No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS AND MICHELLE LEWIS, PETITIONERS

v.

WILLIAM CLARKE

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

PETITION FOR A WRIT OF CERTIORARI

JAMES M. HARRINGTON
POLITO & ASSOCIATES, LLC
567 Vauxhall Street Ext.
Waterford, CT 06385
(860) 447-3300

JENNIFER A. MACLEAN
PERKINS COIE LLP
700 Thirteenth St., N.W.
Washington, D.C. 20005
(202) 654-6200

ERIC D. MILLER
Counsel of Record
LUKE M. RONA
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101
(206) 359-8000
emiller@perkinscoie.com

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

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

Respondent is William Clarke, defendant and appellant below.

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

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

OPINIONS BELOW

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

JURISDICTION

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

INTRODUCTION

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

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

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

The court below did not attempt to justify its holding on the basis of considerations of tribal sovereignty or self-government, nor could it have done so. Respondent was employed by an Indian tribe to drive a limousine to transport patrons to and from a casino. While driving on an interstate highway 70 miles from the casino, he ran into petitioners' car. Petitioners have asserted garden-variety state-law negligence claims based on respondent's off-reservation conduct, and there is no reason why tribal employees should enjoy immunity in that context. In dismissing petitioners' claims, the Connecticut Supreme Court applied a form of tribal sovereign immunity that is broader than the immunity enjoyed by States and the federal government, and it disregarded this Court's admonition that a State must retain the ability "to enforce its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035. The decision below will leave many persons who have been injured by tribal employees without any remedy at all.

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

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

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

STATEMENT

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES M. HARRINGTON
POLITO & ASSOCIATES, LLC
567 Vauxhall Street Ext.
Waterford, CT 06385
(860) 447-3300

JENNIFER A. MACLEAN
PERKINS COIE LLP
700 Thirteenth St., N.W.
Washington, D.C. 20005
(202) 654-6200

ERIC D. MILLER
Counsel of Record
LUKE M. RONA
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101
(206) 359-8000
emiller@perkinscoie.com

JUNE 2016

APPENDIX

APPENDIX A

SUPREME COURT OF CONNECTICUT

No. 19464

BRIAN LEWIS ET AL.

v.

WILLIAM CLARKE ET AL.

Argued: Dec. 15, 2015
Officially Released: Mar. 15, 2016

OPINION

Before: ROGERS, C.J., and PALMER, ZARELLA, EVELEIGH, MCDONALD, ESPINOSA, AND ROBINSON, JS.

EVELEIGH, J.

The dispositive issue in this appeal is whether the trial court properly denied the defendant William Clarke's[1] motion to dismiss the claims made by the

[1] Although Clarke's employer, the Mohegan Tribal Gaming Authority, was also named as a defendant in this case, it is not a party to the present appeal. See footnote 2 of this opinion. For the sake of simplicity, references to the defendant in this opinion are to Clarke in his individual capacity.

plaintiffs, Brian Lewis and Michelle Lewis, on the ground that tribal sovereign immunity did not apply to their claims against the defendant in his individual capacity. On appeal, the defendant asserts that the trial court improperly denied his motion to dismiss because tribal sovereign immunity barred the plaintiffs' claims against him for an accident that occurred while he was acting within the scope of his employment with the Mohegan Tribal Gaming Authority. We agree with the defendant and, accordingly, reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. "On October 22, 2011 . . . Brian Lewis was operating a motor vehicle southbound on [Interstate 95] in Norwalk, Connecticut. . . . Michelle Lewis was his passenger. [The defendant] was driving a limousine behind the plaintiffs. Suddenly and without warning, [the defendant] drove the limousine into the rear of the plaintiffs' vehicle and propelled the plaintiffs' vehicle forward with such force that it came to rest partially on top of a [concrete] barrier on the left-hand side of the highway. The collision and the plaintiffs' resulting injuries were caused by [the defendant's] negligence. At that time, [the defendant] was a Connecticut resident, had a Connecticut driver's license, and, according to the affidavit of Michael Hamilton, the [Mohegan Tribal Gaming Authority's director of transportation], was driving a limousine owned by the [Mohegan Tribal Gaming Authority] and was employed by the [Mohegan Tribal Gaming Authority] to do so. Specifically, [the defendant] was driving patrons of the Mohegan Sun Casino to their homes. The limousine was covered by an au-

tomobile insurance policy issued by Arch Insurance." (Footnote omitted.)

The plaintiffs filed an action against the defendant claiming, inter alia, that they sustained injuries as a result of the defendant's negligence and carelessness.[2] The defendant filed a motion to dismiss the complaint, claiming that the trial court lacked subject matter jurisdiction because he was entitled to tribal sovereign immunity. In support of his motion, the defendant filed, inter alia, the affidavit from Hamilton. The plaintiffs opposed the motion, claiming that the trial court was not without subject matter jurisdiction because the doctrine of tribal sovereign immunity does not extend to a tribal employee, who is named in his individual capacity, and the damages are sought from the employee, not from the tribe. The trial court denied the defendant's motion to dismiss, determining that it was not deprived of jurisdiction over the plaintiffs' claims under the doctrine of tribal sovereign immunity because the plaintiffs sought money damages from the defendant personally, not from the Mohegan Tribal Gaming Authority. This appeal followed.[3]

On appeal, the defendant claims that the trial court improperly denied his motion to dismiss. Specifically, the defendant asserts that the trial court improperly

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[2] Although the plaintiffs initially filed claims against the Mohegan Tribal Gaming Authority, those claims were subsequently withdrawn.

[3] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

concluded that the doctrine of tribal sovereign immunity did not extend to the plaintiffs' claims against the defendant in the present case because they were claims against the defendant in his individual capacity. The defendant asserts that, because he was acting within the scope of his employment for the Mohegan Tribal Gaming Authority and the Mohegan Tribal Gaming Authority is an arm of the Mohegan Tribe (tribe),[4] tribal sovereign immunity bars the plaintiffs' claims against him. In response, the plaintiffs assert that the trial court properly denied the defendant's motion to dismiss. In support of their position, the plaintiffs assert that the remedy sought in their complaint was for damages against the defendant individually and, therefore, would not affect the tribe, accordingly, tribal immunity should not be extended to deprive the court of jurisdiction over their claims.

First, we must address the threshold issue of whether the decision of the trial court denying the motion to dismiss is immediately appealable. "The general rule is that the denial of a motion to dismiss is an interlocutory ruling and, therefore, is not a final judgment for purposes of appeal. . . . The denial of a motion to dismiss based on a colorable claim of sovereign immunity, by contrast, is an immediately appealable final judgment because the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Internal quotation marks omitted.) *Sullins* v. *Rodriguez*, 281 Conn. 128, 130 n.2, 913 A.2d 415

[4] The parties do not dispute that the Mohegan Tribal Gaming Authority is an arm of the tribe. Therefore, we do not address this issue.

(2007); see also *Kizis* v. *Morse Diesel International, Inc.*, 260 Conn. 46, 51, 794 A.2d 498 (2002) (denial of motion to dismiss filed by tribal employees based on tribal sovereign immunity constitutes final judgment for purpose of appeal). In the present case, because the basis of the defendant's motion to dismiss was a claim of tribal sovereign immunity, we conclude that the denial of the motion to dismiss is an immediately appealable final judgment.

Having concluded that the decision of the trial court denying the motion to dismiss is an immediately appealable final judgment, we next address the standard of review and the general principles governing a trial court's disposition of a motion to dismiss that challenges jurisdiction. The defendant's claim that the plaintiffs' claims are barred because the actions arose in the course of his employment with the Mohegan Tribal Gaming Authority is an assertion of "sovereign immunity [that] implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law." (Internal quotation marks omitted.) *Bloom* v. *Gershon*, 271 Conn. 96, 113, 856 A.2d 335 (2004); see also *Fresenius Medical* v. *Puerto Rico Cardiovascular*, 322 F.3d 56, 61 (1st Cir.) (question of whether entity is arm of state entitled to immunity is legal one), cert. denied, 540 U.S. 878, 124 S. Ct. 296, 157 L. Ed. 2d 142 (2003). Accordingly, "[o]ur review of the court's ultimate legal conclusion[s] and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200, 994 A.2d 106 (2010).

Depending on the record before it, a trial court ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to Practice Book § 10-31(a)(1) may decide that motion on the basis of: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed." (Citation omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651, 974 A.2d 669 (2009).

If the trial court decides the motion "on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"In contrast, if the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . [or] public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits [or] other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking,

and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 651–54; see also *Rocky Hill* v. *SecureCare Realty, LLC*, 315 Conn. 265, 277–78, 105 A.3d 857 (2015).

It is well established that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority. *Oklahoma Tax* [*Commission*] v. *Citizen Band Potawatomi Tribe of* [*Oklahoma*], 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) . . . . As dependents, the tribes are subject to plenary control by Congress. See *United States* v. *Lara*, 541 U.S. 193,

200, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) ([t]he [c]onstitution grants Congress powers we have consistently described as plenary and exclusive to legislate in respect to Indian tribes). And yet they remain separate sovereigns [preexisting] the [c]onstitution. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). Thus, unless and until Congress acts, the tribes retain their historic sovereign authority. *United States* v. *Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978).

"Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . That immunity, we have explained, is a necessary corollary to Indian sovereignty and self-governance. *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986); cf. The Federalist No. 81, p. 511 (B. Wright ed. 1961) ([Alexander] Hamilton) ([i]t is inherent in the nature of sovereignty not to be amenable to suit without consent). And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in [Congress'] hands. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S. Ct. 653, 84 L. Ed. 894 (1940) . . . ([i]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit)." (Citations omitted; internal quotation marks omitted.) *Michigan* v. *Bay Mills Indian Community*, U.S. , 134 S. Ct. 2024, 2030, 188 L. Ed. 2d 1071 (2014).

The United States Supreme Court has recently explained that the "baseline position . . . is tribal immunity; and [t]o abrogate [such] immunity, Congress must unequivocally express that purpose. . . . That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." (Citations omitted; internal quotation marks omitted.) Id., 2031–32.

In the present case, the plaintiffs' complaint contained two counts. Both counts originally named both the defendant and the Mohegan Tribal Gaming Authority. Prior to the defendant filing his motion to dismiss, the plaintiffs withdrew all of their claims against the Mohegan Tribal Gaming Authority. Therefore, in deciding the motion to dismiss, the only issue before the trial court was whether the doctrine of tribal sovereign immunity barred the plaintiffs' claims against the defendant in his individual capacity.

As we explained previously in this opinion, "if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts . . . ." (Citations omitted; emphasis omitted; footnote omitted.) *Conboy* v. *State*, supra, 292 Conn. 651–52.

In their complaint, the plaintiffs themselves alleged that "at all relevant times herein, [the defendant] was acting in the scope of his employment with the Mohe-

gan Tribal Gaming Authority and was driving said vehicle with the permission of the Mohegan Tribal Gaming Authority as its [employee, agent or servant]." Furthermore, accompanying his motion to dismiss, the defendant filed the affidavit from Hamilton, which averred that the defendant was driving a limousine owned by the Mohegan Tribal Gaming Authority at the time of the accident. Hamilton further averred that the defendant was employed by the Mohegan Tribal Gaming Authority to use the limousine to drive patrons of the Mohegan Sun Casino to their homes. The plaintiffs did not present any evidence that the defendant was acting outside the scope of his employment at the time of the accident. Therefore, the undisputed facts establish that the defendant was acting within the scope of his employment when the accident that injured the plaintiffs occurred.[5]

It is well established that "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." (Internal quotation marks omitted.) *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997), citing F. Cohen, Federal Indian Law (1986) p. 284 ("it has been held that where the tribe itself is not subject to suit, tribal officers cannot be [held liable] on the basis of

[5] The plaintiffs do not assert that tribal sovereign immunity is inapplicable in the present case because the accident occurred outside of the reservation. Therefore, we do not address the issue of whether, and to what extent, a tribe is immune from liability arising out of commercial activities that occur outside the reservation.

tribal obligations"); see *Romanella* v. *Hayward*, supra, 167 ("[The plaintiff's] action against the tribal officers is a suit against the tribe. As such, the individual defendants' immunity from suit is coextensive with the [t]ribe's immunity from suit."); see also, e.g., *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985); *Tenneco Oil Co.* v. *Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984). Indeed, this court has also recognized that tribal immunity extends to individual tribal officials and employees acting within the scope of their authority. *Kizis* v. *Morse Diesel International, Inc.*, supra, 260 Conn. 54.

The United States Court of Appeals for the Second Circuit has also addressed the implications of tribal immunity in actions against individual employees of the tribe. In *Chayoon* v. *Chao*, 355 F.3d 141 (2d Cir. 2004), cert. denied sub nom. *Chayoon* v. *Reels*, 543 U.S. 966, 125 S. Ct. 429, 160 L. Ed. 2d 336 (2004), the plaintiff appealed the dismissal of certain employment claims against several individuals who were either on the Mashantucket Pequot Tribal Council or were officers or employees of Mashantucket Pequot Gaming Enterprise, which operates the gaming facility known as Foxwoods Resort Casino. The Second Circuit rejected the plaintiff's claims, concluding that "Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are 'subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.' . . . Furthermore, [the plaintiff] cannot circumvent tribal immunity by merely naming officers or employees of the [t]ribe when the complaint concerns actions taken in [the] defendants' official or representative capacities and the complaint does not al-

lege they acted outside the scope of their authority." (Citations omitted.) Id., 143.

Similarly, the United States District Court for the District of Connecticut has also examined whether the doctrine of tribal immunity extended to claims for damages against two employees of the Mashantucket Pequot Museum and Research Center, Inc., where the complaint alleged that they were being named, inter alia, in their "individual capacities." *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, 221 F. Supp. 2d 271, 274 (D. Conn. 2002). In addressing the claims against the employees in their individual capacities, the court explained that "[i]n the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity *only where the complaint pleads—and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the* [t]*ribe.*" (Emphasis added.) Id., 280; see *Garcia* v. *Akwesasne Housing Authority*, 105 F. Supp. 2d 12, 18 (N.D.N.Y. 2000) (stating that personal capacity claim may proceed against tribal official if allegations indicate that tribal official acted outside scope of delegated authority), vacated on other grounds, 268 F.3d 76 (2d Cir. 2001); see also *Puyallup Tribe, Inc.* v. *Washington Game Dept.*, 433 U.S. 165, 170–73, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977) (claim permitted against tribal officials, who were acting as fishermen, rather than tribal government officers when they had engaged in challenged activities).

The District Court further 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. . . . Permitting such a description to affect tribal immunity would eviscerate its protections and ultimately subject [t]ribes to damages actions for every violation of state or federal law. The sounder approach is to examine the actions of the individual tribal defendants. Thus, the [c]ourt holds that 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 . . . .'" (Emphasis omitted.) *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, supra, 221 F. Supp. 2d 280; see also *Sue/Perior Concrete & Paving, Inc.* v. *Seneca Gaming Corp.*, 99 App. Div. 3d 1203, 1204, 952 N.Y.S.2d 353 (2012) ("[a]lthough tribal immunity does not necessarily extend to individual members of the tribe . . . it does as a rule [extend] to individual tribal officials acting in their representative capacity and within the scope of their authority" [citations omitted; internal quotation marks omitted]); *Gooding* v. *Ketcher*, 838 F. Supp. 2d 1231, 1246 (N.D. Okla. 2012) ("[a] tribal official, even if [named] in an individual capacity, is only stripped of tribal immunity when he acts without any colorable claim of authority" [internal quotation marks omitted]).

Nevertheless, the plaintiffs assert, and the trial court agreed, that the doctrine of tribal immunity should not be applied in the present case. Specifically, the plaintiffs assert that the doctrine of tribal immunity does not apply in the present case because the tribe is neither a party, nor the real party in interest because the remedy sought will be paid by the defendant himself, and not the tribe. In support of their claim,

the plaintiffs cite and the trial court relied on *Maxwell* v. *San Diego*, 708 F.3d 1075 (9th Cir. 2013).

In *Maxwell*, family members of a shooting victim brought an action alleging that the victim had been delayed medical treatment. Id., 1079–81. The United States Court of Appeals for the Ninth Circuit reversed the decision of the trial court dismissing an action against paramedics employed by a tribal fire department. Id., 1081. In reversing the trial court's judgment, the Ninth Circuit concluded that tribal immunity did not bar the claims against the paramedics because "a remedy would operate against them, not the tribe." Id., 1087. The Ninth Circuit explained that because the plaintiffs had brought an action against the tribal paramedics in their individual capacities for money damages, "[a]ny damages will come from [the paramedics'] own pockets, not the tribal treasury." Id., 1089.

We reject the plaintiffs' invitation to apply *Maxwell* in the present case. The Ninth Circuit acknowledged that *Maxwell* concerned "allegedly grossly negligent acts committed outside tribal land pursuant to an agreement with a [nontribal] entity." Id., 1090. The fact that the allegations against the plaintiffs in *Maxwell* involved claims of gross negligence makes the Ninth Circuit's holding in that case distinguishable from the present case. Actions involving claims of more than negligence are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity. See, e.g., *Gedrich* v. *Dept. of Family Services*, 282 F. Supp. 2d 439, 474–75 (E.D. Va. 2003) ("[t]he doctrine of sovereign immunity does

not shield state employees from liability for acts or omissions constituting gross negligence"); *Young* v. *Mount Ranier*, 238 F.3d 567, 578 (4th Cir. 2001) (discussing Maryland statute providing that "state personnel are immune from suit and from liability for tortious conduct committed within the scope of their public duties and without malice or gross negligence" [footnote omitted]); see also General Statutes § 4-165 ("[n]o 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").[6]

Indeed, even the Ninth Circuit does not always follow the approach applied in *Maxwell*. See, e.g., *Murgia* v. *Reed*, 338 Fed. Appx. 614, 616 (9th Cir. 2009). In *Murgia*, the Ninth Circuit explained that "[t]he [trial]

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[6] The Ninth Circuit recently followed the *Maxwell* "remedy sought" approach in the case of *Pistor* v. *Garcia*, 791 F.3d 1104, 1109 (9th Cir. 2015). In *Pistor*, the Ninth Circuit concluded that tribal immunity did not extend to employees of a tribe who had an action brought against them for working with local police to seize gamblers at the casino and steal their property. Id., 1108–1109. Once again the decision of the Ninth Circuit not to apply tribal immunity to the defendants is distinguishable because their actions were beyond the scope of their authority. Indeed, the plaintiffs in *Pistor* alleged that the tribal employees developed a scheme with local police "concocted with the goal of punishing plaintiffs for winning so much at . . . [their casino], and the hope of stealing back some of the funds that the plaintiffs had legitimately won." (Internal quotation marks omitted.) Id., 1109. Like *Maxwell*, the facts of *Pistor* are distinguishable from the present case, where there is no allegation that the defendant was acting outside the scope of his employment or in a grossly negligent manner.

court erred in concluding that tribal sovereign immunity did not apply solely because the [d]efendants were [named] in their individual capacities. In our circuit, the fact that a tribal officer is [named] in his individual capacity does not, without more, establish that he lacks the protection of tribal sovereign immunity. . . . If the [defendant tribal employees] were acting for the tribe within the scope of their authority, they are immune from [the plaintiff's claims] regardless of whether the words 'individual capacity' appear on the complaint." (Citation omitted.) Id. Similarly, in an opinion published approximately one month before *Maxwell*, the Ninth Circuit explained that a tribe's sovereign immunity "extends to its officials who were acting in their official capacities and within the scope of their authority when they taxed transactions occurring on the reservation." *Miller* v. *Wright*, 705 F.3d 919, 928 (9th Cir. 2013). Furthermore, no other jurisdictions have adopted the "remedy sought" approach applied in *Maxwell*.

On the basis of the foregoing, we conclude that the doctrine of tribal sovereign immunity extends to the plaintiffs' claims against the defendant 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. We agree with the United States District Court of the District of Connecticut that the plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he acted outside

the scope of his authority. See *Chayoon* v. *Chao*, supra, 355 F.3d 143. Accordingly, we conclude that the trial court improperly determined that tribal sovereign immunity did not extend to the defendant in the present case and, therefore, improperly denied the defendant's motion to dismiss the plaintiffs' complaint.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to dismiss.

In this opinion the other justices concurred.

APPENDIX B

CONNECTICUT SUPERIOR COURT
J.D. NEW LONDON
AT NEW LONDON

No. KNL CV-13-6019099-S

BRIAN LEWIS AND MICHELLE LEWIS,
PLAINTIFFS,

v.

WILLIAM CLARKE,
DEFENDANT.

Sept. 10, 2014

MEMORANDUM OF DECISION ON MOTION TO DISMISS (#104.00)

The plaintiffs, Brian Lewis and Michelle Lewis, initiated this suit by way of complaint filed on October 21, 2013, against William Clarke and the Mohegan Tribal Gaming Authority (MTGA). Two days later, on October 23, 2013, before the return date, the plaintiffs withdrew the action as to the MTGA. On November 19, 2013, William Clarke appeared by counsel. The next day, the plaintiffs filed an amended complaint in

two counts, one each by Brian Lewis and Michelle Lewis against Clarke only ("the complaint").[1]

On December 31, 2013, Clarke moved to dismiss the complaint. Filed with the motion were an affidavit of Michael Hamilton, a copy of a police report on the subject accident, portions of the Mohegan Tribe of Indians Code and a copy of the Tribal State Compact between the Mohegan Tribe and State of Connecticut. The plaintiffs filed an objection to the motion to dismiss on January 6, 2014. Clarke filed a reply memorandum to the plaintiffs' objection on February 11, 2014, attaching a copy of the Mohegan Tribal Code §§ 4-52 and 4-53 and an Affidavit of Mary Lou Morrissette. On February 14, 2014, the plaintiffs filed a surreply. The motion was argued on February 28, 2014.[2] Also on that day, Clarke filed supplemental authorities discussed at oral argument but not included in the briefs. On February 25, 2014, the plaintiffs filed a response to Clarke's supplemental authorities.

FACTS

In deciding a jurisdictional question raised by a motion to dismiss, the court takes the facts to be those alleged, and necessarily implied, in the complaint, construing them in a manner most favorable to the pleader. *Lagassey v. State*, 268 Conn. 723, 736, 846 A.2d 831

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[1] On February 21, 2014, the plaintiffs filed another request for leave to amend their complaint, which request was denied by this court on March 25, 2014, without prejudice to renewal after issuance of this decision on the defendant's motion to dismiss.

[2] The parties filed written waivers of the 120-day deadline for this decision, for which the court thanks them and their respective counsel.

(2004). Legal conclusions and opinions are not taken as true. See *Ellef v. Select Committee of Inquiry*, Superior Court, judicial district of Hartford, Docket No. CV-04-0832432-S (April 8, 2004). The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital*, 272 Conn. 551, 559 n.1, 864 A.2d 1 (2005). Viewing the complaint in this light, the essential facts are as follows.

On October 22, 2011, the plaintiff Brian Lewis was operating a motor vehicle southbound on Interstate Route 95 in Norwalk, Connecticut. The plaintiff Michelle Lewis was his passenger. Clarke was driving a limousine behind the plaintiffs. Suddenly and without warning, Clarke drove the limousine into the rear of the plaintiffs' vehicle and propelled the plaintiffs' vehicle forward with such force that it came to rest partially on top of a jersey barrier on the left hand side of the highway. The collision and the plaintiffs' resulting injuries were caused by Clarke's negligence. At that time, Clarke was a Connecticut resident, had a Connecticut driver's license, and, according to the affidavit of Michael Hamilton, the MTGA's Director of Transportation, was driving a limousine owned by the MTGA and was employed by the MTGA to do so.[3] Specifically, Clarke was driving patrons of the Mohegan Sun Casino to their homes. The limousine was

[3] "[I]f the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 651-52, 974 A.2d 669 (2006).

covered by an automobile insurance policy issued by Arch Insurance.

DISCUSSION

"[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134, 918 A.2d 880 (2007). The party who is asking the court to exercise jurisdiction in his favor must be able to allege facts demonstrating that he is a proper party to make that request. See *St. Paul Travelers Cos. v. Kuehl*, 299 Conn. 800, 808, 12 A.3d 852 (2011). The plaintiff, therefore, bears the burden of proving subject matter jurisdiction. *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003). In determining whether a court has subject matter jurisdiction, every appropriate presumption favors finding such jurisdiction. *Keller v. Beckenstein*, 305 Conn. 523, 531, 46 A.3d 102, 107 (2012).

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." (Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 52, 794 A.2d 498 (2002). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). "'Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity

bars suits for damages against a tribe.' *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996). 'However, such waiver may not be implied, but must be expressed unequivocally.' *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989)." *Kizis v. Morse Diesel International, Inc.*, supra, 53. The tribe must have consented to suit in the specific forum. Id., 53, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

THE PARTIES' CLAIMS

Clarke moves to dismiss the complaint on the ground that the court lacks subject matter jurisdiction because the MTGA is entitled to sovereign immunity, as an entity of the Mohegan Tribe of Indians of Connecticut ("Mohegan Tribe" or "the tribe"), and he is entitled to sovereign immunity as an employee of the MTGA acting within the scope of his employment at the time of the accident. Clarke argues that to deny the present motion would be to abrogate the MTGA's sovereign immunity, and that only the Congress of the United States has that power. Clarke argues that dismissal of this case would not leave the plaintiffs without recourse because they can sue him in the Mohegan Tribal Gaming Court.

The plaintiffs oppose Clarke's motion based on an emerging "remedy-sought" doctrine promulgated by the Ninth and Tenth Circuits of the United States Courts of Appeal. The essence of the "remedy-sought" doctrine is that sovereign immunity does not extend to a tribal employee who is sued in his individual capacity when damages are sought from the employee, not from the tribe, and will in no legally cognizable way

affect the tribe's ability to govern itself independently. The plaintiffs claim that, even treating the MTGA as the Mohegan Tribe, their suit against Clarke individually would not infringe on the tribe's sovereign immunity and therefore, immunity should not be extended to him. Essentially, the plaintiffs argue that the tribe's sovereign immunity is limited; that, in a civil context, tribal immunity prevents only claims and judgments for money against the tribe or the MTGA; and that there is no such claim here, nor any possibility of such a judgment. The plaintiffs urge the court to adopt the remedy-sought analysis applied in *Maxwell v. County of San Diego,* 697 F.3d 941 (9th Cir. 2012), and find that a tribal employee can be sued in his individual capacity so long as the remedy sought is against the employee individually.[4]

Clarke replies that, in our federal circuit – the United States Court of Appeals for the Second Circuit – and under Connecticut law, it is well settled that tribal employees are immune from suit when acting within the scope of their employment, even where a tribal employee is the sole defendant, and that it is unnecessary and inappropriate to examine whether the tribe is a real party in interest. See *Chayoon v. Sherlock,* 89 Conn. App. 821, 877 A.2d 4, cert. denied, 276 Conn. 913, 888 A.2d 83 (2005). Clarke argues that this court should heed the Tenth Circuit's caution, in

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[4] The plaintiffs have cited to the *Maxwell v. County of San Diego* opinion appearing at 697 F.3d 941 (9th Cir. 2012). That opinion, however, has been withdrawn by *Maxwell v. County of San Diego,* 708 F.3d 1075 (9th Cir. 2013). Accordingly, this court relies on the latter opinion.

Native American Distributing v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1297 (10th Cir. 2008), that adoption of the remedy-sought analysis would be like wading into a swamp and reject that analysis. Finally, Clarke claims that, even if this court applies the "remedy-sought" analysis, he would still be immune from suit because the MTGA is the real party in interest by virtue of its commitment to indemnify and defend him, its employee.

In the plaintiffs' sur-reply, they argue that the facts of this case differ from those in *Chayoon v. Sherlock*, supra, 89 Conn. App. 821. The plaintiffs contend that tribal immunity is not attached to an individual employee sued in his individual capacity. They argue that *Chayoon* is distinguishable because the court found, despite the plaintiff's claim, tribal employees were being sued, in part, in their roles as tribal representatives. See *Chayoon v. Sherlock*, supra, 89 Conn. App. 829 (saying defendant is being sued individually does not make it so). The plaintiffs distinguish *Bassett v. Mashantucket Pequot Museum & Research Center*, Inc., 221 F. Supp. 2d 271, 277-78 (D. Conn. 2002), also cited by Clarke, because the complaint in *Bassett* alleged that the tribal employees were being sued "individually and as an authorized agent of the Tribe as well as in their capacities as officers, representatives and/or agents of the [tribal] corporation and/or association."

At oral argument, Clarke cited *Tonasket v. Sargent*, 510 Fed. Appx. 648 (9th Cir., 2013), and *Miller v. Wright*, 705 F.3d 919 (9th Cir., 2013), for the proposition that the remedy-focused analysis employed in

Maxwell has been abandoned. The plaintiffs' dispute that proposition because *Tonasket* and *Miller* did not address the present issue: those decisions involved the execution of a cigarette tax upon a tribal reservation.

ANALYSIS

At the outset, there is no claim by the plaintiffs that the MTGA has waived sovereign immunity or that Clarke has waived his claim to sovereign immunity. Nor does this court perceive that it has any power to "abrogate sovereign immunity" or otherwise assume any power or right reserved to the tribe, let alone to the United States Congress. Rather, the issue presented is whether the MGTA's immunity protects its employee, Clarke, from being sued solely in his individual capacity for an alleged tort occurring off the tribal reservation injuring non-patrons of the MTGA. In other words, the issue is not whether the court has the power to abrogate sovereign immunity, but whether sovereign immunity is present at all. Under the facts of this case, the court concludes that the "remedy-sought" analysis should be applied and, because the remedy sought is not against the MTGA, Clarke is not immune from suit.

Tribal sovereign immunity is limited. "[T]ribal sovereignty is dependent upon, and subordinate to ... the [f]ederal [g]overnment." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980). "The [tribal] sovereign's claim to immunity in the courts of a second sovereign . . . normally depends on the second sovereign's law. *Schooner Exchange v. McFadden*, 7 Cranch 116, 136 (1812)." *Kiowa Tribe of Oklahoma v.*

Manufacturing Technologies, Inc., supra, 523 U.S. 760-61 (*Stevens, J.*, dissenting). Tribal immunity "exists only at the sufferance of Congress and *is subject to complete defeasance.*" (Emphasis in original; internal quotation marks omitted.) *Rice v. Rehner*, 463 U.S. 713, 724, 103 S. Ct. 3291, 77 L. Ed. 2d 961 (1993). Congress has restricted tribal immunity to matters involving tribal self-governance. *Turner v. United States*, 248 U.S. 354, 358, 39 S. Ct. 109, 63 L. Ed. 291 (1919); *Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997) (immunity has not been extended beyond protecting tribal self government or controlling internal relations); *Rice v. Rehner*, supra, 724 (immunity limited to actions promoting powers such as self-sufficiency and economic development traditionally reserved to the tribe).

In *Maxwell*, the key Ninth Circuit case applying the "remedy-sought" doctrine, a Viejas tribal fire department ambulance with two tribal employee paramedics was dispatched to the scene of a shooting at the plaintiffs' residence, which was not on the Viejas Indian Reservation. *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). Following the death of the patient, the plaintiffs brought state law tort claims against the tribal paramedics, individually. Although the Viejas Fire Department was also a defendant, the Viejas Tribe was not a party to the suit.

Carefully considering the purposes of tribal sovereign immunity, the court in *Maxwell* applied a remedy focused analysis, seeking to identify the real party in interest. Id., 1087-1090. The *Maxwell* court determined that the tribal paramedics were not entitled to

immunity because the remedy sought by the plaintiffs would operate only against them personally. Id., 1088. Underlying the test applied in *Maxwell* was the consideration that the court "must be sensitive to whether the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act." (Internal quotation marks omitted.) Id., 1088.

"Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity. See *Santa Clara Pueblo v. Martinez*, [supra, 436 U.S. 58]; *Cook* [*v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008)]. Normally, a suit like this one – brought against individual officers in their individual capacities – does not implicate sovereign immunity." *Maxwell v. County of San Diego*, supra, 708 F.3d 1088, citing *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1190 (9th Cir. 2003). The plaintiffs in this case seek money damages not from the sovereign Mohegan Tribe but from Clarke personally. See *Alden v. Maine*, 527 U.S. 706, 757, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (states' immunity from private suit in their own courts distinguished from suits against states' employees). The essential nature and effect of the relief sought can mean that the sovereign is not the real, substantial party in interest. See *Maxwell v. County of San Diego*, supra, 1088, citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464, 65 S. Ct. 347, 89 L. Ed. 389 (1945).

Several years before *Maxwell*, the Tenth Circuit stated, "[w]here a suit is brought against the agent or official of a sovereign, to determine whether sovereign immunity bars the suit, we ask whether the sovereign is the real, substantial party in interest. *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001) . . . This turns on the relief sought by the plaintiffs. Id. . . . '[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, 104 S. Ct. 900 79 L. Ed. 2d 67 (1984) . . . . Where, however, the plaintiffs' suit seeks money damages from the officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, sovereign immunity does not bar the suit so long as the relief is sought not from the [sovereign's] treasury but from the officer personally.' *Alden v. Maine*, [supra, 527 U.S. 757]." (Citations omitted; internal quotation marks omitted.) *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 546 F.3d 1296-97; see also *Nahno-Lopez v. Houser*, 627 F. Supp. 2d 1269, 1285 (W.D. Okla. 2009) (claims against individuals are not barred if damages are clearly not sought from the tribe). "The general bar against official-capacity claims . . . does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities . . . ." (Emphasis in original.) *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 1296. "Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities – that is, because the powers

they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." (Emphasis in original.) Id., 1296.

Clarke argues that, in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 546 F.3d 1288, the Tenth Circuit likened the remedy-sought analysis to wading into a swamp. That argument is a mischaracterization. In fact, the Tenth Circuit stated: "[w]e need not wade into this swamp [of analyzing who is the real party in interest] . . . because a close reading of the plaintiffs' complaint makes clear that plaintiffs have failed to state a claim against the Individual Defendants in their individual capacities." Id., 1297. A close reading of the complaint in this case reveals that Clarke is only being sued in his individual capacity. The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital*, supra, 272 Conn. 559.

Clarke argues that *Johns v. Voebel*, Superior Court, judicial district of New Haven, Docket No. CV-11-6017037-S (September 23, 2011), in which the complaint was dismissed on sovereign immunity grounds, is analogous to the present case. It is true that, in *Johns*, the plaintiff sued a driver employed by the MTGA who, off the tribal reservation, struck the plaintiff's vehicle. *Johns* is distinguishable from this case because the question of whether the tribal employee was being sued solely in his individual capacity was apparently neither raised nor considered by the court. The plaintiff in *Johns* conceded there was sovereign immunity: the issue was whether the tribal em-

ployee driver was acting outside the scope of his authority.

The defendant claims that *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, supra, 221 F. Supp. 2d 271, and *Chayoon v. Sherlock*, supra, 89 Conn. App. 821, require a different analysis and dismissal of this case. While the plaintiffs' claims in both those cases were dismissed on sovereign immunity grounds, the defendants were tribal employees sued under theories of vicarious tribal liability. The complaint in *Chayoon* stated that the tribal employees were being sued individually as well as in their "professional capacities." *Chayoon v. Sherlock*, supra, 828. In *Bassett*, the District Court found that the defendants were being sued "in their official capacities as officers, representatives, and/or agents of the Tribe." *Bassett v. Mashantucket Pequot Museam and Research Center, Inc.*, supra, 276 n.9. In *Chayoon* and *Bassett*, both of which predate *Native American Distributing*, *Nahno-Lopez v. Houser*, supra, and *Maxwell*, tribal employees were sued in their official capacities. Because it was clear that at least part of the remedy sought was against a sovereign, it was unnecessary to analyze whether there was *no* remedy sought against a sovereign. Compare *Maxwell v. San Diego*, supra, 708 F.3d 1088 (when a case is an official capacity suit, the remedy-sought analysis is not necessary), with *Cook v. Avi Casino Enterprises, Inc.*, supra, 548 F.3d 718 (sovereign immunity barred suit where real defendant in interest was the tribe).

Clarke also relies upon *Kizis v. Morse Diesel International, Inc.*, supra, but *Kizis* was an action resulting

from a fall at the Mohegan Sun Casino, not off the reservation. *Kizis v. Morse Diesel International, Inc.*, supra, 260 Conn. 48-49. Accordingly, *Kizis* is readily distinguishable from the present case. Noting that "[t]he tribe has not consented to state jurisdiction over private actions involving matters that occurred *on tribal land* . . ." the court held that "in this instance, the statutes and compacts cited previously, which have been recognized by both the federal government and the state of Connecticut through compliance with the procedures set forth in the gaming act and the Indian Civil Rights Act, explicitly place the present type of tort action in the jurisdiction of the tribe's Gaming Disputes Court." (Emphasis added; footnote omitted.) Id., 57-58. The facts of *Kizis* make it unilluminating to the present case, in which Clarke is alleged to have driven a limousine on non-tribal land into the vehicle of the plaintiffs, who were not invitees of the tribal casino.

The following Superior Court cases are, contrary to the defendant's claim, not inconsistent with the remedy-sought analysis because their facts and claims are distinguishable. In *Durante v. Mohegan Tribal Gaming Authority*, Superior Court, Complex Litigation Docket, judicial district of Hartford, Docket No. X04-HHD-CV-11-6022130-S (March 30, 2012), the plaintiff was killed in an automobile accident by a drunk driver who had been served alcohol at the Mohegan Sun Casino and brought suit against the MGTA, the chief executive officer of the MGTA, the chairman of the Mohegan Tribal Counsel, and the permittee of a night club at the tribal casino. Likewise, in *Ross v. Spaziante*, Superior Court, judicial district of New London,

Docket No. CV-10-6003909-S (November 1, 2011), the plaintiffs filed suit against the MTGA, the permittee of a tribal casino bar, and others following an automobile accident involving a patron of the bar. Unlike in *Durante* and *Ross*, the MTGA is not a party to this suit and the claims here are not brought against high-ranking tribal officials, as in *Durante*, or based on Dram Shop Act liability of a tribal casino bar, as in *Ross*. In *Vanstaen-Holland v. La Vigne*, Superior Court, judicial district of New London, Docket No. CV-08-5007659-S (February 26, 2009) (47 Conn. L. Rptr. 306), the plaintiffs sued the permittee, the owner, and an employee of an establishment at the Mohegan Sun Casino for reckless service of alcohol to a patron. Again, in *Vanstaen-Holland*, the MTGA was a defendant. *Vanstaen-Holland* does not hold that every tribal employee, as distinguished from officers, is entitled to immunity from personal lawsuits wherever and whenever he or she is working for the tribe.

In the other Superior Court cases cited by Clarke in support of his motion, *McAllister v. Valentino*, Superior Court, judicial district of Fairfield, Docket No. CV-11-5029414-S (April 10, 2012), and *International Motor Cars v. Sullivan*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005168-S (June 20, 2006) (41 Conn. L. Rptr. 559), it was held that sovereign immunity operated to bar suits against Connecticut state marshals, based on several factors including finding no allegations that the respective marshals were being sued in their individual capacities and that the sovereign – the state – was therefore the real party in interest. While *McAllister* and *International Motor Cars* involved claims of state, not tribal,

sovereign immunity, those decisions essentially applied the remedy-sought analysis, without that label.

Turning in another direction for illumination, federal employees may be sued individually for money damages even though the actions giving rise to the claim were done while they were acting within the duties of their employment. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). This court is unpersuaded that Clarke's claim to immunity is stronger than that of federal employees. "We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles. See *Santa Clara Pueblo*, [supra, 436 U.S. 58] . . . ." *Maxwell v. County of San Diego*, supra, 708 F.3d 1089. Mohegan tribal employees are not "absolutely immune from suit" in Connecticut courts. *Wallet v. Anderson*, 198 F.R.D. 20 (D. Conn. 2000).

Connecticut law includes clear criteria for determining the party against whom relief is being sought. "[The Connecticut Supreme Court has] identified the following criteria for determining whether an action against an individual is, in effect, against the state and barred by the doctrine of sovereign immunity: (1) a state official has been sued; (2) the suit concerns some manner in which that official represents the state; (3) the state is the real party in interest against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." (Internal

quotation marks omitted.) *Gordon v. H.N.S. Management Co.*, 272 Conn. 81, 93-94, 861A.2d 1160 (2004). "If the plaintiff's complaint reasonably may be construed to bring claims against the defendants in their individual capacities, then sovereign immunity would not bar those claims." *Miller v. Egan*, 265 Conn. 301, 307, 828 A.2d 549 (2003).

It is Clarke's position that, even if the "remedy-sought" analysis is applied here, the court may and should find that the MTGA is the real party in interest in this suit, so that Clarke should be protected by tribal sovereignty. Clarke asserts that, aside from the insurance policy covering the limosine,[5] the MTGA is ob-

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[5] The defendant argues that the fact that the MTGA had liability insurance on the limousine he was driving does not affect the MTGA's status as real party in interest because the MTGA has a self-insured retention and, even if it did not have that, any claim would affect the MTGA's loss history and cost of coverage. He also claims that, if a judgment were to be entered against him, it would affect the MTGA' s administration and hiring abilities, *i.e.*, that allowing this suit to proceed would discourage prospective employees from accepting employment with the MTGA – apparently because they expect, if hired by the MTGA, to be treated differently when they are alleged to have been negligent drivers than if they were employed by a non-tribe employer. Assuming these effects are real, and not conjectural, the court for two reasons rejects the defendant's claim that they show harm to the MTGA's, or the tribe's, purse or independence. First, the court finds no basis in fact, law or logic on which to conclude that these effects are significant enough to be legally cognizable. Second, considering these claims with all the defendant's claims, let alone separately, they do not meet the four-prong test for finding the MTGA or the tribe the real party in interest in this case. The defendant has not been sued as a tribal official; there is no allegation that the defendant was representing the MTGA or the tribe

ligated to defend and indemnify him pursuant to the Mohegan Tribal Code. Accordingly, just to defend Clarke, let alone pay any judgment against him, would adversely affect the MTGA's treasury. A voluntary undertaking cannot be used to extend sovereign immunity where it did not otherwise exist. See *Group Health, Inc. v. Blue Cross Association*, 625 F. Supp. 69, 76 (S.D.N.Y. 1985) (government may not, by indemnity manufacture immunity for its employees). The court finds that Clarke's claims that the MTGA is the real party in interest in this case – the third and fourth factors in *Gordon v. HNS Management Co.*, supra, 272 Conn. 93-94 – are not supported by the facts. This conclusion is strengthened by the long-standing principle that, in considering whether or not the court has subject matter jurisdiction, the plaintiff's allegations are construed in favor of finding jurisdiction where it is possible, in reason, to do so. *Stone v. Hawkins*, 56 Conn. 111, 115, 14 A. 297 (1888). To extend tribal sovereign immunity to Clarke in this case, where the effect of both the claim and any judgment on the tribal purse and self governance is self-inflicted – that is, the effect results from the MTGA's choices – is beyond the power of this court. Even if by tribal law the MTGA has to indemnify Clarke, that is a tribal choice. This court rejects Clarke's implicit claim that a sovereign may extend immunity to its employees by

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at the time of the collision (even as employee); the MGTA is not, and cannot for the reasons here stated make itself, the party against whom relief is sought; and a judgment against the defendant will not operate to control the activities of the MTGA or subject it to liability. See *Gordon v. H.N.S. Management Co.*, *supra*, 272 Conn. 93-94.

enacting a law assuming its employees' debts. See *Demery v. Kupperman*, 735 F.2d 1139, 1148 (9th Cir. 1984), cert. denied, 469 U.S. 1127, 105 S. Ct. 810, 83 L. Ed. 2d 803 (1985) (state may not extend sovereign immunity by legislation assuming employees' debts). To hold that the MTGA has the unilateral power to expand the boundaries of sovereign immunity based on tribal legislation, contract or other form of tribal indemnification of an employee, or of employees generally, is beyond the power of this court because to do so would not only be to change the law of sovereign immunity, but to do so with unknown public policy ramifications. The Mohegan Tribe, or the MTGA as its subsidiary, can elect to waive sovereign immunity, but cannot unilaterally elect to expand it.

CONCLUSION

This court finds no implication of tribal sovereign immunity such that Clarke, a tribal employee sued in his individual capacity, is immune from suit. Therefore, Clarke's motion to dismiss is denied.

s/ LELAND J. COLE-CHU
Cole-Chu, J.