No.

In the Supreme Court of the United States

BRIAN LEWIS AND MICHELLE LEWIS, PETITIONERS

v.

WILLIAM CLARKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

PARTIES TO THE PROCEEDING

Petitioners are Brian Lewis and Michelle Lewis, plaintiffs and appellees below.

Respondent is William Clarke, defendant and appellant below.

The Mohegan Tribal Gaming Authority was initially named as a defendant but was subsequently dismissed from the case and was not a party in the Supreme Court of Connecticut.

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Brian Lewis and Michelle Lewis respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Connecticut in this case.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court (App., *infra*, 1a-17a) is reported at 320 Conn. 706. The opinion of the Connecticut Superior Court (App., *infra*, 18a-36a) is unreported but is available at 2014 WL 5354956.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on March 15, 2016. The jurisdiction of this court is invoked under 28 U.S.C. 1257(a).

INTRODUCTION

As "domestic dependent nations," Indian tribes enjoy some of the attributes of sovereignty, including sovereign immunity—the right not to be subject to suit without their consent. *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014) (quoting *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). In cases involving States and the federal government, this Court has held that sovereign immunity bars official-capacity actions against government officials. In an official-capacity action, although the official is the nominal defendant, the plaintiff seeks relief that runs against the government. Official-capacity suits thus "represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

Individual-capacity actions are different. In an individual-capacity action, the plaintiff seeks to impose personal liability on the official, and any award of damages "can be executed only against the official's personal assets." *Graham*, 473 U.S. at 166. For that reason, sovereign immunity does *not* bar an individual-capacity damages action against a state or federal official, even if the action arises out of conduct the official undertook while carrying out official duties.

This case presents the question whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment. Applying this Court's cases explaining the distinction between official-capacity and individual-capacity actions, the Ninth and Tenth Circuits have correctly held that the answer is no. But in the decision below, the Connecticut Supreme Court has joined the Second Circuit and the Montana Supreme Court in reaching the opposite conclusion.

The court below did not attempt to justify its holding on the basis of considerations of tribal sovereignty or self-government, nor could it have done so. Respondent was employed by an Indian tribe to drive a limousine to transport patrons to and from a casino. While driving on an interstate highway 70 miles from the casino, he ran into petitioners' car. 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. In dismissing petitioners' claims, the Connecticut Supreme Court applied a form of tribal sovereign immunity that is broader than the immunity enjoyed by States and the federal government, and it disregarded this Court's admonition that a State must retain the ability "to enforce its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035. The decision below will leave many persons who have been injured by tribal employees without any remedy at all.

The Connecticut Supreme Court attempted to distinguish some of the cases on the other side of the con-

flict, but there is little question that, on these facts, the Ninth and Tenth Circuits would have reached a different result. Given the number of courts on each side, the conflict will not be resolved without this Court's intervention. As long as it persists, there will be uncertainty about the standards governing tort claims against the hundreds of thousands of tribal employees in the nation.

Less than four years ago, this Court called for the views of the Solicitor General in *Young* v. *Fitzpatrick*, 133 S. Ct. 2848 (2013), a case raising a similar question, but it ultimately denied certiorari after the Solicitor General explained that the issue had not been adequately preserved. This case, by contrast, is an ideal vehicle for resolving this important legal question. This Court's review is needed now.

STATEMENT

1. On October 22, 2011, petitioners were driving on Interstate 95 in Norwalk, Connecticut, when their car was struck from behind by a limousine driven by respondent. Petitioners' car was pushed into a concrete barrier, and petitioners were injured. At the time of the accident, respondent was employed by the Mohegan Tribal Gaming Authority (MTGA), an arm of the Mohegan Tribe of Indians of Connecticut, and he was driving patrons of the Mohegan Sun Casino, which is approximately 70 miles from Norwalk. App., *infra*, 2a.

2. Petitioners brought a negligence action against respondent in the Connecticut Superior Court. Petitioners initially named both respondent and the MTGA as defendants, but they voluntarily dismissed the MTGA and filed an amended complaint against only respondent. App., *infra*, 3a, 18a-19a.

Respondent moved to dismiss. He argued that the MTGA was entitled to sovereign immunity because it is an arm of the Mohegan Tribe and that he, in turn, was entitled to sovereign immunity because he was an employee of the MTGA acting within the scope of his employment at the time of the accident. App., *infra*, 22a.

The Connecticut Superior Court denied the motion to dismiss. App., *infra*, 18a-36a. The court applied the test adopted by the Ninth Circuit in *Maxwell* v. *County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), under which tribal employees do not enjoy sovereign immunity when "the remedy sought by the plaintiffs would operate only against them personally." App., *infra*, 27a. Here, the court explained, respondent is "being sued solely in his individual capacity for an alleged tort occurring off the tribal reservation," and "because the remedy sought is not against the MTGA, [respondent] is not immune from suit." *Id.* at 25a.

3. The Connecticut Supreme Court reversed. App., *infra*, 1a-17a. The court stated that "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." *Id.* at 10a (quoting *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997)) (brackets in original). It noted that "the tribe is neither a party, nor the real party in interest because the remedy sought will be paid by the defendant himself, and not the tribe." App., *infra*, 13a. And it acknowledged that, in *Maxwell*, the Ninth Circuit had concluded that sovereign immunity is inapplicable when plaintiffs seek a remedy only from individual tribal employees,

not from the tribe itself. *Id.* at 14a. But it reasoned that *Maxwell* was inapposite because that case involved allegations of gross negligence, not ordinary negligence, and "[a]ctions involving claims of more than negligence are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity." *Ibid.* The court concluded that "plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he acted outside the scope of his authority." *Id.* at 16a-17a. The court therefore remanded with instructions to grant the motion to dismiss. *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

A. Lower courts are divided on whether tribal sovereign immunity bars individual-capacity damages actions against tribal employees

The Connecticut Supreme Court held that "the doctrine of tribal sovereign immunity extends to [petitioners'] claims against [respondent] because the undisputed facts of this case establish that he was an employee of the tribe and was acting within the scope of his employment when the accident occurred." App., *infra*, 16a. That decision contributes to a conflict among the lower courts. All courts that have considered the question have agreed that tribal sovereign immunity applies to at least some actions against tribal officers and employees. But the courts disagree about when it applies. The Ninth and Tenth Circuits

have held that immunity applies only when the remedy sought would run against the tribe. On the other hand, the court below has joined the Second Circuit and the Montana Supreme Court in holding that immunity applies whenever the conduct giving rise to the cause of action was within the scope of the defendant's employment. As this case illustrates, those two approaches lead to inconsistent results in cases with similar facts.

1. The Ninth and Tenth Circuits have held that tribal sovereign immunity does not apply to individual-capacity damages actions

The court below expressly declined to follow the Ninth Circuit's decision in *Maxwell* v. *County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), in which the court held that a damages action "brought against individual officers in their individual capacities * * * does not implicate sovereign immunity." *Id.* at 1088. In *Maxwell*, the Ninth Circuit explained that the application of sovereign immunity to a suit against a government or tribal official depends on the remedy that is sought. When "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting," then the action is one against the sovereign, and immunity may apply. *Ibid.* (quoting *Shermoen* v. *United States*, 982 F.2d 1312, 1320 (9th Cir. 1992), cert. denied, 509 U.S. 903 (1993)) (brackets in original). But when a "plaintiff seeks money damages 'not from the state treasury but from the officer[s] personally,'" then the action does not implicate sovereign immunity. *Ibid.*

(quoting *Alden* v. *Maine*, 527 U.S. 706, 757 (1999)) (brackets in original).

The plaintiffs in *Maxwell* had brought state-law tort claims against paramedics employed by a tribal fire department who, plaintiffs alleged, had improperly delayed the treatment of a shooting victim. *Id.* at 1079-1081. The paramedics argued that the claims were barred by tribal sovereign immunity, but the Ninth Circuit rejected that argument, explaining that the "paramedics do not enjoy tribal sovereign immunity because a remedy"—money damages—"would operate against them, not the tribe." *Id.* at 1087.

In an earlier case, *Cook* v. *Avi Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), cert. denied, 556 U.S. 1221 (2009), the Ninth Circuit had stated that "tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority." *Id.* at 727. The court in *Maxwell* acknowledged that language but explained that *Cook* concerned a suit against tribal defendants in their *official* capacity, and therefore "the tribe was the 'real, substantial party in interest.'" 708 F.3d at 1088 (quoting *Cook*, 548 F.3d at 727). The decision in *Cook*, the *Maxwell* court observed, had "conflated the 'scope of authority' and 'remedy sought' principles because they are coextensive in official capacity suits." *Ibid.* The Ninth Circuit concluded that *Cook* "does not change the rule that individual capacity suits related to an officer's official duties are generally permissible." *Ibid.*

More recently, in a damages action involving state-law claims for battery, false imprisonment, and other torts, the Ninth Circuit reaffirmed *Maxwell*'s holding, determining that tribal employees were "not entitled

to sovereign immunity because they were sued in their individual rather than their official capacities, as any recovery will run against the individual tribal defendants, rather than the tribe." *Pistor* v. *Garcia*, 791 F.3d 1104, 1108 (9th Cir. 2015). The court reasoned that "[s]o long as any remedy will operate against the officers individually, and not against the sovereign, there is 'no reason to give tribal officers broader sovereign immunity protections than state or federal officers.'" *Id.* at 1113 (quoting *Maxwell*, 708 F.3d at 1089). "Even if the Tribe agrees to pay for the tribal defendants' liability," the court added, "that does not entitle them to sovereign immunity" because "'[t]he unilateral decision to insure a government officer against liability does not make the officer immune from that liability.'" *Id.* at 1114 (quoting *Maxwell*, 708 F.3d at 1090).

Like the Ninth Circuit, the Tenth Circuit has recognized that tribal sovereign immunity may bar official-capacity actions against tribal officers but does not apply to individual-capacity damages actions. In *Native American Distributing* v. *Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008), the court explained that sovereign immunity applies only when the remedy sought would operate against the tribe:

> The general bar against official-capacity claims * * * does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities * * * . Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities—that is, because the powers they possess in those capacities enable

> them to grant the plaintiffs relief on behalf of the tribe.

Id. at 1296 (citation omitted); accord *Fletcher* v. *United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) ("Because the relief requested * * * would run against the Tribe itself, the Tribe's sovereign immunity protects these defendants in their official capacities."). Although a subsequent decision undermined the clarity of that statement by extending sovereign immunity to bar a damages action against a tribal governor, see *Burrell* v. *Armijo*, 603 F.3d 825, 832 (10th Cir. 2010), more recently the Tenth Circuit has continued to apply the rule set out in *Native American Distributing*, see *Sanders* v. *Anoatubby*, 631 Fed. Appx. 618, 622 n.9 (10th Cir. 2015).

The Louisiana Court of Appeal has also embraced the Ninth Circuit's rule, approvingly citing *Maxwell* and *Pistor* and adopting "a remedy-focused analysis" to determine the availability of sovereign immunity. *Zaunbrecher* v. *Succession of David*, 181 So. 3d 885, 888 (La. Ct. App. 2015), cert. denied, 187 So. 3d 1002 (La. 2016).

2. The court below joined the Second Circuit and the Montana Supreme Court in holding that sovereign immunity bars actions against tribal employees based on conduct within the scope of their employment

As the court below observed, the Second Circuit has held that tribal sovereign immunity bars an individual-capacity damages action against a tribal employee when the action is based on conduct within the scope of his employment. App., *infra*, 11a-12a (cit-

ing *Chayoon* v. *Chao*, 355 F.3d 141, 143 (2d Cir.), cert. denied, 543 U.S. 966 (2004)). In *Chayoon*, for example, the Second Circuit held that tribal sovereign immunity barred a damages action against tribal officials under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* That statute allows for the imposition of liability on individual supervisors, but the court did not consider whether the damages sought by the plaintiff would come from the officials as individuals. See 29 U.S.C. 2617(a) (providing a damages action against an "employer"); 29 U.S.C. 2611(4)(A)(ii)(I) (defining "employer" to include "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer"). Instead, it relied on the categorical proposition 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." *Chayoon*, 355 F.3d at 143; accord *Romanella* v. *Hayward*, 933 F. Supp. 163, 168 (D. Conn. 1996) (concluding that tribal sovereign immunity barred a damages action against tribal employees who were responsible for the maintenance of a parking lot in which the plaintiff slipped, and reasoning that "the negligence claims asserted against [the employees] directly relate to their performance of their official duties"), aff'd, 114 F.3d 15 (2d Cir. 1997).

The Montana Supreme Court has adopted the same position. In *Koke* v. *Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 68 P.3d 814 (Mont. 2003), the plaintiffs sought tort damages against tribal offi-

cials for alleged misconduct in connection with a tribal election. *Id.* at 815. Although the plaintiffs had sued the officials as individuals, see *id.* at 814, the Montana Supreme Court held that tribal sovereign immunity barred the action because "the tribal officials acted in their official capacities" in the events giving rise to the litigation, *id.* at 817.

Intermediate appellate courts in Arizona, California, New York, and Washington have reached the same conclusion. See *Filer* v. *Tohono O'Odham Nation Gaming Enter.*, 129 P.3d 78, 85-86 (Ariz. Ct. App. 2006) (tribal sovereign immunity barred damages action against tribal employees who allegedly served alcohol to intoxicated casino patron who later caused accident); *Trudgeon* v. *Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 72 (Cal. Ct. App. 1999) (tribal sovereign immunity barred damages action against tribal employees who allegedly failed to prevent fight in casino parking lot); *Zeth* v. *Johnson*, 765 N.Y.S.2d 403, 404 (N.Y. App. Div. 2003) (tribal sovereign immunity barred damages action against tribal employee who struck plaintiff's vehicle while operating snowplow); *Young* v. *Duenas*, 262 P.3d 527, 531 (Wash. Ct. App. 2011) (tribal sovereign immunity barred damages action against tribal police officers who allegedly used excessive force in making arrest), cert. denied, 133 S. Ct. 2848 (2013).

3. The decision below cannot be reconciled with the decisions of the Ninth and Tenth Circuits

The Connecticut Supreme Court attempted to distinguish the Ninth Circuit's decision in *Maxwell* on the theory that that case "involved claims of gross negli-

gence," and "[a]ctions involving claims of more than negligence are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity." App., *infra*, 14a; see *id.* at 15a n.6 (offering a similar distinction of *Pistor*). That reasoning is flawed.

As an initial matter, an employee's conduct is not outside the scope of his or her employment merely because it involves "gross negligence." Under the common-law test applied in most jurisdictions, conduct is within the scope of employment if it is "of the kind [the employee] is employed to perform," if "it occurs substantially within the authorized time and space limits," if "it is actuated, at least in part, by a purpose to serve the master," and, when it involves the use of force, if the use of force is foreseeable by the master. *Restatement (Second) of Agency* § 228(1) (1958). That test applies regardless of how negligent or even willful the conduct may be: "An act may be within the scope of employment although consciously criminal or tortious." *Id.* § 231. Accordingly, courts routinely find grossly negligent conduct to be within the scope of employment. See, *e.g.*, *Scottsdale Ins. Co.* v. *Subscription Plus, Inc.*, 299 F.3d 618, 621-622 (7th Cir. 2002); *Protectus Alpha Nav. Co.* v. *North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1387 (9th Cir. 1985).

More importantly, under the rule adopted by the Ninth and Tenth Circuits, neither the scope of tribal officials' employment nor their level of carelessness has anything to do with whether sovereign immunity applies to an action against them. As those courts have explained, immunity depends on the capacity in which the defendants are sued, not on the capacity in

which they were acting at the time of the events giving rise to the litigation. "So long as any remedy will operate against the officers individually, and not against the sovereign," tribal sovereign immunity does not apply. *Pistor*, 791 F.3d at 1113; accord *Native Am. Distrib.*, 546 F.3d at 1296.

The complaint in this case seeks relief only from an individual tribal employee, not from the Tribe—the MTGA was expressly dropped as a defendant. App., *infra*, 3a n.2. For that reason, it is an individual-capacity action for damages against the tribal employee. Had this lawsuit been brought in either the Ninth or the Tenth Circuit, it would not have been dismissed on the basis of sovereign immunity.

B. The decision below is contrary to this Court's cases limiting the scope of sovereign immunity in actions against government officials

Sovereign immunity bars suits seeking relief from the sovereign, not suits seeking relief only from the sovereign's employees. In extending tribal sovereign immunity to bar a damages action against a tribal employee, the Connecticut Supreme Court misapplied this Court's precedents describing the difference between individual-capacity and official-capacity actions. It also created a form of tribal immunity that is far broader than the comparable immunities applicable to States and the federal government. That immunity will leave many plaintiffs who have been injured by tribal employees without a remedy.

1. This Court has identified an "important limit to the principle of sovereign immunity"—namely, that it does not "bar all suits against state officers." *Alden*,

527 U.S. at 756. Some suits against officers "are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State." *Ibid.* But sovereign immunity "does not bar certain actions against state officers for injunctive or declaratory relief," as under *Ex parte Young*, 209 U.S. 123 (1908). *Alden*, 527 U.S. at 757. And, crucially, "[e]ven a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Ibid.*

As this Court has previously explained, "damages actions against public officials require[] careful adherence to the distinction between personal- and official-capacity suits." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law," and "an award of damages against an official in his personal capacity can be executed only against the official's personal assets." *Id.* at 165, 166. By contrast, "[o]fficial-capacity suits * * * generally represent only another way of pleading an action against an entity of which an officer is an agent." *Id.* at 165 (quoting *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). In other words, an official-capacity suit "is not a suit against the official but rather is a suit against the official's office. As such it is no different from a suit against the State itself." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (citation omitted).

The Connecticut Supreme Court expressly rejected what it called "the 'remedy sought' approach"—that is, an inquiry into whether the relief sought in the litigation would run against the sovereign or only against the officer personally. App., *infra*, 16a. Instead, the court focused on the capacity in which the defendant was alleged to have acted; in its view, the critical fact was respondent's status as "an employee of the tribe [who] was acting within the scope of his employment when the accident occurred." *Ibid.* But that approach is directly contrary to this Court's instruction that "the phrase 'acting in their official capacities,'" when used in describing official-capacity claims, "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Hafer* v. *Melo*, 502 U.S. 21, 26 (1991). Merely acting within the scope of official authority does not immunize an officer from personal liability. *Id.* at 28. Instead, the principle of sovereign immunity simply "does not erect a barrier against suits to impose 'individual and personal liability'" on government officials, even if that liability is based on acts they took in the course of their official duties. *Id.* at 30-31 (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 238 (1974)); accord *Alden*, 527 U.S. at 757.

2. The decision below yields the anomalous effect of extending the sovereign immunity of Indian tribes far more broadly than the sovereign immunity of States or the federal government. As to States, the "fundamental postulates implicit in the constitutional design," *Alden*, 527 U.S. at 729, include the principles that "each State is a sovereign entity in our federal system" and that immunity from suit is "inherent

in the nature of sovereignty," *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 54 (1996) (internal quotation marks omitted). Nevertheless, as already explained, those principles do not bar actions "against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself." *Alden*, 527 U.S. at 757. Such actions—most commonly brought under 42 U.S.C. 1983—are routine.

Similarly, "[s]overeign immunity shields the United States from suit" in the absence of an express statutory waiver. *United States* v. *Bormes*, 133 S. Ct. 12, 16 (2012). But the sovereign immunity of the United States does not prohibit individual-capacity damages actions against federal officers. For example, this Court has recognized a cause of action against federal officers for certain constitutional violations. *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); see *id.* at 410 (Harlan, J., concurring) (noting that, notwithstanding the availability of individual liability, "the sovereign still remains immune to suit"). And individual liability extends beyond constitutional claims: this Court has held that federal officials are not generally immune from state-law tort liability. While the Court has recognized that state-law tort suits against federal officers may be subject to an individual official immunity—not to sovereign immunity—that individual immunity is limited to situations in which "the challenged conduct is within the outer perimeter of an official's duties and is *discretionary* in nature." *Westfall* v. *Erwin*, 484 U.S. 292, 300 (1988) (emphasis added). Congress subsequently broadened the scope of immunity

for federal officials, but it has created no comparable statutory immunity for tribal officials. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563.

As the Ninth Circuit has correctly observed, there is "no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles." *Maxwell*, 708 F.3d at 1089. Indeed, this Court has held that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," not some other, broader immunity. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978); see *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2041 (2014) (Sotomayor, J., concurring) (cautioning against "disparate treatment of these two classes of domestic sovereigns"—States and Indian tribes).

In *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), this Court observed that tribal sovereign immunity is a common-law doctrine that "developed almost by accident." *Id.* at 756. Recognizing that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," the Court has adhered to it only because of principles of *stare decisis*. *Id.* at 758; accord *Bay Mills*, 134 S. Ct. at 2036-2039. But while those principles may compel the doctrine's retention (at least in the absence of congressional action), they provide no basis for extending it beyond that of any other sovereign in our system of government.

3. The Connecticut Supreme Court's error was not simply a matter of attaching the wrong label to the immunity that it extended to respondent. While this Court has recognized immunity doctrines that protect some government officials from certain kinds of individual-capacity damages actions, none of those doctrines applies here. This Court's cases construing the scope of official immunities show how far the court below departed from established principles governing damages actions against government officials.

For example, this Court has held that certain government officials are entitled to qualified immunity from liability based on their official conduct. Under the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). That doctrine, however, does not apply to this case, which involves a claim of negligence arising from the nondiscretionary act of driving a limousine on a highway.

This Court has also recognized a rule of absolute immunity for certain government officials, but that rule applies even more narrowly than qualified immunity. Specifically, absolute immunity is available only to government officials performing certain narrowly defined functions, most of them associated with the judicial process. See *Rehberg* v. *Paulk*, 132 S. Ct. 1497 (2012) (witnesses); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (judges); *Tenney* v. *Brandhove*, 341 U.S. 367

(1951) (legislators); see also *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (President of the United States). The functions performed by respondent—driving patrons to and from a tribal casino—do not fit within any of the traditional categories of absolute immunity.

Finally, certain activities of Indian tribes may be immune from state regulation altogether, including through the imposition of civil liability on tribal officials. Thus, when a state-law claim arises out of on-reservation activity, it may sometimes be preempted by federal law or by the interests of tribal sovereignty. See *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). But that doctrine has no application to this case, which arises out of off-reservation commercial activity. Applying state law to a motor-vehicle accident on an off-reservation highway would in no sense "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Mescalero Apache Tribe*, 462 U.S. at 332 (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)). Rather, it would be consistent with the rule that "'Indians going beyond reservation boundaries' are subject to any generally applicable state law." *Bay Mills*, 134 S. Ct. at 2034 (quoting *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005)).

Indeed, when this Court reaffirmed in *Bay Mills* that tribes do not give up their sovereign immunity by engaging in off-reservation commercial activity, it emphasized that tribal officials would remain subject to state regulation and that a State would retain a "panoply of tools * * * to enforce its law on its own

lands." 134 S. Ct. at 2035. Thus, the Court noted that "tribal immunity does not bar * * * a suit for injunctive relief against *individuals*, including tribal officials, responsible for unlawful conduct." *Ibid.* The Court went on to observe that "to the extent civil remedies proved inadequate, [a State] could resort to its criminal law." *Ibid.* Consistent with *Bay Mills*, the State of Connecticut applied its criminal law to respondent after the accident at issue here: the Connecticut State Police cited him for violating Connecticut General Statutes § 14-240 by following a vehicle too closely, an infraction punishable by a fine. Resp. Conn. Super. Ct. Mot. to Dismiss, Ex. B (Dec. 31, 2013). The court below did not explain why a tribal employee engaging in off-reservation conduct should be immune from state tort law when he is subject to state criminal law.

Tort judgments are an important means by which a State "enforce[s] its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035. Tort law serves not only to compensate victims of accidents but also to deter wrongful conduct. See *Restatement (Second) of Torts* § 901 (1979). As this Court has observed, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion) (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)). When a commercial enterprise enjoys sovereign immunity, it need not comply with rules of conduct established by state tort law, including taking precautions to prevent accidents, because it will not be forced to internalize the cost of its misconduct. In that con-

text, the only way to deter tortious conduct is by allowing the victims of a wrong to seek a remedy from the individuals who injured them.

4. The decision below will leave many plaintiffs who are injured by tribal employees without a remedy. There is no dispute that a tribe itself enjoys sovereign immunity, so if immunity extends to the tribe's employees, then there will be no one from whom the victims of tribal employees' torts can recover.

Of course, it is possible that some tribes may choose to waive immunity to allow tort suits. Under the Mohegan Tribal Code, for example, a person injured in circumstances such as those of this case may bring a claim in the Mohegan Gaming Disputes Court. See Mohegan Tribal Code § 3-248(a). Such a proceeding carries no right to a jury trial, and any award is subject to strict limits on non-economic damages and to a prohibition on punitive damages and damages for loss of consortium. Mohegan Tribal Code §§ 3-248(d), 3-251(a)(1)-(3). In addition, a claimant's potential recovery is capped at the limit of any liability insurance policy the Tribe happens to maintain. Mohegan Tribal Code § 3-251(a)(4). More importantly, that remedy exists only at the grace of the Tribe, and under the decision below, sovereign immunity extends to the Tribe's employees whether or not the Tribe chooses to make a tort claim procedure available. Many tribes in the United States have no tort claim procedure, and many do not maintain tribal courts. Victims of torts committed by those tribes' employees will be left with no avenue for relief.

In the context of commercial disputes, the potential for unfairness of a broad application of tribal sovereign

immunity may be limited because parties dealing with tribes can contract for a waiver of immunity. See, *e.g.*, *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (tribe waived immunity by agreeing to a contract with an arbitration clause). Similarly, as this Court observed in *Bay Mills*, a State seeking the ability to sue a tribe "need only bargain for a waiver of immunity" when negotiating a gaming compact. 134 S. Ct. at 2035. But petitioners, like most tort victims, had no opportunity to negotiate with the Tribe whose employee caused their injuries. As they were driving on a highway 70 miles from the Mohegan Tribe's casino, petitioners had no reason to anticipate that a tribal employee would run into them. It would be unfair and anomalous to apply sovereign immunity to deprive them of a remedy for their injuries.

C. The question presented is important, and this case would be a good vehicle for resolving it

1. Because the Ninth Circuit's decisions in *Maxwell* and *Pistor* and the Tenth Circuit's decision in *Native American Distributing* are consistent with this Court's cases distinguishing official-capacity from individual-capacity suits, further consideration is unlikely to lead these courts to change their positions and adopt the view of the courts that have agreed with the court below. Conversely, because several other state and federal courts have taken the Connecticut Supreme Court's side of the conflict, there is little chance that they will all change their positions. Additional consideration in the lower courts is unlikely to

resolve the conflict, and intervention by this Court is necessary.

2. As this case demonstrates, tribal commercial activity has a broad footprint outside of Indian reservations. There are now 486 tribal gaming operations in 28 States, and their gross gaming revenues are more than $28 billion each year. Nat'l Indian Gaming Comm'n, *NIGC Fact Sheet* (Aug. 2015). Those facilities employ approximately 600,000 people. H.R. Rep. No. 260, 114th Cong., 1st Sess. 21 (2015). And of course gaming is just one of the commercial activities in which tribes can engage.

As tribal commercial activity increases, interactions between tribal employees and other persons will increase as well. In those interactions, tribal employees—like any other employees—will sometimes commit torts. They can be involved in motor-vehicle accidents, as in this case; they can serve alcohol to intoxicated persons, see, *e.g.*, *Filer*, 129 P.3d at 80; they can commit employment-related torts, see, *e.g.*, *Chayoon*, 355 F.3d at 142; they can fail to prevent physical assaults, see, *e.g.*, *Trudgeon*, 84 Cal. Rptr. 2d at 66-67; or they can engage in physical altercations themselves and seize property from casino patrons, see, *e.g.*, *Pistor*, 791 F.3d at 1108-1109. The standard governing the liability of tribal employees is therefore a question with important practical consequences. In light of the division in the lower courts, that question requires resolution by this Court.

3. This Court recognized the importance of the question presented when it invited the Solicitor General's views on the petition for a writ of certiorari in *Young* v. *Fitzpatrick*, 133 S. Ct. 2848 (2013). The

plaintiff in that case was the personal representative of the estate of a man who died while being arrested by the Puyallup Tribal Police. He sought damages from the individual police officers for their alleged use of excessive force. The Washington Court of Appeals held that his claims were barred by tribal sovereign immunity, which, it said, "extends not only to the tribe itself, but also to tribal officers and tribal employees, as long as their alleged misconduct arises while they are acting in their official capacity and within the scope of their authority." *Young* v. *Duenas*, 262 P.3d at 531.

In response to this Court's invitation, the Solicitor General argued that the case did not squarely raise the question presented here. Observing that the Washington Court of Appeals had "characterized [the] suit as an 'attempt[] to sue the tribe in a civil suit in state court,'" the Solicitor General reasoned that the court "did not consider the state-law tort claims to be truly individual-capacity ones." Gov't Br. at 15, *Young* v. *Fitzpatrick*, *supra* (No. 11-1485) (quoting *Young* v. *Duenas*, 262 P.3d at 532). He also noted that the petitioner had failed to address the question whether tribal sovereign immunity can apply to individual-capacity damages actions: "[E]ven assuming that the state court's decision could be read as implicitly applying tribal sovereign immunity to state-law tort claims beyond the official-capacity context referred to in the cases on which it relied, that question is not fairly included in the question presented, nor even alluded to in the body of the petition." *Id.* at 17.

Unlike *Young*, this case squarely presents the question whether sovereign immunity applies to indi-

vidual-capacity damages actions against tribal employees. The question was briefed below and thoroughly addressed by the Connecticut Supreme Court. And because it involves a commonplace factual scenario that is likely to recur, this case would be an ideal vehicle for resolving that important legal question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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