

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22 mention in an unpublished opinion in --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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