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IN THE SUPREME COURT OF THE UNITED STATES

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 BRIAN LEWIS, ET AL., :
 Petitioners : No. 15-1500
 v. :
 WILLIAM CLARKE, :
 Respondent. :
 - - - - - x

Washington, D.C.

Monday, January 9, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

ERIC D. MILLER, ESQ., Seattle, Wash.; on behalf of the Petitioners.

ANN O'CONNELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting reversal.

NEAL K. KATYAL, ESQ., Washington, D.C.,; on behalf of the Respondent.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in case 15-1500 Lewis v. Clarke.

Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER

ON BEHALF OF THE PETITIONERS

MR. MILLER: Mr. Chief Justice, and may it please the Court:

In an individual capacity action against a government employee, the plaintiff seeks relief from the employee personally. The judgment is not enforceable against the government. For that reason, such an action does not implicate sovereign immunity. This Court has repeatedly applied that principle to individual capacity actions against federal and state employees, and it applies equally when the defendant is an employee of an Indian tribe.

In advocating the contrary rule, respondent takes the position that plaintiffs who have had no connection to an Indian tribe whatsoever who were injured as a result of a tribal employee's negligence in carrying on a commercial activity miles away from a reservation should have no remedy except whatever the tribe chooses to provide in tribal court. That position

1 represents an extraordinary and unwarranted expansion of
2 tribal immunity.

3 JUSTICE GINSBURG: They say it's the same as
4 if it were federal employee, then you would have the
5 Westfall Act. If it was a state employee, you would
6 have the same regime, and the tribe says, "And we do the
7 same thing." You can sue in our court just as you could
8 sue in federal court under the Westfall Act --
9 Connecticut court under the Connecticut Act, and you can
10 sue in our court.

11 MR. MILLER: Well, and when a claim arises,
12 you know, within the reservation that is subject to the
13 tribe's legislative and adjudicatory jurisdiction, then
14 the tribe has the authority to define how that claim
15 shall be handled.

16 But here, we're talking about a claim that
17 arose under Connecticut law from an accident on a
18 Connecticut highway not on the reservation, and the
19 tribe does not have the authority to define the process
20 for handling that claim. That's subject to Connecticut
21 law.

22 So the -- the analogy, I think, that they're
23 trying to draw is if you had an employee of one state
24 who, you know, was involved in an accident in a
25 different state -- and there are a lot of reasons that

1 situation isn't really analogous, but even taking it on
2 its own terms, the forum state has jurisdiction over
3 that case. The forum state can resolve that. It
4 doesn't have to send the -- send the plaintiffs off to
5 file in -- in the state of -- that the employee was
6 from.

7 So there -- what the -- what the respondent
8 is asking for here is a sort of immunity, a sort of
9 ability to control how the litigation proceeds that is
10 unlike what any other state would enjoy. And in his
11 briefing --

12 JUSTICE SOTOMAYOR: There is one flaw there.
13 Under our decision in Hyatt, Clarke would have been
14 entitled to the immunity that Connecticut gave its own
15 officials.

16 MR. MILLER: Well, there are a couple of
17 antecedent questions there, Your Honor.

18 JUSTICE SOTOMAYOR: I agree.

19 MR. MILLER: So, one, Hyatt is about the
20 full faith and credit clause, which applies --

21 JUSTICE SOTOMAYOR: Hyatt does not --

22 MR. MILLER: -- only to states and not --
23 not tribes.

24 JUSTICE SOTOMAYOR: -- the tribes.

25 MR. MILLER: Hyatt is also about an action

1 against a state agency and not an individual capacity
2 action against a state employee.

3 JUSTICE SOTOMAYOR: You're absolutely true.
4 We haven't extended Hyatt that far yet.

5 MR. MILLER: But even granting both of those
6 extensions of the decision, the rule in -- in Hyatt is
7 that the State cannot treat another state worse than it
8 would treat itself.

9 So if you applied the analogy here, you
10 would say that Connecticut has a regime in which an
11 action against a state employee is barred, but instead
12 you sue the state directly.

13 So applying that here, you would say, well,
14 we can't sue Mr. Clarke, so instead we get to sue the
15 tribe. But the tribe doesn't want that because the
16 tribe is not willing to subject itself to jurisdiction
17 in Connecticut. The tribe has not waived its sovereign
18 immunity in Connecticut courts. So the tribe is not
19 asking for application of that principle of Hyatt; it's
20 asking for something quite a bit more. And it's -- what
21 it is asking for is the authority to legislate for how
22 litigation arising out of vehicle accidents off the
23 reservation in the state of Connecticut shall be
24 handled, and that's an authority --

25 JUSTICE KENNEDY: Well, just -- just so I

1 understand the case: If this plaintiff had elected to
2 sue in the tribal court, the rule would have been that
3 there is indemnity from the tribe. And if there -- if
4 negligence had been shown, then I assume there would be
5 recovery against the tribe?

6 MR. MILLER: The -- the tribe -- yeah, yes.

7 JUSTICE KENNEDY: I mean, we can take the
8 case on that assumption.

9 MR. MILLER: Yes. The tribe has a
10 procedure, not identical to what's available in state
11 court and much more limited in some ways, but it does
12 have a procedure that allows recovery against the tribe
13 in tribal court had the plaintiffs chosen to invoke
14 that.

15 CHIEF JUSTICE ROBERTS: Well, very limited
16 though; right? I mean, there's a significant cap on
17 punitive damages.

18 MR. MILLER: Well, that's -- but punitive
19 damages are not available at all. Noneconomic damages
20 are -- are capped at twice the amount of actual damages,
21 which is a cap that doesn't exist in Connecticut either
22 for actions against a private party or even for actions
23 against the state. There's a much shorter -- or there's
24 a shorter statute of limitations. It's only one year.
25 There's no right to trial by jury. So there are a

1 number of both procedural and substantive differences.

2 That's correct, Your Honor.

3 JUSTICE ALITO: When -- when there is a suit
4 against an entity like the Port Authority of New York
5 and New Jersey and the question is whether that is
6 really a -- a suit -- whether that is a suit against one
7 of the states and, therefore, subject to sovereign
8 immunity, we would look to see who would pay the
9 judgment. So that's Mr. Katyal's argument.

10 Why wouldn't we do the same -- why should we
11 not do the same thing when it is against an employee?

12 MR. MILLER: When -- when you have a
13 state-created agency like -- like the Port Authority,
14 the Court looks at a number of factors to assess whether
15 that agency should be treated as essentially the State
16 or as some distinct entity, and you're right. One of
17 the factors is financial responsibility.

18 But the Court has never applied that
19 analysis in assessing whether a -- a natural person who
20 is not a creation of State law --

21 JUSTICE KAGAN: Well, why shouldn't we? I
22 mean, you suggest the difference is because this is a
23 voluntary agreement. But why shouldn't it be the rule
24 that if the State pays, we should understand it to be a
25 suit against the State.

1 MR. MILLER: Well, there -- a couple of --
2 that would be inconsistent with a number of decisions.

3 JUSTICE KAGAN: I -- I think you're right,
4 Mr. Miller. I think we would have to change our law to
5 say something like that. I'm just asking, like what --
6 why wouldn't that be a sensible rule?

7 MR. MILLER: Well, for one thing, it's not a
8 sensible rule because as a -- immunity is a question
9 that ought to be decided, as this Court has said many
10 times, at the threshold of a litigation. You ought to
11 be able to look at the pleadings and see is this suit
12 against the State or is it against somebody other than
13 the State. And if it is, immunity bars the suit and --
14 and we don't proceed further.

15 Indemnification is not always so easy to
16 tell at the outset. The tribal code, for example,
17 provides for indemnification except in cases of reckless
18 conduct. In this case, we haven't alleged recklessness,
19 but we also haven't had any discovery and it may be that
20 facts will emerge in the course of discovery that would
21 establish that Mr. Clarke had been reckless at the time
22 of the accident, and then, even on Respondent's theory,
23 that the indemnification obligation would disappear and
24 so would immunity.

25 JUSTICE KAGAN: So those kinds of

1 considerations haven't prevented us from looking to
2 who's ultimately going to pay the bills in the kinds of
3 cases that Justice Alito was talking about.

4 MR. MILLER: Well, when -- when you're
5 talking about a -- a sort of state-created entity, you
6 know, but the State is itself an artificial legal
7 construct and so there has to be some test for figuring
8 out, you know, whether some other artificial legal
9 construct is a different entity or the same entity.

10 But that's just not how we think about it
11 with real-live people who are not the State. They're
12 necessarily something different. And I -- if
13 Respondent's theory that indemnification of the officer
14 makes the officer the State, if that were right, then,
15 as we noted in the brief, there are many States that by
16 statute indemnify all of their employees and a 1983
17 damages actions against employees in any of those States
18 would implicate the Eleventh Amendment. And this
19 Court's decision in *Hafer v. Melo* would be what you
20 would have to go the other way in all of those States.
21 And not only has this Court never held that, so far as
22 we're aware, no court has ever even suggested that as a
23 possibility.

24 We also see the converse of this -- of this
25 issue in -- in this Court's decision in *Regents of the*

1 University of California v. Doe, where the defendant was
2 the University of California and it was subject to a --
3 an indemnification obligation from the Department of
4 Energy, and the plaintiff said, correctly, you know, the
5 university does not face any real financial liability
6 here. You know, whatever happens, the Federal
7 government is going to pay. But the Court nonetheless
8 held that Eleventh Amendment's immunity still applies
9 because the suit was won against the State.

10 And so the -- the crucial question -- that's
11 what the Court said in Larson -- the crucial question is
12 whether the relief sought in a suit addressed to the
13 officer is actually relief against the sovereign.
14 You -- you look at what the relief is that's being
15 sought and not the -- the more difficult to determine
16 question of where the economic loss might or might not
17 ultimately fall at the end of all the proceedings.

18 JUSTICE ALITO: Could a State give greater
19 immunity to an Indian tribe than is available under
20 Federal law?

21 MR. MILLER: As a matter of State law, yes,
22 a State could choose to do that. And the State --

23 JUSTICE ALITO: So the Connecticut supreme
24 court could do that if it wanted to?

25 MR. MILLER: Yes. I mean, we would -- we

1 would urge it not -- not to do so and we'd also argue
2 that an argument for doing so in this case has not been
3 preserved. But as a matter of State law, we don't see
4 any impediment to the State choosing to do that.

5 JUSTICE GINSBURG: Suppose this -- the
6 driver of the vehicle was not working for the -- for an
7 Indian tribe, but instead was an employee of a foreign
8 embassy. In -- in that case, am I right that the
9 immunity, sovereign immunity, would stop the suit?

10 MR. MILLER: No, Your Honor, it would not.
11 So a -- a suit against -- if you're saying a suit
12 against the individual employee --

13 JUSTICE GINSBURG: Yes.

14 MR. MILLER: -- who was driving a car,
15 our -- the -- the test set out in -- in the second
16 restatement is that that would not be barred by official
17 immunity. It certainly wouldn't be barred by sovereign
18 immunity either, because it's not a suit against the
19 sovereign.

20 Now, I have to say there aren't a lot of
21 cases, certainly not recently, in which individual
22 employees of foreign governments have been sued in this
23 situation, and that's because, in this situation, you
24 could sue the foreign government directly under the
25 FSIA.

1 In this case, the -- if the foreign
2 government were operating a casino in Connecticut, you
3 could just sue them directly under the commercial
4 activity exception, and if for reason that didn't apply,
5 the -- the domestic tort exception. A tort committed in
6 the United States by the foreign government is not
7 subject to foreign sovereign immunity.

8 So it -- it is our understanding that you
9 could sue the employee and then certainly you could sue
10 the foreign government.

11 JUSTICE KAGAN: Is it always the case that
12 the plaintiff simply gets to choose whether it wants to
13 proceed in an individual capacity or in an official
14 capacity, or are there constraints at all on that
15 choice?

16 MR. MILLER: The -- well, the constraints
17 are that in certain circumstances an official capacity
18 suit is going to be barred by sovereign immunity, but --

19 JUSTICE KAGAN: No, right. But -- but --

20 MR. MILLER: In framing -- in framing the
21 complaint, it's up to the plaintiff to decide what
22 relief he or she wants to seek and from whom. And --
23 and that's really what defines the -- the capacity in
24 which the officer is being sued.

25 CHIEF JUSTICE ROBERTS: What about an

1 Edelman v. Jordan type situation? I mean, if you name
2 the individual who's in charge of disbursing the funds
3 of the tribe and pursue -- proceed just against the
4 individual, it's still going to be regarded as a suit
5 against the sovereign.

6 MR. MILLER: Well, that's because in -- in
7 Edelman -- I guess the -- the -- the fuller answer to
8 the question would be that the plaintiff gets to choose,
9 but the way they choose is by the relief that they're
10 seeking, not just the label that they attach.

11 So in -- in Edelman, I mean, whatever the
12 plaintiff may have chosen to call that, the action --
13 the -- the relief that was sought was the payment of
14 welfare benefits or disability benefits. You know,
15 Mr. Edelman didn't have the benefits personally and then
16 couldn't pay them personally. But the relief that was
17 sought was, you know, directing Mr. Edelman to use his
18 authority as an officer of the State to pay the benefits
19 out of the State treasury, and -- and because of the
20 relief bound the State, that was an official capacity
21 action.

22 So it -- it's defined by -- it's not just a
23 matter of labels. It's -- it's defined by the relief.
24 Here, there's really no dispute that the relief that we
25 are seeking is a payment of money damages from

1 Mr. Clarke personally. He's not -- he's not the tribal
2 treasurer. He doesn't have authority to make some
3 payment on behalf of the tribe. We -- we just want the
4 money from him as an individual.

5 JUSTICE BREYER: Do you think the
6 official --

7 JUSTICE SOTOMAYOR: Recognizing the broader
8 description of the remedy-sought analysis contained in
9 Maxwell, that if the suit is seeking not just public
10 funds but affects the public administration or requires
11 the tribe to do something, it's still --

12 MR. MILLER: Yes. The -- the -- well,
13 the -- I mean, the test is -- you know, is the officer
14 being compelled to do something on behalf of the tribe
15 or is he being compelled to do something just as a -- a
16 private person who happens to be an employee of -- of
17 the tribe? It turns on -- on that question, not as the
18 Connecticut supreme court thought; the -- the question
19 of in what capacity was he acting at the time of the
20 events that gave rise to the litigation.

21 JUSTICE BREYER: What -- what do you think
22 -- maybe you're going to get to this. What do you think
23 of the official immunity idea that the government puts
24 forward?

25 MR. MILLER: Well, the -- the first thing we

1 think about that is that it is not before the Court.
2 The question presented as stated both in the petition
3 and in Respondent's brief in our position referred only
4 to sovereign immunity.

5 The only issue that was addressed below was
6 sovereign immunity. The only argument that was made
7 below was sovereign immunity, and -- and, indeed,
8 Respondent's argument below was essentially that what --
9 what he said to the Connecticut supreme court was
10 they're really suing the tribe, they're not really suing
11 me. This is just a trick of pleading.

12 So that's an argument that not only is not
13 an official immunity argument, it's really inconsistent
14 with the idea of an immunity that would apply in a --

15 JUSTICE ALITO: So you think it was waived.
16 Was that argument? Waived.

17 MR. MILLER: We -- we do at least for
18 purposes of -- of this appeal. This is an interlocutory
19 appeal from a motion to dismiss. We don't -- you know,
20 if it is -- when it's ultimately remanded to the trial
21 court, there will be further proceedings, discovery,
22 opportunity for a motion for summary judgment. We're
23 not taking the position that it's necessarily foreclosed
24 for all time. But in the course of this appeal, it
25 certainly has not been preserved.

1 And it's not just a -- sort of nicety of --
2 of, you know, this Court's Rule 14.1. There's a solid,
3 practical reason for the Court not to address the issue
4 here. And that is that, you know, what everyone thinks
5 of the merits of the argument, there are certainly a lot
6 of difficult, novel questions raised by the official
7 immunity issues here. This Court, were it to resolve
8 them, would be the first Court to do so, not just in the
9 course of this litigation, but on many of these
10 questions the first Court anywhere ever. And we would
11 suggest that that's not an appropriate exercise of this
12 Court's discretion.

13 JUSTICE KENNEDY: I suppose that's correct.
14 And I was going to ask you, you responded to an earlier
15 question and -- and indicated that the State could
16 expand the immunity of the Indian tribe. And I was
17 going to ask you, is there any authority for that?
18 That's -- that's a troublesome concept for me. But,
19 again, I don't think that's before us. That's all going
20 to happen below?

21 MR. MILLER: That's -- yes. The State
22 hasn't attempted --

23 JUSTICE KENNEDY: Or am I right about that?
24 We don't need to address it.

25 MR. MILLER: You don't need -- the State has

1 not tried to do that. We -- we will urge it not to.

2 JUSTICE GINSBURG: It was a suggestion in
3 the government's brief that Connecticut might afford
4 some kind of comity.

5 MR. MILLER: Yes. And the State -- you
6 know, the exact scope of that is not presented here
7 because no one's tried to do it yet. But the State may
8 have some discretion as a matter of comity to extend --
9 to defer to tribal court, you know, procedures and to
10 tribal law beyond what Federal law or the Federal
11 Constitution requires. But -- but it hasn't sought to
12 do so, and so that's not presented here.

13 If there are no further questions, I'd like
14 to reserve the remainder of my time.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Miller.

17 Ms. O'Connell.

18 ORAL ARGUMENT OF ANN O'CONNELL
19 FOR UNITED STATES, AS AMICUS CURIAE,
20 SUPPORTING THE PETITIONERS

21 MS. O'CONNELL: Mr. Chief Justice, and may
22 it please the Court:

23 Petitioners' suit is a personal-capacity
24 suit against an individual tribal employee, and the
25 tribe sovereign immunity is therefore not implicated.

1 The Connecticut supreme court reached the
2 opposite conclusion by holding that a tribe's sovereign
3 immunity extends to any of its employees acting within
4 the scope of his employment, even if the plaintiff seeks
5 damages against that employee personally. That holding
6 is contrary to the settled rule; that distinguishing
7 between a personal-capacity suit and an
8 official-capacity suit depends on the capacity in which
9 the employee is sued, not the capacity in which he acted
10 when he inflicted the alleged harm.

11 It particularly makes sense that tribal
12 sovereign immunity wouldn't apply here because there's a
13 coordinate doctrine of official immunity that applies in
14 personal-capacity suits. And we think official immunity
15 does, as a matter of Federal common law, apply to tribal
16 employees that it should extend to the scope of the
17 Federal common law.

18 JUSTICE SOTOMAYOR: Did we reach that
19 question?

20 MS. O'CONNELL: We don't think the Court
21 should reach the question in this case. We've briefed
22 both tribal sovereign immunity and official immunity, so
23 the Court has the whole scope of how immunity defenses
24 should operate in a case like this. And we certainly
25 wanted the Court to be aware of our views on official

1 immunity. We wouldn't want the Court to write anything
2 in its opinion about tribal sovereign immunity that
3 would preclude a defense of official immunity from being
4 raised in this case or by other tribal employees sued in
5 the future.

6 But the Connecticut supreme court decided
7 this question as a matter of tribal sovereign immunity,
8 and that's the question before the Court. So we think
9 it's appropriate for the Court to decide the tribal
10 sovereign immunity question and remand to the
11 Connecticut supreme court, which could address official
12 immunity to the extent --

13 JUSTICE SOTOMAYOR: I'm sorry. What would
14 we write that you think would affect official immunity?
15 As I was reading your brief, I was trying to figure that
16 out.

17 MS. O'CONNELL: Well --

18 JUSTICE SOTOMAYOR: Because you're basically
19 announcing a rule that in individual-capacity suits,
20 sovereign immunity is not implicated unless the remedy
21 sought implicates the tribe directly.

22 What else could we write that would preclude
23 official immunity?

24 MS. O'CONNELL: Well, I think, Justice
25 Sotomayor, these -- as you can tell from the Connecticut

1 supreme court's decision in this case and the cases
2 cited therein, these two concepts often confused or
3 conflated with one another in lower courts. And so we
4 just wanted to be absolutely clear what we think the
5 United States' view is on each of those separate
6 questions so that the Court -- you know, so that the
7 Court wouldn't write anything in a tribal sovereign
8 immunity opinion that would affect official immunity.

9 JUSTICE KAGAN: Do you think that might have
10 happened here in the court below, in the Connecticut
11 courts, that those two concepts were confused?

12 MS. O'CONNELL: The Connecticut supreme
13 court, we think, when you read the opinion, they've
14 definitely decided this case as a matter of tribal
15 sovereign immunity. I think the -- the mistake that
16 litigants in courts often make is to say that if a tort
17 was committed in the employee's official capacity, it's
18 an official-capacity suit and it's barred by sovereign
19 immunity. But the Court has repeatedly explained that's
20 not the right way to go about it. If you're suing the
21 employee in his personal capacity for damages against
22 him, the immunity of his sovereign employer is not
23 implicated.

24 It's possible that this issue could still be
25 decided on remand. That would be an issue of

1 Connecticut State law to determine whether an official
2 immunity defense has already been raised by citing cases
3 that conflate the concepts, or maybe there's still an
4 opportunity for the Respondent to raise that as a matter
5 of State law.

6 JUSTICE ALITO: Now, on the facts of this
7 case, is there any argument in favor of official
8 immunity? Mr. Clarke is not a member of the tribe.
9 He's driving a limo on I-95 transporting gamblers and he
10 rear-ends Mr. Lewis, who is not a member of the tribe.
11 You think there's any argument in favor of sovereign
12 immunity for Mr. Clarke under the facts of this case?

13 MS. O'CONNELL: For official immunity, based
14 on the facts as you've described them and as I
15 understand them, no. Driving is -- is a quintessential
16 activity that involves no policymaking authority. I
17 think the Federal Drivers Act shows that and cases of
18 this Court show that.

19 I would stress that this Court -- the case
20 was dismissed at the most preliminary stages, so the
21 Respondent hasn't had an opportunity to develop any kind
22 of an official immunity argument. I suppose there could
23 be some reason that he could give why he would be
24 authorized to drive in a way that would otherwise be
25 reckless, maybe like a medical emergency or something.

1 We just -- I don't know that anything like that was
2 happening. As far as I understand it, this was a
3 typical traffic accident where a car was rear-ended.
4 And in such a case, there would be no entitlement to
5 official immunity.

6 JUSTICE SOTOMAYOR: Well, Mr. Clarke is
7 arguing that if you're going to go back to the common
8 law official immunity doctrine, that covered, as our
9 Westfall case indicated, even nondiscretionary acts;
10 that it covered every act. What's your position on
11 that?

12 MS. O'CONNELL: Westfall said the opposite.
13 So the -- the case they're looking to is Barr v. Mateo.

14 JUSTICE SOTOMAYOR: I'm sorry. I confused
15 the cases.

16 MS. O'CONNELL: But in Westfall, the Court
17 said that view of what the Federal common law provided
18 was a mistaken reading of Barr v. Mateo. And it's this
19 Court that tells us what the Federal common law is. In
20 Westfall, the Court describes that as an immunity only
21 for discretionary decisionmaking functions on behalf of
22 sovereign employees, but not for anything else.

23 JUSTICE KENNEDY: I -- I thought your brief
24 was helpful and quite correct on explaining the bases
25 for sovereign immunity and the difference between

1 official immunity. But then at the very end, you
2 indicate, well, maybe Connecticut can expand this as a
3 matter of State law.

4 Is there -- is there authority for the
5 proposition that a State can expand the immunity of an
6 Indian tribe?

7 MS. O'CONNELL: Yes. I think as a -- as a
8 matter of --

9 JUSTICE KENNEDY: What case do I read to
10 find that?

11 MS. O'CONNELL: It would -- it would be a
12 matter of State law. They would not be --

13 JUSTICE KENNEDY: What case can I read to
14 find that?

15 MS. O'CONNELL: I -- I don't know of a case
16 that specifically --

17 JUSTICE KENNEDY: It seems to me a
18 far-reaching proposition to say that this extent of
19 tribal immunity is a matter of State law.

20 MS. O'CONNELL: It's -- it is a matter of
21 Federal law. The State wouldn't be amending the Federal
22 law by -- as a matter of comity expanding a greater
23 protection to an Indian tribe. And an example might be
24 if in this case Connecticut took a look at the facts and
25 the Court said, well, we offer complete immunity to our

1 employees in this circumstance and so does the tribe,
2 and the tribe has set up its own system. We're going to
3 defer to that system and give this employee complete
4 immunity in this case, even though the Federal common
5 law would afford him less as a matter of comity.

6 JUSTICE KENNEDY: Well, I think that's a
7 difficult proposition, but, again, we need not reach it
8 here.

9 MS. O'CONNELL: I think that's correct.

10 CHIEF JUSTICE ROBERTS: Well, one reason it
11 might be a difficult proposition is that the Court has
12 suggested several times that there is some uneasiness
13 with the doctrine of applying sovereign immunity to
14 tribal entities at all.

15 Does the government have a position on that?

16 MS. O'CONNELL: The -- well, we think
17 it's -- it's settled at this point that tribal sovereign
18 immunity is a -- is an issue of Federal law, that it
19 applies to commercial activities, including
20 off-reservation commercial activities.

21 The Court suggested in Bay Mills that there
22 may be an exception to tribal sovereign immunity if
23 there were some circumstance in which a -- like, a tort
24 victim or a person with no connection to the tribe,
25 which is the Petitioners here, had no remedy for their

1 injuries because of tribal sovereign immunity. We don't
2 think those circumstances have come to pass here. Of
3 course, there's a remedy in tribal court -- or at least
4 there was. There was a question about whether it's
5 barred by a statute of limitations. But also this suit,
6 a personal-capacity suit against the driver of the
7 vehicle, is a way that they could potentially recover
8 for their injuries without suing the tribe.

9 But tribal sovereign immunity has -- has
10 generally -- it is understood to be a matter of Federal
11 law. It arises from the United States' recognition of
12 Indian tribes. And so because it's an attribute of
13 sovereignty to have not only sovereign immunity, but
14 official immunity, as a matter of Federal law, tribal
15 employees should be entitled to such an immunity as
16 well.

17 If the Court does get into the -- the issue
18 of foreign sovereigns, we would just like to note that
19 it's our view that foreign officials are entitled to
20 complete immunity in United States courts. You could
21 sue the foreign sovereign under the Foreign Sovereign
22 Immunities Act. And in this case, you would be able to,
23 but we've explained in a couple of different footnotes
24 in our briefs that --

25 JUSTICE GINSBURG: Are you then giving a

1 different answer to the one that -- that we just heard?

2 MS. O'CONNELL: Yes.

3 JUSTICE GINSBURG: I -- I suppose everything
4 was the same except that it was a vehicle belonging to a
5 foreign embassy driven by an employee of that embassy.

6 MS. O'CONNELL: Yes.

7 JUSTICE GINSBURG: You say that employee
8 would have --

9 MS. O'CONNELL: That's correct. Under --
10 under the law that applies to foreign states and foreign
11 officials, some foreign officials are entitled to
12 complete immunity; the others are entitled to an
13 official immunity that extends to any acts taken in the
14 scope of their official duties, not just to
15 discretionary ones. So the driver would be immune under
16 the -- the law applicable to foreign drivers.

17 JUSTICE GINSBURG: And the only suit would
18 be against the sovereign nation itself.

19 MS. O'CONNELL: That's correct.

20 If there are no further questions, thank
21 you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Katyal.

24 ORAL ARGUMENT OF NEAL K. KATYAL

25 ON BEHALF OF THE RESPONDENT

1 MR. KATYAL: Thank you, Mr. Chief Justice,
2 and may it please the Court:

3 As Justice Ginsburg noted, the Mohegan tribe
4 is asking for the same protections from suit that every
5 other sovereign enjoys. If Clarke were a Federal
6 employee, a foreign employee, or a Connecticut State
7 one, this suit would be barred. There's no reason the
8 rule should be different for tribes. And, indeed, for
9 the last 50 years, it hasn't been ever since the Davis
10 decision in 1968. Lower courts have given tribal
11 employees a broad immunity from tort liability until the
12 Ninth Circuit recently reversed course.

13 Petitioners are asking this Court to strip
14 tribal employees of that longstanding immunity based on
15 three technicalities.

16 First, they're saying that the plaintiffs
17 shouldn't be able to plead around immunity by putting
18 the words "individual capacity" in the caption of their
19 complaint. But the Court's jurisprudence is more
20 nuanced than that. It looks to rather the real party in
21 interest and whether a judgment will in substance and
22 effect run against the tribe. If it does, then it's a
23 suit against the sovereign and immunity should attach
24 regardless of the complaints forum.

25 JUSTICE ALITO: Well, what would happen in

1 all the 1983 actions or all the Bivens actions if there
2 was an agreement by the government employee -- employer
3 to indemnify the individual?

4 MR. KATYAL: Easy, Justice Alito, and that
5 was my friend's answer to that kind of dangerous
6 scenario that would unfold. But those are very easy
7 because as ex parte Young and this Court's decision in
8 Scheuer v. Rhodes say those were circumstances in which
9 the State official is acting ultra vires by -- by
10 violating the Federal Constitution. And so all of those
11 1983 suits would still proceed. So we're saying that --
12 that kind of the best way to understand this case, this
13 Court hasn't really decided the question of what is the
14 effect of an indemnification agreement on State
15 employees. But it has said so, as you were saying in
16 response to my friend, the State instrumentality cases,
17 cases like Hess, which look to whether or not the
18 instrumentality is under the control of the sovereign
19 and who's ultimately responsible in practical effect for
20 the judgment. And those two questions, if you ask them
21 here, are answered affirmatively in favor of the tribe.

22 JUSTICE BREYER: I thought you could sue
23 some -- but I may have it totally wrong. I thought,
24 suppose that in Georgia, there was some people who are
25 drivers for the State and they go out and have an auto

1 accident. I thought you could sue the individual. You
2 can't?

3 MR. KATYAL: In -- in Georgia --

4 JUSTICE BREYER: Let's take any State. I'm
5 using that as an example. States have a lot of people
6 driving, and one goes out on the road and gets into an
7 auto accident. I thought that you could sue the
8 individual driver.

9 MR. KATYAL: In general, you cannot. So
10 Connecticut --

11 JUSTICE BREYER: You cannot.

12 MR. KATYAL: -- is a very good example. So
13 they have a statute --

14 JUSTICE BREYER: You mean you cannot because
15 of the State law.

16 MR. KATYAL: Correct.

17 JUSTICE BREYER: Either they pass a statute
18 or they have a State law.

19 MR. KATYAL: Correct, correct.

20 JUSTICE BREYER: And so what's the --

21 MR. KATYAL: And so --

22 JUSTICE BREYER: -- what -- what is our --
23 our -- we're deciding this as -- as a matter of what?
24 As a matter of the Federal Constitution, aren't we?

25 MR. KATYAL: Federal common law, I think, is

1 the best way of understanding --

2 JUSTICE BREYER: Common law under the Indian
3 tribe being a domestic nation.

4 MR. KATYAL: Correct. And so --

5 JUSTICE BREYER: All right. So --

6 MR. KATYAL: And so that's --

7 JUSTICE BREYER: So are -- are there states
8 that do allow you to sue somebody who -- who rear-ends
9 you?

10 MR. KATYAL: I'm not aware of any State that
11 does so. Certainly, in response to Justice Alito's
12 question, to the extent there was some Federal cause of
13 action or something, that would supersede.

14 JUSTICE GINSBURG: But wouldn't --

15 MR. KATYAL: And --

16 JUSTICE GINSBURG: -- wouldn't that have
17 been the Connecticut law but for its Westfall
18 Act-type -- I mean, the Westfall Act changed it. Before
19 that, it was my understanding that the employee, the
20 driver, you could bring an individual suit against the
21 driver. That's what the law was under the Westfall v.
22 Erwin decision, and then Congress changed it. But
23 before that, you could bring an individual suit.

24 MR. KATYAL: You couldn't actually, Justice
25 Ginsburg, because the Federal Drivers Act in 1961

1 forbade that. And so that was --

2 JUSTICE GINSBURG: Well, let's go back
3 before there was legislation that changed it.

4 MR. KATYAL: Correct.

5 JUSTICE GINSBURG: But under the ordinary
6 law, the employee was -- you could sue an -- the
7 employee in a personal capacity.

8 MR. KATYAL: Certainly before 1959, I think
9 that's right. But as our brief explains, after *Barr v.*
10 *Mateo*, lower court after lower court said the -- said
11 that official immunity extends to nondiscretionary
12 functions. And in the *Westfall* decision, to be sure,
13 Justice Ginsburg, this Court said that it was limited to
14 discretionary functions, but Congress quickly repudiated
15 that and said that the Court got it actually wrong
16 and --

17 JUSTICE KENNEDY: Well, but that --

18 JUSTICE GINSBURG: What did it --

19 JUSTICE KENNEDY: -- that -- that's a
20 congressional act. You're asking us, in effect, to do
21 what the Congress had to do in -- in *Westfall*. And
22 you -- and you begin by saying, oh, this is a pleading
23 maneuver --

24 MR. KATYAL: Uh-huh.

25 JUSTICE KENNEDY: -- which is, I think, a

1 demeaning professional comment. And all they were doing
2 is following the rules that were very clearly explained
3 in the government's brief and in the -- and in the
4 Petitioners' brief that there's a difference between
5 sovereign immunity and official immunity. That's the
6 difference.

7 MR. KATYAL: Justice Kennedy --

8 JUSTICE KENNEDY: But you want to say that
9 it should be alighted because of -- of the tribe's
10 indemnification agreement, and you want -- but in effect
11 what you want us to do is to pass a little Westfall Act
12 up here.

13 MR. KATYAL: Justice Kennedy, three -- three
14 responses.

15 First of all, we certainly didn't mean to
16 deride them professionally or otherwise. We're picking
17 up on this Court's own language in saying that it's the
18 substance that controls the forum, which it's used in
19 many of the immunity cases.

20 Second, on response to the question about
21 whether we're asking this Court to do Congress's work
22 for it, no. We're actually asking this Court to do no
23 more than what is done in the foreign tort -- in the
24 Federal Tort Claims Act, cases like Boyle, for example.
25 Justice Kennedy, the very argument that you made was

1 made by the dissent by Justice Brennan, but you joined
2 Justice Scalia's opinion, which said that just because
3 the text of the act didn't cover Federal contractors --
4 and even though the Federal contractor lobbied --
5 lobbied behind -- lobbied Congress for actually an
6 extension to the act for the immunity, what this Court
7 said is, our job as a court in interpreting Federal
8 common law is to look to the wisdom embodied in
9 statutes.

10 And just because Congress didn't connect the
11 dots and apply the law to Federal contractors, it only
12 applied it to Federal employees, the Court said, that's
13 what we should do here. And cases like Willis in 1966
14 say the same thing, which is it's the job of the Court
15 to try and look to the wisdom --

16 JUSTICE BREYER: Yeah.

17 MR. KATYAL: -- of the statutes.

18 JUSTICE BREYER: But my understanding, which
19 Justice Ginsburg said, is that, basically -- the
20 Westfall Act is a complicated act, but, basically, if
21 you're rear-ended by a postal employee, you can sue the
22 government of the United States. So a person who's the
23 victim of an accident has recourse.

24 Now, my guess would be that states do
25 something similar, because it seems to me very odd that

1 if I'm rear-ended or run over by some kind of State car
2 which has a State driver that there's no remedy at all.

3 MR. KATYAL: Absolutely.

4 JUSTICE BREYER: There is a remedy.

5 MR. KATYAL: I'm sorry if I misspoke.

6 JUSTICE BREYER: Yeah.

7 MR. KATYAL: But absolutely you'd have a
8 remedy against the State itself, just not against the
9 employee.

10 JUSTICE BREYER: Okay. But here what we
11 have is there is no remedy against the tribe. And
12 that's why I thought it would be odd to say there's no
13 remedy at all. And, therefore, the basic principle
14 seemed to be that you could sue the employee, but not
15 the State.

16 MR. KATYAL: So, Justice --

17 JUSTICE BREYER: And then they changed that
18 through legislation.

19 MR. KATYAL: So, Justice Breyer, we think
20 that that's absolutely not true; that is, there is a
21 remedy against the tribe. The tribe has expressly
22 waived its sovereign --

23 JUSTICE KAGAN: Well, that's entirely
24 contingent. It might be true in this case, but it
25 doesn't have to be true. Another tribe could say, no,

1 we don't feel like stepping in.

2 MR. KATYAL: That's absolutely right. But I
3 think the important point and what our brief says and
4 what the NACI brief joined by Texas and four other
5 states representing, you know, a bunch of tribes is that
6 the way to deal with that is the compact process. That
7 is -- and this goes to your question earlier, Justice
8 Kennedy, about whether states have protections in this
9 area.

10 The remedy -- the -- the parade of
11 hypotheticals is dealt with by the fact that you can't
12 actually -- we couldn't even gamble in Connecticut,
13 couldn't set up this operation without Connecticut first
14 agreeing in a compact voluntarily to having this, and in
15 the course of that compact, they said, criminal
16 jurisdiction State, we get -- we're going to still
17 retain it. But with respect to civil jurisdiction, they
18 said this tribe, you set up your own tribal court
19 system. And so this exactly --

20 JUSTICE ALITO: The problem -- the problem
21 with that argument is that it -- it seems to suggest
22 that the State's motive will be to provide protection
23 for somebody like Mr. Clarke. But the State of
24 Connecticut has a very strong incentive to -- to be
25 solicitous of the interests of the Mohegan tribe because

1 the State gets an enormous amount of revenue from this
2 casino. Isn't that true?

3 MR. KATYAL: But I -- I -- Justice Alito, I
4 understand the point, but I think that's true generally
5 in law; that is, we -- we rely on the State to -- to
6 make its own prerogatives and choices. So, for example,
7 the State could decide not to have tort claims at all if
8 they wanted to -- not just against tribes, but against
9 anyone if they wanted to incentivize businesses in one
10 way or another. I don't think this Court gets into
11 that.

12 Rather, I think the question, and as our
13 brief shows, State after State have actually done the
14 reverse, Justice Alito. Seventeen different States have
15 compacts that do things like channel this litigation
16 into State courts instead of tribal courts. The New
17 Mexico example at page 53 of our brief is a good
18 example.

19 Indeed, Justice Alito, in Connecticut
20 itself, Foxwood Casino, which is run by the Pequot
21 tribe, has the following statute, quote, "Any person
22 injured through the negligence of any Pequot tribe" --
23 "tribal employee, while acting within the scope of his
24 employment and while operating a motor vehicle, shall
25 have a right of action. The tribe hereby expressly

1 waives its immunity from suit for such claims provided
2 such suit is brought in the courts of the State of
3 Connecticut."

4 That's the way to deal with this, which is,
5 if a State's concerned about -- you know, about limit --
6 about not -- about tribal courts or anything like that,
7 they can do what many States have done, which is say,
8 hey, if you want to have gaming operations in our State,
9 you've got a first say and agree to waive sovereign
10 immunity in State court. That's not what they did here,
11 and now they're simply trying to relitigate the terms.

12 JUSTICE SOTOMAYOR: Well, that wouldn't help
13 Mr. Clarke -- that wouldn't help Mr. Lewis because --
14 well, it would help him. He could sue the -- the tribe,
15 but he wants to sue Mr. Clarke.

16 MR. KATYAL: Well --

17 JUSTICE SOTOMAYOR: And so if the tribe's
18 waived sovereign immunity, why shouldn't the individual?

19 MR. KATYAL: Justice Sotomayor, before the
20 lawsuit was brought, there was a preexisting statute
21 that -- of the tribe that says that they fully indemnify
22 Mr. Clarke, they pay all of the expenses and pay any
23 judgment that was rendered against him.

24 So anything in substance and --

25 JUSTICE SOTOMAYOR: So your sovereign

1 immunity argument relies solely on that --

2 MR. KATYAL: Correct. If -- if there were
3 no indemnification agreement or anything like that --

4 JUSTICE BREYER: Indemnification in the
5 Bivens actions, you say oh, those are constitutional
6 actions. I thought 1983 says violation of the law of
7 the Constitution or laws of the United States.

8 MR. KATYAL: Correct. And so --

9 JUSTICE BREYER: But they are all
10 constitutional.

11 MR. KATYAL: Correct. If it's a State, it'd
12 be also ultra vires. And same thing would be true here;
13 that is, if the Federal government passed some law that,
14 you know, provided a tort, you know, our argument does
15 not extend to that. It only extends to a clash between
16 State law and the law of the tribe. So --

17 JUSTICE GINSBURG: Is there any -- is there
18 any court that has held that an indemnification
19 agreement, agreement to indemnify the employee, extends
20 sovereign immunity to that employee?

21 MR. KATYAL: So -- so this Court hasn't
22 reached that question. And the lower courts, I think,
23 have basically said -- for example, the Medicare cases
24 at page 19 of our brief are good examples, the Blue
25 Cross. So Blue Cross is administering a Federal program

1 and they -- and in the course of doing so, they get
2 sued, and the question that those cases are grappling
3 with is who is the real party in interest? Does Blue
4 Cross get Federal -- get sovereign immunity? And the
5 answer that those courts give is yes.

6 So we think you could look to those, Justice
7 Ginsburg, as well as looking to the indemnification
8 cases as I was saying to Justice -- the -- the
9 instrumentality cases as I was saying to Justice Alito.

10 JUSTICE GINSBURG: The -- the
11 indemnification in other contexts, does somebody --
12 you -- you couldn't have an indemnity agreement that
13 would count, let's say, for diversity of citizenship, it
14 would only be the parties.

15 You couldn't -- the indemnity agreement --
16 the party that indemnifies is not a necessary party
17 under Rule 19. So we haven't considered the real party
18 in interest to be the one who provides indemnity.

19 MR. KATYAL: To be sure, Justice Ginsburg,
20 in joinder and -- and in things like that, I think
21 that's right, but I don't think that is -- those are
22 private party litigation cases.

23 I think if this Court's asking for what's
24 the best analogy to this situation here, which is a
25 sovereign-immunity situation, I think the

1 instrumentality cases are -- are quite a bit closer than
2 the ones like joinder and the like, which don't have
3 anything to do with immunity at all.

4 In case after case, starting with Ford
5 Motor, this Court has been asking the question, who is
6 the real party in interest for purposes of sovereign
7 immunity. Here, the real party in interest -- this is
8 not, you know, some sort of lawyer -- you know, we're
9 not being -- trying to denigrate them, but the fact is,
10 in practical effect, the judgment here is against the
11 tribe. There was a statute of the tribe that said we're
12 responsible for all the costs, all the judgment and so
13 on. And, yes, Justice Sotomayor, they might say they
14 want to sue Clarke, but in practical effect they're not
15 suing Clarke.

16 JUSTICE BREYER: Okay. So how do we deal
17 with this. Every tribe passes this. You say great.
18 Indemnify everybody. You'll never have to pay because
19 as soon as you do that, nobody can sue you. And so,
20 therefore, the tribe is totally immune from the most
21 ordinary accidents taking place off the reservation, and
22 the victim of now these missiles being sent out from the
23 reservation because they run over people and there's no
24 remedy at all.

25 Now -- now that -- that seems to me pushing

1 the notion of tribal sovereign immunity off the
2 reservation into a place where there are just no
3 remedies for victims at all. Now, what is the answer to
4 that?

5 MR. KATYAL: The answer to that is in our
6 brief. That's exactly right, Justice Breyer, that to
7 the extent a tribe is kind of creating a shell game in
8 saying, oh, we're going to indemnify these people, but
9 then not pay the judgment or assert sovereign immunity
10 akin to some of the hypotheticals in the first hour of
11 the argument, the -- the last case that you were
12 hearing, absolutely those were cases in which lower
13 court after lower court, like the Ninth Circuit have
14 said, oh, that's a situation in which sovereign immunity
15 doesn't apply.

16 Now, you've said here, well, the fact that
17 it's commercial or off reservation matters, and that's
18 something that Mr. Miller said. You know, below they,
19 of course, didn't say that. That's what the Connecticut
20 supreme court said at Petition Appendix page 10, but
21 they never made those types of arguments.

22 But to the extent that they're troubling the
23 Court, I think the answer is what this Court has said in
24 Bay Mills and Kiowa, which is, tribal immunity is
25 different in that respect than maybe some other types of

1 immunity; that is, it does extend to commercial
2 off-reservation activity. There are longstanding
3 reasons for that having to do with the fiscal base of
4 tribes and other things like that.

5 This Court -- I don't think they're asking
6 this Court to try and relitigate Bay Mills or Kiowa.
7 You've decided it squarely twice. An argument I think
8 flows very naturally from that.

9 Justice Kennedy, there was a third thing I
10 wanted to say in response to your long question before,
11 which is, you had said that -- and this is something
12 that the other side had said -- that the lower court had
13 relied only on sovereign immunity and not on official
14 immunity.

15 I don't think that that's quite right. I
16 think that the lower court here, the Connecticut supreme
17 court, relied on -- basically conflated both doctrines,
18 and there's a -- I think, you know, that's the way
19 Connecticut courts have done this. Indeed, there is no
20 official immunity case about tribes in Connecticut
21 courts that we have been able to find except for one
22 mention in an unpublished opinion in --

23 JUSTICE SOTOMAYOR: So why didn't you do it
24 in your question presented? Presumably, you're --

25 MR. KATYAL: We -- we certainly should

1 have -- the brief in opposition, there's no doubt,
2 Justice Sotomayor, should have been clearer on this
3 point --

4 JUSTICE SOTOMAYOR: Well, your opening brief
5 on page 22, 23 says, we're not claiming any personal
6 immunity. You know the difference.

7 MR. KATYAL: I think -- I think that we --
8 we did say --

9 JUSTICE SOTOMAYOR: Between official and --

10 MR. KATYAL: In the -- in the brief in
11 opposition at page 1, we did say that if this -- that
12 the employee cases and the statutory cases support our
13 position, as well as at pages 14 and 15 of that --
14 and -- and 22 and 23 of that brief.

15 And I do think that that follows naturally
16 from the way the Connecticut courts have understood
17 this, which is to conflate both doctrines together,
18 official immunity and tribal immunity.

19 JUSTICE SOTOMAYOR: So why don't we
20 unconfiate them, send them back and tell them, answer
21 the two doctrines differently, because we've always
22 treated them differently.

23 MR. KATYAL: Well -- right. So we -- we
24 don't have a problem with that. The one, I guess,
25 concern I'd have about that is exactly what Ms.

1 O'Connell just said a few moments ago, which is, she
2 said that -- that the reason why -- she said, quote, "It
3 makes sense that tribal sovereign immunity does not
4 apply because official immunity does." And if you take
5 that view, that the reason why tribal sovereign immunity
6 doesn't apply is because of official immunity being
7 here, then I think you would have to get into that
8 question.

9 We certainly think you should because we
10 think for 50 years, starting with the Davis decision in
11 1968, Federal courts have recognized immunity, sometimes
12 they call it tribal immunity, sovereign immunity.
13 Sometimes they call it official immunity, sometimes they
14 call it sovereign immunity. It doesn't actually matter
15 here.

16 It does matter absolutely, Justice
17 Sotomayor, in the State context what label you put on
18 it, because if it's sovereign immunity, Congress can't
19 abrogate it, they have Eleventh Amendment protections.
20 But that's not true with respect to tribes; that is,
21 Congress's power is plenary, whether you call it
22 official immunity or sovereign immunity.

23 And so for that reason, we think the Court
24 should get into it here and -- and affirm what the
25 courts have said.

1 JUSTICE GINSBURG: So Congress could have
2 enacted a Westfall Act covering tribes, but it didn't.

3 MR. KATYAL: Correct, Justice Ginsburg.
4 That's exactly the argument this Court rejected in Boyle
5 and Justice Scalia's opinion, which is Congress was
6 lobbied to extend the Federal -- the Federal Tort Claims
7 Act except to federal contractors. They didn't. This
8 Court then did exactly that. And as this Court has said
9 in Willis, quote, "If there's a Federal statute dealing
10 with the general subject, it's a primer pository of
11 Federal policy and a starting point for Federal common
12 law."

13 So Federal common law works differently than
14 the kind of expressio unius reading that I think the
15 other side and that's embodied in the premise to your
16 question. I think the question for this Court in
17 answering Federal common law is -- in asking the Federal
18 common law question is: What is Congress's judgment in
19 this area? And if they can identify some distinction
20 between a tribal driver and a Federal driver or
21 something like that, absolutely, that's a fair -- that's
22 fair game.

23 JUSTICE GINSBURG: The Federal driver never
24 had common law immunity. It has under the Westfall Act
25 statutory immunity, but it didn't -- the drivers didn't

1 have common law immunity.

2 MR. KATYAL: They didn't before 1961 as I
3 was -- as I was saying, but I do think the unbroken
4 tradition of the lower courts after Barr v. Matteo in
5 1959, is to give low level employees, nondiscretionary
6 employees, Federal -- Federal common law immunity.

7 JUSTICE GINSBURG: But we said that was
8 wrong. In Westfall, we said that Barr applies to
9 defamation and kindred torts, not negligent driving.

10 MR. KATYAL: Correct. You did. And you
11 also invited Congress, because you said, look, we're not
12 sure about this and we'd -- Congress, we'd like you to
13 act. And then Congress did act. And when Congress
14 acted, they dramatically repudiated the notion that in
15 common law --

16 JUSTICE GINSBURG: You said repudiated.
17 They could have said, yeah, the Court got the -- the law
18 right, what -- what it was, but we think the law should
19 be changed, and not necessarily repudiating this Court's
20 reading of what the common law is.

21 MR. KATYAL: I think that's actually in the
22 findings itself, Justice Ginsburg, of the act, as well
23 as the House report. It's also in Justice Breyer's
24 concurrence in Haley v. Osborn in 1988 which we quote,
25 because there Justice Breyer said that employees had,

1 quote, "received an immunity that applied to
2 nondiscretionary as well as discretionary actions before
3 the Westfall decision," and enacted the Westfall Act to,
4 quote, "maintain the scope of that pre-Westfall
5 immunity." And so --

6 JUSTICE ALITO: Why should -- why should
7 a -- a tribal employee driving a limo be entitled to
8 official immunity? You say that the purpose of official
9 immunity is to protect, quote, "the fearless, vigorous,
10 and effective administration of policies of government,"
11 but you -- you want to have -- you want to encourage
12 limo drivers on I-95 to be fearless in the way they
13 drive?

14 MR. KATYAL: Well, I -- I think the -- the
15 first point is that their argument is so sweeping it
16 extends not just to drivers, it extends to tribal
17 judges, it extends to tribal prosecutors, and, yes, it
18 extends even to drivers of emergency vehicles. The
19 Ninth Circuit and Tenth Circuit amicus brief talks about
20 police and fire and all sorts of tribal things in which
21 you actually would, Justice Alito, for sure, I think,
22 want them to be fearless in saving peoples' lives and
23 things like that.

24 And, yes, there are times there are rough
25 edges to any immunity doctrine in which you can say,

1 well, in this case how is that policy being served. I
2 mean take this Court's decision in *Imbul v. Packman*,
3 which had the, you know, grossest facts imaginable.
4 A -- you know, a state prosecutor who's fabricating
5 evidence, which this Court said unanimously that that
6 person was absolutely immune.

7 So I agree that there are going to be some
8 of those cases, but I think the logic of all of the
9 pre-Westfall decisions, as well as the Westfall Act, is
10 to say, we're not getting into that about -- you know,
11 as long as the person is a Federal employee, then they
12 have official immunity.

13 And here, as long as the person is a tribal
14 employee and as long as -- is -- and because the State
15 of Connecticut does have a remedy against any sort of
16 concerns, so if they were concerned about your situation
17 about fearless driving, they can do -- and negotiate in
18 the compact, as New Mexico has done, for something else
19 and say, look, we want this channeled into State court,
20 we insist that you waive immunity, there are a host of
21 remedies that are available to States in this
22 circumstance and, indeed, Connecticut availed themselves
23 of them in this compact.

24 And now what these folks are asking for is
25 to renegotiate that compact and ask for something up and

1 beyond what the State of Connecticut has provided.

2 If there are no further questions?

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Miller, 7 minutes.

5 REBUTTAL ARGUMENT OF ERIC MILLER

6 ON BEHALF OF THE PETITIONERS

7 MR. MILLER: Thank you.

8 On the question of official immunity, we've
9 already discussed the reasons why it's not part of the
10 case before this Court, but I'd like to add that this
11 case is a particularly bad vehicle with which to
12 consider the -- in which to consider the question of
13 official immunity.

14 As has been discussed, in order to craft an
15 immunity rule that would reach the facts of this case,
16 it would be something far beyond what the common law has
17 recognized. This is a case that involves negligent
18 driving of a car. That's the canonical example of a
19 nondiscretionary, non-policymaking tort.

20 It also arises from off-reservation
21 commercial activity of a tribe and it's a tort action
22 from that. We are not suggesting -- we are not asking
23 the Court to revisit Bay Mills, but in Footnote 8 of Bay
24 Mills, the Court noted that there is at least some
25 question as to whether the tribe even has sovereign

1 immunity in that context. And, again, you -- you don't
2 need to resolve that question here, but that's an
3 additional reason to be cautious before reaching out and
4 creating a very broad rule of official immunity in these
5 circumstances.

6 That leaves the question of indemnification
7 and whether indemnification somehow changes the
8 sovereign immunity analysis. The -- the Respondent
9 suggests that -- that the judgment here would somehow
10 bind the tribe. The -- the Connecticut supreme court
11 does not have the authority to issue a judgment that
12 binds the Mohegan tribe, because the -- the tribe --
13 because of the tribe's sovereign immunity. But the
14 Connecticut supreme court judgment will not do that.

15 The Connecticut supreme court judgment will
16 bind Mr. Clarke separately. The tribe may have agreed
17 to indemnify him, and that doesn't change the analysis
18 because, as you pointed out, Justice Ginsburg, the Court
19 doesn't normally look at indemnification in figuring out
20 who the real parties in interest are. In the diversity
21 context. In the 1983 context. Respondent's answer to
22 1983 is to say, well, that's different because of ex
23 parte Young. But this Court has said that ex parte
24 Young does not authorize the relief of retrospective
25 rewards of damages.

1 So, you know, if Respondent were right and
2 indemnification converted the action against the
3 employee into one against the State, then even under
4 Young, it wouldn't be permissible.

5 JUSTICE KAGAN: Do you think, Mr. Miller,
6 that there's any decision that precludes us from saying
7 that we're going to treat this as sovereign immunity or
8 not sovereign immunity depending on an -- an
9 indemnification agreement?

10 MR. MILLER: There's no case that directly
11 precludes you from saying that. It would be very
12 difficult to reconcile with the analysis in Regents of
13 the University of California v. Doe, and it would
14 also -- I think a holding to that effect, you know,
15 would be an intention with all of the cases -- you know,
16 all the 1983 cases from states that indemnify their
17 employees that have assumed the non -- the absence of
18 sovereign immunity.

19 It would also be in considerable tension
20 with the analysis in diversity cases and -- and Rule 19
21 cases. But there's nothing directly on point that would
22 say you can't do that.

23 Finally, as you pointed out, Justice Breyer,
24 allowing indemnification to create sovereign immunity
25 here would -- would have the very strange consequence

1 that, by allowing the tribe to come in and say well,
2 the -- the action against the employee is really against
3 us, we're going to have to pay, therefore immunity
4 applies, but now that immunity applies, we don't have to
5 pay, that allows the -- the liability to just simply
6 disappear --

7 JUSTICE BREYER: Well, I heard his argument.
8 I mean, he may not, I don't want to saddle him with
9 this, but common -- Federal common law, sovereign
10 immunity idea, and where a tribe -- let -- so let's look
11 at what the statutes do.

12 And we see every State and the Federal
13 government don't let you bring a suit against the
14 employee and make the employee pay for an automobile
15 accident. Rather, they offer some other remedy.

16 You go against the State, for example, under
17 the Westfall Act, you go against the Federal government,
18 and so by analogy, where the tribe is, in fact, going to
19 pay and also offers a remedy, then, by analogy, that
20 latter part being important then, then, by analogy, the
21 Federal common law should be shaped to reflect.

22 I think that's basically the kind of thought
23 he's -- your opponent here is trying to put in my head.

24 MR. MILLER: Yes, and -- and there are two
25 answers to that. The -- the first is that as a factual

1 matter, in fact, not every State bars actions against
2 individual employees. There are a number of states that
3 allow them and -- and then they indemnify the employee,
4 but you can sue the employee in his own name.

5 The more fundamental problem with that
6 argument from respondent is that the tribe may choose as
7 a matter of grace to provide a remedy in its court, but
8 this is a traffic accident on a public highway in
9 Connecticut. And the victims of that accident, the
10 petitioners had a right under Connecticut law, to get
11 redress from the negligent party and they had a right to
12 go to a Connecticut court to seek that redress.

13 And the tribe can pass the statute, but the
14 tribe does not have the authority to reach out into the
15 state of Connecticut and take away Petitioners' state
16 law right from them. If there are no further questions.
17 We ask the judgment be reversed.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 11:57 a.m., the case in the
21 above-entitled matter was submitted.)

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