

No. _____

**In The
Supreme Court of the United States**

—◆—
CYNTHIA LOPEZ,

Petitioner,

v.

ERIC QUAEMPTS, DAVID TOVEY, AND
THE CONFEDERATED TRIBES OF THE
UMATILLA INDIAN RESERVATION,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The Court Of Appeal Of California,
Third Appellate District**

—◆—
PETITION FOR WRIT OF CERTIORARI
—◆—

ERICK G. KAARDAL
MOHRMAN, KAARDAL &
ERICKSON, P.A.
150 South Fifth Street,
Suite 3100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074
kaardal@mklaw.com
Counsel of Record for Petitioner

ERIKA HEATH
369 Pine Street, Suite 410
San Francisco, California
94104
Telephone: 415-426-7850
erika@heathlegal.com

MONIQUE OLIVIER
OLIVIER SCHREIBER &
CHAO LLP
475 14th Street, Suite 250
Oakland, California 94162
Tel: 415-484-0980
monique@oscllegal.com
Attorneys for Petitioner

QUESTIONS PRESENTED

In an attempt to immunize a tribe and its employees from liability, the Confederated Tribes of the Umatilla Indian Reservation (“the Tribe”) ratified the tortious actions of two tribal employees. Plaintiff Lopez claimed in her California state court complaint these employees’ actions to be fraudulent and outside the scope of their employment authority. The California courts took notice of the Tribe’s ratification of the employees’ purportedly tortious acts, but denied any legal significance. The questions presented are:

1. Whether this Court, to allow for more complete state court tort remedies against individual tribal employees, as indicated in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), should clarify existing tribal sovereign immunity law to allow tort victims to sue a tribe based on vicarious liability when a tribe ratifies individual tribal employees’ actions giving rise to the state tort claims.
2. Whether the lower court’s refusal to recognize a tribe’s ratification of tribal employees’ allegedly tortious acts, as an express waiver of sovereign immunity impermissibly interferes with states’ rights to award remedies to tort victims.

PARTIES TO THE PROCEEDINGS

Petitioner is Cynthia Lopez who is the plaintiff in the California superior court and appellant (the “Petitioner” or “Lopez”) in the California Court of Appeal.

Respondent is The Confederated Tribes of The Umatilla Indian Reservation, a federally-recognized tribe and defendant in the California superior court and appellee (the “Respondent” or “Tribe”) in the California Court of Appeal.

Eric Quaempts was an employee of the Tribe during the relevant time period and is a defendant in the California superior court and appellee (“Quaempts”) in the California Court of Appeal.

David Tovey was an employee of the Tribe during the relevant time period and is a defendant in the California superior court and appellee (“Tovey”) in the California Court of Appeal.

CORPORATE DISCLOSURE STATEMENT

Petitioner Cynthia Lopez is an individual. She is not a corporate entity nor affiliated with any corporate entity regarding her petition.

RELATED CASES

Cynthia Lopez v. Eric Quaempts, David Tovey, and the Confederated Tribes of the Umatilla Indian Reservation, No. 34-2017-00206329, Superior Court, County of

RELATED CASES—Continued

Sacramento, California. Judgment entered on April 16, 2018.

Cynthia Lopez v. Eric Quaempts, David Tovey, and the Confederated Tribes of the Umatilla Indian Reservation, No. C087445, Court of Appeal of the State of California. Judgment entered December 29, 2021.

Cynthia Lopez v. Eric Quaempts, David Tovey, and the Confederated Tribes of the Umatilla Indian Reservation, No. S272597, In the Supreme Court of California. Judgment entered March 9, 2022.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	ii
RELATED CASES	ii
TABLE OF CONTENTS	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION INVOLVED....	1
STATEMENT OF THE CASE.....	2
A. Facts and Procedural History.....	3
REASONS FOR GRANTING THE PETITION.....	9
I. Tribal ratification of tribal employees’ allegedly tortious actions in order to assert tribal sovereign immunity abrogates Lewis, and reduces the availability of state remedies	9
II. Tribal ratification of tribal employees’ tortious act is an express waiver of tribal sovereign immunity	16
1. The California Court of Appeal refused to identify ratification of the tribal employees’ prior tortious acts as an express waiver of sovereign immunity	16

TABLE OF CONTENTS—Continued

	Page
2. Ratification is applicable to tribes as an acceptance of liability and an express waiver of sovereign immunity.....	18
3. Tribal ratification of alleged state tortious acts encroaches upon states' rights	21
III. The questions presented warrant this Court's review	24
CONCLUSION.....	27

APPENDIX

Opinion, Court of Appeal of California, Third Appellate District (Nov. 29, 2021).....	App. 1
Order to Quash/Dismiss Plaintiffs' First Amended Complaint, Superior Court of California, Sacramento County (Apr. 16, 2018)	App. 19
Order Denying Review, Supreme Court of California (Mar. 9, 2022).....	App. 73

TABLE OF AUTHORITIES

	Page
CASES:	
<i>C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe</i> , 532 U.S. 411 (2001).....	10
<i>Cook v. AVI Casino Enterprises</i> , 548 F.3d 720 (9th Cir. 2008).....	2, 3, 17
<i>Curtis, Collins & Holbrook Co. v. United States</i> , 262 U.S. 215 (1923)	14
<i>Ford Motor Co. v. Dep’t of Treasury</i> , 323 U.S. 459 (1945).....	11
<i>Hardin v. White Mountain Apache Tribe</i> , 779 F.2d 476 (9th Cir. 1985).....	3, 17
<i>In re Greene</i> , 980 F.2d 590 (9th Cir. 1992)	10
<i>Irving v. Mazda Motor Corp.</i> , 136 F.3d 764 (11th Cir. 1998)	22
<i>Jean v. Spurrer</i> , 35 Md. 110 (1872).....	20
<i>Kiowa Tribe v. Mfg. Techs.</i> , 523 U.S. 751 (1998).....	7, 10, 11, 12
<i>Lewis v. Clarke</i> , 137 S. Ct. 1285 (2017).....	<i>passim</i>
<i>Linneen v. Gila River Indian Community</i> , 276 F.3d 489 (9th Cir. 2002).....	3, 17
<i>Lopez v. Quaempts</i> , 2021 WL 5561997 (Cal.App. 3 Dist., 2021)	8
<i>Maxwell v. County of San Diego</i> , 708 F.3d 1075 (9th Cir. 2013).....	16, 17

TABLE OF AUTHORITIES—Continued

	Page
<i>Michigan v. Bay Mills Indian Community</i> , 572 U.S. 782 (2014)	10, 11
<i>Native American Distributing v. Seneca-Cayuga Tobacco Co.</i> , 546 F.3d 1288 (10th Cir. 2008).....	17
<i>Pink v. Modoc Indian Health Project</i> , 157 F.3d 1185 (9th Cir. 1998).....	10, 11
<i>Pistor v. Garcia</i> , 791 F.3d 1104 (9th Cir. 2015)....	16, 17
<i>Puyallup Tribe, Inc. v. Department of Game</i> , 433 U.S. 165 (1977)	10
<i>Sac & Fox Nation v. Hanson</i> 47 F.3d 1061 (10th Cir. 1995)	10
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).....	10
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984).....	10, 22
<i>Taylor v. Gen. Motors Corp.</i> , 875 F.2d 816 (11th Cir. 1989)	22
 STATUTES:	
28 U.S.C. § 1257(a).....	1
 CONSTITUTIONAL PROVISIONS:	
U.S. Constitution, Article I, Section 8	1

TABLE OF AUTHORITIES—Continued

	Page
OTHER AUTHORITIES:	
Alexandra B. Klass, <i>Tort Experiments in the Laboratories of Democracy</i> , 50 <i>Wm. & Mary L. Rev.</i> 1501, 1503 (2009)	22
Joseph Story, <i>Agency</i> , § 251 at 301 (1846)	20
Restatement (Second) of <i>Agency</i> § 82 (1958).....	19, 20
Restatement (Second) of <i>Agency</i> § 85 (1958).....	20
Restatement (Third) of <i>Agency</i> § 4.01	19

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cynthia Lopez respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal. The California Supreme Court denied review.

**OPINIONS BELOW**

The denial of review by the California Supreme Court dated March 9, 2022 is not published and is reproduced in the Appendix (“App.”) at 73. The decision of the California Court of Appeal is an unpublished decision dated November 29, 2021, and is reproduced at App. 1–18, 2021 WL 5561997. The decision of the California Superior Court is not reported and is reproduced at App. 19–72.

**JURISDICTION**

The California Supreme Court denied review of the Court of Appeal decision on March 9, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

**CONSTITUTIONAL PROVISION INVOLVED**

Article I, Section 8 of the Constitution states that “Congress shall have the power to regulate Commerce

with foreign nations and among the several states, and with the Indian tribes.”

◆

STATEMENT OF THE CASE

In *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), this Court declared that a suit brought against a tribal employee, in a personal capacity, for a tort committed by the employee within the scope of employment, the employee, not the Indian tribe, is the real party in interest and the tribe’s sovereign immunity is not implicated. However, this Court in *Lewis*, and since *Lewis*, has not determined whether sovereign immunity applies if the tribe has expressly ratified the purportedly tortious acts of the tribal employee: does a tribe’s ratification of the tribal employee’s purportedly tortious acts expressly waive sovereign immunity?

Lopez argued below that the tribal employees’ pre-employment misrepresentations communicated to Lopez and later ratified by the Tribe, make the Tribe vicariously liable by acting as an express waiver of sovereign immunity. But, the California Court of Appeal disagreed. The state appellate court found no waiver, affirming dismissal of Lopez’s tort claims against the Tribe. The court based its holding on Ninth Circuit decisions which extended tribal sovereign immunity to tribal employees where the plaintiff sought to hold the tribe or a tribal entity vicariously liable for the actions of the employees who were sued in their official capacity. App. 12, citing *Cook v. AVI Casino Enterprises*, 548

F.3d 720 (9th Cir. 2008); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479–480 (9th Cir. 1985). However, none of these decisions involved a tribe’s ratification of the employee’s conduct which had caused tort claims.

The Court of Appeal held, without significant analysis, that ratification was not the type of waiver required for waiver of tribal sovereign immunity. App. 9. The California Supreme Court did not grant a discretionary appeal. In response, Lopez has filed this petition to address the issues presented.

A. Facts and Procedural History.

1. Lopez is not a member of the Tribe.¹ While she was working and living in Sacramento, California (off-reservation), employees of the Tribe contacted her to inform her of tribal job openings. They encouraged her to apply for a managerial position. One of the available positions was for program manager of the First Foods Policy Program (“FFPP”) within the Tribe’s Department of Natural Resources. The vacancy announcement said the goal of the Department was to protect, restore and enhance the “first foods”—water, salmon, deer, cous, and huckleberry—for the perpetual benefit of the Tribe.

¹ Facts and procedural history taken from Court of Appeal opinion. App. 2–4.

Although the vacancy announcement described duties for the program manager position, state court co-defendant, Eric Quaempts, a tribal employee, sued in his individual capacity,² did not disclose that the program and position would be substantially different from what was described in the vacancy announcement regarding promotion opportunities, staffing, benefits, and budget. Lopez would not have applied for the position had she known the vacancy announcement contained intentionally false information inducing her to apply for and accept the position.

Lopez did apply for the job. Lopez accepted employment and the Tribe obtained her as a FFPP manager. She thus moved from Sacramento, California, to rural Eastern Oregon as the FFPP manager on the tribal reservation. All these actions were taken by

² The California appellate court did not agree that the underlying amended complaint adequately announced that Quaempts or Tovey were sued individually, and instead found that her attempt to assert ratification liability against the Tribe essentially defeated her ability to pursue the Quaempts and Tovey as individuals. *See* App. 12–13 (“Although the caption of the first amended complaint named Quaempts and Tovey as individuals, we may not simply rely on the caption but must determine whether the action against Quaempts and Tovey actually sought relief against the Tribe. . . . Rather, unlike the circumstances in *Lewis*, the first amended complaint named the Tribe vicariously liable for the conduct of its employees . . . whose alleged acts or omissions in the course of recruiting, hiring and supervising Lopez . . . formed the grounds for Lopez’s causes of action.”). The appellate court’s analysis at this stage, however, does not distract from the questions presented as they directly pose the issues relating to tribal ratification and effects upon state rights and individuals seeking relief under state remedies for alleged tribal members’ tortious acts.

Lopez based on the intentionally false information she was provided as she would later allege in the state court complaint.

After successfully completing work probation, Lopez discovered that the budget for the FFPP was not as stated in the vacancy announcement. She communicated both in writing and orally with Quaempts and state court co-defendant David Tovey, also a tribal employee and supervisor to Quaempts, about bringing the FFPP's budget and staffing up to what was, as alleged, falsely advertised in the vacancy announcement. But, Quaempts and Tovey refused to rectify the situation.

Lopez then hired an attorney. The attorney representing Lopez wrote to Tovey and the Tribe's attorney, describing Lopez's claims of fraud and seeking an amicable resolution between Lopez and the Tribe.

Lopez subsequently took family medical leave for unrelated injuries. About three months later, the Tribe informed Lopez that if she would not accept a proposed separation agreement, she would need to report to work in six days with a letter from her treating physician clearing her to work. Lopez could not provide such a letter and the Tribe refused to allow her to return to work.

2. Lopez filed her lawsuit, asserting causes of action for fraud, negligent misrepresentation, fraudulent misrepresentation, and unfair business practices. Her first amended complaint asserted the same causes of action. The amended complaint made several allegations:

- The vacancy announcement contained false information about the budget and staffing for the First Foods Policy Program.
- Quaempts did not inform Lopez that the program manager position would be substantially different than advertised.
- Quaempts made false representations to Lopez about promotion opportunities and benefits.
- When Lopez asked to hire more staff up to the advertised levels, Quaempts said there was no budget for these staff.
- Quaempts rebuffed Lopez's attempts to increase the budget for the FFPP.
- Quaempts retaliated against Lopez when she complained that the staffing and budget for the program were not as represented during her recruitment.

As alleged, the Tribe knew of, and ratified, both Tovey's and Quaempts's conduct. The defendants, through their attorneys, admitted to these particular facts before the lower court: (1) there was an advertisement; (2) it was disseminated; (3) it recruited Dr. Lopez; (4) that "preemployment," meant "recruitment; and (5) the Tribe ratified the recruitment of Dr. Lopez.

Despite the Tribe's ratification of the individual tribal employees' acts, once Lopez filed her state action, the individual defendants, Quaempts and Tovey, and the Tribe, filed a motion to quash the service of, and to

dismiss, Lopez's amended complaint based on tribal sovereign immunity. The trial court granted the motion. App. 20.

The alleged ratified acts of false misrepresentations were contained in the actual advertisement, but also as oral representations. Although all defendants admitted to the above acts and that these acts were all ratified by the Tribe, the defendants did not admit or agree to characterizing these acts as fraudulent, deceptive, or tortious.

3. The superior court dismissed Lopez's complaint on grounds of tribal sovereign immunity. App. 40. In its decision, the superior court suggested that the alleged illegal pre-employment conduct of individual co-defendants Quaempts and Tovey was within the sphere of a "contract," thus allowing for tribal immunity for employees or members to avoid individual liability. *Citing Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751 (1998). App. 25. The court then opined that "if negotiations leading to a contract were not immune, the exception would emasculate the immunity." App. 28.

The court thus concluded that Lopez did not meet her burden "or presenting authorities and evidence to persuade the court that Quaempts and Tovey engaged in the sort of conduct 'outside the scope' of their official duties or supervisory duties such that the tribe's immunity would not extend to them." App. 40. As for ratification, the court concluded it would have no bearing on the application of tribal immunity as to the

Tribe, but would effectively immunize the individual defendants. *Id.*

4. Lopez appealed and the California Court of Appeal affirmed. App. 1–19. In relevant part, the appellate court held that tribal ratification is not an express waiver of sovereign immunity:

Lopez does not point to any applicable Congressional authorization for her lawsuit . . .

Although the Tribe’s attorney agreed that the Tribe ratified the acts of recruiting, hiring and interviewing Lopez, including the creation and posting of the job description, the Tribe did not stipulate that Quaempts or Tovey committed illegal or improper conduct outside the scope of their employment authority.

In any event, a waiver of tribal sovereign immunity cannot be implied but must be explicit and unequivocally expressed. . . . Waivers are strictly construed and there is a strong presumption against them. . . .

Lopez v. Quaempts, 2021 WL 5561997 (Cal.App. 3 Dist., 2021) (citations omitted). App. 8–9. Notably, the Court of Appeal did not even let the individual claims against Quaempts and Tovey move forward, insisting that those claims were “official capacity” claims because Lopez also sought to hold the Tribe liable. *Id.* at 9–10. This outcome clearly contradicts *Lewis*, which permits claims against individual defendants. The California Supreme Court denied review on March 9, 2022. App.

73. These decisions left Lopez without any remedy whatsoever for the torts committed against her.

5. Lopez's petition for writ of certiorari followed. Lopez's petition presents to the Court, for the first time, the legal question of whether tribal ratification of a tribal employee's conduct is an express waiver of sovereign immunity. If so, the tribe which ratifies a tribal employee's acts is vicariously liable for the torts of the tribal employee and the tribe becomes a real party in interest.



REASONS FOR GRANTING THE PETITION

I. Tribal ratification of tribal employees' allegedly tortious actions in order to assert tribal sovereign immunity abrogates *Lewis*, and reduces the availability of state remedies.

The California Court of Appeal has substantially deviated from the consistent application of the common law principle of tribal sovereign immunity. This includes the assurance that tort victims may seek state court remedies against individual tortfeasors under *Lewis v. Clark*, 137 S. Ct. 1285 (2017). The lower court's rationale contradicts *Lewis* by depriving tort victims of state remedies even when a tribe *ratifies* tribal employees' allegedly tortious acts. The lower court acts as if somehow tortious acts fall within the scope of employment. They do not.

Further, the decision sanctions the expansion of sovereign immunity in such a way as to interfere with

states' rights to compensate tort victims. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Lopez contends the Tribe expressly waived its immunity from suit because it ratified the alleged misconduct of individual defendants Quaempts and Tovey. Quaempts's and Tovey's actions, to the extent that they were tortious, made them liable for state court tort remedies in their respective personal capacities, consistent with *Lewis*. Under the sovereign immunity doctrine, the Tribe would generally have no vicarious liability in this situation. However, because the Tribe ratified Quaempts's and Tovey's actions, the Tribe is vicariously liable for Quaempts's and Tovey's actions.

To be sure, as "domestic dependent nations," Indian tribes are generally immune from suit as a sovereign power, unless that immunity is abrogated by Congress or expressly waived by the tribe. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788–790 (2014); *C & L Enterprises, Inc. v. Citizen Band Pottawatomie Indian Tribe*, 532 U.S. 411, 418 (2001); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 170–173 (1977). Accordingly, courts have immunized tribes from suit arising from activities occurring on and off the reservation, from governmental and commercial activities, and from employment activities. *Michigan*, 572 U.S. at 797–800; *Kiowa Tribe*, 523 U.S. at 754–755, 758; *see also Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1064–1065 (10th Cir. 1995); *In re Greene*, 980 F.2d 590, 591, 596–597 (9th Cir. 1992); *Pink v.*

Modoc Indian Health Project, 157 F.3d 1185 (9th Cir. 1998).

This Court has an obligation to review the effects of tribal sovereign immunity.³ Such protection can come at a price that is often “unjust” for plaintiffs who need to be made whole. *Kiowa Tribe*, 523 U.S. at 764–766 (Stevens, J., dissenting) “This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity.” (*Id.*) Thus, while courts are reluctant to interfere with governance, they are equally or perhaps even more reluctant to expand the doctrine of sovereign immunity beyond its original purpose. *See, e.g., Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 462 (1945) (sovereign immunity “does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally.”)

More recently, this Court has questioned the reach of the sovereign immunity doctrine to tribes. *See Michigan*, 572 U.S. at 814–817 (2014) (Thomas, J., dissenting, joined by Scalia, J., Ginsburg, J., Alito, J.). Justice Thomas, in his dissent, opined how *Kiowa Tribe* was a decision made in error: “Such an expansion of tribal immunity is unsupported by any rationale for that doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty. That decision, wrong to begin with, has only worsened with the

³ Sovereign immunity “is a matter of federal law and is not subject to diminution by the States.” *Michigan, supra*, 572 U.S. at 789; *see Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 754–755, 758 (1998).

passage of time.” *Id.* at 814. As he explained, “this notion cannot support a tribe’s claim of immunity in the courts of another sovereign—either a State (as in *Kiowa*) or the United States (as here). Sovereign immunity is not a freestanding ‘right’ that applies of its own force when a sovereign faces suit in the courts of another.” *Id.* at 816 (citations omitted).

In *Lewis*, the U.S. Supreme Court clarified the sovereign immunity doctrine’s reach. This Court ruled that sovereign immunity “does not erect a barrier against suits to impose individual and personal liability” against tribal employees sued in their personal capacities, regardless of whether they were acting within the scope of their employment with the tribe. *See Lewis*, 127 S. Ct. at 1292–1293.

Indeed, tribal sovereign immunity protects tribal employees sued only in their official capacities. *Lewis*, 137 S. Ct. at 1294. However, the analysis for determining whether a tribe’s sovereign immunity protects a tribal employee is remedy-focused. *Id.* at 1290–1292. *Lewis* specifically involved a negligence tort after the plaintiffs were hit in their vehicle on an interstate highway by a tribal employee who was driving a limousine for the Mohegan Sun Casino. *Id.* at 1289–1290. The plaintiffs initially sued the individual driver as well as the Mohegan Tribal Gaming Authority. *Id.*; *see also Lewis v. Clarke*, 320 Conn. 706, 708 n. 2 (2017). Although the claims against the gaming authority were subsequently withdrawn, the individual defendant also moved to dismiss, arguing that he was entitled to invoke sovereign immunity as an employee of the tribe,

acting within the scope of his employment at the time of the accident. *Lewis*, 137 S. Ct. at 1290.

This Court explained that defendants in an official-capacity action may assert sovereign immunity; whereas, defendants in an individual-capacity action may not, although personal immunity defenses may apply. *Id.* at 1291–1292. Because the plaintiff’s lawsuit in *Lewis* was a negligence action against the tribal employee and not a suit against the employee in his official capacity, this Court concluded that a judgment in that action would not operate against the tribe nor require action by the tribe or disturb its property. *Id.* at 1290–1291. This Court held that tribal sovereign immunity did not bar the plaintiff’s lawsuit because the employee, and not his tribal employer, was the real party in interest. *Id.* at 1290–1293 (stating that the critical inquiry was who may be legally bound by the trial court’s judgment and not who will ultimately pick up the tab).

Lopez contends the Tribe expressly waived its sovereign immunity from suit because it ratified the alleged misconduct of individual defendants Quaempts and Tovey. Quaempts’s and Tovey’s actions, to the extent that they were tortious, made them liable for state court tort remedies in their respective personal capacities, consistent with *Lewis*. Under the sovereign immunity doctrine, the Tribe would generally have no vicarious liability in this situation. However, because the Tribe ratified Quaempts’s and Tovey’s actions, the Tribe should be potentially liable.

Specifically, this Court in *Lewis* held that state remedies are available for garden variety torts against tribal employees in their personal capacities. However, the California Court of Appeal decision here, based on sovereign immunity, deprives such potential state remedies for Lopez. The appellate court concluded the Tribe ratified “the acts of recruiting, hiring and interviewing Lopez, including the creation and posting of the job description, [but] the Tribe did not stipulate that Quaempts or Tovey committed illegal or improper conduct outside the scope of their employment authority.” App. 9. Unfortunately, the Court of Appeal made a distinction which does not make a legally significant difference. The alleged tortious acts were committed under the rubric of “recruitment,” which was ratified by the Tribe. In other words, the Tribe ratified Quaempts’s and Tovey’s purported torts—which establishes tribal liability or vicarious liability.

Long ago, this Court generally found that acts of an agent are imputed to the principal when the principal adopts the unauthorized act of his agent in order to retain a benefit for himself. For instance, in *Curtis, Collins & Holbrook Co. v. United States*, 262 U.S. 215 (1923), an agent employed to procure title to land, contrary to instructions, procured it with knowledge of a fraud practiced on the owner. Although the agent had an interest adverse to his principal to conceal the defect in title because his own profits would increase with the number of titles procured, his knowledge was imputed to the principal. He was the sole actor for the corporate principal in procuring the fraudulent

patents. In such a case the principal is impaled on the horns of a dilemma. If he disclaims the agent's acceptance of the property for him as unauthorized, he has no ground to retain it; on the other hand, if he retains the property he adopts the agent's act in procuring it and must in fairness take the accompanying burden of the agent's knowledge.

Here, the Tribe retained the benefit of Lopez's hiring as the FFPP manager through the unauthorized and fraudulent acts of the tribal employees. Because the Tribe ratified the tribal employees' conduct, the effect is that both the Tribe and the tribal employees, even in their personal capacities, were protected by sovereign immunity. So, in this instance, Lopez is left without the state remedies *Lewis* intended to provide her.

Lopez contends that the Tribe by ratifying Quaempts's and Tovey's actions, adopted the conduct as its own, necessarily accepting any liability that arose from that conduct, and thereby expressly waiving sovereign immunity. In contrast, the California appellate court's reasoning is that if the Tribe ratifies the conduct of the tribal employees then the Tribe is protected by tribal sovereign immunity regardless of the ratification. But, the California court's approach leaves tort victims empty-handed, with no state remedies, whenever a tribe ratifies a tribal business employees' allegedly tortious conduct.

II. Tribal ratification of tribal employees' tortious act is an express waiver of tribal sovereign immunity.

1. The California Court of Appeal refused to identify ratification of the tribal employees' prior tortious acts as an express waiver of sovereign immunity.

Although the California Court of Appeal correctly identified that the Ninth Circuit has extended tribal sovereign immunity to tribal employees where the plaintiff sought to hold the tribe or a tribal entity vicariously liable for the actions of the employees, the state appellate court refused to identify tribal ratification of the tribal employees' prior tortious acts as an express waiver of sovereign immunity. The legal question of tribal ratification was an issue of first impression for the California courts—as it is for this Court. The Court of Appeal, however, addressed the matter as if it was addressed in earlier Ninth Circuit decisions.

But those decisions did not address the legal issue of vicarious liability based on tribal ratification. The Ninth Circuit has never addressed tribal ratification as a waiver of sovereign immunity leading to vicarious liability for the tribe—only tribal sovereign immunity has been addressed. Even before *Lewis*, the Ninth Circuit had held that tribal sovereign immunity does not extend to a tribal employee sued in his or her individual capacity. *Pistor v. Garcia*, 791 F.3d 1104, 1110, 1112–1114 (9th Cir. 2015); *Maxwell v. County of San Diego*, 708 F.3d 1075, 1087–1089 (9th Cir. 2013). In *Pistor*, for example, gamblers sued the chief of the Tonto

Apache Police Department, the general manager of the Tonto Apache Tribe's hotel and casino and the Tribal Gaming Office Inspector for damages relating to the detention of the gamblers at the tribe's casino and the seizure of their property. *Pistor*, at 1108–1109. On appeal from an order denying the tribal defendants' motion to dismiss based on tribal sovereign immunity, the Ninth Circuit held that tribal sovereign immunity did not bar the suit because the plaintiffs sought to hold the tribal defendants liable in their individual capacities and did not seek money damages from the tribe, and the tribal defendants did not show that a judgment would interfere with tribal administration or restrain the tribe from acting. *Id.* at 1108, 1113–1114; see *Maxwell*, 708 F.3d at 1088; see also *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296–1297 (10th Cir. 2008) (acknowledging that tribal officials may be sued in their individual capacities for actions taken in their official capacities where the relief sought was from the officials personally and not from the sovereign). The Ninth Circuit noted that the gamblers had not sued the tribe. *Pistor*, at 1113. By contrast, the Ninth Circuit has extended tribal sovereign immunity to tribal employees where the plaintiff sought to hold the tribe or a tribal entity vicariously liable for the actions of the employees. *Cook*, 548 F.3d at 720, 726–727; *Linneen*, 276 F.3d at 492; *Hardin v. White Mountain Apache Tribe*, 779 F.2d at 479–480.

In these Ninth Circuit decisions, the Ninth Circuit has never addressed tribal ratification as a waiver of sovereign immunity causing vicarious liability for the

tribe. Thus, the California Court of Appeal did not directly answer the question of whether tribal ratification of the tribal employees' prior tortious acts is an express waiver of sovereign immunity. The Court of Appeal did not recognize the question presented was one of first impression—and needed to be resolved.

Meanwhile, consistent with the generous approach of *Lewis* to assure remedies for tort victims, Lopez contends that the Tribe, by ratifying Quaempts's and Tovey's actions, adopted their conduct as its own, necessarily accepting any liability that arose from that conduct, and thereby expressly waiving sovereign immunity. The California courts disagreed. Instead, while the California courts recognized the tribal ratification, it concluded the ratification had no legal consequence.

2. Ratification is applicable to tribes as an acceptance of liability and an express waiver of sovereign immunity.

a. Lopez contends the Tribe expressly waived its immunity from suit because it expressly ratified the conduct of Quaempts and Tovey which was outside the scope of their employment authority. Essentially, the Tribe, by ratifying Quaempts's and Tovey's actions that were outside the scope of their employment authority, adopted their conduct as its own, necessarily accepting any liability that arose from that conduct, and thereby expressly waiving sovereign immunity. That is, after all, what ratification is.

b. Ratification is not an empty doctrine; it carries important consequences. By ratifying, a principal, who may not otherwise be liable, becomes liable for the wrongful conduct of the agent. *See, e.g., Rakestraw v. Rodrigues*, 8 Cal.3d 67, 72–73 (1972). The doctrine, for the purposes of tort law, is defined in the Restatement (Second) of Agency as:

[A]ffirmance by a person of a prior act which did not bind him but was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

Restatement (Second) of Agency § 82 (1958). Moreover, “knowing acceptance of the benefits of a transaction ratifies the act of entering into the transaction.” Restatement (Third) of Agency § 4.01 cmt. d. In this case, the California Court of Appeal acknowledged an express ratification in the courtroom by the Tribe’s attorney:

[T]he Tribe’s attorney agreed that the Tribe ratified the acts of recruiting, hiring and interviewing Lopez, including the creation and posting of the job description. . . .

App. 9. Such express ratification, in the tort context, is an express waiver of sovereign immunity.

The legal consequences of ratification in tort law are: (1) the supplying of authority to bind the principal where there was none originally, and (2) the “relation back” of that authorization. Both features are summed up in the maxim “omnis ratihabitio retrotrahitur et

mandato priori aequiparatur” (every ratification relates back and is equivalent to a prior authority). *Jean v. Spurrier*, 35 Md. 110, 114 (1872).

The most important limitation on the ratification doctrine as applied to torts is the agent’s actions must have been undertaken on account of the principal:

[R]atification can only be effectual between the parties when the act is done by the agent avowedly for or on account of the principal and not when it is done for or on account of the agent himself or some other person. This would seem to be an obvious deduction from the very nature of a ratification, which presupposes the act to be done for another but without competent authority from him; and therefore gives the same effect to the act as if it had been done by the authority of the party for whom it is purported to have been done and as his own act.

Joseph Story, *Agency*, § 251 at 301 (1846). *See also* Restatement (Second) of Agency §§ 82 and 85 (1958). Thus, the principal cannot be held liable under the ratification doctrine for an agent’s tortious conduct if the agent did not undertake the tortious conduct on behalf of the principal.

c. In this case, in an apparent attempt to immunize Quaempts and Tovey, the Tribe ratified Quaempts’s and Tovey’s actions, claimed by the plaintiff to be tortious, in order to absolve any liability by cover of the umbrella of tribal sovereignty immunity. The Court of

Appeal acknowledged the ratification, but denied any legal significance:

Although the Tribe’s attorney agreed that the Tribe ratified the acts of recruiting, hiring and interviewing Lopez, including the creation and posting of the job description, the Tribe did not stipulate that Quaempts or Tovey committed illegal or improper conduct outside the scope of their employment authority.

App. 9. Thus, according to the decision, such ratification is not sufficient to waive a tribe’s sovereign immunity. Although waivers of tribal sovereign immunity are strictly construed and “cannot be implied but must be explicit and unequivocally expressed,” App. 9, ratification necessarily falls under the category of explicit waiver. After all, the very act of ratification means that the principal is accepting liability that may not otherwise exist.

Especially in light of the *Lewis* decision, which permitted torts to proceed against individual defendant tortfeasors, this Court should address the effects of ratification doctrine on those torts.

3. Tribal ratification of alleged state tortious acts encroaches upon states’ rights.

a. In recent years, states have been “experimenting” in providing citizens with tort remedies. As one author expressed, “[s]tate tort experiments, however, are not limited to tort ‘reform,’ that restricts common law rights and remedies. Indeed, at the same time

states are decreasing the rights of their citizens to bring certain types of claims for personal injury against drug manufacturers, product manufacturers, doctors, and others, they are also increasing the rights of their citizens to bring other types of tort claims in targeted areas such as consumer fraud, privacy, publicity, and environmental protection.” Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 *Wm. & Mary L. Rev.* 1501, 1503 (2009). As this Court has noted, compensation for tort remedies has been traditionally regarded as within the scope of states’ rights. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (noting “the States’ traditional authority to provide tort remedies to their citizens”). *See also*, e.g., *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 767 (11th Cir. 1998) (quoting *Taylor v. Gen. Motors Corp.*, 875 F.2d 816, 823 (11th Cir. 1989)) (within the context of federal preemption, the “strong presumption” against finding express preemption “when the subject matter, such as the provision of tort remedies to compensate for personal injuries, is one that has traditionally been regarded as properly within the scope of the states’ rights”).

Moreover, “state experiments with tort law likely will not abate any time soon. States will continue to struggle with where to increase and decrease tort rights to respond to the needs of their citizens, the business community, and technological and social advances.” *Tort Experiments in the Laboratories of Democracy*, 50 *Wm. & Mary L. Rev.* at 1536.

The California Court of Appeal decision expanding the reach of sovereign immunity, to cancel the ratification doctrine abrogates the gains tort victims were granted in *Lewis*. It also sanctions tribal interference with states' rights to compensate tort victims, and interferes with states' experiments to increase tort rights to respond to the needs of their citizens.

b. Here, the California court erred. Tribal ratification has legal consequences affecting both plaintiffs and states. Because the Tribe ratified the tribal employees' prior acts, allegedly tortious, the following legal consequences of ratification in tort law apply: (1) the supplying of authority to bind the principal where there was none originally, and (2) the "relation back" of that authorization. Thus, because of the Tribe's express ratification, the Tribe is presumed to have supplied authority for the tribal employees' allegedly tortious actions and that authority relates back to when the allegedly tortious actions occurred.

The California courts' decisions contradict this Court's approach to allow state court remedies against tribal employees in their individual capacities. It is also consistent with the recognition of states' rights to provide citizens with tort remedies. This Court in *Lewis*, although not addressing the issue of tribal ratification being an express waiver of tribal sovereign immunity, ensured that these state court remedies would be provided to tort victims. Specifically, this Court held the tribe in that case lost in arguing that its indemnification policies over a tribal officer or employee were sufficient to extend tribal sovereignty immunity as a

defense against an employee sued in his individual capacity. *Lewis*, 137 S. Ct. at 1289, 1292. This Court resolved the legal question by identifying the “critical inquiry [as] who may be legally bound by the court’s judgment, not who will ultimately pick up the tab.” *Id.* In other words, “[a tribe’s] indemnification provision does not somehow convert the suit against [the employee] into a suit against the sovereign.” *Id.* at 1293.

The Tribe in this case *voluntarily* ratified the alleged pre-employment acts of Quaempts and Tovey. Under the doctrine of ratification, a principal’s ratification of the agent’s acts establishes vicarious liability. So, unlike in *Lewis*, the tribe’s ratification of the tribal employees’ conduct, which is different than indemnification, does convert the suit against the employees into a suit against the sovereign consistent with the ratification doctrine. It is also consistent with *Lewis* in protecting states’ rights to provide remedies to tort victims.

III. The questions presented warrant this Court’s review.

The California Court of Appeal’s error warrants this Court’s review. The state appellate court’s decision arbitrarily expands the scope of tribal sovereign immunity, a federal common law doctrine, abrogating the preserved rights of plaintiffs against individual tribal members found in *Lewis*, and interferes with states’ rights to provide remedies to tort victims.

The appellate court's decision holding ratification extending tribal sovereign immunity to tribal employees' conduct outside employment authority calls for clarification from this Court regarding the meaning of *Lewis*. On the one hand, *Lewis* provided state court remedies for garden variety torts against individual tribal business employees in their individual capacity. On the other hand, the California court decision cuts off tribal ratification as a theory for vicarious liability against the tribe based on tribal employees' allegedly tortious conduct. The appellate court based its holding on Ninth Circuit decisions which extended tribal sovereign immunity to tribal employees where the plaintiff sought to hold the tribe or a tribal entity liable or vicariously liable for the actions of the employees who were sued in their official capacity. App. 12. But, these Ninth Circuit cases are distinguishable. None of these decisions involved the instant facts, where the tribe expressly ratified the underlying conduct giving rise to the tort claims.

Further, with tribal ratification, the California Court of Appeal's decision expands the reach of sovereign immunity, abrogating the gains tort victims granted by *Lewis* and sanctions tribal encroachment on states' rights. The states' traditional authority to provide tort remedies to its citizens is eroded if a tribe can extend its sovereign immunity to eviscerate allegedly tortious acts of tribal members, sued individually, by mere ratification, thereby, avoiding the liability associated with the wrongdoing. The situation calls for an answer to the question of sovereign immunity

applying if the tribe has expressly ratified the tribal employee's allegedly tortious acts.

This case is an excellent vehicle to determine whether tribal ratification waives sovereign immunity because the Tribe's tribal attorneys, in court, expressly ratified the tribal employees' alleged pre-employment misrepresentations during the recruiting of potential tribal employee Lopez.

The California Court of Appeal never recognized this novel legal issue before it. Instead, the appellate court concluded that the Tribe did not "expressly ratify [the] misconduct [of the employees] that was outside the scope of their employment authority." App. 9. But, there is no such distinction in law regarding ratification because liability exists if the employer ratifies the employee's conduct giving rise to the tort claims. Here, the Tribe's ratification of the tribal employees' acts, giving rise to Lopez's tort claims, establishes the tribe's vicarious liability.

What this petition seeks then is a clarification from the Court regarding *Lewis* and how the *Lewis* precedent applies to tribal ratification. Under *Lewis*, this type of legal question is only presented when the Tribe expressly ratifies the tribal employees' actions which give rise to the plaintiffs' tort claims. This Court's resolution of these legal issues will have a nationwide effect on state and tribal rights, including the states' traditional authority to provide tort remedies. Most importantly, the Court's resolution will determine whether tribes may continue in the United States

to assert tribal ratification to immunize tribal employees from liability leaving tort victims with no remedies—contrary to *Lewis*.

◆

CONCLUSION

The petition for a writ of certiorari should be granted. First, this Court, should allow for more complete state court tort remedies against individual tribal employees, as indicated in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), by clarifying that existing tribal sovereign immunity law allows tort victims to sue a tribe based on vicarious liability when a tribe ratifies individual tribal employees' actions giving rise to the state tort claims. Second, this Court should determine that the lower court's refusal to recognize a tribe's ratification of tribal employees' allegedly tortious acts, as an express waiver of sovereign immunity impermissibly interferes with states' rights to provide remedies to tort victims.

Respectfully submitted,

ERICK G. KAARDAL
MOHRMAN, KAARDAL &
ERICKSON, P.A.
150 South Fifth Street,
Suite 3100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074
kaardal@mklaw.com
Counsel of Record for Petitioner

ERIKA HEATH
369 Pine Street, Suite 410
San Francisco, California
94104
Telephone: 415-426-7850
erika@heathlegal.com

MONIQUE OLIVIER
OLIVIER SCHREIBER &
CHAO LLP
475 14th Street, Suite 250
Oakland, California 94162
Tel: 415-484-0980
monique@osclegal.com
Attorneys for Petitioner