No. 15-1500

IN THE

Supreme Court of the United States

BRIAN LEWIS, ET AL.,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

On Writ of Certiorari to the
Supreme Court of Connecticut

BRIEF FOR RESPONDENT

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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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INTRODUCTION

Petitioners allege that they were injured by Respondent, an employee of the Mohegan Tribe of Indians, while he was acting within the scope of his employment. They brought this damages suit in Connecticut court, with the aid of a pleading maneuver and a bit of happenstance.

First, the pleading maneuver. Petitioners agree that, at the time of the accident, Respondent was driving a tribal vehicle and acting at the behest of the Tribe. They also agree that sovereign immunity prevents them from suing the Tribe in state court for their damages. And they agree that, as a matter of tribal law, the Tribe must pay every cent of any damages award against Respondent. But because they sued Respondent "individually" rather than

suing the Tribe, Petitioners argue that they can seek damages from the Tribe's treasury, free of the inconveniences of sovereign immunity. This Court's sovereign immunity jurisprudence is more nuanced than that; it looks past the caption to identify the "real party in interest." The Tribe bears the financial burden of any adverse judgment here, so it is the real party in interest.

Second, the happenstance. In the event that Petitioners succeed in circumventing sovereign immunity, their suit depends on the fortuity that this case involves a *tribal* employee, as opposed to an employee of any other sovereign. If the same car accident had involved a federal employee or a foreign employee, then official immunity would clearly bar this suit. If the same car accident had involved a Connecticut employee, then a Connecticut statute would bar this suit. And if the same car accident had involved an employee of another State that, like Connecticut and the Tribe, immunizes its own employees, then comity and the Constitution would bar this suit. Only because this case involves a tribal employee can Petitioners argue that they have found a loophole—one that this Court should close. Tribal employees should receive the same common-law immunity from state tort suits that federal employees receive, including immunity from the suit here.

Under either sovereign immunity or official immunity, then, the Connecticut Supreme Court was right: Petitioners' suit should not proceed in state court. That result does not leave Petitioners without a remedy. The State of Connecticut and the Tribe have contractually agreed to a full, fair tribal tort system. Petitioners could have and should have sought relief there.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Mohegan Constitution, the Mohegan Tribal Code, the Connecticut General Statutes, and the Federal Tort Claims Act are reprinted in the addendum.

STATEMENT

A. Statutory Background

1. The Mohegan Tribe is a federally recognized Indian Tribe located in Connecticut. 59 Fed. Reg. 12,140 (Mar. 15, 1994). Its reservation comprises approximately one square mile on the western bank of the Thames River; a Connecticut state highway bisects that land. The Tribe also controls about ten other parcels, held in trust or owned in fee, that are separated by miles of Connecticut roads. *See* Mohegan Tribe, *Plan Showing Trust and Fee Lands of the Mohegan Tribe of Indians of Connecticut* (Dec. 2016), https://goo.gl/qpwQGs. On behalf of its members, the Tribe maintains a police force, manages a court system, provides social assistance, and negotiates agreements with States and the Federal Government, among other functions. *See, e.g.*, Mohegan Const. art. IX, § 2; Mohegan Tribal Code chs. 5-6.[1]

In 1994, the Tribe and Connecticut entered into a Gaming Compact pursuant to the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (25 U.S.C. § 2701 *et seq.*). *See* Mohegan Tribe – State of Connecticut Gaming Compact (May 17, 1994) (Gaming Compact or Com-

[1] Links to the Mohegan Tribal Code can be found at mohegan.nsn.us/government/tribal-court-system.

pact), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026002.pdf; 59 Fed. Reg. 65,130 (Dec. 16, 1994) (approving the Compact). That Compact authorizes the Tribe to conduct Class III gaming on its reservation, subject to several conditions. Gaming Compact § 3; *see id.* §§ 3(c)-(f), 5, 9, 14 (establishing licensing, registration, operations, and health and safety requirements). One of those conditions states that the Tribe must establish "reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities." *Id.* § 3(g). Although the Compact does not itself "waive[ ] [the Tribe's] sovereign immunity from suit with respect to such claims," it requires the Tribe to maintain "a remedial system analogous to that available for similar claims arising against the State or such other remedial system as may be appropriate following consultation with the State gaming agency." *Id.*

2. The Tribe created two specialized governmental entities to carry out its obligations under the Gaming Compact. First, the Tribe established the Mohegan Tribal Gaming Authority (MTGA) to exercise "[a]ll governmental and proprietary powers of the Mohegan Tribe over the development, construction, operation, promotion, financing, regulation and licensing" of tribal gaming activities. Mohegan Const. art. XIII, § 1; *see* Mohegan Tribal Code § 2-21. Both IGRA and the Mohegan Tribal Code require the Tribe to use gaming revenues to improve the welfare of its members and to further governmental activities. *See* 25 U.S.C. § 2710(b)(2)(B); Mohegan Tribal Code §§ 2-21, 2-181, 2-182; *see also* Gaming Compact § 16. As the parties thus agree, the MTGA is an arm of the Tribe and shares the Tribe's sovereign immunity from suit.

Mohegan Const. art. XIII, § 1; *see* Pet. Br. 3; Pet. App. 4a n.4; *see also* U.S. Br. 1.

Second, the Tribe established a Gaming Disputes Court, which it vested with "[e]xclusive jurisdiction * * * over disputes arising out of or in connection with [tribal] [g]aming" or "the actions of The Tribal Gaming Authority." Mohegan Const. art. XIII, § 2; *see* Mohegan Tribal Code § 3-21. Under the Mohegan Constitution, judges of the Gaming Disputes Court must be appointed by the Tribal Council (the Tribe's principal executive and legislative body) from a publicly available list of retired federal judges and Connecticut attorney trial referees. Mohegan Const. art. XIII, § 2.3. They cannot be related to any members of the Tribal Council, and may be removed only for cause. *Id.* §§ 2.3(b), 2.6. Any adverse decision at the trial level may be appealed to a three-judge panel of the Gaming Disputes Court of Appeals. *Id.* § 2.4; Mohegan Tribal Code §§ 3-26, 3-171.

3. As required by the Gaming Compact, the Tribe also adopted a remedial scheme for tort claims against the MTGA that closely mirrors Connecticut's own system for claims against the State. Like Connecticut, the Tribe has waived its sovereign immunity against suits by any person, "wherever located," who alleges that he was injured by the MTGA or by its employees acting within the scope of their authority. Mohegan Tribal Code §§ 3-244, 3-248(a), 3-250(b); *see* Conn. Gen. Stat. Ann. §§ 4-160(c), 4-165(a) (authorizing parallel claims against the State). Plaintiffs must bring such suits in the Gaming Disputes Court. Mohegan Tribal Code § 3-250(b). In adjudicating those suits, the Gaming Disputes Court applies Connecticut tort law, subject to minor modifications. *Id.* §§ 3-52(a), 3-241 to 3-252; *see, e.g.*,

Crenshaw v. *Mohegan Tribal Gaming Auth.*, 11 Am. Tribal Law 94, 98 (Mohegan Gaming Disputes Ct. App. 2011) (applying Connecticut's definition of "negligence"). And the Tribe imposes limitations on damages awards drawn from state law: As in Connecticut, plaintiffs may not recover punitive damages. Mohegan Tribal Code § 3-251(a)(1); *Ware* v. *Connecticut*, 983 A.2d 853, 868 (Conn. App. Ct. 2009). Also as in Connecticut, the Tribe may not pay awards that exceed available funds. Mohegan Tribal Code § 3-251(a); Conn. Gen. Stat. Ann. § 4-162.

Moreover, the Tribe has borrowed Connecticut's restriction on suits against government employees. Like Connecticut, the Tribe does not permit individuals to bring tort suits against its employees for acts taken within their official duties. *Boskello* v. *Mohegan Tribal Gaming Auth.*, 12 Am. Tribal Law 242, 243 (Mohegan Gaming Disputes Ct. 2013) (citing Mohegan Tribal Code § 3-248(a)); *see* Conn. Gen. Stat. Ann. § 4-165(a). Plaintiffs who are injured by MTGA employees must instead sue the MTGA itself, which has assumed liability for its employees' negligent acts. *See* Mohegan Tribal Code § 3-131; *Boskello*, 12 Am. Tribal Law at 244. If, however, a plaintiff brings a suit against an MTGA employee for any act "within the scope of his or her employment," the Tribe must "indemnify" the employee and "provide for [his] defense." Mohegan Tribal Code §§ 4-52, 4-53.

Over the past two decades, the Gaming Disputes Court has adjudicated dozens of tort suits. It has repeatedly issued substantial monetary awards against the MTGA. *See, e.g.*, *Wilson* v. *Mohegan Tribal Gaming Auth.*, 6 Am. Tribal Law 554 (Mohegan Gaming Disputes Ct. 2005) (awarding $499,613

to a plaintiff who suffered injuries after falling from a defective chair); *Bernardo* v. *Mohegan Tribal Gaming Auth.*, 7 Am. Tribal Law 380 (Mohegan Gaming Disputes Ct. 2007) (awarding $151,245 in a slip-and-fall suit). The Gaming Disputes Court even heard another tort suit involving the same car accident at issue here; that case eventually settled. *See Boskello*, 12 Am. Tribal Law at 242; Ryan Blessing, *Mohegan Tribe Settles Lawsuit in 2011 Limo Accident*, Norwich Bulletin (June 26, 2015) (reporting $775,000 settlement).

B. Proceedings Below

In 2011, Petitioners Brian and Michelle Lewis were injured in an automobile accident involving a Tribe-owned vehicle driven by Respondent William Clarke. Pet. App. 2a. Respondent was an employee of the MTGA, and his duties included driving patrons home from the Mohegan Sun Casino. *Id.* At the time of the accident, Respondent was acting within the scope of his employment. *Id.*

Petitioners brought this state-law negligence suit in Connecticut state court. Their complaint alleges that Respondent's negligence caused the collision and Petitioners' resulting injuries. Pet. App. 3a. As originally filed, the complaint named the MTGA and Respondent as co-defendants. *Id.* at 9a. But Petitioners amended that complaint to remove the MTGA as a defendant; they now seek money damages from Respondent "in his individual capacity." *Id.*

Respondent moved to dismiss the suit for lack of subject matter jurisdiction. Pet. App. 3a. He argued that the MTGA is entitled to immunity in state court because it is an arm of the Mohegan Tribe, and that Respondent himself is entitled to immunity because

he was a MTGA employee acting within the scope of his employment when the accident took place. *Id.* at 22a. The trial court denied the motion to dismiss. *Id.* at 36a.

In a unanimous decision, the Supreme Court of Connecticut reversed. Pet. App. 2a.[2] The court determined that "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)). Relying on *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, 221 F. Supp. 2d 271 (D. Conn. 2002), the court explained that "[c]laimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity." Pet. App. 12a-13a (quoting *Bassett*, 221 F. Supp. 2d at 280). Rather, "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 (brackets omitted) (quoting *Bassett*, 221 F. Supp. 2d at 280). Applying that test, the court concluded that Respondent was entitled to "tribal sovereign immunity," and to dismissal of the claims against him, "because the undisputed facts of this case establish that he was an employee of the tribe and was acting within the scope of his employment when the accident occurred." *Id.* at 16a.

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[2] The Connecticut Supreme Court transferred Respondent's appeal directly to its own docket, skipping over the intermediate appellate court, pursuant to Conn. Gen. Stat. Ann. § 51-199(c). Pet. App. 3a.

This Court granted the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Supreme Court of Connecticut correctly held that Respondent is immune from this suit. Respondent is entitled to that protection under the doctrine of sovereign immunity or, in the alternative, the closely related doctrine of official immunity.

1. Sovereign immunity bars this suit because the Tribe is the real party in interest. It is well-established that sovereign immunity attaches not only where a suit is captioned as a claim against a sovereign, but also where the sovereign is the "real, substantial party in interest." *Ford Motor Co.* v. *Dep't of Treasury*, 323 U.S. 459, 464 (1945), overruled on other grounds by *Lapides* v. *Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002). Petitioners have sued Respondent for conduct within the scope of his official duties, and every penny that they seek to recover would be drawn from the Tribe's treasury. This is, "in essence," a suit against the Tribe. *Id.*

That is no less true because the Tribe's obligation to pay comes from a legally binding indemnity law. *See* Mohegan Tribal Code § 4-52. A sovereign's "obligat[ion] to bear and pay *** indebtedness" suffices to extend its immunity to a sovereign *instrumentality*. *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994). There is no reason why a different result should obtain in the case of an *official* under the sovereign's control. The contrary lower court decisions that Petitioners and the Government cite involved either violations of federal law or illusory promises; they are inapposite here.

2. Alternatively, if Respondent is considered the real party in interest, the common-law doctrine of official immunity bars this suit. For over half a century, federal officials have received absolute immunity from tort liability for acts taken within the scope of their official duties. *Barr* v. *Matteo*, 360 U.S. 564, 573, 575-576 (1959) (opinion of Harlan, J.). The same considerations that justify immunity for federal officials—including protecting "the fearless, vigorous, and effective administration of policies of government," *id.* at 571—apply to tribal officials. Federal common law should therefore grant tribal officials the same immunity.

The Court should not limit that immunity to "discretionary functions," as the Government proposes. The Government gleans such a limit from this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988). But Congress "reacted quickly" after that decision "to delete the 'discretionary function' requirement, finding it an unwarranted judicial imposition." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 426 (1995). The Court should not use its common-law authority to revive the very rule that Congress repudiated. And it especially should not reinvigorate that rule for tribal officials, for whom it would be particularly costly and inequitable.

3. Finally, affording immunity here, whether sovereign or official, would advance important federal policies. It would preserve the sovereign dignity of Indian Tribes, safeguard the Tribes' financial integrity, and aid the effective functioning of tribal government. It would also respect the contractual agreements that many States and Tribes have entered into under IGRA. Moreover, affording immunity to Respondent would not leave Petitioners without

a remedy. Petitioners are entitled to sue the MTGA in tribal court, where the Tribe has waived its sovereign immunity under terms similar to or more generous than those offered by many States. *See* Mohegan Tribal Code §§ 3-248(a), 3-250(b).

ARGUMENT

This case concerns two interrelated forms of immunity that protect tribal officials: sovereign immunity and official immunity.

"Sovereign immunity" refers to the immunity of the government itself—including the immunity of an Indian Tribe. *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). Individual officials may cloak themselves in the government's sovereign immunity if a suit naming them "in fact" seeks relief from the sovereign. *Alden* v. *Maine*, 527 U.S. 706, 756 (1999). That is true, for example, if a plaintiff seeks specific relief involving property or money held by the sovereign. *See, e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949). It is likewise true if a plaintiff sues an official for damages, but the sovereign itself is the "real, substantial party in interest." *Ford Motor Co.* v. *Dep't of Treasury*, 323 U.S. 459, 464 (1945).

"Official immunity," meanwhile, shields government officials from suits for damages paid out of their *own* pockets. Official immunity encompasses several common-law doctrines. One such doctrine shields federal officials, foreign officials, and—as relevant here—tribal officials from state-law civil suits. In *Barr* v. *Matteo*, 360 U.S. 564 (1959), the

Court concluded that federal officials are entitled to an "absolute privilege" from liability for state tort suits based on acts "taken *** within the outer perimeter of [their] line of duty." *Id.* at 573, 575-576 (opinion of Harlan, J.); *see Howard* v. *Lyons*, 360 U.S. 593 (1959) (same). Although the Court retreated from *Barr* decades later, *see Westfall* v. *Erwin*, 484 U.S. 292 (1988), Congress immediately reinstated a broad rule of immunity, covering discretionary and non-discretionary functions alike. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (28 U.S.C. § 2679); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 426 (1995).

Though formally invoked by an individual, official immunity "springs from the same root considerations that generated the doctrine of sovereign immunity." *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974), abrogated on other grounds by *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Immunity from suit, after all, "is not a badge or emolument of exalted office" but is "designed to aid in the effective functioning of government." *Barr*, 360 U.S. at 572-573. Officials at risk of state tort suits may be "unduly timid in carrying out their official duties"; immunity encourages vigorous public service by freeing them "of the costs of vexatious and often frivolous damages suits." *Westfall*, 484 U.S. at 295.

Lower courts have often blended "sovereign immunity" and "official immunity" when assessing suits against tribal officials in their individual capacities. Most early cases extending immunity to tribal officials conceived of that immunity as an application of *Barr*'s official immunity rule. *See, e.g.*, *Davis* v. *Littell*, 398 F.2d 83, 85 (9th Cir. 1968); *White Moun-*

tain Apache Indian Tribe v. *Shelley*, 480 P.2d 654, 657-658 (Ariz. 1971). Later cases relied on those precedents, but referred to tribal officials' immunity as a form of tribal sovereign immunity. *See, e.g.*, *United States* v. *Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981) (citing *Davis* and *White Mountain*); *Diver* v. *Peterson*, 524 N.W.2d 288, 290 (Minn. Ct. App. 1994) (citing *Davis*). The inconsistent nomenclature may reflect the fact that, in the tribal context, the terminology makes little functional difference: Both forms of tribal immunity are defined by federal common law and subject to Congress's "plenary control." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *see also, e.g.*, *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851-853 (1985); *Cty. of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 233-235 (1985).[3]

The Connecticut Supreme Court's decision here is the latest link in that game of telephone. The court relied, for example, on *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), *aff'd*, 114 F.3d 15 (2d Cir. 1997) (per curiam), which relied on *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476, 478-480 (9th Cir. 1985), which relied on *Davis*, 398 F.2d at 85, which relied on *Barr*. *See* Pet. App. 10a-11a. It also adopted the analysis in *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, 221 F.

[3] For States, by contrast, the label matters. Sovereign immunity is constitutionally protected from congressional abrogation, at least with respect to Congress's Article I powers. *See Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996). Official immunity, however, may be modified by Congress. *See Westfall*, 484 U.S. at 300.

Supp. 2d 271 (D. Conn. 2002). *See* Pet. App. 12a-13a. *Bassett* reasoned that, while "Eleventh Amendment immunity does not extend to suits against a *state* official in his 'individual capacity,' * * * the officer could claim absolute or qualified immunity as a defense." 221 F. Supp. 2d at 280 (emphasis added). But in the *tribal* context, *Bassett* collapsed sovereign and official immunity into one analysis; the question was simply whether the tribal official had acted "beyond his authority." Pet. App. 13a (quoting *Bassett*, 221 F. Supp. 2d at 280); *see also* U.S. Br. 17. The Connecticut Supreme Court's decision thus has its roots in official immunity, at least as much as sovereign immunity.

Regardless of the label it used, the Connecticut Supreme Court arrived at the right outcome. Sovereign immunity bars Petitioners from bringing this suit in state court because the Tribe is the real party in interest: It exercised control over Respondent and is legally obligated to indemnify him for damages based on acts within the scope of his duties. Alternatively, if this Court determines that Respondent is the real party in interest, then official immunity applies. Since *Barr*, that doctrine has granted government officials immunity from state tort liability for acts within the line of duty, including Respondent's acts here. Either way, the result is the same: Petitioners cannot invoke state tort law to sue a tribal official who was doing his job. Just as if Respondent were a federal official or a state official, Petitioners must bring this suit against the Tribe in its own courts.

I. SOVEREIGN IMMUNITY BARS THIS SUIT

Petitioners do not contest that their original complaint, which named the MTGA as a defendant, was barred by sovereign immunity. *See* Pet. Br. 22. Instead, they argue that sovereign immunity became irrelevant when Petitioners relabeled their suit an action against Respondent "in his individual capacity." Pet. Br. 7-9. This Court has never taken that formalistic approach. Rather, it has analyzed whether the sovereign is the real party in interest—that is, whether the defendant is the sovereign's agent and the sovereign will foot the bill. Here, the Tribe (1) authorized Respondent to act on its behalf, and (2) promised by statute to indemnify him for such acts, while substituting itself as the appropriate defendant in its own court system. *See* Mohegan Tribal Code §§ 3-131, 4-52. Given that pair of features, the Tribe is the real party in interest and its sovereign immunity bars Petitioners' suit.

1. This Court has long cautioned that the caption of a lawsuit is not the sole determinant of sovereign immunity. In an ordinary individual-capacity action against a public official, damages are paid from "the official's personal assets," and sovereign immunity does not apply. *Kentucky* v. *Graham*, 473 U.S. 159, 166-167 (1985); *see Hafer* v. *Melo*, 502 U.S. 21, 25 (1991) (explaining that individual-capacity suits "impose individual liability upon a government officer"). But that is not true of all putative individual-capacity suits. To the contrary, the Court has examined "the essential nature and effect of the proceeding" to determine whether "the action is in essence" a suit against the sovereign. *Ford Motor Co.*, 323 U.S. at 464. If it is, then the sovereign "is

the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*; *see Larson*, 337 U.S. at 687 (holding that a suit "must fail, whether or not the officer might otherwise be suable," if it is, "in effect, a suit against the sovereign").

In damages actions against a sovereign's agent, the sovereign is the real party in interest if it must pay any adverse judgment. *See Ford Motor Co.*, 323 U.S. at 464 (asking whether the suit "is in essence one for the recovery of money from the state"). Petitioners suggest that this rule applies only when a judgment will be formally executed against the sovereign's treasury. *See* Pet. Br. 8. But this Court has not drawn such a bright line. In *Larson*, for example, it explained that sovereign immunity attaches if a judgment against the sovereign's agent might "require action by the sovereign *or disturb* the sovereign's property." 337 U.S. at 687 (emphasis added). The use of the disjunctive and the term "disturb" capture situations in which a sovereign might be liable "in effect" as well. *Id.*; *see also Malone* v. *Bowdoin*, 369 U.S. 643, 648 (1962) (holding that sovereign immunity barred an "action which *in substance and effect* was one against the United States" (emphasis added)).

The Court reiterated its functional approach in *Edelman* v. *Jordan*, 415 U.S. 651 (1974). It explained that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* at 663. That was true even though the plaintiffs had nominally sued state officials, because "[t]he funds to satisfy the award in this case

must *inevitably* come from the general revenues of the State of Illinois." *Id.* at 665 (emphasis added); *see also id.* at 664 ("These funds will *obviously* not be paid out of the pocket of [the official]." (emphasis added)). As a result, any judgment would "resemble[ ]" a monetary judgment against the sovereign. *Id.* at 665. The analysis, in other words, focused on the practicalities—who would "inevitably" or "obviously" pay—rather than whose name appeared in the caption.

2. This Court has not yet decided "which arrangements between a State and a nominal defendant are sufficient to establish that the State is the real party in interest." *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 316 n.10 (1990). But in the closely related context of suits against state (or tribal) *instrumentalities*, the Court has held that an entity shares the sovereign's immunity if the sovereign (1) controls that entity and (2) is liable for its debts.

In *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), the Court evaluated both factors to determine whether a purported state instrumentality was entitled to share a State's sovereign immunity. It first treated control as a prerequisite, noting that States have "ultimate control of every state-created entity." *Id.* at 47; *see id.* at 60-61 (O'Connor, J., dissenting) (advocating control as the dispositive factor). So the Court focused on financial responsibility and deemed "the vulnerability of the State's purse as the most salient factor." *Id.* at 48. In short, "is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise?" *Id.* at 51. That determination depends on whether the State, *in its own laws*, has assumed responsibility for the

entity's debts. *See id.* at 46 (reasoning that the two controlling States "bear no legal liability for [the corporation's] debts" and that "nothing in the compact or the laws of either State" suggests that it "would pay"); *see also Regents of Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 n.5 (1997) (explaining that immunity "is a question of federal law" that "can be answered only after considering the provisions of state law that define the agency's character").

Lower courts applying *Hess* have commonly considered the presence or absence of state indemnity laws in determining whether an entity shares a State's sovereign immunity. *See, e.g.*, *Grajales* v. *Puerto Rico Ports Auth.*, 831 F.3d 11, 29 (1st Cir. 2016) (Puerto Rico law did not make the government "liable, as a practical matter," for an adverse judgment against the agency); *Kreipke* v. *Wayne State Univ.*, 807 F.3d 768, 776 (6th Cir. 2015) (Michigan law required any judgment against the university to be paid by the State), petition for cert. pending, No. 15-1419 (filed May 19, 2016); *U.S. ex rel. Oberg* v. *Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 138 (4th Cir. 2014) (Pennsylvania law disavowed state liability for the agency's debts), petition for cert. pending, No. 15-1045 (filed Feb. 16, 2016). Courts have been even more accommodating for tribal arrangements, extending sovereign immunity to entities whose success inures to the Tribe's benefit, even if the Tribe does not formally indemnify them. *See, e.g.*, *Breakthrough Mgmt. Grp.* v. *Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1194-1195 (10th Cir. 2010) (extending sovereign immunity to casino that funded governmental functions); *Allen* v. *Gold Country Casino*, 464 F.3d 1044, 1046-1047 (9th Cir. 2006) (extending sovereign immunity to casino

that promoted tribal economic development); *see also* U.S. Br. at *13, *Inyo Cty.* v. *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony*, No. 02-281, 2003 WL 252549 (Jan. 23, 2003) (arguing that tribal corporation was entitled to sovereign immunity because "any money judgment against [it] would necessarily deplete what would otherwise be tribal funds").[4]

That functional approach should apply equally to the determination whether a suit against a state (or tribal) *official* is really a suit against the sovereign. The ultimate question in both contexts is the same: Is the sovereign responsible for an adverse judgment against its agent? *Compare Hess*, 513 U.S. at 48 (asking whether "judgments *** must be paid out of [the sovereign's] treasury"), *with Edelman*, 415 U.S. at 663 (asking whether any "liability *** must be paid from public funds"). If control and a statutory obligation to "pay *** indebtedness," *Hess*, 513 U.S.

[4] Lower courts have applied a similar analysis—control plus indemnification—to determine whether government agents are entitled to immunity in the Medicare context. *See, e.g.*, *Pani* v. *Empire Blue Cross Blue Shield*, 152 F.3d 67, 72 (2d Cir. 1998) (intermediary received sovereign immunity because it is "a government agent that acts on behalf of the Medicare Administrator * * * and is entitled to indemnification from the United States, which, therefore, is the real party of interest" (brackets and internal quotation marks omitted)); *Pine View Gardens, Inc.* v. *Mut. of Omaha Ins. Co.*, 485 F.2d 1073, 1075 (D.C. Cir. 1973) (intermediary received sovereign immunity because an adverse judgment "would, in effect, be requiring a government fiscal agent to make a payment for which, in turn, the agent would reasonably seek, and justly claim, reimbursement from the Government").

at 51, suffice to answer that question in the affirmative for public entities, then they should suffice for public officials as well. Indeed, Petitioners' "leading treatise" makes just that point. *See* Pet. Br. 9-10 (discussing 5 Fowler V. Harper et al., *Harper, James and Gray on Torts* (3d ed. 2008)). Although the treatise says that a sovereign is "seldom" the real party in interest in a tort suit against a government official, it includes an important caveat: "Except where a public entity by statute may be permitted or required to indemnify the employee if he is held liable." *Harper* § 29.9, at 790 n.3.

Applying the two-pronged functional approach here, the Tribe is the real party in interest. As an initial matter, the control prerequisite is satisfied. Respondent was a tribal employee, was sued for actions that he took at the Tribe's behest, and was driving a Tribe-owned vehicle at the time of the accident. Pet. App. 2a. Petitioners have never asserted that he acted outside the scope of his employment. *See id.* at 3a. The Tribe therefore exercised control over the conduct underlying this suit.

More importantly, the Tribe bears full financial liability for any adverse judgment in this case. In the Mohegan Tribal Code, the Tribe has committed to "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" if the officer or employee was "acting in the discharge of his or her duties or within the scope of his or her employment." Mohegan Tribal Code § 4-52. And the Tribe has not just indemnified its employees; it has declared that the Tribe itself (or the MTGA) is the appropriate "named defendant" in a tort action. *Id.* § 3-131. Under the "laws of the [Tribe]," *Hess*, 513

U.S. at 46, any damages levied against Respondent "must be paid from public funds." *Edelman*, 415 U.S. at 663.

The combination of the Tribe's control over its officials and its statutory commitment to indemnify them means that the Tribe is the real party in interest and that sovereign immunity bars this suit.

3. Petitioners and the Government object that the Tribe's indemnification law is irrelevant because it is "voluntary." *See* Pet. Br. 24; U.S. Br. 11-12. But indemnification laws concerning a state or tribal instrumentality are equally "voluntary," and they are the *touchstone* of sovereign immunity under *Hess*. Neither Petitioners nor the Government cites a single case from this Court holding that such laws should be ignored here.

Petitioners point only to *Alden* v. *Maine*, 527 U.S. 706. *See* Pet. Br. 24. Yet *Alden* did not say a word about indemnification. It merely described one of the underlying justifications for sovereign immunity—that "[p]rivate suits against nonconsenting States *** may threaten the financial integrity of the States" and interfere "with the will of their citizens." 527 U.S. at 750-751. And so they may. Subjecting a Tribe to monetary damages in a state court, whether formally or functionally, would have the same effect. The State could exercise "a power and a leverage" over the Tribe. *Id.* at 750. And that power would "carr[y] with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity" of the Tribe. *Id.* Petitioners' proposed solution—that a Tribe simply decline to indemnify its employees, Pet. Br. 24—is no solution at all. It would similarly defeat "the will of [the Tribe's] citizens,"

Alden, 527 U.S. at 751, by overriding their decisions to encourage public service and to deputize the tribal government to litigate external legal disputes on officials' behalf.

The Government, for its part, cites this Court's decision in *Regents*, 519 U.S. 425. U.S. Br. 12. As its "*cf.*" signal suggests, *Regents* does not control. There, the plaintiff argued that when "the *State* [is] indemnified by a third party," it is *stripped* of its sovereign immunity. 519 U.S. at 431 (emphasis added). The Court flatly rejected the argument. It quipped that "if the sovereign State of California should buy insurance to protect itself against potential tort liability to pedestrians stumbling on the steps of the State Capitol, it would not cease to be 'one of the United States.'" *Id.* at 431. But the Court made clear that a State's obligation to pay a judgment remained relevant "[w]hen deciding whether a *state instrumentality* may invoke the State's immunity" in the first place. *Id.* at 429 (emphasis added). After all, "a State's legal liability for judgments * * * [w]as an indicator of the relationship between the State and its creation." *Id.* at 430-431; *see id.* at 429 n.5 (reaffirming that a state instrumentality's entitlement to sovereign immunity depends on the voluntary "provisions of state law that define the agency's character").

That leaves several lower court decisions that have refused to give weight to state indemnification statutes. *See* U.S. Br. 12. Those decisions have raised two additional concerns about federal supremacy and fairness. Yet both concerns are already folded into the real-party-in-interest analysis: An official who violates federal law lacks the imprimatur

of the sovereign, and a sovereign that forecloses all relief lacks any threat to its treasury.

First, lower courts have balked at the prospect that a State might shield its officials from *federal* laws like 42 U.S.C. § 1983. They have accordingly refused to allow States to use indemnification statutes to extend their Eleventh Amendment immunity to officials sued under federal law. *See Duckworth* v. *Franzen*, 780 F.2d 645, 651 (7th Cir. 1985) (opining that "it would be absurd" to allow a State "to put its employees beyond the reach of section 1983" by indemnifying them); *Demery* v. *Kupperman*, 735 F.2d 1139, 1147 (9th Cir. 1984) (refusing to afford States "the power effectively to prevent vindication of federal rights in federal court"). Those decisions are consistent with a real-party-in-interest analysis. A State or Tribe cannot be the real party in interest if an official violates federal law, even if the sovereign has agreed to indemnify the official. That is because actions in violation of federal law are ultra vires, just as actions outside the scope of an official's authority are ultra vires. *Demery*, 735 F.2d at 1146; *see Ex parte Young*, 209 U.S. 123, 159-160 (1908) (explaining that when a state official "comes into conflict with the superior authority of [the federal] Constitution, * * * he is in that case stripped of his official or representative character"); *Scheuer*, 416 U.S. at 237-238 (applying same analysis to state official sued for damages for "depriv[ing] another of a federal right"); *see also Larson*, 337 U.S. at 690. A Tribe's sovereign immunity from *state* liability, or vice versa, presents no such conflict with supreme federal law.

Second, lower courts have worried that, in some circumstances, indemnity could be an illusory offer. Put differently, a State might give with one hand by

promising to indemnify its officials, and take with the other by claiming sovereign immunity. *See Griess* v. *Colorado*, 841 F.2d 1042, 1046 (10th Cir. 1988) (per curiam); *Demery*, 735 F.2d at 1147. Again, though, a real-party-in-interest analysis accounts for that concern. If a sovereign has offered cost-free indemnity, a suit does not truly risk "disturb[ing] the sovereign's property." *Larson*, 337 U.S. at 687. And again, that incongruity is beside the point here. The Tribe has not offered indemnity in name only; it has assumed liability for is officials' negligence in its own courts and has required that it be named as the defendant in their place, putting its treasury at stake. Mohegan Tribal Code §§ 3-131, 3-250.

In sum, the real-party-in-interest analysis comes out differently in this case than in the various lower court cases about indemnification. Here, the Tribe authorized Respondent's actions (and could so authorize, because there was no conflict with superior federal law), and it committed to pay for the legal repercussions of those actions in tribal court (and thus did not make an illusory promise). Under the facts of this case, then, the Tribe is the real party in interest.

4. Finally, as a practical matter, indemnification is not truly "voluntary" for many Tribes, as it is for States. At least until this Court clarifies the scope of their official immunity, *see infra* pp. 26-49, tribal employees are uniquely at risk of liability because they often must engage in off-reservation activity. Tribes, in turn, must indemnify their officials or suffer interference with their public administration.

Simple geography makes the point. Unlike States, Indian reservations may be located in remote areas and spread across non-contiguous parcels of land. *See* Steve E. Dietrich, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 Wash. L. Rev. 113, 131 (1992) (describing Tribes' need to traverse roads that "frequently weave in and out of reservation land"). The Mohegan Tribe, for example, holds several distinct properties, connected by miles of Connecticut roads. *See* Mohegan Tribe, *Plan Showing Trust and Fee Lands of the Mohegan Tribe of Indians of Connecticut* (Dec. 2016), https://goo.gl/qpwQGs. As a result, tribal officials must leave tribal land in order to perform basic functions, from conducting law enforcement to providing emergency and social services to tribal members. In fact, tribal officials may carry out those services pursuant to mutual-aid agreements with Connecticut municipalities, whereby each party commits to render emergency services in the other's jurisdiction. *See* Conn. Dep't of Emergency Servs. & Pub. Prot., *Statewide Fire Rescue Disaster Response Plan* (2015), https://goo.gl/m7saLd (listing Mohegan Tribal Fire Department among participating departments). If the Tribe did not indemnify its officials, it might be forced to forgo the full complement of services incident to self-governance. That is not a dilemma that States face, at least not on the same scale.

Tribes also face unique economic constraints, which require them to engage in more outward-facing activities. Because much of their land is held in trust by the Federal Government and because members have little income, "few tribes have any significant tax base." Catherine T. Struve, *Tribal Immuni-*

ty & Tribal Courts, 36 Ariz. St. L.J. 137, 169 (2004). Tribes' limited territory and tenuous financial position "make it particularly likely that tribal enterprises must engage in external commerce." *Id.* at 169 n.184; *see Bay Mills*, 134 S. Ct. at 2043-2045 (Sotomayor, J., concurring) (describing the "insuperable *** barriers Tribes face in raising revenue through more traditional means"). As this Court has acknowledged, external commercial activities may "provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services." *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 218-219 (1987).

Because leaving the reservation may be a geographic and economic necessity, the Tribe cannot rely on tribal law alone to protect its employees. Connecticut, by contrast, can guarantee immunity to employees within its borders—even, in at least some circumstances, on tribal land. Conn. Gen. Stat. Ann. § 4-165(a); *see Nevada* v. *Hicks*, 533 U.S. 353, 364 (2001). But the Tribe has no such luxury. As a consequence, it "inevitably" must indemnify its employees for off-reservation activity. *Edelman*, 415 U.S. at 655.

II. ALTERNATIVELY, OFFICIAL IMMUNITY BARS THIS SUIT

If the Court concludes that Respondent, rather than the Tribe, is the real party in interest, it should still affirm the Connecticut Supreme Court. In that event, the common-law doctrine of official immunity protects Respondent from state tort liability for actions that he performed within the scope of his official duties.

Petitioners assert that the Court should not consider official immunity because the question presented uses the words "sovereign immunity." Pet. Br. 22 n.2. But Petitioners just took those words from the Connecticut Supreme Court's opinion, and as discussed above, the Connecticut Supreme Court—like most lower courts—used "tribal sovereign immunity" as an umbrella term to encompass both sovereign immunity and official immunity. *See supra* pp. 12-14. The court adopted the reasoning of *Bassett*, a decision that explicitly blended both concepts, Pet. App. 12a-13a (quoting *Bassett*, 221 F. Supp. 2d at 280), and it invoked official-immunity laws to illustrate which actions are "subject to sovereign immunity," *id.* at 14a-15a (citing *Young* v. *City of Mount Ranier*, 238 F.3d 567, 578 (4th Cir. 2001), and Conn. Gen. Stat. Ann. § 4-165).[5] The "precise terms of the question presented" do not compel the Court to ignore official immunity when it is "essential to analysis" of the decision below. *Procunier* v. *Navarette*, 434 U.S. 555, 559 n.6 (1978).

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[5] Even in other contexts, where Connecticut courts draw a distinction between sovereign immunity and official immunity, they treat both defenses the same way procedurally. Both defenses are raised by a motion to dismiss for lack of subject matter jurisdiction and are amenable to an immediate appeal. *See Martin* v. *Brady*, 802 A.2d 814, 817 (Conn. 2002) (official immunity "implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss" (internal quotation marks omitted)); *Manifold* v. *Ragaglia*, 891 A.2d 106, 113-114 (Conn. App. Ct. 2006) (denial of official immunity "is an immediately appealable final judgment"); Pet. App. 4a-5a.

At the certiorari stage, Petitioners recognized as much. They devoted several pages of their petition to arguing that "[t]he Connecticut Supreme Court's error was not simply a matter of attaching the wrong label" to "official immunit[y]." Pet. 19; *see id.* at 17-20 (discussing *Westfall* and other official-immunity precedents). Respondent countered that "the decision below is consistent with the limits on the immunity of government officials" and pointed to the Westfall Act and the analogous Connecticut statute for support. Br. in Opp. 1, 24-25. Despite their footnote of protest, Petitioners have continued this argument in their merits brief, where they again spend pages trying to show that official immunity would not bar this suit. Pet. Br. 13-17.

The Government agrees that official immunity is in the question presented, judging by the last half of its brief. *See* U.S. Br. 18-33. The parties are fully apprised of the issue. And by failing to address this doctrine, the Court would potentially strip away a protection that tribal officials have relied on for decades without considering a central legal basis on which that protection rests. Nothing requires the Court to take that approach. It should address whether Respondent is entitled to the substance of the immunity that the Connecticut Supreme Court recognized.

A. The Federal Common Law Extends Official Immunity To Tribal Officials

Official immunity is "a creature of the common law." *Scheuer*, 416 U.S. at 241. The Court began developing official immunity doctrines centuries ago to "promote the effective functioning of the Federal Government." *Howard*, 360 U.S. at 597; *see Spal-*

ding v. *Vilas*, 161 U.S. 483, 494 (1896); *Scheuer*, 416 U.S. at 241-242. It reasoned that if public officials were subject to personal liability for their official acts, they would be "unduly timid in carrying out their official duties," *Westfall*, 484 U.S. at 295; "time and energies which would otherwise be devoted to governmental service" would be consumed defending harassing or frivolous lawsuits, *Barr*, 360 U.S. at 571; and "the fearless, vigorous, and effective administration of policies of government" would be "inhibit[ed]," *id.*

This Court has recognized a variety of federal common-law immunity rules to vindicate those goals. It has held that judges, prosecutors, and the President are absolutely immune from personal-capacity suits concerning some or all of their official acts. *See Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872). Officials at every level of government receive qualified immunity from civil liability for violations of federal law. *See Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987); *Scheuer*, 416 U.S. 232. And, most pertinent here, federal officials are entitled to immunity from state-law tort liability. *See Barr*, 360 U.S. at 571.

As the Government explains, "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." U.S. Br. 26. Tribes, no less than other governments, require "fearless, vigorous, and effective administration." *Barr*, 360 U.S. at 571. And the administration of a Tribe, like that of any other government, would be impaired if its officials were subject to pervasive personal liability for their official acts. *See id.* Because the Federal Government

has a unique interest in protecting "strong tribal governments," 25 U.S.C. § 4301(a)(6), federal common law should grant tribal officials the same immunity it extends to other government officials. U.S. Br. 26 & n.7; *cf. Nat'l Farmers Union Ins.*, 471 U.S. at 856; *Bay Mills*, 134 S. Ct. at 2030-2031; *Oneida Indian Nation*, 470 U.S. at 233-235; *see generally Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 505 (1988).

Petitioners disagree, arguing in a footnote that "the principles of federal supremacy that support official immunity for federal employees are not applicable to tribal employees." Pet. Br. 22-23 n.2. But federal employees' immunity from tort liability is not based on "principles of federal supremacy"; it derives from the interest in "promot[ing] the effective functioning of the Federal Government." *Howard*, 360 U.S. at 597. The Federal Government has a parallel interest in promoting the effective functioning of tribal governments. *See Nat'l Farmers Union Ins.*, 471 U.S. at 856. The same immunity should protect that interest, too.

B. Official Immunity Protects Tribal Officials From State-Law Tort Suits Concerning Acts Within The Scope Of Their Duties

The only real dispute is what the scope of that immunity should be. The Government asks this Court to subject tribal officials to the rule of *Westfall* v. *Erwin*, which held that federal officials' immunity was limited to their "discretionary functions." U.S. Br. 27. But *Westfall* was an outlier that Congress quickly repudiated. For three decades prior to that decision, federal courts had granted officials *absolute*

immunity from tort liability concerning their official acts. And when *Westfall* "eroded" that immunity, Westfall Act § 2(a)(3), Congress "reacted quickly to delete the discretionary function requirement, finding it an unwarranted judicial imposition." *Lamagno*, 515 U.S. at 426. The Court should not use its common-law authority to impose *Westfall*'s discredited rule on tribal officials, especially after *Westfall* itself sought "guidance" from Congress, 484 U.S. at 300.

1. Congress enacted the Westfall Act to restore the rule of absolute immunity that prevailed under *Barr* v. *Matteo*

a. First, a brief history: Prior to 1959, federal officials received limited immunity from state-law tort liability. Although the Court had long held that judicial officers and cabinet-level officials were immune from liability for certain state-law torts, *see Spalding*, 161 U.S. at 494; *Bradley*, 80 U.S. (13 Wall.) 335, it remained unclear whether that immunity protected lower-ranking employees or covered the full range of tort claims. As late as 1942, when Congress was drafting the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, disgruntled individuals could and "constantly" did sue federal employees in their personal capacity to challenge actions with which they were unhappy. *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 25 (1942) (statement of Assistant Att'y Gen. Francis Shea).

In *Barr* v. *Matteo*, the Court clarified the scope of official immunity. It confirmed that immunity from tort liability extended to *all* federal employees, not just "officers of cabinet rank." 360 U.S. at 572-573.

And it stated that the immunity provided an "absolute privilege" against any tort suits concerning acts "taken * * * within the outer perimeter of [the employee's] line of duty." *Id.* at 574-575 (opinion of Harlan, J.); *see id.* at 577-578 (Black, J., concurring) (agreeing that immunity attached because the challenged act "was neither unauthorized nor plainly beyond the scope of [the employee's] official business"); *see also Howard*, 360 U.S. at 597 (similar).

For "three decades" following *Barr*, the "great weight of authority" held that "federal employees' actions were *absolutely* protected from common law tort liability" so long as they were "within the outer perimeter of the employee's official duties." *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 62 (1988) (*Westfall Act Hearing*) (statement of Robert L. Willmore, Deputy Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice) (emphasis added). Courts granted immunity regardless of the nature of the tort claim, and regardless of whether the employee's action entailed meaningful discretion. *Id.*; *see* U.S. Br. at 10, *Westfall*, *supra* (No. 86-714) (similar). Although a few courts construed *Barr* more narrowly, that was a sufficiently minority view that by 1988, the Department of Justice reported that employees were only "occasionally" sued in their personal capacity, and individual liability "[r]arely" attached. *Westfall Act Hearing* 64-65; *see* H.R. Rep. No. 100-700, at 2 (1988) (reporting that "[u]ntil the *Westfall* decision, nearly all actions against Federal employees in their personal capacity were unsuccessful").

The Government has evidently forgotten all that. It now claims that prior to 1988, employees did not receive tort immunity for non-discretionary conduct unless a specific statute so provided. U.S. Br. 23-25, 28. That description of the law would have been unrecognizable to the Department of Justice that urged passage of the Westfall Act and to the Congress that enacted it. *See Westfall Act Hearing* 64-65; H.R. Rep. No. 100-700, at 2; *see also Osborn* v. *Haley*, 549 U.S. 225, 257 (2007) (Breyer, J., concurring in part and dissenting in part) (stating that until 1988 "many thought" that federal employees received "an immunity that applied to nondiscretionary, as well as discretionary, actions that fell 'within the scope' of the employee's 'office or employment' " (citation omitted)). It is also irreconcilable with the case law after *Barr*, which regularly granted employees immunity for non-discretionary acts. *See, e.g.*, *Gen. Elec. Co.* v. *United States*, 813 F.2d 1273, 1276-1277 & n.3 (4th Cir. 1987) (per curiam); *Poolman* v. *Nelson*, 802 F.2d 304, 307-308 (8th Cir. 1986) (citing cases); *Lojuk* v. *Johnson*, 770 F.2d 619, 626-627 (7th Cir. 1985); *see also* U.S. Br. at 11 & n.6, *Westfall, supra* (No. 86-714) (noting that even those courts of appeals that required discretion often "reached almost the same result by concluding that the authority to exercise very limited discretion is sufficient").

The statutes that the Government and Petitioners cite only confirm the point. *See* U.S. Br. 23-25; Pet. Br. 15-16. The FTCA was enacted more than a decade before *Barr*. Act of Aug. 2, 1946, Tit. IV, Pub. L. No. 79-601, 60 Stat. 812, 842-847. The Federal Drivers Act was proposed and debated before *Barr*, as well; although Congress enacted the statute

shortly after that decision, there is no indication that Congress was aware of the case or recognized its import. *See* H.R. Rep. No. 87-297, at 2 (1961); Pub. L. No. 87-258, 75 Stat. 539 (1961). The remaining statutes appear to have been efforts to *correct* the errors of outlier courts that had denied official immunity for non-discretionary acts. For instance, in 1976 Congress enacted 10 U.S.C. § 1089 to overrule the D.C. Circuit's decision in *Henderson* v. *Bluemink*, 511 F.2d 399 (D.C. Cir. 1974), which had denied immunity to health-care personnel for non-discretionary conduct. *See* S. Rep. No. 94-1264, at 3-4 (1976); U.S. Br. 25. As even the D.C. Circuit acknowledged, its decision departed from two other circuits that had granted immunity in materially identical circumstances. *See Henderson*, 511 F.2d at 403; *see also* S. Rep. No. 94-1264, at 4 (explaining that "[p]rior to 1974," health-care personnel often received tort immunity).

b. The law did change—briefly—in 1988. That year, in *Westfall* v. *Erwin*, the Court sided with the minority of lower courts and held that employees were entitled to immunity from tort liability only for acts that involved a meaningful degree of discretion. 484 U.S. at 298. As the Court explained, it believed that "the central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability" for non-discretionary conduct. *Id.* at 296. It reasoned that "[w]hen an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct"; "[i]t is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of

policies of government.'" *Id.* at 296-297 (quoting *Barr*, 360 U.S. at 571).

The Court added an important caveat: "We are also of the view, however, that Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." *Id.* at 300. Accordingly, it said, "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Id.*

c. Congress "reacted quickly." *Lamagno*, 515 U.S. at 426. In a hearing three months after the decision, representatives of the Department of Justice and federal employee organizations informed Congress that *Westfall* had significantly curtailed the absolute immunity employees had enjoyed since *Barr*. *See Westfall Act Hearing* 61-62; *see also id.* at 33, 176, 190-191, 243; H.R. Rep. No. 100-700, at 2. Those witnesses uniformly rejected the Court's judgment that the goal of "promoting effective government[] would not be furthered" by such immunity. *Westfall*, 484 U.S. at 296. As the Department of Justice explained, stripping employees of tort immunity for non-discretionary functions would subject them to "bankrupting liability simply for engaging in [their] daily responsibility," cause a "devastating" effect on the "morale o[f] the Federal workforce," render it "increasingly difficult to attract the brightest and best candidates into the Federal service," and "make it far more difficult for Federal agencies to accomplish their missions." *Westfall Act Hearing* 57-58; *see*

H.R. Rep. No. 100-700, at 3 (quoting extensively from this testimony).[6]

In November 1988, Congress enacted the Westfall Act. It found that "Federal employees for many years have been protected from personal common law tort liability by a broad based immunity," but that "Westfall v. Erwin *** seriously eroded" that immunity. Westfall Act § 2(a)(3)-(4). It also found that "[t]his erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation," which would "seriously undermine the morale

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[6] *See also Westfall Act Hearing* 33 (statement of Rep. Frank Wolf) (warning that "[t]he mere threat of legal action against Federal employees could leave workers intimidated in their performance of official duties" and "seriously undermine the functions and morale of many Federal agencies"); *id.* at 45 (Letter from G. Jerry Shaw, Gen. Counsel, Sr. Execs. Ass'n) (contending that "[o]nce employees become aware of the potential personal liability" under *Westfall*, "it is only logical that the government would suffer a loss of productivity and a diminished enthusiasm to take necessary actions"); *id.* at 180-181 (statement of Lois G. Williams, Dir. of Litig., Nat'l Treasury Emps. Union) (calling the decision "disastrous for *** efficient functioning of government"); *id.* at 191 (statement of Michael E. Minahan, Pres., Fed. Managers Ass'n) (stating that "[t]he risk of personal liability and the climate of uncertainty created by *Westfall* is counterproductive to the maintenance of a dynamic and competent workforce"); *id.* at 274 (Letter from Charles R. Gillum, Chairman, President's Council on Integrity & Efficiency) (predicting that the decision "will have a devastating impact on law enforcement, investigation and audit activities").

and well being of Federal employees" and "impede the ability of agencies to carry out their missions." *Id.* § 2(a)(5)-(6). Pointing to the Court's plea for guidance, the Act noted that "the Supreme Court indicated that * * * legislative consideration of this matter would be useful." *Id.* § 2(a)(7).

Responding to that invitation, the Act amended the FTCA "to return Federal employees to the status they held prior to the *Westfall* decision." H.R. Rep. No. 100-700, at 4; *see Lamagno*, 515 U.S. at 426. It added a provision stating that employees could not be sued for any "negligent or wrongful act or omission * * * within the scope of [their] office or employment." Westfall Act § 5 (28 U.S.C. § 2679(b)). As was the case before *Westfall*, only the Government itself was the proper defendant in a suit concerning such conduct. *Id.*; *see id.* § 2(a)(2).

2. The rule that prevailed under *Barr* is the appropriate common-law rule of official immunity

The upshot of this history is unmistakable. In enacting the Westfall Act, Congress rejected *Westfall* root and branch, explaining that its premise was incorrect and that its consequences would be disastrous. *See Lamagno*, 515 U.S. at 426 (Congress "delete[d] [*Westfall*'s] 'discretionary function' requirement, finding it an unwarranted judicial imposition"); *Osborn*, 549 U.S. at 257 (Breyer, J., concurring in part and dissenting in part) (Congress sought to "overturn [*Westfall*'s] holding" and "*maintain* the scope of pre-*Westfall* immunity *minus Westfall*'s *'discretionary function' limitation*" (emphasis in original)). That judgment is entitled to this Court's respect.

a. Several reasons compel that conclusion. First, the *Westfall* Court expressly requested Congress's input on the proper official-immunity rule, and Congress answered. In *Westfall*, the Court asked Congress to provide "guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." 484 U.S. at 300. Congress responded with its "legislative consideration of this matter," Westfall Act § 2(a)(7), making abundantly clear that, in its judgment, absolute immunity *was* warranted in any "context" involving non-discretionary acts. The Court has often noted the critical importance of respecting the dialogue between the branches by listening to the instructions Congress gives in response to judicial decisions. *See Boumediene* v. *Bush*, 553 U.S. 723, 738 (2008) (stating that "[i]f th[e] ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that [a statute] was a direct response to [the Court's] holding"); *United States* v. *Home Concrete & Supply, LLC,* 132 S. Ct. 1836, 1852 (2012) (Kennedy, J., dissenting) ("[I]nstructive exchanges [between the branches] would be foreclosed by an insistence on adhering to earlier interpretations of a statute even in light of new, relevant statutory amendments."). This is as clear a case of that dialogue as any.

Second, Congress's guidance in this context ought to carry particular weight because it stems from Congress's disagreement with the *empirical* assessment on which the Court rested its holding. In *Westfall*, the Court made the predictive judgment that granting officials immunity for non-discretionary acts would not "promot[e] effective government" because "[i]t is only when officials

exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.'" 484 U.S. at 296-297 (quoting *Barr*, 360 U.S. at 571). After holding extensive hearings and spending months considering the issue, Congress disagreed: Limiting immunity would create several problems that the Court had overlooked, including causing employees to behave overcautiously, *Westfall Act Hearing* 57-58; deterring "the brightest and best candidates" from joining federal employment, *id.*; and "seriously undermin[ing] [employees'] morale and well being"—problems that, taken together, *would* "impede the ability of agencies to carry out their missions," Westfall Act § 2(a)(6).

As *Westfall* rightly noted, "highly empirical" judgments are matters that Congress is paradigmatically "in the best position" to handle. 484 U.S. at 300. And judgments about the administration of a government workforce are ones in which Congress and the Executive Branch are especially expert. The Court did not have the benefit of expert guidance when it decided *Westfall*. But Congress did, and it found that the Court had erred.

Third, the Court must pay close attention to the policy judgments embodied in the Westfall Act because official immunity is a doctrine of federal common law. As the Court has explained many times, federal common law serves to "fill the interstices of federal legislation," *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979), and to effectuate the "policy choices" that federal statutes "embody," *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). Accordingly, "[i]f there is a federal statute dealing with the general subject, it is a prime

repository of federal policy and a starting point for federal common law." *Wallis* v. *Pan. Am. Petro. Corp.*, 384 U.S. 63, 69 (1966); *see Boyle*, 487 U.S. at 513; *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 457 (1942); *Deitrick* v. *Greaney*, 309 U.S. 190, 200-201 (1940).

The Court has repeatedly made this point in the context of official immunity. It explained in *Nixon* v. *Fitzgerald* that "decisions concerning the immunity of government officials from civil damages liability have been guided by * * * federal statutes." 457 U.S. at 747. And in *Westfall* itself, the Court said that the scope of official immunity "is a matter of federal law, 'to be formulated by the courts *in the absence of legislative action* by Congress.'" 484 U.S. at 295 (emphasis added) (quoting *Howard*, 360 U.S. at 597).

Here, Congress has acted, and it gave clear and unequivocal guidance that *Westfall* was wrong. The common law of official immunity should reflect that guidance.

b. The Government has no response to any of this. It asserts that the Westfall Act "does not alter the scope of" common-law immunity. U.S. Br. 28. But it offers nothing in support of this *ipse dixit* except a stringcite of lower-court cases applying the *Westfall* rule to federal contractors and other non-governmental entities. As the Court has repeatedly recognized, however, the rationales for official immunity often do not extend with full force to private contractors. *See Richardson* v. *McKnight*, 521 U.S. 399, 409-412 (1997) (describing "certain important differences that, from an immunity perspective, are critical"); *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1670 (2012) (Sotomayor, J., concurring) (noting that "such

cases should be decided as they arise, as is our longstanding practice in the field of immunity law"). More to the point, Congress has said the same thing: It expressly excluded "any contractor with the United States" from the protection of the Westfall Act. 28 U.S.C. § 2671. That lower courts have not provided contractors the protection Congress expressly denied them says nothing about what the rule should be for *government* employees.

The Government also says that the common law should "reflect[ ] the balance recognized by this Court in its *Westfall* decision between the benefits and costs of immunity." U.S. Br. 28. But why? The Court invited Congress to give it guidance on that "complex and often highly empirical inquiry" nearly three decades ago, *Westfall*, 484 U.S. at 300, and Congress informed the Court that it had made a mistake. Indeed, the Government *itself* vehemently argued that the balance struck by the Court in *Westfall* was in error, and would have a "devastating" effect on its workforce. *Westfall Act Hearing* 57-58. The Government never explains why tribal officials should be subject to that balance from which it worked so hard to free its own employees.

3. It would be particularly inappropriate to subject tribal officials to the *Westfall* rule

That analysis is sufficient to resolve the case. As the Government agrees, tribal officials should benefit from the same common-law rule of official immunity that federal officials enjoy. U.S. Br. 6, 26. And that common-law rule is, for the reasons just discussed, the rule that prevailed under *Barr*. But several

additional considerations make it particularly inappropriate to apply the *Westfall* rule to tribal officials.

a. For one thing, the concerns that led Congress to enact the Westfall Act apply with special force to tribal officials. As noted above, Tribes face unique geographic and economic challenges. Tribal lands are often noncontiguous and remote, requiring tribal employees to travel through States on a regular basis. And Tribes are heavily reliant on outward-facing commercial activities to support tribal governments and provide for their members. *See supra* pp. 24-26.

As a result, tribal employees—and particularly "lower-level employees" like Respondent, on whom Congress thought the *Westfall* rule would have its "most severe impact," H.R. Rep. No. 100-700, at 3—often must expose themselves to state tort liability as a necessary incident of their jobs. Drivers, law enforcement officers, emergency workers, and many other tribal officials must regularly enter States and engage in activities for which they face the risk of tort claims. That risk would inevitably "undermine the morale and well being of [tribal] employees," Westfall Act § 2(a)(6), and create an air of "timid[ity]" and "fear[]" that the Court has long recognized is not conducive to effective government, *Westfall*, 484 U.S. at 295. Those costs would make it more difficult—and expensive—for Tribes to attract "the brightest and best candidates" to enter public service. *Westfall Act Hearing* 58. Indeed, as Congress recognized in 1961, they would make it particularly difficult to attract and retain capable drivers. *See* H.R. Rep. No. 87-297, at 3 (explaining that denying official immunity to government drivers "has an adverse effect on the efficiency and morale of

those employees" and "hardly aids in attracting and holding the responsible sort of employee required for such work"). Those are costs that no government should be required to bear, and they make the "balance" struck in *Westfall* all the more one-sided for Tribes.

b. Tribes' unique sovereign status also cuts against application of the *Westfall* rule. As the Government acknowledges, federal law has long granted officials of foreign sovereigns "immunity from suits for acts taken in an official capacity, not only for discretionary acts." U.S. Br. 22 n.5 (citing, *inter alia*, *Jones* v. *LeTombe*, 3 U.S. (3 Dall.) 384, 385 (1798)); *see Samantar* v. *Yousuf*, 560 U.S. 305, 320 (2010) (explaining that foreign official immunity is "governed by the common law"). Federal courts continue to apply that absolute immunity rule as a doctrine of federal common law. *See Samantar*, 560 U.S. at 322 n.17; *Yousuf* v. *Samantar*, 699 F.3d 763, 775 (4th Cir. 2012); *Matar* v. *Dichter*, 563 F.3d 9, 14 (2d Cir. 2009).

It would be deeply anomalous if federal law treated tribal officials less favorably than "foreign visitors in American courts." *Bay Mills*, 134 S. Ct. at 2041 (Sotomayor, J., concurring). Although important differences exist between Tribes and foreign sovereigns, *see id.* at 2040-2041, the Court has often drawn on the immunity rules applicable to foreign sovereigns in determining what immunity Tribes should receive. *See C&L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001) (citing the rule governing "waivers of immunity by foreign sovereigns" in assessing the scope of tribal waiver); *Kiowa Tribe of Okla.* v. *Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) (deeming

"the problems of sovereign immunity for foreign countries" "instructive" in determining the scope of tribal sovereign immunity); *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (explaining that Tribes should be "accorded the same status as foreign sovereigns" when suing States).

That practice reflects the fact that Tribes are "domestic dependent nations" and "separate sovereigns pre-existing the Constitution," who "retain their historic sovereign authority" unless Congress abrogates it. *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted). Therefore, unless Congress says otherwise, tribal officials at least retain the immunity from suit that they would have possessed as officials of independent sovereigns. That immunity is the rule that Congress codified in the Westfall Act.

The Government objects to this line of reasoning on the ground that the "principles of customary international law" and "foreign relations" considerations that underlie the doctrine of foreign official immunity do not apply to tribal officials. U.S. Br. 23 n.5. But that argument simply ignores the Court's repeated admonition that Tribes once *were* "separate sovereigns"—to whom these considerations unquestionably *were* applicable—and that, unlike States, they did not surrender their sovereign rights in a Convention to which they were not parties. *Bay Mills*, 134 S. Ct. at 2030; *see Coeur d'Alene*, 521 U.S. at 268.

Petitioners, for their part, scoff at the notion that a tribal employee would be "treated as somehow akin to a foreign ambassador. Pet. Br. 2. But that is not what Respondent asks. Foreign *ambassadors*, unlike

ordinary foreign officials, are entitled to a near-absolute immunity from "civil process in the receiving state" that extends beyond their official acts. 1 Restatement (Third) of Foreign Relations Law § 464(2) at 458 (1986); *see* U.S. Br. 22 n.5. All Respondent asks is that he be treated the same as a foreign driver—or, for that matter, a federal one—and receive immunity from state tort liability when doing his job.

c. Subjecting a tribal official like Respondent to the *Westfall* rule would also be profoundly inequitable. Consider what the outcome of this suit would have been if Respondent had been driving a car on behalf of any other government. If he had been a federal employee, federal law would have given him an absolute shield of immunity. So too if he had been a foreign official. And if Respondent had worked for Connecticut, state law would have immunized him fully. *See* Conn. Gen. Stat. Ann. § 4-165(a).

Indeed, Respondent would have been entitled to absolute immunity even if he were an official of *another State*. That is because, as this Court held just last Term in *Franchise Tax Board of California* v. *Hyatt*, 136 S. Ct. 1277 (2016), the Full Faith and Credit Clause generally bars a State from declining to observe another State's immunity rules if they are no more restrictive than its own. *Id.* at 1282-1283; *see* U.S. Const. art. IV, § 1 ("Full faith and credit shall be given in each state to the public acts * * * of every other state."). Both Connecticut and the Tribe grant their public officials absolute immunity from tort suits based on acts within the scope of their duties. Conn. Gen. Stat. Ann. § 4-165(a); *Boskello* v. *Mohegan Tribal Gaming Auth.*, 12 Am. Tribal Law 242, 243 (Mohegan Gaming Disputes Ct. 2013)

(citing Mohegan Tribal Code § 3-248(a)). Under *Hyatt*, then, a state official in Respondent's shoes would have been entitled to the absolute immunity Connecticut gives its own officials.

Petitioners thus seek to impose on Respondent a uniquely disfavored status—one unlike that of virtually any other government official in the United States. This Court often takes considerations of fairness and uniformity into account when crafting common-law rules. *See, e.g.*, *Int'l Bhd. of Elec. Workers, AFL-CIO* v. *Hechler*, 481 U.S. 851, 857-858 (1987); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486-487 (1981). Here, those considerations support extending to Respondent the full immunity that nearly every other government official in his position would enjoy.

d. The Government does not make any compelling argument to the contrary. It first contends that Congress "coupled" the official immunity provided in the Westfall Act 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." U.S. Br. 29. Because Congress has not required Tribes to do the same, the Government reasons, there is a possibility that "bar[ring] all state-law tort suits against tribal employees" would deny tort plaintiffs any "avenue for relief," a result the Government thinks that Congress did not intend. *Id.*

That argument suffers from several problems. The first is its premise. As this Court squarely held in *United States* v. *Smith*, 499 U.S. 160 (1991), the Westfall Act "immunizes Government employees from suit *even when* an FTCA exception precludes

recovery against the Government." *Id.* at 165 (emphasis added). That is not an infrequent occurrence: As the Government well knows, the FTCA contains a lengthy list of exceptions to its waiver of sovereign immunity, including claims arising out of discretionary functions, 28 U.S.C. § 2680(a), intentional torts, *id.* § 2680(h), and overseas conduct, *id.* § 2680(k). Thus, the Westfall Act does not ensure that persons injured by government employees may bring tort suits against the United States, as the Government claims. It often forecloses relief entirely, but the grant of official immunity applies regardless.

The Government's concern that Tribes will deny plaintiffs any avenue of relief is also unfounded. As the Government concedes, the Mohegan Tribe has waived its sovereign immunity against off-reservation torts by its employees. U.S. Br. 31; *see* Mohegan Tribal Code §§ 3-244, 3-248(a), 3-250(b). That is not a coincidence. In negotiating compacts with Tribes, States are typically in a position to ask that Tribes create a system of adjudicating off-reservation torts, and Tribes typically agree. *See Bay Mills*, 134 S. Ct. at 2035. Although Congress has not *required* Tribes to offer an alternative avenue of relief, in practice one often exists.

Of course, it is theoretically possible that a Tribe could attempt to deny plaintiffs any avenue of relief. But as the Court made plain in *Bay Mills*, that speculative possibility is no justification for the Court to withhold immunity wholesale. Indeed, *Bay Mills* posed an almost identical concern: By upholding Tribes' sovereign immunity for off-reservation commercial conduct, the Court observed, it was possible that it would leave "a tort victim, or other plaintiff who has not chosen to deal with a tribe,"

with "no alternative way to obtain relief for off-reservation commercial conduct." *Id.* at 2036 n.8. But that did not sway the Court. It thought it sufficient that the plaintiff before it had "many alternative remedies," and there was thus no "need [to] consider whether the situation would be different if no alternative remedies were available." *Id.* So too here. The plaintiffs have a viable and fair "alternative remed[y]" in tribal court. As in *Bay Mills*, the Court can leave for another day the question whether a tribal official's immunity should be curtailed where no such remedy exists.

As a second argument, the Government asks the Court to draw a negative inference from the fact that Congress has granted tribal officials absolute immunity in certain circumstances. U.S. Br. 29-30. That inference is as attenuated as they come. The provisions the Government cites simply make clear that when tribal officials act *on behalf of the Federal Government*, only the United States is liable for their actions. *See* Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, Tit. III, § 314, 104 Stat. 1959 (tribal officials performing contracts or agreements for Federal Government); 25 U.S.C. § 2804(a), (f) (federal, tribal, state, or other government agency aiding in federal law enforcement); *id.* § 5321(d) (tribal officials carrying out federal contracts). When Congress drafted those provisions, it had no reason to address what immunity tribal officials should receive when they act on behalf of a Tribe. There is thus no reason to infer that Congress intended to curtail that immunity.

And that is all the Government offers. Perhaps it recognizes that there is little to be said for subjecting

tribal officials to a rule it vigorously urged this Court not to adopt, *see* U.S. Br., *Westfall*, *supra* (No. 86-714), and immediately, and successfully, pressed Congress to overturn, *see Westfall Act Hearings* 57-58. Indeed, it was not long ago that the Government told the Court that "[t]he scope of federal immunity available to * * * tribal officers" should be "informed" by the immunity federal officers receive under the Westfall Act, U.S. Br. at 21 & n.14, *Hicks*, *supra* (No. 99-1994), a position the Government struggles to reconcile with its current view, U.S. Br. 30-31 n.9.

The Government had it right the first time. The Court can, and should, follow Congress's clear "guidance," decline to revive the *Westfall* rule, and hold that federal law grants tribal officials the same absolute immunity from state tort liability that it has given federal officials for more than half a century.[7]

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[7] If, however, this Court concludes that *Westfall* provides the applicable official immunity rule, it should allow the Connecticut courts to consider in the first instance whether Respondent's duties entailed sufficient discretion to satisfy it. *See* U.S. Br. 33. As the Government acknowledges, courts have concluded that driving may in some circumstances entail meaningful discretion. *See, e.g.*, *McBride* v. *Bennett*, 764 S.E.2d 44, 47 (Va. 2014). The Connecticut courts should also be permitted to determine whether Respondent is entitled to official immunity under federal or state doctrines of comity analogous to the constitutional rule that this Court recognized in *Hyatt*. *See supra* pp. 45-46; *cf. Nat'l Farmers Union Ins.*, 471 U.S. at 853-857; U.S. Br. 31-32.

III. FEDERAL POLICIES SUPPORT RATHER THAN UNDERCUT THE RECOGNITION OF IMMUNITY

Petitioners conclude their brief with an appeal to policy. Pet. Br. 23-29. But they discount the need for immunity—whether sovereign or official—and vastly overstate its costs.

1. For starters, recognizing immunity in this case would serve several important purposes. As already discussed, immunity would preserve "the financial integrity" of a Tribe, *Alden*, 527 U.S. at 750, by protecting the Tribe from crippling liability outside its courts and beyond its control. *See supra* pp. 15-26. And with respect to tribal officials, it would "aid in the effective functioning of government." *Barr*, 360 U.S. at 573; *see supra* pp. 26-49.

The recognition of immunity would also advance important comity and dignity principles. The Federal Government has taken an unequivocal stance on tribal sovereignty and dignity. Congress has codified a special federal "obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes." 25 U.S.C. § 4301(a)(6). And it has specifically blessed tribal courts, declaring that they are "appropriate forums for the adjudication of disputes affecting personal and property rights." *Id.* § 3601(6). Immunity rules that create incentives for active tribal governments with robust tribal courts thus reflect the Federal Government's "policy of supporting tribal self-government and self-determination." *Nat'l Farmers Union Ins.*, 471 U.S. at 856.

At the same time, Tribes stand in a unique position vis-à-vis state court systems. Whereas States have agreed to mutual waivers of immunity, "it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties." *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 782 (1991). States and Tribes, in other words, have not constitutionally committed to a cooperative governmental scheme—the same scheme that allows one State to hale another State or (sometimes) its officials into court. *See id.*; *see also Franchise Tax Bd. of Cal.* v. *Hyatt*, 538 U.S. 488 (2003). Federal law thus draws sharper boundaries between the two coordinate sovereigns. *Cf. Hicks*, 533 U.S. at 365 (in the reverse context, warning that "if a tribe can affix penalties to acts done under the immediate direction of the state government, and in obedience to its laws, the operations of the state government may at any time be arrested at the will of the tribe" (internal quotation marks and brackets omitted)). Congress, of course, can revise those boundaries at any time. *See United States* v. *Wheeler*, 435 U.S. 313, 326 (1978) (noting that Tribes have ceded their ability "to determine their external relations" to the Federal Government).

2. Petitioners' primary rejoinder is that the recognition of immunity would impair States' interests in regulating within their territory. *See* Pet. Br. 26-29. Not so.

As an initial matter, the Court has already distinguished state *regulation* of tribal conduct from the application of tribal *immunity*. It has noted that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the

State." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973). But it has also explained that the rule that "substantive state laws apply to off-reservation conduct" does not mean "that a tribe no longer enjoys immunity from suit." *Kiowa*, 523 U.S. at 755. The immunity of Tribes or tribal officials from state-law tort suits is a federal question distinct from the scope of Connecticut's regulatory power.

For similar reasons, Petitioners' argument about tribal legislative power under *Montana* v. *United States*, 450 U.S. 544 (1981), misses the point. *See* Pet. Br. 29-31. This case does not involve a Tribe's efforts to regulate nonmembers; it involves nonmembers' efforts to circumvent tribal immunity. *Federal* law, not *tribal* law, determines whether a Tribe or its officials enjoy immunity in state court. A Tribe could not demand that immunity of its own accord, except to the extent that its tribal laws inform a federal test. *See, e.g.*, *Regents*, 519 U.S. at 429 n.5 (state law affects arm-of-the-sovereign test); *Hyatt*, 136 S. Ct. at 1282-1283 (state law affects Full Faith and Credit test).

Immunity from tort liability, moreover, says nothing about tribal officials' amenability to *criminal* law. *See* Pet. Br. 26. The Tribe would not be the real party in interest in a criminal case. And neither *Barr* nor the Westfall Act grants any protection from criminal liability. Indeed, the Compact between the Tribe and Connecticut affirms that Connecticut shall "have jurisdiction to enforce" those "criminal laws of the State which are consistent with the provisions of this Compact on the Reservation." Gaming Compact § 4(a). Although there might be exceptional circumstances in which the application of state criminal law would implicate significant sovereignty interests—

perhaps a tribal police officer cited for speeding to an emergency, *see Cabazon Band of Mission Indians* v. *Smith*, 388 F.3d 691 (9th Cir. 2004)—this case does not present them. Connecticut criminal law remains a regulatory backstop for States, as this Court recognized in *Bay Mills*. *See* 134 S. Ct. at 2035.

More to the point, and as *Bay Mills* also recognized, *see id.*, States may bargain over the scope of their regulatory authority. Under IGRA, States and Tribes are required to negotiate compacts governing gaming activities. 25 U.S.C. § 2710(d)(3)(A). Those compacts may include provisions relating to "the application of the criminal and civil laws and regulations of the Indian tribe or the State." *Id.* § 2710(d)(3)(C)(i); *see also id.* § 81(d)(2) (requiring immunity waivers or disclosures in certain land contracts). That is precisely what the Compact between Connecticut and the Tribe does: It requires the Tribe to establish "reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities." Gaming Compact § 3(g). Connecticut and the Tribe could have settled on a different contractual term that permitted Connecticut residents to bring tort suits in state court. *See Bay Mills*, 134 S. Ct. at 2035 (observing that "States have more than enough leverage").[8] They did not. Resolution of this case in tribal

[8] The New Mexico-Santa Clara Compact, for example, permits injured individuals to bring suit in state court or tribal court, under either state or tribal law. *See* Indian Gaming Compact Between the State of New Mexico and Santa Clara Pueblo § 8 (July 16, 2015), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-033870.pdf. Other compacts permit injured individuals

court thus effects, not undermines, the State's policy choices.

3. Petitioners then shift course and argue that it would be unfair to deprive tort victims of a remedy. Pet. Br. 27-29. The argument that Petitioners are left without a remedy fails as both a factual and a legal matter.

As a factual matter, Petitioners *have* a remedy—in tribal court. Consistent with the Gaming Compact, the Tribe has adopted a remedial system in which suits can be brought directly against the Tribe or its arm, the MTGA. *See* Mohegan Tribal Code § 3-248(a) (providing that "[a]ny person who, *wherever located*, sustains an injury" allegedly caused by an MTGA employee "may file a complaint with the Gaming Disputes Trial Court" (emphasis added)); *id.* § 3-250(b) (waiving the Tribe's sovereign immunity for "tort claims arising under this Code"); Gaming Compact § 3(g) (requiring the Tribe to maintain a remedial system for gaming-related injuries "analogous to that available for similar claims arising against the State"). In fact, other Connecticut residents involved in the *same* car accident at issue here brought suit in tribal court and ultimately obtained

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to bring suit in either state or tribal court once they exhaust a tribal administrative process. *See, e.g.*, Tribal State Compact Between the Choctaw Nation of Oklahoma and the State of Oklahoma § 3(D)(5) (Aug. 17, 1994), www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038414.pdf; Gaming Compact Between the Seminole Tribe of Florida and the State of Florida § VI.D.4-5 (Apr. 7, 2010), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026001.pdf.

substantial sums of money. *See Boskello*, 12 Am. Tribal Law 242; Ryan Blessing, *Mohegan Tribe Settles Lawsuit in 2011 Limo Accident*, Norwich Bulletin (June 26, 2015).

Petitioners contend that various statutory limits on the Tribe's liability render a tribal forum insufficient. *See* Pet. Br. 28. But the relevant provisions of the Tribal Code are standard fare for sovereigns; indeed, most were borrowed from Connecticut law, *see supra* pp. 5-6. Many States likewise deny jury trials, prohibit punitive damages, cap compensatory damages, and restrict damages to the limits of their insurance coverage. *See, e.g.*, 705 Ill. Comp. Stat. Ann. § 505/1 (tort claims against State to be heard by special Court of Claims, rather than jury); Ark. Code Ann. § 21-9-203 (no punitive damages against State); Alaska Stat. Ann. § 09.17.010 (total damages for all claims arising out of single injury or death capped at $400,000); Okla. Stat. Ann., Tit. 47, § 158.2 (liability for operation of motor vehicles limited to amount of insurance); *see generally* Struve, *supra*. The United States also prohibits jury trials and punitive damages in suits under the FTCA. *See* 28 U.S.C. §§ 2402, 2674. On the whole, the Tribe is more generous in its waiver of sovereign immunity than many States—and far more generous than some States, which preclude recovery against both the State and its officials. *See* Ala. Const. art I., § 14 (complete state immunity from damages); *Parker* v. *Amerson*, 519 So. 2d 442, 446 (Ala. 1987) (official immunity from damages). Contrary to Petitioners' portrayal, the Tribe's liability scheme does not include unusually strict limits on their recovery.

As a legal matter, too, there is no uniform rule that all tort victims are entitled to a remedy in court. To

the contrary, immunity doctrines mean that many violations may go unremedied to further other goals of our legal regime. *See Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877 (1986) (concluding that any "perceived inequity" in preserving tribal sovereign immunity "simply must be accepted in view of the overriding federal and tribal interests"); *Scheuer*, 416 U.S. at 242 (explaining that official immunity "assume[s] that it is better to risk some error and possible injury from such error than not to decide or act at all"). The Westfall Act grants federal officials absolute protection from tort liability without providing an equally broad waiver of the Federal Government's sovereign immunity. *Compare* 28 U.S.C. § 2679(b) (federal official immunity), *with id.* § 2680 (federal government immunity). Immunity for foreign officials likewise does not depend on a waiver of the foreign sovereign's immunity. *Compare Yousuf*, 699 F.3d at 774-775 (foreign official immunity), *with* 28 U.S.C. § 1604 (foreign government immunity). Petitioners' complaint that a tribal forum "exists only at the grace of the Tribe," Pet. Br. 28, is thus legally unremarkable.

It is also inaccurate. The availability of a forum is subject to complete congressional control. Congress has used that control to abrogate tribal immunity in certain contexts. *See, e.g.*, 25 U.S.C. §§ 81, 1303, 2710(d)(7)(A)(ii). If Congress believes that tort victims are being left without a remedy, it can limit tribal immunity, whether sovereign or official. *See Bay Mills*, 134 S. Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."). It has not done so. The Tribe's full and fair tort system—crafted in

consultation with Connecticut and consistent with mainstream liability limits—suggests that Congress may feel no pressing need to intervene.

CONCLUSION

The judgment of the Supreme Court of Connecticut should be affirmed.

Respectfully submitted,

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Counsel for Respondent

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ADDENDUM

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. **Mohegan Const. art. XIII, § 1 provides:**

Creation of Gaming Authority.

All governmental and proprietary powers of The Mohegan Tribe over the development, construction, operation, promotion, financing, regulation and licensing of gaming, and any associated hotel, associated resort or associated entertainment facilities, on tribal lands (collectively, "Gaming") shall be exercised by The Tribal Gaming Authority, provided that such powers shall be within the scope of authority delegated by The Tribal Council to The Tribal Gaming Authority under the ordinance establishing The Tribal Gaming Authority. Leases and other encumbrances granted by The Tribal Gaming Authority for Gaming development and financing shall be deemed to be for governmental purposes and may be for periods not to exceed 50 years. The Tribal Council shall, by ordinance, establish The Tribal Gaming Authority, which shall oversee, regulate, prudently hold and manage all of the Gaming assets of The Mohegan Tribe. The Tribal Gaming Authority shall have the power to grant a limited waiver of sovereign immunity as to Gaming matters, to contracts relating to Gaming, to the revenues of The Tribal Gaming Authority, to the assets within the control of The Tribal Gaming Authority, and as otherwise authorized by The Tribal Council, but shall have no such right as to

other tribal revenues, assets or powers. Nothing contained in this Section shall limit the power of The Tribal Council to waive the sovereign immunity of The Mohegan Tribe as to Gaming or other matters, or with respect to other tribal revenues or assets. The Tribal Gaming Authority shall have the power to enter into contractual relationships which bind The Mohegan Tribe, provided that such contracts shall be within the scope of authority delegated by The Tribal Council to The Tribal Gaming Authority. Contracts of The Tribal Gaming Authority shall be the law of The Mohegan Tribe and shall be specifically enforceable in accordance with their terms. To the extent that tribal law does not otherwise govern a dispute, the Gaming Disputes Court may apply relevant provisions of Connecticut law. The Tribal Gaming Authority shall have the authority to submit disputes to arbitration. The Tribal Gaming Authority shall have the authority to stipulate for judgment before the Gaming Disputes Court created by Section 2 of this Article. Any stipulation for judgment made by The Tribal Gaming Authority shall be binding on The Mohegan Tribe, The Tribal Gaming Authority and upon the Gaming Disputes Court, provided that such stipulation is within the scope of authority delegated by The Tribal Council to The Tribal Gaming Authority. The Gaming Disputes Court shall grant the relief so stipulated upon a finding that all conditions for granting such relief expressly set forth in such stipulation have been met.

2. **Mohegan Const. art. XIII, § 2 provides:**

Creation of Gaming Disputes Court.

The Tribal Council shall establish, by ordinance the Gaming Disputes Court, which shall be composed of a Trial Branch and an Appellate Branch. Exclusive jurisdiction for The Tribe over disputes arising out of or in connection with the Gaming, the actions of The Tribal Gaming Authority, or contracts entered into by The Mohegan Tribe or Gaming Authority in connection with Gaming, including without limitation, disputes arising between any person or entity and The Tribal Gaming Authority, including customers, employees, or any gaming manager operating under a gaming management agreement with The Tribal Gaming Authority, or any person or entity which may be in privity with such persons or entities as to Gaming matters shall be vested in the Gaming Disputes Court. Notwithstanding the provisions of Article X of this Constitution, the Gaming Disputes Court shall also have exclusive jurisdiction to determine all controversies arising under this Constitution which in any way relate to Gaming.

2.1. *Procedures.* The Gaming Disputes Court shall have the power to enact reasonable rules of procedure. The Gaming Disputes Court may, in its discretion, receive evidence and adjudicate controversy de novo. All proceedings of the Gaming Disputes Court shall be conducted in the state of Connecticut, and shall be open to the public, absent a finding that justice otherwise requires.

2.2. *Remedies*. Nothing in this Article XIII shall preclude or modify the effect of any arbitration

mechanism or other dispute resolution mechanism in any agreement otherwise within the jurisdiction of the Gaming Disputes Court. The Gaming Disputes Court shall have full jurisdiction and authority to compel arbitration, to enforce any arbitration order or other dispute resolution mechanism provision and to mandate any remedy which the Gaming Disputes Court finds justice may require. All findings and orders of the Gaming Disputes Court shall be in writing. In the event that either party to a contract which provides for arbitration seeks an order from the Gaming Disputes Court to compel such arbitration, the Gaming Disputes Court shall not review the merits of the dispute, but shall order the parties to arbitrate; all questions of the enforceability of the agreement to arbitrate, or an obligation to arbitrate the dispute in question, being for the arbitrators to decide.

2.3. *Appointment of Judges.* The Tribal Council shall appoint the Judges of the Gaming Disputes Court. The Tribal Council shall, within thirty days of the adoption of this Article XIII, appoint a minimum number of four Judges for the Gaming Disputes Court. At any time said number of judges falls below four, The Tribal Council shall within thirty days, appoint such additional judges as necessary to restore the minimum number to four judges. If The Tribal Council fails to restore the minimum pool of four within said thirty days, the remaining Judges shall appoint the judges necessary to restore the number to four judges. All judges shall be selected from a publicly available list of eligible retired federal judges or Connecticut Attorney Trial Referees duly appointed by the Chief Justice of the

Connecticut Supreme Court pursuant to Connecticut General Statute § 52-434(a)(4), as amended from time to time, who remain licensed and qualified to practice law in the State of Connecticut, each of whom:

(a) has never been convicted of a felony or any gaming offense;

(b) is not a member of The Tribal Council, or a relative of any such member by blood, marriage, or operation of law;

(c) is of sound mind, trustworthy, and of good moral character;

(d) is able to determine in what cases he or she will be disqualified and is willing to disqualify himself or herself;

(e) is capable of carrying out the duties of the office, including staff administration and supervision; and

(f) is willing to commit, upon public oath of affirmation, to uphold this Constitution and to fairly and impartially adjudicate all matters before the Gaming Disputes Court.

2.4. *Appeals.* Appeals from any decision of the Trial Branch shall be heard by three Judges in the Appellate Branch. Decisions of the Appellate Branch shall be final. There shall be no further right of appeal within The Tribal Court.

2.5. *Compensation.* Judges of the Gaming Disputes Court shall be compensated by The Tribal Council in amounts appropriate to the duties and responsibilities of the office, which compensation shall not be diminished during a judge's

continuation in office. The Gaming Disputes Court shall have the power to take appropriate action to enforce this subsection.

2.6. *Recall and Discipline*. After appointment, Judges of the Gaming Disputes Court shall be subject to discipline and removal for cause pursuant to the Rules of the Court.

3. **Mohegan Tribal Code § 2-21 provides:**

Establishment.

The Mohegan Tribal Gaming Authority ("Authority") is hereby established by The Mohegan Tribal Council on May 15, 1995, pursuant to and consistent with Article XIII of The Mohegan Constitution, and authorized to exercise all governmental and proprietary powers of The Mohegan Tribe over development, construction, operation, promotion, financing, regulation and licensing of gaming, and any associated hotel, associated resort or associated entertainment facilities, on Tribal lands. The authority hereby assumes all obligations, responsibilities and duties of The Mohegan Tribe under Gaming Law existing at the date of enactment of this Article.

4. **Mohegan Tribal Code § 3-21 provides:**

Establishment of Gaming Disputes Court.

There is hereby established the Gaming Disputes Court. The Gaming Disputes Court shall be composed of a Trial Branch and an Appellate Branch. The Trial Branch shall be known as the "Gaming Disputes Trial Court." The Appellate Branch shall be known as the "Gaming Disputes Court of Appeals." This Appellate Court shall not have jurisdiction to

hear or decide any case except cases timely appealed from the Gaming Disputes Trial Court and over which the Gaming Disputes Trial Court properly exercises subject matter jurisdiction pursuant to this Article. The Gaming Disputes Court of Appeals shall have jurisdiction to decide whether any case appealed from the Gaming Disputes Trial Court was within that court's subject matter jurisdiction under this Article and The Mohegan Constitution.

5. **Mohegan Tribal Code § 3-52 provides:**

Sources of Tribal Law.

(a) The substantive law of The Mohegan Tribe for application by the Gaming Disputes Court shall be:

(1) The law as set forth in any Mohegan Tribal ordinances or regulations.

(2) The General Statutes of Connecticut, as may be amended from time to time, are hereby adopted as and declared to be the positive law of The Mohegan Tribe for application by the Gaming Disputes Court, except as such statutes are in conflict with Mohegan Tribal Law.

(3) The common law of the State of Connecticut interpreting the positive law adopted in Subsection (2) above, which body of law is hereby adopted as and declared to be the common law of The Mohegan Tribe for application by the Gaming Disputes Court, except as such common law is in conflict with Mohegan Tribal Law.

6. **Mohegan Tribal Code § 3-131 provides:**

Actions Seeking Relief Against The Tribe or Its Officers or Employees.

In any civil action where relief is sought under this Article against The Mohegan Tribe, its officers or employees, or which alleges any breach of legal duty thereby, the named defendant shall be The Mohegan Tribe or The Mohegan Tribal Gaming Authority as specified in the governing contract or agreement.

7. **Mohegan Tribal Code § 3-244 provides:**

Purpose.

The Mohegan Tribe of Indians of Connecticut, a federally-recognized sovereign Indian tribal nation occupying the Mohegan Reservation on land held in trust by the United States in Uncasville, Connecticut, intends this Code to govern the adjudication of torts arising from actions of the Mohegan Tribe of Indians Connecticut and from actions of the Mohegan Tribal Gaming Authority, and their subordinate entities and their respective authorized officials, agents, employees and representatives acting within the scope of their authority or employment on behalf of such entities, wherever located.

8. **Mohegan Tribal Code § 3-248 provides:**

Procedure.

(a) Any person who, wherever located, sustains an injury as defined in this Code that arises from or out of the Gaming Facilities or that is allegedly caused directly or indirectly by acts or omissions of the MTGA (or its authorized representatives), and who seeks recovery from the MTGA for such alleged

injury, may file a complaint with the Gaming Disputes Trial Court, together with the required filing fee, pursuant to the Rules of Procedure of the Gaming Disputes Court.

(b) Any person who, wherever located, sustains an injury as defined in this Code and who seeks to recover for said injury from any Mohegan Tribal Entity (or its authorized representatives) allegedly caused directly or indirectly by acts or omissions of a Mohegan Tribal Entity other than the MTGA (or its authorized representatives), may file a Complaint with the Mohegan Tribal Court, together with the required filing fee, pursuant to the Rules of Procedure of the Mohegan Tribal Court.

(c) Every complaint filed under this Code shall contain the following:

(1) The name and address of the claimant and the name and address of the claimant's attorney, if any;

(2) A concise statement, in consecutively numbered paragraphs, of the facts giving rise to the complaint;

(3) The date(s), time(s), and location(s) of the alleged injury, if known;

(4) The name of any individual(s) alleged to have caused the alleged injury, and their relationship, if known, to a Mohegan Tribal Entity;

(5) The name of the Mohegan Tribal Entity that is considered liable to the Claimant for the alleged injury;

(6) A concise statement of the nature and extent of any alleged injury sustained by the Claimant; and

(7) If the Complaint is brought by a personal representative of a person under a disability (as defined in this Code), the name of such personal representative and a copy of any officially-dated document probative of the appointment of such personal representative.

(d) No person or entity shall have a right pursuant to this Code to the trial of any matter before a jury.

(e) A final judgment of a Mohegan Trial Court in any action brought under this Code may be appealed pursuant to the applicable Rules of the Mohegan Court in which final judgment [is] entered.

9. **Mohegan Tribal Code § 3-250 provides:**

Limited Waiver of Sovereign Immunity and Consent to Suit.

(a) By enactment of this Code, The Mohegan Tribe waives its sovereign immunity, and the sovereign immunity of its subordinate entities except for the Mohegan Tribal Gaming Authority, and consents to be sued by persons with tort claims arising under this Code, but only in the Mohegan Tribal Court; provided that this waiver of sovereign immunity shall permit no recovery of damages against The Mohegan Tribe or the Mohegan Tribal Entities or their authorized representatives, in any measure or amount in excess of the damages authorized to be recovered under this Code.

(b) By adoption of this Code, the Mohegan Tribal Gaming Authority waives its sovereign immunity

and consents to be sued by persons with tort claims arising under this Code, but only in the Mohegan Gaming Disputes Court; and this waiver of sovereign immunity shall permit no recovery of damages against the Mohegan Tribal Gaming Authority, or its authorized representatives, in any measure or amount in excess of the damages authorized to be recovered under this Code.

(c) The waivers of sovereign immunity contained herein shall be strictly and narrowly construed.

(d) The limitations upon recovery against the sovereign tribal entities and representatives as set forth herein shall not apply to limit recovery against a defendant that is not a Mohegan Tribal Entity or its authorized representative.

(e) This Code shall not apply to any claims by an employee, as defined in this Code, arising in connection with: an application for employment; the rejection of an employment application; or any aspect of the employment relationship. All employment-based rights, claims, and remedies of Mohegan Tribal Entity employees are codified elsewhere, and this Code expressly does not waive the sovereign immunity of The Mohegan Tribe or any Mohegan Tribal Entity and does not contain or express any consent by The Mohegan Tribe or any Mohegan Tribal Entity to be sued for any matter arising out of the employment relationship. The exclusion of such employee claims shall not serve as a bar to claims by an employee when such claims do not arise from or out of any aspect of an employment relationship.

(f) This Code shall not apply to any claim by a person who has a cause of action pending or adjudicated in any other judicial or arbitral forum based upon alleged acts or omissions actionable against any Tribal defendant or entity pursuant to the limited waiver of sovereign immunity contained in the Memorandum of Agreement between the Mohegan Tribe and the State of Connecticut, dated May 28, 2014, regarding law enforcement.

(g) Nothing herein shall be construed as a waiver of either the Mohegan Tribe or the Mohegan Tribal Gaming Authority of its sovereign immunity as to claims arising under any Connecticut General Statute or arising under Connecticut common law.

10. **Mohegan Tribal Code § 3-251 provides:**

Limitations on Awards.

(a) This Code does not permit recovery, from The Mohegan Tribe, the Mohegan Tribal Entities, the Mohegan Tribal Gaming Authority, or from their authorized officers, agents, representatives or Employees while engaged in conduct within the scope of their employment or authority, of:

(1) Punitive or exemplary damages;

(2) Damages for loss of consortium; or

(3) Non-economic damages in excess of two hundred (200) percent of the proven actual damages prior to any reduction for collateral source payments; or

(4) Damages in excess of the limits of any applicable liability insurance policy carried by The Mohegan Tribe, the MTGA, or other Mohegan Entity.

(b) Any award of damages to a claimant shall be reduced in proportion to the claimant's contributory negligence, provided that the claimant shall recover nothing if the claimant's contributory negligence is determined to be greater than fifty (50) percent.

(c) Following the determination of any award for actual damages, the court shall deduct from the actual damages recoverable by the claimant the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment (the "collateral source deduction"), provided that no collateral source deduction shall be made to the extent that a right of subrogation exists with respect to the collateral source. The amount of any write-off, voluntary or involuntary, by a healthcare provider shall constitute a collateral source paid for the benefit of the claimant under this section. The collateral source deduction shall be reduced in proportion to the claimant's comparative negligence, if any. The collateral source deduction from actual damages shall not be reduced in any way by the cost of health insurance premiums or other costs of procurement of the collateral source. Notwithstanding the provisions of section 3-242, all provisions of this sub-section shall be applied both prospectively and retroactively and shall apply to cases already pending in the Mohegan Gaming Disputes Trial court as of November 14, 2012.

11. **Mohegan Tribal Code § 4-52 provides:**

Indemnification.

If the Employee gives the Employer prompt written notice of any claim, demand, or suit, the

Employer 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 alleged deprivation of any person's civil rights 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. The written notice required under this Section 4-52 shall be sent certified mail to the Attorney General of The Mohegan Tribe and to either the Chairman of the Mohegan Tribal Council or the Chairman of the Management Board of the Mohegan Tribal Gaming Authority as applicable.

12. **Mohegan Tribal Code § 4-53 provides:**

Defense against claims.

The Employer shall provide for the defense of any such Officer or Employee in any civil action or proceeding in any Mohegan Tribal, State or Federal court arising out of any alleged act, omission or deprivation which occurred or is alleged to have occurred while the Officer or Employee was acting in the discharge of his or her duties or in the scope of his or her employment, except that the Employer shall not be required to provide for such a defense whenever the Employer based on its investigation of the facts and circumstances of the case, determines that the Officer or Employee has acted outside the scope of his or her employment or has acted wantonly, recklessly or maliciously. The Employer

shall notify the Official or Employee in writing of this determination.

13. **Conn. Gen. Stat. Ann. § 4-160 provides in pertinent part:**

Authorization of actions against the state

(a) Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable.

* * * * *

(c) In each action authorized by the Claims Commissioner pursuant to subsection (a) or (b) of this section or by the General Assembly pursuant to section 4-159 or 4-159a, the claimant shall allege such authorization and the date on which it was granted, except that evidence of such authorization shall not be admissible in such action as evidence of the state's liability. The state waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of. The rights and liability of the state in each such action shall be coextensive with and shall equal the rights and liability of private persons in like circumstances.

(d) No such action shall be brought but within one year from the date such authorization to sue is granted. With respect to any claim presented to the Office of the Claims Commissioner for which authorization to sue is granted, any statute of

limitation applicable to such action shall be tolled until the date such authorization to sue is granted. The claimant shall bring such action against the state as party defendant in the judicial district in which the claimant resides or, if the claimant is not a resident of this state, in the judicial district of Hartford or in the judicial district in which the claim arose.

(e) Civil process directed against the state shall be served as provided by section 52-64.

(f) Issues arising in such actions shall be tried to the court without a jury.

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14. **Conn. Gen. Stat. Ann. § 4-165 provides in pertinent part:**

Immunity of state officers and employees from personal liability

(a) 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.

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15. **28 U.S.C. § 2671 provides:**

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments,

independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

16. **28 U.S.C. § 2679 provides:**

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for 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 is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person

shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment

under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

17. **28 U.S.C. § 2680 provides:**

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of

goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of

investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.