No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS, ET AL., PETITIONERS

v.

WILLIAM CLARKE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

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

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INTEREST OF THE UNITED STATES

The United States has long been "committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 (1985). A tribe's sovereign immunity from suit is one important protector of tribal autonomy. The United States therefore has an interest in ensuring the correct application of the doctrine of tribal sovereign immunity.

STATEMENT

1. This case arises out of an automobile accident involving an employee of the Mohegan Tribal Gaming Authority (Gaming Authority), which is an arm of the federally recognized Mohegan Tribe of Indians of Connecticut (the Tribe). Pet. App. 4a & n.4; 81 Fed. Reg. 26,829 (May 4, 2016). Respondent was employed by the Gaming Authority as a limousine driver. On

October 22, 2011, while respondent was driving patrons of the Mohegan Sun Casino to their homes in a limousine owned and insured by the Gaming Authority, he rear-ended petitioners' vehicle. The accident occurred on Interstate 95 near Norwalk, Connecticut, outside the Tribe's reservation. Pet. App. 2a-3a, 20a.

2. The Tribe has waived the sovereign immunity of the Gaming Authority and consented to suits "by persons with tort claims arising under th[e Mohegan Torts] Code, but only in the Mohegan Gaming Disputes Court." Mohegan Tribe of Indians Code (Mohegan Tribal Code), Ch. 3, Art. IV, § 3-250(b). The Tribal Code governs "the adjudication of torts arising from actions of the [Gaming Authority], and * * * [its] authorized officials, agents, employees and representatives acting within the scope of their authority or employment on behalf of [the Gaming Authority], wherever located." *Id.* § 3-244; see also *id.* § 3-248(a). The Tribal Code provides that "[n]othing herein shall be construed as a waiver of either the Mohegan Tribe or the [Gaming Authority] of its sovereign immunity as to claims arising under any Connecticut General Statute or arising under Connecticut common law." *Id.* § 3-250(g).

The Tribal Code does not permit recovery from the Gaming Authority or its employees of (1) punitive damages, (2) damages for loss of consortium, (3) noneconomic damages in excess of 200% of the proven actual damages, or (4) "[d]amages in excess of the limits of any applicable liability insurance policy carried by" the Tribe or the Gaming Authority. Ch. 3, Art. IV, §§ 3-250(b), 3-251(a).

In addition, the Tribal Code provides that if an employee gives the Gaming Authority prompt notice, the

Gaming Authority "shall save harmless and indemnify its Officer or Employee from financial loss and expense arising out of any claim, demand, or suit by reason of his or her alleged negligence * * * or other act or omission resulting in damage or injury, if the Officer or Employee is found to have been acting in the discharge of his or her duties or within the scope of his or her employment and such act or omission is found not to have been wanton, reckless or malicious." Ch. 4, Art. III, § 4-52. The Tribal Code further provides that the Gaming Authority "shall provide for the defense" of its employees "in any civil action or proceeding in any Mohegan Tribal, State or Federal court" arising from torts alleged to have been committed while acting within the scope of employment. *Id.* § 4-53.

3. Although petitioners could have sued the Gaming Authority in the Mohegan Gaming Disputes Court, they instead filed a state-law negligence action against respondent in Connecticut Superior Court. Pet. App. 18a. Petitioners initially named both respondent and the Gaming Authority as defendants. Shortly thereafter, petitioners voluntarily dismissed their claims against the Gaming Authority and filed an amended complaint against respondent alone, seeking damages from him personally. *Id.* at 18a-19a. Respondent moved to dismiss petitioners' amended complaint for lack of subject matter jurisdiction. Respondent argued that, because he was acting within the scope of his employment when the accident occurred, the negligence claim against him was barred by tribal sovereign immunity. *Id.* at 22a.

The Connecticut Superior Court denied respondent's motion to dismiss. Pet. App. 18a-36a. The

court held that the Gaming Authority's sovereign immunity did not protect respondent from being sued "in his individual capacity for an alleged tort occurring off the tribal reservation injuring non-patrons" of the Mohegan Sun Casino. *Id.* at 25a. The court explained that "sovereign immunity does not extend to a tribal employee who is sued in his individual capacity when damages are sought from the employee, not from the tribe, and will in no legally cognizable way affect the tribe's ability to govern itself independently." *Id.* at 22a-23a; see *id.* at 25a-36a. In this case, the court noted, petitioners "seek money damages not from the sovereign Mohegan Tribe but from [respondent] personally." *Id.* at 27a.

The Superior Court rejected respondent's argument that the Gaming Authority, and not respondent, is the real party in interest because it is "obligated to defend and indemnify [respondent] pursuant to the Mohegan Tribal Code," and any judgment against respondent would therefore be paid from the Gaming Authority's assets. Pet. App. 34a-35a; see Mohegan Tribal Code, Ch. 4, Art. III, §§ 4-52, 4-53. The court explained that "[a] voluntary undertaking cannot be used to extend sovereign immunity where it did not otherwise exist." Pet. App. 35a.

4. The Connecticut Supreme Court reversed and remanded with directions to grant respondent's motion to dismiss. Pet. App. 1a-17a. The court explained that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority," which includes the common-law immunity from suit traditionally enjoyed by sovereign powers. *Id.* at 7a (quoting *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). "It is

well established," the court then stated, that "the 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 omitted)); see generally *id.* at 11a-17a. The court therefore concluded that petitioners' claims were barred by tribal sovereign immunity because "the undisputed facts establish that [respondent] was acting within the scope of his employment" at the time of the collision. *Id.* at 10a, 16a.

In the Connecticut Supreme Court's view, "when the complaint concerns actions taken in [the] defendant's official or representative capacit[y]" and within the scope of his employment, a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the [t]ribe." Pet. App. 11a (quoting *Chayoon* v. *Chao*, 355 F.3d 141, 143 (2d Cir.) (per curiam), cert. denied, 534 U.S. 966 (2004)); see *id.* at 12a-13a. Instead, the court continued, "a tribal official—even if [named] in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority.'" *Id.* at 13a (quoting *Bassett* v. *Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F. Supp. 2d 271, 280 (D. Conn. 2002)).

SUMMARY OF ARGUMENT

I. A. Sovereign entities, including Indian tribes, are generally entitled to immunity from suit in the United States. Where a plaintiff names an employee of the sovereign as defendant, rather than the sovereign itself, the suit may nevertheless be barred by sovereign immunity, depending on whether the claim

seeks relief from the individual in an official capacity or in a personal capacity.

A suit against an employee of the sovereign is an official-capacity suit if the requested relief would run against the government—for example, where the plaintiff seeks an award of benefits wrongfully withheld or a refund of taxes paid. A personal-capacity suit, on the other hand, seeks to impose personal liability on a government employee for actions taken in the course of his employment. The rule that sovereign immunity does not bar personal-capacity damages suits arising out of an employee's performance of official duties has been applied to federal and state employees alike.

B. Tribal sovereign immunity arises from the same principles underlying federal and state sovereign immunity, and the Court should therefore apply the same analysis to determine whether a suit against a tribal employee is an official-capacity suit that should be treated as a suit against the Tribe itself.

C. Petitioners' suit is an action against respondent in his personal capacity and therefore is not barred by the Tribe's sovereign immunity. The Connecticut Supreme Court reached the opposite conclusion by relying on decisions holding that a claim directly related to a tribal employee's performance of his official duties is a claim against the sovereign and could not be considered a personal-capacity claim. Those holdings are directly contrary to the settled rule that distinguishing between a personal-capacity suit and an official-capacity suit turns not on the conduct that gave rise to the suit, but on the party against whom relief is sought.

II. A. Although sovereign immunity does not bar personal-capacity suits against employees of a sover-

eign, employees who are sued in their personal capacities may raise the related but distinct defense of *official* immunity. For negligence actions, this Court held that federal common law immunized federal employees from liability arising out of actions that involve the employee's exercise of "discretionary" judgment. *Westfall* v. *Erwin*, 484 U.S. 292, 295-297 (1988). That common-law rule reflects a balance between the benefits and costs of insulating government employees from suit. That limitation on official immunity of federal employees has now been superseded by the Westfall Act, 28 U.S.C. 2679, which confers absolute immunity on federal employees and substitutes the United States as defendant under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680.

B. The same concerns that justified recognition of official immunity for federal employees as a matter of federal common law justify affording official immunity to tribal employees. A tribe's ability to exercise its sovereign powers, like that of the federal government, depends on the freedom of its employees to exercise independent judgment. The respect owed to tribal sovereignty and self-government therefore supports the common-law defense of official immunity for tribal employees sued under state tort law. The scope of that immunity for negligence claims applies only to actions involving the exercise of discretionary judgment.

Although federal employees now enjoy complete *statutory* immunity from tort liability, the purposes of the common-law defense counsel against extending that broader immunity to tribal employees as a matter of federal common law. That is especially so because the statutory immunity conferred on federal employees is coupled with a waiver of sovereign immunity

enabling injured plaintiffs to sue the United States, and because Congress has conferred absolute immunity on certain tribal employees (likewise coupled with substitution of the United States under the FTCA) but has not done so for respondent. The Connecticut courts could, however, extend a broader immunity defense to tribal employees, or defer to the Tribe's waiver of its sovereign immunity or to tribal law, as a matter of comity.

C. The Connecticut courts would be free on remand to consider the possibility that respondent is entitled to an official-immunity defense to the extent that issue remains open as a procedural matter.

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY DOES NOT BAR TORT SUITS THAT SEEK DAMAGES AGAINST TRIBAL EMPLOYEES IN THEIR PERSONAL CAPACITIES

A. Sovereign Immunity Does Not Bar Personal-Capacity Suits Against Employees Of The Sovereign

Sovereign entities, including Indian tribes, are generally entitled to immunity from suit in the United States, unless that immunity is waived by the sovereign or validly abrogated by Congress. See *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *Alden* v. *Maine*, 527 U.S. 706, 713 (1999); *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Price* v. *United States*, 174 U.S. 373, 375-376 (1899). It is also well established that even where a plaintiff names an officer or employee of the sovereign as defendant (rather than the sovereign itself), the suit may nevertheless be barred by sovereign immunity. *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459,

464 (1945). Whether sovereign immunity bars such a suit depends on whether plaintiff seeks relief from that individual in his official or his personal capacity. *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991); *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985).

1. A suit against an officer or employee of the sovereign is an official-capacity suit if the plaintiff "must look to the government entity itself" for relief. *Graham*, 473 U.S. at 166. For example, in *Edelman*, the plaintiff sued state officials alleging that they had administered a federal-state program in violation of federal law and requested as relief "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all * * * benefits wrongly withheld." 415 U.S. at 656 (citation omitted). The Court observed that the requested funds "will obviously not be paid out of the pocket of petitioner Edelman" and instead would "inevitably come from the general revenues of the State of Illinois." *Id.* at 664-665. The court therefore concluded that the requested award "resemble[d] far more closely [a] monetary award against the State itself" and was barred by sovereign immunity. *Ibid.*

Similarly, in *Ford Motor Co.*, the Court held that a taxpayer action against Indiana officials seeking a refund of taxes paid under protest was "in essence one for the recovery of money from the state." 323 U.S. at 464 (citation omitted). Because the State was "the real, substantial party in interest," it was "entitled to invoke its sovereign immunity from suit even though individual officers [we]re nominal defendants." *Ibid.* (citation omitted).

Official-capacity suits against an officer or employee of a sovereign "generally represent only another

way of pleading an action against [the] entity of which [the] officer is an agent." *Graham*, 473 U.S. at 165 (quoting *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). Sovereign immunity therefore bars such suits, even though they are nominally directed at the sovereign's agent. See *Edelman*, 415 U.S. at 663; *Ford Motor Co.*, 323 U.S. at 462-463; see also *Graham*, 473 U.S. at 166 ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Sovereign immunity does not, however, bar official-capacity suits against state officers to the extent the suit seeks prospective injunctive relief to prevent a state officer from violating federal law. See *Edelman*, 415 U.S. at 664-665 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

2. Personal-capacity suits, on the other hand, seek to impose *personal* liability on government officers and employees for actions taken in the course of their governmental duties. *Graham*, 473 U.S. at 165; see *Scheuer* v. *Rhodes*, 416 U.S. 232, 237-238 (1974), abrogated on other grounds by *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The operative question in determining whether a suit is against a government officer or employee in his personal capacity is whether the suit seeks relief that operates against the agent's personal interests (such as the payment of damages from his own assets)—*not* whether the suit challenges actions the agent took in the course of his or her official duties. *Hafer*, 502 U.S. at 26-27; see *Graham*, 473 U.S. at 165-166.

Such suits seeking to recover damages from the officer or employee personally are not considered suits against the sovereign, even though they arise out of the agent's work for the sovereign, and they therefore

are not barred by sovereign immunity. As this Court has explained, if the "wrongful actions" of "[g]overnment officers" are "such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686 (1949). Thus, "[i]n a suit against the officer to recover damages for the agent's personal actions" in the performance of his duties, the "question is easily answered" that the suit is not against the government and is not barred by sovereign immunity. *Id.* at 687; accord, *e.g.*, *Hafer*, 502 U.S. at 30; *Ford Motor Co.*, 323 U.S. at 462. That rule has been applied to federal and state employees alike. See, *e.g.*, *Larson*, 337 U.S. at 687-688 (federal official); *Hafer*, 502 U.S. at 26-27 (state official).[1]

Furthermore, a sovereign's voluntary agreement to indemnify its agents for personal-capacity liability aris-

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[1] A parallel distinction is drawn between suits against foreign sovereigns and their officers and employees. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, governs the sovereign immunity of a foreign state and its agencies and instrumentalities, while the immunity of individual officers and employees of a foreign government is governed by distinct procedures and substantive standards applied by the Executive, informed by principles of international law. See *Samantar* v. *Yousuf*, 560 U.S. 305, 311-312 (2010); see also *id.* at 321-323. A suit against a foreign official seeking damages from his own pocket is governed by official immunity because it is not a suit against the foreign state itself. See *id.* at 325. A suit against a foreign official in his official capacity, by contrast, may be treated as a suit against the foreign state itself, as the state is the real party in interest. See *ibid.* (citing *Graham*, 473 U.S. at 166).

ing out of their official actions does not convert suits against them into suits against the sovereign. See, *e.g.*, *Blalock* v. *Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988); *Duckworth* v. *Franzen*, 780 F.2d 645, 650 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986); *Wilson* v. *Beebe*, 770 F.2d 578, 588 (6th Cir. 1985) (en banc); cf. *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 430-431 (1997) (fact that state university would be indemnified by federal government did not divest university of Eleventh Amendment immunity; "the presence or absence of a third party's undertaking to indemnify the agency should [not] determine whether it is the kind of entity that should be treated as an arm of the State").

B. Sovereign Immunity Likewise Does Not Bar Personal-Capacity Suits Against Tribal Employees

Tribal sovereign immunity arises from the same principles that underlie federal and state sovereign immunity. The Court should therefore apply the analysis described above to determine whether a suit against a tribal employee is an official-capacity suit that must be treated as a suit against the Indian tribe itself, or instead is a personal-capacity suit against the tribal employee.

"Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted). One "core aspect[]" of tribal sovereignty is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Ibid.* (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978)). That remedy is "a necessary corollary to Indian sovereignty and self-governance." *Ibid.* (quoting *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g, P.C.*,

476 U.S. 877, 890 (1986)); see *Bay Mills*, 134 S. Ct. at 2030 ("It is 'inherent in the nature of sovereignty not to be amenable' to suit without consent.") (quoting The Federalist No. 81, at 511 (Alexander Hamilton) (B. Wright ed. 1961)). This Court accordingly has long recognized that Indian tribes enjoy sovereign immunity from suit and that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998); see *Bay Mills*, 134 S. Ct. at 2030-2031; *Oklahoma Tax Comm'n* v. *Citizens Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Three Affiliated Tribes*, 476 U.S. at 890-891; *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 172-173 (1977). Tribal sovereign immunity applies to suits based on activities (including commercial activities) both on and off the tribe's reservation. *Bay Mills*, 134 S. Ct. at 2031, 2036-2039; *Kiowa*, 523 U.S. at 758.

The contours of tribal sovereign immunity are "a matter of federal law." *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756). Accordingly, the same foundational principle that applies as a matter of federal law to federal and state sovereign immunity—that sovereign immunity shields only the sovereign itself—should be applied to tribal sovereign immunity as well. Indeed, the Court has already recognized that suits for prospective injunctive relief may be brought against tribal officials. *Id.* at 2035; *Santa Clara Pueblo*, 436 U.S. at 59; see also *Vann* v. *Kempthorne*, 534 F.3d 741, 749-750 (D.C. Cir. 2008).

This Court has previously declined to extend tribal sovereign immunity to bar suits against a tribe's agents.

See, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 59 (stating that a tribal officer "is not protected by the tribe's sovereign immunity from suit"); *Department of Taxation & Fin.* v. *Milhelm Attea & Bros.*, 512 U.S. 61, 72 (1994) (explaining that although sovereign immunity bars a suit against the tribe, "damages actions against individual tribal officers" would not be barred). A lawsuit seeking damages from a tribal employee is no more a claim against the tribe itself than a personal-capacity suit against a state or federal employee is a claim against the State or the United States. Accordingly, as the Ninth and Tenth Circuits have correctly recognized, such a claim is not barred by tribal sovereign immunity. See *Pistor* v. *Garcia*, 791 F.3d 1104, 1113 (9th Cir. 2015) ("So 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.") (citation and internal quotation marks omitted); accord *Maxwell* v. *County of San Diego*, 708 F.3d 1075, 1088-1090 (9th Cir. 2013); *Native Am. Distrib.* v. *Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296-1297 (10th Cir. 2008).[2]

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[2] Before *Pistor*, some Ninth Circuit cases suggested that tribal sovereign immunity barred any action against a tribal employee arising out of the performance of official duties. See Br. in Opp. 18-22; Pet. App. 11a. But, as the court explained in *Maxwell* and *Pistor*, those cases did not, by and large, consider whether that rule would bar a suit seeking relief against the employee in his personal capacity. *Maxwell*, 708 F.3d at 1089; *Pistor*, 791 F.3d at 1113-1114.

Some decisions of the Tenth Circuit likewise state that the scope of a tribal employee's immunity is coextensive with the scope of his authority. See *Burrell* v. *Armijo*, 603 F.3d 825, 832 (10th Cir. 2010); *Burrell* v. *Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006),

C. Petitioners' Suit Against Respondent Is A Personal-Capacity Suit

1. Petitioners' suit is an action against respondent in his personal capacity. Petitioners' suit seeks to impose *personal* liability on respondent for his alleged negligence—*i.e.*, to recover directly against respondent's own assets. Pet. App. 18a-19a. Accordingly, tribal sovereign immunity does not bar petitioners' claims. See *Hafer*, 502 U.S. at 26-27; *Graham*, 473 U.S. at 165-166; *Scheuer*, 416 U.S. at 237-238.

Respondent has maintained that a judgment against him would functionally run against the Tribe because the Tribe has committed to indemnify him for any adverse judgment. See Pet. App. 34a-35a. But such a voluntary commitment to indemnify does not render the indemnifying sovereign a real party in interest. See *Pistor*, 791 F.3d at 1114 ("Even if the Tribe agrees to pay for the tribal defendants' liability, that does not entitle them to sovereign immunity."); *Maxwell*, 708 F.3d at 1090 ("The unilateral decision to insure a government officer against liability does not make the officer immune from that liability."); see also, *e.g.*, pp. 11-12, *supra*.

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cert. denied, 549 U.S. 1167 (2007); *Tenneco Oil Co.* v. *Sac & Fox Tribe of Indians of Okla.*, 725 F.2d 572, 576 n.1 (10th Cir. 1984) (McKay, J., concurring) (per curiam) (cited at Pet. App. 11a). *Tenneco*, however, involved claims for declaratory and injunctive relief. See 725 F.2d at 574. The *Burrell* case involved damages and appears to treat the suit as a personal-capacity suit. 603 F.3d at 830; 456 F.3d at 1161. But the first *Burrell* decision relied on *Tenneco*, see 456 F.3d at 1174, and the second *Burrell* decision cited *Native American Distributing* without recognizing any tension between its holding and the statement in that case that personal-capacity damages suits are not barred by tribal sovereign immunity. See 603 F.3d at 832.

2. The Connecticut Supreme Court reached the opposite conclusion, holding that sovereign immunity bars all claims against tribal employees for actions carried out within the scope of their employment. See Pet. App. 10a-16a. For that proposition, the court relied, *inter alia*, on *Romanella* v. *Hayward*, 933 F. Supp. 163 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997), in which a federal district court held that a claim "directly relate[d] to [the defendants'] performance of their official duties" could not be a personal-capacity claim. *Id.* at 168. That holding is directly contrary to the settled rule that what makes a claim an official-capacity claim is "the capacity in which the * * * officer is sued, not the capacity in which the officer inflicts the injury." *Hafer*, 502 U.S. at 26; *Graham*, 473 U.S. at 165-166.[3]

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[3] The Connecticut Supreme Court also relied on the Second Circuit's *per curiam* opinion in *Chayoon* v. *Chao*, 355 F.3d 141, cert. denied, 534 U.S. 966 (2004), for the proposition that a plaintiff cannot circumvent tribal sovereign immunity by naming officers or employees of the tribe as defendants, at least where the complaint concerns actions taken within the scope of their authority. Pet. App. 11a-12a. *Chayoon*, however, relied on precedent involving *official*-capacity suits against tribal officials, see 355 F.3d at 143 (citing *Oneida Indian Nation of N.Y.* v. *City of Sherrill*, 337 F.3d 139, 169 (2d Cir. 2003), rev'd on other grounds, 544 U.S. 197 (2005)), and did not clarify whether its reasoning applied to claims seeking damages against tribal employees personally.

Respondent cites (Br. in Opp. 9, 13) state court decisions for the proposition that tribal sovereign immunity extends to tribal officers acting in their representative capacities and within the scope of their authority. In three of those decisions, the courts drew a distinction between individual- and official-capacity suits. *Inquiry Concerning Complaint of Judicial Standards Comm'n* v. *Not Afraid*, 245 P.3d 1116, 1120 (Mont. 2010); *Wright* v. *Colville Tribal Enter. Corp.*, 147 P.2d 1275, 1280 (Wash. 2006) (en banc),

The Connecticut Supreme Court did not attempt to explain why sovereign immunity should shield tribal employees more broadly than it shields employees of the United States and of the States. To the contrary, the court never acknowledged that its holding deviated from principles governing federal and state sovereign immunity. One district court decision on which the Connecticut Supreme Court relied, see Pet. App. 12a-13a, addressed the deviation between the treatment of tribal and state officers. See *Bassett* v. *Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F. Supp. 2d 271, 280 (D. Conn. 2002). That court maintained that tribal sovereign immunity should protect tribal employees from personal-capacity suits because state employees have the additional protection of official-immunity defenses when they are sued in their personal capacities. *Ibid.* That reasoning is misguided.

Bassett assumed that tribal employees, unlike state employees, cannot assert an official-immunity defense when sued in their personal capacities. 221 F. Supp. 2d at 280. That assumption, we submit, is incorrect. As explained below, official immunity should be recognized as a matter of federal common law for tribal officers and employees when acting within the scope of their employment, "predicated upon a considered inquiry into the immunity historically accorded the

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cert. dismissed, 550 U.S. 931 (2007); *Wright* v. *Prairie Chicken*, 579 N.W. 2d 7, 11 (S.D. 1998). Others incorrectly concluded that a suit against a tribal official acting within the scope of his employment could not be a personal-capacity suit. *Koke* v. *Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 68 P.3d 814, 817 (Mont. 2003); *Oberloh* v. *Johnson*, 768 N.W.2d 373, 376 (Minn. App. 2009).

relevant official at common law and the interests behind it." *Hafer*, 502 U.S. at 28-29 (citation omitted). Sovereign immunity and official immunity, though reflecting similar concerns, are distinct doctrines having different scopes. See *Scheuer*, 416 U.S. at 239-240. Indeed, the common-law doctrine of official immunity developed specifically because sovereign immunity "did not protect all government officers from personal liability." *Id.* at 239.

In *Hafer*, when rejecting the plaintiffs' argument that constitutional tort liability under 42 U.S.C. 1983 should turn "on the capacity in which [state officials] acted when injuring the plaintiff," the Court explained that such a rule "would absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities," yet the Court's cases "do not extend absolute immunity to all officers who engage in necessary official acts." 502 U.S. at 27. Similarly here, an Indian tribe's sovereign immunity from suit does not bar personal-capacity suits that would otherwise not be shielded by an official-immunity defense.

II. TRIBAL EMPLOYEES SUED IN THEIR PERSONAL CAPACITIES ARE ENTITLED UNDER FEDERAL COMMON LAW TO OFFICIAL IMMUNITY FROM LIABILITY ARISING OUT OF ACTIONS INVOLVING DISCRETIONARY JUDGMENT

A. Federal Common Law Provides A Defense Of Official Immunity For Government Employees Sued In Their Personal Capacities For Tortious Conduct Occurring In The Scope Of Their Employment

Although sovereign immunity does not bar personal-capacity suits against government employees, the re-

lated federal common-law doctrine of *official* immunity protects government employees against personal-capacity tort suits. That doctrine should likewise apply to tribal employees acting within the scope of their employment outside the tribe's reservation.[4]

1. Because the immunity of the sovereign does not bar personal-capacity suits against the sovereign's employees, the common law gave rise to the personal defense of official immunity. *Scheuer*, 416 U.S. at 239-240. The doctrines of sovereign immunity and official immunity, though not identical in scope or function, both reflect a policy of ensuring that litigation does not unduly interfere with the government's performance of its sovereign duties. As this Court has explained:

> The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the "King can do no wrong"—did not protect all government officers from personal liability, the common law soon recognized the necessity of per-

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[4] This case does not present any issue concerning torts committed by tribal employees on the tribe's reservation. In that context, it would be necessary to consider tribal tort law and immunities under tribal law applicable to suits against the tribe's employees. See *Williams* v. *Lee*, 358 U.S. 217 (1959). Correspondingly, Connecticut law is the source of both substantive law and applicable immunities in suits against state employees within its borders. See, pp. 31-33, *infra*.

This case also does not present an issue concerning possible preemption of state tort law because of an asserted conflict with a tribe's exercise of governmental functions or its ability to engage in activities supported by federal law.

> mitting officials to perform their official functions free from the threat of suits for personal liability.

Id. at 239.

While sovereign immunity completely bars suits against the sovereign absent the sovereign's consent, the official-immunity defense available in personal-capacity suits does not always provide complete protection. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982); see *Larson*, 337 U.S. at 687 n.7 (contrasting "limitations on the court's jurisdiction to hear a suit directed against the sovereign" with immunity defenses). "[O]fficials whose special functions or constitutional status requires complete protection from suit" are entitled to "absolute immunity." *Harlow*, 457 U.S. at 807. Officials entitled to absolute immunity include "legislators, in their legislative functions," *ibid.* (citing *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975)); "judges, in their judicial functions," *ibid.* (citing *Stump* v. *Sparkman*, 435 U.S. 349 (1978)); "prosecutors and similar officials," *ibid.* (citing *Butz* v. *Economou*, 438 U.S. 478, 508-512 (1978)); "executive officers engaged in adjudicative functions," *ibid.* (citing *Butz*, 438 U.S. at 513-517); and the President of the United States, *ibid.* (citing *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982)).

The Court has also recognized an absolute "defense by officers of government to civil damage suits for defamation and kindred torts." *Barr* v. *Matteo*, 360 U.S. 564, 569 (1959) (opinion of Harlan, J.) (holding that agency director was entitled to absolute privilege against libel claim based on press release). Central to the Court's rationale in doing so was the discretionary judgment inherent in a government officer's decision to make a public statement, and the necessity of such

discretion to the effective functioning of government. See *id.* at 574-575 ("We think that under these circumstances a publicly expressed statement of the position of the agency head * * * was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively"); *id.* at 576-577 (Black, J., concurring).

Outside the scope of those protected functions, however, government officers and employees have traditionally been protected by a qualified immunity from suit. See, *e.g.*, *Harlow*, 457 U.S. at 808-813 (holding that White House aides could assert only a defense of qualified immunity in a challenge to the legality of their official actions); *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967) (noting that "[t]he common law has never granted police officers an absolute and unqualified immunity"). With regard to state-law negligence actions, this Court held that federal common law immunizes federal employees only from liability arising out of actions that involved the employee's exercise of "discretionary" judgment. *Westfall* v. *Erwin*, 484 U.S. 292, 295-297 (1988).

The Court reasoned in *Westfall* that the limitation of official immunity to actions arising out of an employee's discretionary actions reflects a balance between the benefits and costs of insulating government employees from suit. With respect to benefits, the Court explained, official immunity is intended not "to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation." 484 U.S. at 295. In particular, official immunity seeks to counter the possibility that "the threat of liability will make federal officials unduly timid in carrying out their official duties, and that

effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits." *Ibid.*; see *Doe* v. *McMillan*, 412 U.S. 306, 319 (1973). Thus, the Court explained, "[i]t is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of government policies.'" *Westfall*, 484 U.S. at 297 (quoting *Barr*, 360 U.S. at 571) (opinion of Harlan, J.).

The Court also noted the costs of extending official immunity to liability for actions not involving the requisite degree of discretionary judgment. Official immunity, the Court noted, denies compensation to "[a]n injured party with an otherwise meritorious tort claim * * * simply because he had the misfortune to be injured by a [government] official." *Westfall*, 484 U.S. at 295. For that reason, such immunity "is justified only when 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.'" *Id.* at 295-296 (quoting *Doe*, 412 U.S. at 320). Where official conduct does not involve discretionary judgment, the Court concluded, federal common law does not confer immunity. *Id.* at 297-298.[5]

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[5] The scope of immunity under federal common law in the domestic context differs from that of officials of foreign governments in suits in U.S. courts, discussed in note 1, *supra*. As a general matter, under principles of customary international law accepted by the Executive Branch, certain foreign officials enjoy absolute immunity from all suits and others enjoy immunity from suits for acts taken in an official capacity, not only for discretionary acts. See U.S. Amicus Br. at 10, *Samantar* v. *Yousuf*, 560 U.S. 305 (2010) (No. 08-1555); see, *e.g.*, *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897); *Jones* v. *LeTombe*, 3 U.S. (3 Dall.) 384, 385 (1798). The broader scope of foreign official immunity reflects its relation

2. Although federal common law has provided federal employees with official immunity from tort liability only for actions involving the exercise of discretion, Congress by statute has provided federal employees with additional protections.

a. Congress's first step in protecting federal employees from personal liability was in its enactment in 1946 of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. The FTCA waives the United States' sovereign immunity from damages claims based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). In enacting the FTCA, Congress sought to supplement the right to sue government employees personally that already existed at common law. See *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong. 2d Sess. 25 (1942) (*House Hearings*) (statement of Assistant Attorney General Francis Shea) ("That the aggrieved person has a right to sue the Government employee is not a sufficient answer because not infrequently the employee * * * is not financially capable of meeting a sizable judgment, and as a rule, the loss or injury occurs in situations in which the Government should in all conscience bear the responsibility.").

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to the Nation's conduct of foreign relations, the role of the Executive Branch in articulating the scope of and suggesting immunity, and principles of international law. Those considerations have no application to the immunity of Indian tribal officials.

The FTCA's judgment bar, however, furnished some protection to individual employees by providing that a judgment in an FTCA suit against the United States is a "complete bar" to "any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676; see *Simmons* v. *Himmelreich*, 136 S. Ct. 1843 (2016). By making the United States liable for its employees' torts and including the judgment bar, the FTCA sought to cut down on the large number of suits against federal employees that were allowed to proceed under the common law—including myriad suits for damages arising out of federal employees' negligent operation of motor vehicles. See *House Hearings* 9 (testimony of Assistant Attorney General Francis Shea) (explaining that "the Government, through the Department of Justice, is constantly being called on by heads of the various agencies to go in and defend" federal employees sued in negligence for injuries caused by operation of a motor vehicle within the scope of their duties); see also *Dalehite* v. *United States*, 346 U.S. 15, 29 n.21 (1953).

b. Because the FTCA did not foreclose tort plaintiffs from suing federal employees, such suits continued to proceed in spite of the judgment bar. The continued frequency of tort suits against federal drivers in particular, see, *e.g.*, *Government Emps. Ins. Co.* v. *Ziarno*, 273 F.2d 645, 648-649 (2d Cir. 1960), led Congress in 1961 to enact the Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539. That act made an FTCA suit against the United States the exclusive remedy for "damage to property or for personal injury, including death, resulting from the operation by any em-

ployee of the Government of any motor vehicle while acting within the scope of his office or employment." *Ibid.* Congress subsequently enacted similar protections for physicians and other health-care personnel employed by various federal agencies—in each case by making an FTCA suit against the United States the exclusive remedy. See 10 U.S.C. 1089; 22 U.S.C. 2702; 38 U.S.C. 7316; 42 U.S.C. 233; 51 U.S.C. 20137. Those statutory protections were a direct response to decisions holding that health-care personnel were not protected by the common-law official-immunity doctrine. See, *e.g.*, *Jackson* v. *Kelly*, 557 F.2d 735 (10th Cir. 1977); *Henderson* v. *Bluemink*, 511 F.2d 399 (D.C. Cir. 1974).

Finally, in 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, following this Court's articulation of the limitations on common-law official immunity in *Westfall* v. *Erwin*. The Westfall Act makes an action against the United States under the FTCA the exclusive remedy for all claims of "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 2679(b)(1).[6]

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[6] Connecticut provides similar protection to its employees. See Conn. Gen. Stat. Ann. § 4-165(a) (West 2014) ("No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter.").

B. Tribal Employees Sued In Their Personal Capacities Are Entitled To Official Immunity For Discretionary Actions Within The Scope Of Their Employment

1. The same concerns that justified recognition of official immunity for federal employees justify affording official immunity to tribal employees as a matter of federal common law.[7] A tribe's ability to exercise its governmental powers effectively, like that of the federal government, depends on the freedom of its employees to exercise "independent judgment." *Westfall*, 484 U.S. at 296. The threat of state-law liability —like other forms of undue interference—may compromise employees' exercise of independent judgment, just as it may for federal employees. See *ibid.* In such cases, "the fearless, vigorous, and effective administration of policies of government" suffers. *Id.* at 297 (citation omitted). Thus, both the respect owed to tribal sovereignty and self-government, see *Bay Mills*, 134 S. Ct. at 2030, and the policies of federal common law support the defense of official immunity for tribal employees sued under state tort law. See, *e.g.*, *Bay Mills*, 134 S. Ct. at 2032 ("[C]ourts will not lightly assume that Congress * * * intends to undermine Indian self-government.").

2. The scope of official immunity afforded to tribal employees sued in their personal capacities for torts committed in the scope of their employment should conform to the federal common-law immunity this Court recognized for federal employees. For tribal

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[7] This Court has recognized federal common-law defenses to state causes of action in a variety of contexts in which important federal interests are implicated—including in the *Westfall* decision itself. 484 U.S. at 296-297; see, *e.g.*, *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988).

officials acting in a legislative, judicial, prosecutorial, or adjudicative capacity, absolute immunity should apply. See p. 20, *supra*. With respect to tort liability based on allegations of negligence, federal common law immunizes government employees only for actions involving the exercise of discretionary judgment. *Westfall*, 484 U.S. at 295-298. In *Westfall*, this Court specifically rejected the contrary view of some courts that "conduct within the outer perimeter of an official's duties is automatically immune from suit" as a misreading of *Barr* v. *Matteo*. 484 U.S. at 298 n.4. The Court explained that *Barr* repeatedly pointed to "the discretionary nature" of the challenged act, and that "*Barr* did not purport to depart from the widely followed common-law rule that only discretionary functions are immune from liability." *Ibid.* (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 1059-1060 (5th ed. 1984)); accord Restatement (Second) of Torts § 895D(3)(a) (2016).[8]

3. That federal employees now enjoy complete *statutory* immunity from tort liability under the Westfall Act does not mean that *common-law* official immunity

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[8] As the United States explained in its amicus brief (at 18-21) in *Nevada* v. *Hicks*, 533 U.S. 353 (2001) (No. 99-1994), a parallel official immunity should also be recognized as a matter of federal common law in tribal-law tort suits against state and local employees for law-enforcement and other activities within the scope of their employment within an Indian reservation. Federal law contemplates and sometimes effectively requires that state officers act within a reservation, *e.g.*, in enforcing state criminal law in a State that has assumed law enforcement responsibilities under Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. 1162, 25 U.S.C. 1321 *et seq.*, and 28 U.S.C. 1360)), and they should be protected by official immunity under federal law in doing so.

has correspondingly broadened. To the contrary, Congress would have had no need to pass the Westfall Act or any of the earlier immunity statutes for drivers and health-care personnel if federal common law (or, indeed, the sovereign immunity of the United States) did not leave federal employees exposed to certain kinds of tort suits. Cf. *Westfall*, 484 U.S. at 299-300.

Moreover, although the Westfall Act displaces federal common-law official immunity for federal employees, it does not alter the scope of the common-law defense where that defense still applies—for example, in cases involving federal contractors or other persons who are not federal employees but perform government functions. In such cases, courts continue to apply the defense described in the *Westfall* decision. See*, e.g.*, *Murray* v. *Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 174 (2d Cir. 2006); *Midland Psychiatric Assocs., Inc.* v. *United States*, 145 F.3d 1000, 1004-1005 (8th Cir. 1998); *Beebe* v. *Washington Metro. Area Transit Auth.*, 129 F.3d 1283, 1289 (D.C. Cir. 1997); *Mangold* v. *Analytic Servs., Inc.*, 77 F.3d 1442, 1447 n.4 (4th Cir. 1996). "Despite the changes wrought by the Westfall Act, it is well established that *Westfall* still articulates the more restrictive federal common-law rule limiting official immunity to discretionary conduct." *Midland Psychiatric Assocs.*, 145 F.3d at 1005. Accordingly, in the absence of an Act of Congress granting a broader immunity, the scope of official immunity for tribal employees should be governed by the federal common law of official immunity, reflecting the balance recognized by this Court in its *Westfall* decision between the benefits and costs of immunity. See pp. 21-22, *supra*.

It is significant in this regard that complete statutory immunity from tort liability for federal employees provided in the Westfall Act (and earlier statutes shielding federal drivers and health-care personnel) is coupled with a waiver of sovereign immunity so that injured plaintiffs may bring tort suits arising out of those employees' actions against the United States itself. See pp. 24-25, *supra*. Expanding the common-law defense of official immunity for tribal employees to include all torts committed within the scope of employment would, in contrast, bar all state-law tort suits against tribal employees—even for negligence claims arising from off-reservation automobile accidents—without assuring an alternate avenue for relief against the sovereign. Although Congress could provide an alternative avenue of relief for such plaintiffs through an abrogation of tribal sovereign immunity in state court, *e.g.*, *Kiowa*, 523 U.S. at 759, it has not done so.

It is also significant that Congress *has* acted to confer absolute immunity on tribal employees in certain circumstances not present here. And in doing so it has coupled that immunity with a substitution of liability against *the United States* under the FTCA. Congress has so provided for all tribal employees performing functions assumed by a tribe pursuant to contracts with the Department of the Interior and the Department of Health and Human Services under the Indian Self-Determination Act (ISDA), 25 U.S.C. 5321 *et seq.*, as well as programs carried on pursuant to compacts with those Departments under their Self-Governance Programs, 25 U.S.C. 5361-5399. See Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, Tit. III,

§ 314, 104 Stat. 1959. Congress has furnished a similar immunity to tribal (and state) law enforcement personnel who assist Bureau of Indian Affairs law enforcement personnel pursuant to an agreement entered into under the Indian Law Enforcement Reform Act, 25 U.S.C. 2801 *et seq.* See 25 U.S.C. 2804(f). The substitution of the United States for the individual tribal employee sued in his personal capacity in such cases would be pursuant to the Westfall Act. Finally, 25 U.S.C. 5321(d) provides parallel protection for tribal medical personnel carrying out contracts with the Indian Health Service pursuant to ISDA by treating them as employees of the Public Health Service under 42 U.S.C. 233(a), which makes an FTCA suit against the United States the exclusive remedy. See *Hui* v. *Castaneda*, 559 U.S. 799 (2010).

The fact that Congress has acted to confer absolute immunity on tribal employees in certain circumstances, and coupled that immunity with the availability of a suit against the United States under the FTCA in federal court, reinforces the conclusion that courts should not expand common-law immunity to cover non-discretionary activities of tribal employees in the absence of an Act of Congress.[9]

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[9] In its amicus brief in *Nevada* v. *Hicks*, 533 U.S. 353 (2001), the United States did not propose to define the precise scope of official immunity that should be available to tribal (and state) officials under federal common law. The brief stated that the scope of that immunity "may appropriately be informed by the scope of the immunity available to federal officers in similar circumstances under the Constitution, federal common law, and federal statutes," citing the Westfall Act in a footnote. U.S. Br. at 21 & n.14, *Nevada* v. *Hicks* (99-1994). That brief did not say that the immunity should necessarily have the scope afforded by the Westfall Act; otherwise, there would have been no occasion to refer to federal common law

The Tribe has waived the Gaming Authority's sovereign immunity and consented to suit under the Mohegan Torts Code for injuries arising out of actions of its employees, including for off-reservation torts, in the Mohegan Gaming Disputes Court. Mohegan Tribal Code, Ch. 3, Art. IV, §§ 3-248(a), 3-250(b). But the existence of that waiver of sovereign immunity in tribal court in this case cannot expand the scope of a generally applicable official-immunity defense for all tribal employees acting within the scope of their employment.

In light of that waiver of sovereign immunity allowing suits against the Gaming Authority, it appears that the Tribal Code makes the Gaming Authority, not individual employees, the proper defendant in a suit based on actions within the scope of their employment. See *Boskello* v. *Mohegan Tribal Gaming Auth.*, 12 Am. Tribal Law 242, 243-244 (Mohegan GDTC 2013). The State of Connecticut has similarly waived its immunity from suit and concomitantly conferred immunity on its own employees for actions within the

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as also informing the analysis. In briefs filed after *Nevada* v. *Hicks*, the United States, while not taking a definitive position, cited this Court's decision in *Westfall* limiting immunity to discretionary acts and did not affirmatively urge absolute immunity for all tribal employees. See U.S. Br. at 16 n.10, *Young* v. *Fitzpatrick*, 133 S. Ct. 2848 (2013) (No. 11-1485); U.S. Br. at 18, *Kizis* v. *Morse Diesel Int'l, Inc.*, 794 A.2d 498 (Conn. 2002) (No. 16499).

The position of the United States in this brief is informed by (indeed adopts) the scope of federal common-law immunity for federal employees. It is also informed by the Westfall Act and other statutes that couple absolute immunity for federal employees with the substitution of the federal sovereign as a defendant, and Congress's decision to extend immunity under those statutes to certain tribal employees but not to respondent.

scope of their employment, where the conduct was not wanton, reckless, or malicious. See note 6, *supra*. The Connecticut Supreme Court therefore could consider on remand whether considerations of comity, informed by policies of federal Indian law, would warrant recognition of a comparable immunity for employees of the Gaming Authority sued in Connecticut state court for actions within the scope of their employment. The Connecticut Supreme Court could also consider whether considerations of comity would warrant application in state court of damages limitations provided by tribal law.

C. The Connecticut Supreme Court May Consider The Application Of Official Immunity On Remand

The Connecticut state courts addressed only tribal sovereign immunity and did not address the possible defense of official immunity under federal common law, including whether respondent was engaged in a discretionary function at the time of the collision.

The FTCA contains a "discretionary function" exception, which provides that the United States is not liable for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Cases interpreting that exception have generally treated the choices involved in driving a motor vehicle as not "discretionary" in the operative sense. See, *e.g.*, *United States* v. *Gaubert*, 499 U.S. 315, 325 n.7 (1991); *Dalehite*, 346 U.S. at 57-58. And yet, some types of driving decisions may be sufficiently imbued with policy decisions so as to trigger the purposes of common-law immunity. The Virginia Supreme Court,

for example, has concluded as a matter of state law that a driver may be entitled to immunity when taking on "special risks" while driving, "to effectuate a governmental purpose." *McBride* v. *Bennett*, 764 S.E.2d 44, 47 (Va. 2014); see *id.* at 48 (holding that, under Virginia law, state officers who hit and killed a bicyclist while responding to a domestic-violence call were immune from suit).

If the Court reverses the Connecticut Supreme Court's decision holding that petitioner's suit is barred by tribal sovereign immunity, the Connecticut Supreme Court will be free to consider a claim of official immunity to the extent that issue remains open as a procedural matter in the state courts.

CONCLUSION

The judgment of the Connecticut Supreme Court should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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NOVEMBER 2016