign immunity were applied. None involve decisions of internal governance or administration of a tribe's business. This is the key fact that distinguishes this case from *Lewis v. Clarke* and which requires a writ of certiorari to correct the Ninth Circuit's unwarranted expansion of that holding, and to resolve the split with *Chayoon*.

3. The Decision is Also Contrary to the Holdings of Numerous Other Federal and State Courts.

The Ninth Circuit's reasoning stands in stark contrast to holdings from federal and state courts in the Ninth Circuit and nationwide, underscoring the need for guidance from this Court. By way of example:

In *Jamul Action Committee v. Stevens*, 2:13-CV-01920-KJM, 2014 WL 3853148, at *17 (E.D. Cal. Aug. 5, 2014) (unreported), the District Court for the Eastern District of California held that the chairperson of the Jamul Indian Village, Raymond Hunter, was entitled to sovereign immunity even though he was named individually in a suit. The suit in question challenged a decision of the National Indian Gaming Commission declaring the Jamul Indian Village had lands that qualified for casino development under applicable federal statutes. *Id.* at *2. Chairman Hunter initiated

construction of a casino in reliance on this determination. Applying the real-party-in-interest test, the court found "initiating construction of the Tribe's casino presumably falls under the chairman's duties in his representative capacity rather than his individual capacity," and dismissed the suit based on sovereign immunity. *Id.* at *13.

In *Brown v. Garcia*, 225 Cal. Rptr. 3d 910 (Cal. Ct. App. 2017), members of the Elem Indian Colony Pomo Tribe brought defamation claims against current and former tribal council members. *Id*. at 911. Defendants moved to quash the summons and complaint for lack of subject matter jurisdiction. *Id*. at 912. Relying on *Lewis v. Clarke*, *Maxwell*, and *Pistor*, plaintiffs argued sovereign immunity did not apply because they sued defendants in their individual capacities and were seeking damages from them only as individuals, not from the tribe. *Id*. at 916.

The state court rejected the plaintiffs' argument, reasoning persuasively that "[t]he wrongs alleged in those cases were garden variety torts with no relationship to tribal governance and administration." *Id*. at 916.

> This case is different. As the trial court noted, *Maxwell* and *Pistor* make clear that the general rule is not dispositive if the lawsuit will encroach upon the tribe's sovereignty. Here, substantial evidence established that defendants were tribal officials at the time of the alleged defamation and that they were acting within the scope of their tribal authority when

> they determined that, for the reasons stated in the allegedly defamatory Order of Disenrollment, plaintiffs should be disenrolled from the Tribe pursuant to a validly enacted tribal ordinance. On this record . . . the trial court concluded that plaintiffs sought to hold defendants liable for actions they took as tribal officials in pursuing plaintiffs' disenrollment from the Tribe on the basis of plaintiffs' alleged unlawful acts. . . .
>
> We agree. A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. It is thus not dispositive here that the complaint sought relief only from individual defendants. Despite the plaintiffs' careful pleading, their action sought to hold defendants liable for their legislative functions and is thus in reality an official capacity suit properly subject to sovereign immunity.

Id. at 916-17 (internal quotes and citations omitted).

In *Bell v. City of Lacey*, No. 3:18-cv-05918-RBL, 2019 WL 2578582 (W.D. Wash. June 24, 2019) (slip copy), plaintiff, a non-tribal member, brought suit against a tribe alleging false imprisonment, infliction of emotional distress, and indifference to medical needs after he suffered a stroke while detained at a detention facility owned and operated by the tribe. The District Court for the Western District of Washington dismissed plaintiff's allegations of conspiracy against the tribe's chief executive officer and chief financial

officer on sovereign immunity grounds, finding that plaintiff's claims against the individual defendants stemmed from policy-level decisions made as representatives of the tribe and administrative conduct undertaken as officers.

In *Forsythe v. Reno-Sparks Indian Colony*, No. 2:16-cv-01867-GMN-VCF, 2017 WL 3814660, * 3-4 (D. Nev. Aug. 30, 2017), the United States District Court for the District of Nevada dismissed claims against individual tribal officers for discrimination in failing to award a woman-owned business a construction contract, finding that the complaint's allegations did not allege that the officers acted other than in their official capacities. *See also Stanko v. Tribe*, No. CIV. 17-5008-JLV, 2017 WL 4217113, * 4 (D. S.D. Sept. 20, 2017) (dismissing § 1983 claims against individual tribal jail officers because officers were acting within their official capacity at time of alleged incident).

Other federal circuits agree that the distinction between official- and personal-capacity claims survive in the tribal context post-*Lewis v. Clarke*. *See*, *e.g.*, *Buntin v. City of Boston*, 857 F.3d 69, 75-76 (1st Cir. 2017) (citing *Lewis* and dismissing § 1981 discrimination claims against individually named defendants because complaint did not contain allegations supporting claims for conduct outside of their official capacities).

Here, as in the above cases, it is not dispositive that JW Gaming brought suit against the Tribal Defendants as individuals. JW Gaming's claims in essence seek to hold the Tribal Defendants liable for the

manner in which they determined, in their official capacities, to use the proceeds of Plaintiff's casino investment. These claims implicate matters of internal governance and business administration, matters that are no less central to a tribe's "existence as an independent political community" as decisions regarding tribal membership. *See Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 757 (1998) [hereinafter "*Kiowa*"] (noting that Supreme Court retained doctrine of sovereign immunity "on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency"); *see also Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (noting that tribal casino "is not a mere revenue-producing tribal business. . . . The [Indian Gaming Regulatory Act] provides for the creation and operation of Indian casinos to promote 'tribal economic development, self-sufficiency, and strong tribal governments.' 25 U.S.C. §2702(1)."). In this case "the sovereign entity is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Cook*, 548 F.3d at 727.

C. Certiorari Should Be Granted Because the Proper Application of Tribal Sovereign Immunity is a Question of National Importance.

1. Immunity From Suit is a Necessary Element of Tribal Sovereignty that, Absent a Congressional Mandate to the Contrary, Must Be Preserved.

This Court has long recognized that Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) [hereinafter "*Bay Mills*"] (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) [hereinafter "*Potawatomi*"] (quotations omitted)). Among the core aspects of sovereignty that tribes possess is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). That immunity, this Court has explained, is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). "And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands." *Bay Mills*, 572 U.S. at 789 (citing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)). "Thus, [this Court has] time and again treated the 'doctrine of tribal immunity [as] settled law' and

dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Id*. (quoting *Kiowa*, 523 U.S. at 756).

This immunity from suit extends to the business activities of tribes, not merely to governmental activities. *See Kiowa*, 523 U.S. at 760 (declining to make exception for suits arising from a tribe's commercial activities, even when they take place off Indian lands); *see also Potawatomi*, 498 U.S. at 505-06 (reaffirming "longstanding doctrine of tribal sovereign immunity . . . in order to promote Indian self-government, self-sufficiency, and economic development. . . ."). The right to be immune from suit also extends to those officials through whom tribes must act. *See Cook*, 548 F.3d at 727 ("Tribal sovereign immunity 'extends to tribal officials when acting in their official capacity and within the scope of their authority.' ") (quoting *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002)).

Against this backdrop is the settled rule that Congress, not the courts, is empowered to determine the limits of tribal sovereign immunity. As this Court stated in *Kiowa*:

> Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation.
>
> In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue

> by comprehensive legislation counsels some caution by us in this area. Congress "has occasionally authorized limited classes of suits against Indian tribes" and "has always been at liberty to dispense with such tribal immunity or to limit it." It has not yet done so.
>
> In light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Kiowa, 523 U.S. at 759-60 (citations omitted).

By interpreting *Lewis v. Clarke* to permit suits against tribal officials for actions taken in their official capacity, the Ninth Circuit imposes a limitation on tribal sovereign immunity that is unsanctioned by Congress. This Court should accept certiorari in order to ensure that Congress's directives regarding tribal sovereign immunity are upheld.

2. The Decision Below Threatens to Open the Floodgates to Private Lawsuits Under State Tort Law.

Failing to adequately consider the nature of the allegations and relief sought in the complaint below, the Ninth Circuit held that the Tribal Defendants were the real parties in interest simply because they were

named individually. Not only does this conflict with settled law of this Court and the Second Circuit, but it opens a Pandora's box of private lawsuits under state tort law challenging actions that are essential to tribal self-governance. It also opens the door to the airing of intra tribal disputes in state and federal courts,[8] further undermining the ability of tribes to effectively govern. *See Santa Clara Pueblo*, 436 U.S. at 60 ("[R]esolution in a foreign forum of intra tribal disputes of a more 'public' character . . . cannot help but unsettle a tribal government's ability to maintain authority"). Permitting a plaintiff to strip tribal officials of immunity simply by pleading individual-capacity damages actions, would encourage political opponents, business rivals, or opponents of tribal sovereignty to subject officials at all levels of tribal government to tort suits in foreign courts. *See Butz v. Economou*, 438 U.S. 478, 515 (1978). *Lewis v. Clarke* does not support such a result, and the lower court's holding, if allowed to stand, will effectively eviscerate the doctrine of sovereign immunity for tribal officials in the Ninth Circuit.

As one court, writing shortly after adoption of the federal policy of Indian self-determination, succinctly stated:

> [S]overeign immunity is intended to protect what assets the Indians still possess from loss

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[8] Federal courts will likely be flooded with such disputes. As JW Gaming attempts to do here, plaintiffs will use the threat of federal judgments as a means to extract political concessions or settlements from the Tribe's governing members. Intra tribal disputes should be heard in tribal courts or resolved through tribal political processes, not made the subject of federal court litigation.

> through litigation. 'That has been the settled doctrine of the government from the beginning. If any other course were adopted, the tribes would soon be overwhelmed with civil litigation and judgments.' If tribal assets could be dissipated by litigation, the efforts of the United States to provide the tribes with economic and political autonomy could be frustrated.

Cogo v. Cent. Council of Tlingit & Haida Indians of Alaska, 465 F. Supp. 1286, 1288 (D. Alaska 1979) (quoting *Adams v. Murphy*, 165 F. 304 (308-09) (8th Cir. 1908)).

This Court should accept certiorari in order to reverse the Ninth Circuit's invitation for plaintiffs to file state tort law actions that challenge official actions of tribes, impede effective governance, and deplete tribal assets.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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