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 PETITIONERS

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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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OPINIONS BELOW

The opinion of the Connecticut Supreme Court (Pet. App. 1a-17a) is reported at 320 Conn. 706 and 135 A.3d 677. The opinion of the Connecticut Superior Court (Pet. App. 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 petition for a writ of certiorari was filed on June 13, 2016, and was granted on September 29, 2016. The jurisdiction of this court rests on 28 U.S.C. 1257(a).

INTRODUCTION

This Court has held that individual-capacity damages actions against government officials do not implicate sovereign immunity because they do not operate against a sovereign. The Connecticut Supreme Court, however, created a different rule for employees of an Indian tribe. Applying that rule here, it concluded that the victims of negligent driving on an interstate highway in Connecticut—70 miles from an Indian reservation—were prohibited from invoking Connecticut tort law to seek compensation for their injuries in a Connecticut court because the driver who ran into them happened to be an employee of an Indian tribe.

That decision ignores the distinction this Court has long maintained between individual-capacity and official-capacity actions. It extends the sovereign immunity of an Indian tribe to a context—a damages action seeking relief only from an individual employee—in which the sovereign immunity of the United States or a State would not apply. And it gives tribal employees an absolute immunity from suit that undermines the State's interest in deterring wrongful conduct and tort victims' interest in receiving compensation for their injuries.

That expansive immunity has no basis in law or policy. A tribal employee transporting gamblers to and from a casino should not be treated as somehow akin to a foreign ambassador. This Court should reverse the decision below and hold that tribal employees, like all other persons subject to a State's jurisdiction, can be held personally accountable for their wrongful conduct.

STATEMENT

1. On October 22, 2011, petitioners Brian and Michelle Lewis were driving southbound on Interstate 95 in Norwalk, Connecticut, when their car was struck from behind by a limousine driven by respondent William Clarke. The impact propelled the Lewises' car forward with such force that it landed on top of the concrete barrier separating opposite directions of traffic. Both of the Lewises were injured. Pet. App. 2a.

Clarke is a Connecticut resident who holds a Connecticut driver's license. At the time of the accident, he was employed by the Mohegan Tribal Gaming Authority (MTGA), an arm of the Mohegan Tribe of Indians of Connecticut, and his passengers were patrons of the Mohegan Sun Casino, which is approximately 70 miles from Norwalk. Pet. App. 2a.

2. The Lewises brought a negligence action against Clarke in the Connecticut Superior Court. They initially named both Clarke and the MTGA as defendants, but before any of the defendants appeared, the Lewises voluntarily dismissed the MTGA and filed an amended complaint against only Clarke. Pet. App. 3a, 18a-19a.

Clarke 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. Pet. App. 22a.

The Connecticut Superior Court denied the motion to dismiss. Pet. App. 18a-36a. The court applied the test adopted by the Ninth Circuit in *Maxwell* v. *County of San Diego*, 708 F.3d 1075 (2013), under which

tribal employees do not enjoy sovereign immunity when "the remedy sought by the plaintiffs would operate only against them personally." Pet. App. 27a. Here, the court explained, Clarke 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, Clarke is not immune from suit." *Id.* at 25a. The court acknowledged that the MTGA had agreed to indemnify Clarke, but it rejected the suggestion "that the MTGA has the unilateral power to expand the boundaries of sovereign immunity based on tribal legislation, contract or other form of tribal indemnification of an employee." *Id.* at 36a.

3. The Connecticut Supreme Court reversed. Pet. App. 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." Pet. App. 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.

SUMMARY OF ARGUMENT

The sovereign immunity of an Indian tribe does not bar individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

This Court has consistently distinguished between suits seeking relief from a sovereign and suits seeking damages from government employees or representatives. When a plaintiff seeks damages from the sovereign, whether the sovereign is sued directly or through its named officials, sovereign immunity applies. 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," and they may be barred by sovereign immunity. *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)).

By contrast, sovereign immunity does not bar an individual-capacity damages action, even if the action arises out of conduct the official undertook while car-

rying out official duties. That is because 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. This understanding of sovereign immunity is confirmed by examining actions against federal and state employees. This Court has repeatedly held that the sovereign immunity of the United States does not bar individual-capacity damages actions against federal employees, and that state sovereign immunity does not bar individual-capacity damages actions against state employees.

The rule should be no different here. This Court has never suggested that tribal sovereign immunity is broader than the immunity enjoyed by the United States or the States. The policies underlying immunity do not support expanding tribal sovereign immunity to bar individual-capacity damages actions against tribal employees: doing so is not necessary to protect the sovereign dignity of Indian tribes or to protect the tribal fisc, nor is it needed to protect tribal autonomy and self-government. On the other hand, barring state-law tort actions against individual tribal employees would represent an unwarranted intrusion on state regulatory authority and would deprive tort victims of compensation.

An Indian tribe has the power to enact statutes permitting the resolution of tort claims in tribal court, but it cannot expand its sovereign immunity from suit in other forums. Even within a reservation, a tribe has only limited authority to legislate with respect to nonmembers. In the circumstances of this case, a tribe does not have the authority to deprive nonmember

tort victims of their state-law right to recover for their injuries.

ARGUMENT

A. Sovereign immunity does not apply to actions seeking relief from individual government officials

This Court has held that "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). Because an official-capacity action operates against the sovereign, government officials sued in their official capacity may assert sovereign immunity. *Id.* at 165-166. By contrast, individual-capacity actions—also referred to as personal-capacity actions—do not implicate sovereign immunity because a "victory in a personal-capacity action is a victory against the individual defendant," not the sovereign. *Id.* at 167.

1. "Official-capacity suits * * * 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Graham*, 473 U.S. at 165 (quoting *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). Such a 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); accord *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."). Recognizing the reality that an official-capacity suit is one against the office, not the individual officeholder, the Federal

Rules of Civil Procedure provide that "[a]n action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending." Fed. R. Civ. P. 25(d). Instead, "[t]he officer's successor is automatically substituted as a party." *Ibid.*; accord Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3. And if damages are awarded in an official-capacity action, "a plaintiff seeking to recover * * * must look to the government entity itself." *Graham*, 473 U.S. at 166; see *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985) ("[A] judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents.").

"Personal-capacity suits," by contrast, "seek to impose personal liability upon a government official for actions he takes under color of state law." *Graham*, 473 U.S. at 165. While "officers sued for damages in their official capacity * * * assume the identity of the government that employs them," officers who are "sued in their personal capacity come to court as individuals." *Hafer* v. *Melo*, 502 U.S. 21, 27 (1991). That distinction "is more than 'a mere pleading device,'" *ibid.* (quoting *Will*, 491 U.S. at 71), and it has important consequences in litigation. If the defendant in an individual-capacity action leaves office, the defendant's successor is not automatically substituted. If the defendant dies, "the plaintiff would have to pursue his action against the decedent's estate." *Graham*, 473 U.S. at 166 n.11. And, most importantly, any "award of damages against an official in his personal capacity can be executed only against the official's personal assets," not against the government. *Id.* at 166.

2. Because an official-capacity action is really an action against the sovereign, government officials sued in their official capacity may assert sovereign immunity. "The general rule," this Court has observed, "is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963) (per curiam). In other words, when a plaintiff seeks relief "against the sovereign, although nominally directed against the individual officer," then the plaintiff's "suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949); accord *Alden* v. *Maine*, 527 U.S. 706, 756 (1999) (explaining that "sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State"); *In re Ayers*, 123 U.S. 443, 506 (1887) (Sovereign immunity covers "not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party * * * against which the judgment or decree effectively operates.").

By contrast, sovereign immunity does not bar damages actions against officials in their individual capacity. As a leading treatise explains, "[t]he Anglo-American tradition did not include a general theory of immunity from suit or from liability on the part of public officers." 5 Fowler V. Harper et al., *Harper, James and Gray on Torts* § 29.8, at 786 (3d ed. 2008). While "[i]n some circumstances [a] suit against an officer will

in reality be a suit against the state, so that its allowance would circumvent the state's own immunity," that "would seldom, if ever, be the case if the action is to recover tort damages out of the officer's own pocket." *Id.* § 29.9, at 790. Accordingly, this Court has held that if an officer's conduct is "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*, 337 U.S. at 686; accord *Alden*, 527 U.S. at 757 ("Even 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.").

3. In the decision below, the Connecticut Supreme Court expressly rejected what it called "the 'remedy sought' approach" as articulated in *Maxwell* v. *County of San Diego*, 708 F.3d 1075, 1088-1089 (9th Cir. 2013)—that is, an inquiry into whether the relief sought in the litigation would run against the sovereign or only against the officer personally. Pet. App. 16a. Instead, the court focused on the capacity in which the defendant was alleged to have acted; in its view, the critical fact was Clarke's status as "an employee of the tribe [who] was acting within the scope of his employment when the accident occurred." *Ibid.* The other courts that have taken the same position as the court below have employed similar reasoning. See, *e.g.*, *Chayoon* v. *Chao*, 355 F.3d 141, 143 (2d Cir.) (holding 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"), cert. denied, 543 U.S. 966 (2004); *Koke* v. *Little Shell Tribe of Chippewa Indians of Mont., Inc.*, 68 P.3d 814, 817 (Mont. 2003) (sovereign immunity barred an action against tribal officials because "the tribal officials acted in their official capacities" in the events giving rise to the litigation).

That approach is contrary to this Court's cases, which make clear that "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." *Larson*, 337 U.S. at 687. And "[i]n a suit against the officer to recover damages for the agent's personal actions that question is easily answered" because "[t]he judgment sought will not require action by the sovereign or disturb the sovereign's property." *Ibid.*

In focusing on whether Clarke was *acting* in his official capacity, the court below ignored this Court's instruction to determine whether a defendant is being *sued* in his official capacity. Pet. App. 10a (observing that Clarke was "acting in [his] representative capacity and within the scope of [his] authority" at the time of the accident) (quoting *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997)). As this Court has explained, "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*, 502 U.S. at 26. In other words, the "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"; instead, immunity extends only to "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." *Native Am. Distrib.* v. *Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008).

For that reason, in an individual-capacity action, "whether defendants were acting in their official capacities under color of state or under color of tribal law is wholly irrelevant" to the availability of sovereign immunity. *Pistor* v. *Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015). An individual-capacity suit against an officer always "seeks to hold the officer personally liable for wrongful conduct taken *in the course of her official duties*," but "[a]s the officer *personally* is the target of the litigation, she may not claim sovereign immunity." *Ibid.*; accord *Hafer*, 502 U.S. at 28. 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 performed in the course of their official duties. *Hafer*, 502 U.S. at 30-31 (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 238 (1974)).

B. The law governing actions against federal and state officials provides additional evidence that sovereign immunity does not apply to individual-capacity damages actions

As explained above, the conclusion that sovereign immunity does not bar individual-capacity damages

actions follows from this Court's statements about the nature of such actions. That conclusion is also supported by a long history of litigation against both federal and state officials.

1. The sovereign immunity of the United States does not bar damages actions against federal officials

In the absence of an express statutory waiver, "[s]overeign immunity shields the United States from suit." *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. Examples of such actions are plentiful.

One common type of damages action against federal officials is that brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for certain constitutional violations. In a *Bivens* action, the plaintiff seeks to recover damages from the defendants in their individual capacities. *Bivens* actions are possible not because the Constitution creates an exception to sovereign immunity but rather because imposing individual monetary liability on federal officers is consistent with that immunity. That principle is illustrated by *Bivens* itself, in which the Court recognized a cause of action for constitutional violations while acknowledging that it could not create an exception to federal sovereign immunity: "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." *Id.* at 410 (Harlan, J., concurring in the judgment).

The Court "implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994). The premise of *Bivens*, therefore, is that sovereign immunity applies to actions against the government but does not apply to individual-capacity damages actions against federal officers. See *Consejo de Desarrollo Economico de Mexicali, A.C.* v. *United States*, 482 F.3d 1157, 1173 (9th Cir. 2007) (explaining that a *Bivens* plaintiff "seeks to impose personal liability upon a federal official" and that "a *Bivens* suit against a defendant in his or her official capacity would merely be another way of pleading an action against the United States, which would be barred by the doctrine of sovereign immunity").

Another type of damages action that has historically been available against federal officials is one based on state tort law. Congress has passed a series of statutes addressing such actions, and the premise of all of those statutes is that sovereign immunity is not a barrier to damages actions against individual officials.

Early in the Nation's history, Congress provided for the removal to federal court of state-court claims against federal officers "for any thing done, or omitted to be done, as an officer of the customs." Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198. That act was the predecessor of the modern federal-officer removal statute, which now permits the removal of any state-court civil action against "any officer * * * of the United States * * * in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. 1442(a)(1); see *Watson* v. *Philip Morris Cos.*, 551 U.S.

142, 147-149 (2007) (describing the history of the statute). "[T]he main point" of the statute, this Court has observed, "is to give officers a federal forum in which to litigate the merits of immunity defenses." *Id.* at 151 (quoting *Jefferson Cty.* v. *Acker*, 527 U.S. 423, 447 (1999) (Scalia, J., concurring in part and dissenting in part)). Litigating those official immunity defenses would be unnecessary, of course, if such actions were barred by sovereign immunity.

In 1961, Congress enacted a statute providing that an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, would be the exclusive remedy "for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." Act of Sept. 21, 1961 (Federal Drivers Act), Pub. L. No. 87-258, 75 Stat. 539. In so doing, it barred tort actions against individual federal employees based on motor-vehicle accidents. Explaining the purpose of the legislation, the House Judiciary Committee observed that while FTCA actions were already available to the victims of accidents involving government-employee drivers, accident victims could choose to sue the employees as individuals. As a result, "all of the persons who operate vehicles for the United States face the possibility of being sued as individuals for incidents which occur while they are performing duties in behalf of the Government." H.R. Rep. No. 297, 87th Cong., 1st Sess. 2 (1961); see *id.* at 3 (describing examples of tort claims that had been asserted against individual government employees). Because the sovereign immunity of the United States did

not preclude such actions, Congress recognized that only legislation could "exclude suits against employees in their individual capacities." S. Rep. No. 736, 87th Cong., 1st Sess. 4 (1961).

Congress subsequently enacted similar statutes to bar medical-malpractice actions against individual federal employees. See Act of Oct. 8, 1976 (Gonzalez Act), Pub. L. No. 94-464, 90 Stat. 1985 (Armed Forces medical personnel); Foreign Relations Authorization Act, Fiscal Year 1977, Pub. L. No. 94-350, § 119, 90 Stat. 828 (State Department medical personnel); Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 4, 84 Stat. 1870 (Public Health Service); Act of Oct. 31, 1965, Pub. L. No. 89-311, § 6, 79 Stat. 1156 (Veterans Administration medical personnel). As in the context of federal drivers, the House Judiciary Committee recognized that if a "claimant chooses to sue the officer or employee individually in a state court for alleged malpractice," then "the only advantage [the defendant] has is to remove the case to a Federal District Court and be represented by the Department of Justice. If the defendant loses the case *he* must pay the judgment." H.R. Rep. 333, 94th Cong., 1st Sess. 2 (1975); see S. Rep. No. 1264, 94th Cong., 2d Sess. 3 (1976) ("Defense medical personnel have long been subject to personal liability for actions arising out of their official medical duties.").

Then, in 1988, this Court decided *Westfall* v. *Erwin*, 484 U.S. 292, holding that state-law tort suits against federal officers may be subject to an individual "official immunity"—*not* to sovereign immunity—but that the individual immunity is limited to situations in which "the challenged conduct is within the outer pe-

rimeter of an official's duties and is discretionary in nature." *Id.* at 300. The Court observed that "absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct" and that "absolute immunity for federal officials 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* v. *McMillan*, 412 U. S. 306, 320 (1973)).

The decision in *Westfall* left plaintiffs free to pursue individual-capacity damages actions against federal officials whose conduct was not discretionary. Congress altered that rule by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act. The Westfall Act makes an FTCA action against the United States the exclusive remedy for any "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," and, with limited exceptions, it forecloses tort actions against individual federal employees. 28 U.S.C. 2679(b)(1). The *Westfall* decision and the Westfall Act provide further evidence that the sovereign immunity of the United States does not eliminate the personal liability of federal employees.[1]

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[1] The Westfall Act does not apply to this case because it governs only actions against federal employees. Under the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, and the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, Congress

2. State sovereign immunity does not bar damages actions against state officials

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). State sovereign immunity is protected by the Eleventh Amendment. But as in the federal context, sovereign immunity does 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; *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 462 (1945) ("Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."), overruled on other grounds, *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002).

Individual-capacity damages actions are commonly brought against state officials under 42 U.S.C. 1983. In opposing the petition for a writ of certiorari, Clarke suggested (Br. in Opp. 23) that such actions are possi-

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likely would have authority to enact a similar statute governing actions against tribal officials; if it were to do so, it could consider whether to extend immunity to employees of tribal commercial enterprises. As explained below, however, see pp. 29-31, *infra*, the legislative authority of an Indian tribe is significantly more limited than that of Congress or a state legislature.

ble only because "Section 1983 abrogates sovereign immunity," but that is incorrect. This Court has held that Section 1983 does not authorize a suit against a State, in part because "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity." *Will*, 491 U.S. at 66; accord *Graham*, 473 U.S. at 169 n.17. Thus, damages actions against state officials are permissible not because Section 1983 has eliminated sovereign immunity but because "the Eleventh Amendment," which guarantees that immunity, simply "does not erect a barrier against suits to impose 'individual and personal liability' on state officials." *Hafer*, 502 U.S. at 30-31 (quoting *Scheuer*, 416 U.S. at 238).

Sovereign immunity also does not create a barrier to non-constitutional tort actions against individual state employees. As a consequence, many States have adopted legislation to regulate such actions. In some States, statutes provide for the indemnification of employees who are subject to individual liability based on the performance of their official duties. See, *e.g.*, Cal. Gov't Code Ann. § 825; Colo. Rev. Stat. Ann. § 24-10-110; Kan. Stat. Ann. § 75-6109; La. Stat. Ann. § 13:5108.1; Me. Rev. Stat. Ann. tit. 14, § 8112; Mich. Comp. Laws Ann. § 691.1408; N.Y. Pub. Off. Law § 17; Or. Rev. Stat. Ann. § 30.285. Other States have enacted statutes like the Westfall Act that make an action against the State the exclusive remedy for torts committed by state employees, thereby barring suits against the employees themselves. See, *e.g.*, Alaska Stat. Ann. § 09.50.253; Conn. Gen. Stat. Ann. § 4-165; Fla. Stat. Ann. § 768.28; Ga. Code Ann. § 50-21-25; Iowa Code Ann. § 669.5; Mass. Gen. Laws Ann. ch.

258, § 2; N.D. Cent. Code Ann. § 32-12.2-03; S.D. Codified Laws § 21-32-17. The existence of those statutes confirms the general rule that, in the absence of legislation, state officials are not immune from individual damages liability for acts within the scope of their employment.

C. Tribal sovereign immunity should not be extended to bar individual-capacity damages actions against tribal officials

In holding that tribal sovereign immunity bars Clarke's claims, the Connecticut Supreme Court interpreted tribal sovereign immunity to be broader than that of both the United States and the States. That expansion cannot be justified by reference to the traditional understanding of sovereign immunity; it is not supported by the policies underlying immunity; and it represents an unwarranted intrusion on state regulatory authority.

1. Tribal sovereign immunity is no broader than the sovereign immunity of the United States or the States

As "domestic dependent nations," Indian tribes enjoy some of the attributes of sovereignty. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). One such attribute is sovereign immunity, and for that reason, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). Insofar as tribal sovereign immunity rests on the "traditional[]" understanding of the immunity "enjoyed by sovereign powers," that immunity should not extend more

broadly than that of other sovereigns, such as the United States and the States. *Ibid.*; see *Maxwell*, 708 F.3d at 1089 ("We see 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.").

Nothing in this Court's cases suggest that tribal sovereign immunity is broader than that of the States or the federal government. To the contrary, this Court has recognized that it is narrower in some respects: "[B]ecause of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy." *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877, 890 (1986). There is accordingly no basis in precedent for a broad rule of tribal sovereign immunity that would insulate tribal employees from individual-capacity damages actions.

This Court has expressed concerns about the scope of tribal sovereign immunity. In *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), the Court recognized that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine" of tribal sovereign immunity. *Id.* at 758. As the Court observed, the doctrine "extends beyond what is needed to safeguard tribal self-governance"; it is "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities"; and it "can harm those who are unaware that they are dealing with a tribe * * * or who have no choice in the matter, as in the case of tort victims."

Id. at 757-758. In *Kiowa*, the Court nevertheless adhered to the doctrine of tribal sovereign immunity because of principles of *stare decisis*. *Id.* at 760 ("[W]e decline to revisit our case law and choose to defer to Congress."). It did the same in *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014) ("[T]his Court does not overturn its precedents lightly."). In so doing, however, the Court noted that it had "never * * * specifically addressed * * * whether immunity should apply in the ordinary way" in the circumstances of this case—that is, when "a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct." *Id.* at 2036 n.8.

The Connecticut Supreme Court's decision disregards those considerations to extend immunity to a kind of action that the doctrine of sovereign immunity never previously covered. This case presents no occasion for this Court to decide whether the sovereign immunity of the Mohegan Tribe itself extends to tort claims arising from off-reservation commercial conduct. That issue was not raised below, and it is not within the scope of the question presented. But the Court's expression of doubt as to the existence of tribal sovereign immunity in this context counsels strongly against expanding that immunity to bar tort claims against individual tribal employees.[2]

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[2] Clarke has not argued that he enjoys any personal official immunity. Any such argument would be outside the scope of the question presented and would lack merit in any event. This Court has never held that the official immunity addressed in *Westfall* extends to officials of Indian tribes, and the principles of federal supremacy that support official immunity for federal em-

2. Barring claims against individual officials would not serve the purposes of sovereign immunity

This Court has identified several interests that sovereign immunity promotes. Extending immunity to bar claims against individual tribal officials would not serve those interests.

First, suits against tribal employees do not impair a tribe's sovereign dignity. In the context of state immunity, this Court has observed that "the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts." *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002); see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.") (quoting *Ayers*, 123 U.S. at 505). Suits seeking relief only from a tribe's employees, however, do not force the tribe "to answer the complaints of private parties" and thus do not impair that sovereign dignity.

Second, suits against tribal employees do not "threaten the financial integrity" of a tribe. *Alden*,

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ployees are not applicable to tribal employees. In addition, to the extent that the distinction between discretionary and non-discretionary conduct is relevant to determining whether an individual-capacity action would be barred, the conduct at issue in this case—driving a limousine to transport casino patrons—cannot be characterized as the sort of discretionary conduct that this Court held to be protected in *Westfall*.

527 U.S. at 750; see *South Carolina State Ports Auth.*, 535 U.S. at 765 ("[S]overeign immunity serves the important function of shielding state treasuries."). As explained above, a judgment in an individual-capacity action may be enforced only against the employee's personal assets, not against the tribe itself. Some tribes, of course, may choose to indemnify their employees for damage awards. See, *e.g.*, Mohegan Tribal Code §§ 2-27, 4-51 *et seq.* But that unilateral decision does not expand the scope of immunity. This Court has observed that "private suits for money damages" directly against sovereigns may impair their "ability to govern in accordance with the will of their citizens" because such suits will mean that "the allocation of scarce resources among competing needs" will be determined by courts rather than through "deliberation by the political process established by the citizens." *Alden*, 527 U.S. at 750-751. Indemnification, by contrast, reflects a tribe's voluntary decision in accordance with "the will of [its] citizens." If a tribe finds that indemnification is unduly burdensome, it can choose not to engage in it, or to engage in it only in a limited fashion. For example, as the Mohegan Tribe has done, it may choose not to indemnify employees who engage in "wanton, reckless or malicious" activity. Mohegan Tribal Code § 4-52. A tribe thus remains free to make its own decisions about "the allocation of scare resources." *Alden*, 527 U.S. at 751.

Third, suits against tribal employees do not threaten tribal autonomy or self-governance. In *Kiowa*, this Court observed that "the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments

by States." 523 U.S. at 758. In some contexts, the application of state law may "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)). In those cases, federal laws and policies may preempt the application of certain state laws to on-reservation activity, unless the state interests at stake are sufficient to justify the assertion of state authority. See *Mescalero Apache Tribe*, *supra*; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). But the application of nondiscriminatory rules of state tort law to the off-reservation conduct of tribal employees does not implicate those considerations. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973) ("Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.").

That is especially so where, as here, the employees are engaged in a commercial activity. Commercial activities conducted by tribes may help fund governmental functions, but that does not alter their fundamentally commercial nature, nor does it mean that they implicate tribal self-governance. See *Solis* v. *Matheson*, 563 F.3d 425, 434 (9th Cir. 2009) ("[T]here is nothing * * * involving self-governance about the employment of Indians and non-Indians by a retail business engaged in interstate commerce."); *Florida Paraplegic Ass'n* v. *Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1129 (11th Cir. 1999) (concluding that "a commercial enterprise open to non-Indians from which

the Tribe intends to profit * * * does not relate to the governmental functions of the Tribe"); *Reich* v. *Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (concluding that a tribe's "employment of non-Indians weighs heavily against its claim that its activities affect rights of self-governance in purely intramural matters," and observing that "tribal relations with non-Indians fall outside the normal ambit of tribal self-government").

3. Actions against tribal employees serve important state interests

Individual-capacity damages actions against tribal employees can serve important state regulatory interests. Expanding sovereign immunity to bar such claims would impair those interests.

Even within an Indian reservation, a State has considerable regulatory authority. This Court's "cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Nevada* v. *Hicks*, 533 U.S. 353, 361 (2001); see *ibid.* ("State sovereignty does not end at a reservation's border."). And the State's authority is greater still outside of a reservation. Thus, 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. It observed that "to the extent civil remedies proved inadequate, [a State] could resort to its criminal law." *Ibid.* Those state-

ments are consistent with the principle that a State, unlike an Indian tribe, retains "the power to enforce laws against all who come within the sovereign's territory." *Duro* v. *Reina*, 495 U.S. 676, 685 (1990); see *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

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. As this Court has explained, "[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)); see *Restatement (Second) of Torts* § 901 (1979). When an 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 context, 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.

Tort law also serves a State's policy of ensuring compensation for victims. Because sovereign immunity may bar a suit against a tribe itself, an action against the individual tortfeasor is the only way for the victim of a tort committed by a tribal employee to receive the compensation that state law provides. Of course, it is possible that some tribes may choose to waive immunity to allow tort suits directly against the tribe. Under the Mohegan Tribal Code, for example, a person injured in circumstances such as those of this

case may bring a claim, but only 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). More importantly, that remedy exists only at the grace of the Tribe. Many tribes have not created a tort-claims procedure; many have no court systems at all. Steven W. Perry, U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of Tribal Justice Agencies in Indian Country, 2002*, at iii (2005). As applied in those settings, an extension of tribal sovereign immunity to bar actions against tribal employees will leave injured plaintiffs with no remedy.

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 that is not true of "a tort victim, or other plaintiff who has not chosen to deal with a tribe." *Id.* at 2036 n.8. That reality is vividly illustrated by the facts of this case: As they were driving on an interstate highway 70 miles away from the Mohegan Tribe's reservation, the Lewises had no reason to anticipate that a tribal

employee would run into them, and thus they had no occasion to negotiate a waiver of immunity. It would be unfair and anomalous to apply sovereign immunity to deprive them of their state-law right to seek compensation for their injuries in a state court.

D. A tribe cannot expand its sovereign immunity by statute

In opposing the petition for a writ of certiorari, Clarke emphasized (Br. in Opp. 25-26) that the Mohegan Tribe has adopted a statute providing for the resolution of tort claims in a proceeding against the Tribe (not an individual tribal employee) in tribal court. The statute also provides that "[t]he sovereign immunity of The Mohegan Tribe shall attach * * * to the actions or inactions of any individual acting on behalf of The Mohegan Tribe." Mohegan Tribal Code § 4-116(c); see also Mohegan Tribal Code § 3-249(a) ("Venue for tort claims * * * against authorized representatives of the MTGA acting within the scope of their employment, shall be found exclusively in the Mohegan Gaming Disputes Court."). The Connecticut Supreme Court did not rely on those statutes, and with good reason. While the Tribe has the authority to limit the jurisdiction of its own courts, it may not limit the jurisdiction of the Connecticut courts, and it may not strip petitioners of their state-law rights by insulating Clarke from liability for his off-reservation conduct.

This Court has held that tribes do not possess the authority "to determine their external relations" with non-Indians. *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978). Even within a reservation, "tribes lack civil authority over the conduct of nonmembers on non-

Indian fee land." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 647 (2001). Instead, tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008); see also *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975) (tribes retain authority to govern "both their members and their territory"). For that reason, "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank*, 554 U.S. at 328.

Within its territory, the legislative authority of an Indian tribe is limited. Tribes "have lost any 'right of governing every person within their limits except themselves,'" subject to two narrow exceptions. *Montana* v. *United States*, 450 U.S. 544, 565 (1981) (quoting *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978)). Under the first exception, tribes may regulate "nonmembers who enter consensual relationships with the tribe or its members." *Ibid.*; see *Strate* v. *A–1 Contractors*, 520 U.S. 438, 456-457 (1997)). Under the second exception, tribes may regulate nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. While the second exception may appear broad when "[r]ead in isolation," it is limited to "'what is necessary to protect tribal self-government or to control internal relations.'" *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564). The conduct to be regulated "must do more than injure the tribe, it must 'imperil the subsistence' of the tribal communi-

ty." *Plains Commerce Bank*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566).

Even within a tribe's territory, neither of the *Montana* exceptions would empower a tribe to eliminate the common-law right to maintain individual-capacity suits against tortfeasors. As a general matter, tort victims have not entered into a consensual agreement with a tribe, nor have they engaged in an activity that imperils tribal welfare. While a tribe may have the authority to regulate its employees, it may not regulate unconsenting third parties by depriving them of rights they would otherwise enjoy. And that conclusion has even greater force where, as here, a claim arises out of off-reservation conduct. In these circumstances, allowing a tribe to strip tort victims of their right to bring state-law causes of action in state court would represent an unprecedented expansion of tribal legislative authority.

CONCLUSION

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

Respectfully submitted.

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