No. 15-1500

IN THE

Supreme Court of the United States

BRIAN LEWIS, *et al.*,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

On Writ of Certiorari to the Supreme Court of Connecticut

BRIEF OF *AMICI CURIAE* CONNECTICUT TRIAL LAWYERS ASSOCIATION & AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS

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November 21, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

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

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STATEMENT OF INTEREST[1]

The Connecticut Trial Lawyers Association ("CTLA") and the American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, as *amici curiae* respectfully submit this brief in support of the Petitioners.

The CTLA is a non-profit association with approximately 1174 members predominantly of the plaintiff's bar practicing in Connecticut. The CTLA is dedicated to creating and maintaining a more just society by preserving individual rights within the justice system to achieve the following goals: (1) Ensure that the civil justice system works for all people; (2) Hold wrongdoers accountable regardless of their corporate, government, association or individual status; (3) Protect consumer rights and safeguard the environment; (4) Advance the cause of those whose person or property is injured or damaged; (5) Preserve and protect access to the courts and jury system of this state and this nation; and (6) Uphold the honor and integrity of the profession of law.

The AAJ is a non-profit advocacy and lobbying organization for plaintiffs' lawyers in the United States. It provides trial attorneys with information, professional support and a nationwide network that enables them to most effectively and expertly represent clients. Specifically, the AAJ is comprised of trial attorneys who are committed to ensuring that all

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties consented in writing to the filing of this *amici curiae* brief.

people—individuals, families, patients, workers and consumers—can seek justice in our nation's courtrooms. The mission of the AAJ is to promote a fair and effective justice system—and to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in America's courtrooms.

This Case touches upon several of the vital goals of both the CTLA and the AAJ. Critical to the mission of both organizations is the notion that *all* individuals whose person or property has been injured should be able to seek a just remedy in our nation's courtrooms. The access, fairness and effectiveness of our civil justice system depends upon it. Moreover, members of both the CTLA and the AAJ work tirelessly each day to protect and preserve it. Their clients depend on their expertise and guidance as they navigate the court system, and the question of whether a tribal employee may be pursued for alleged tortious wrongdoing is directly relevant to (1) whether CTLA and AAJ members are able to effectively represent their clients, and (2) whether *all* of their clients will have equal and fair access to seek justice in our nation's civil courtrooms.

Because the Supreme Court of Connecticut's decision in this matter extends sovereign immunity to tribe employees who commit tortious acts and are sued individually, it will leave many individuals whose person or property has been injured by those employees without a remedy and therefore without access to the justice system. This is an unacceptable outcome. Based upon these strong interests in the access to and fairness of our nation's courts, the CTLA and AAJ

jointly urge this Court to hold that a tribe's sovereign immunity does *not* extend to its employees for individual liability in tort. The judgment of the Connecticut Supreme Court should be reversed and the matter remanded for further proceedings.

SUMMARY OF ARGUMENT

The question before this Court concerns the scope of tribal sovereign immunity over a tribe employee sued individually for negligent and tortious actions that caused severe injury upon unsuspecting persons. This question raises issues concerning the fundamental right of individuals whose person or property has been injured to seek redress for their injuries and to access our nation's courts in exercise of that right. If, as the Connecticut Supreme Court concluded, tribal immunity is expanded to shield a tribe employee from liability in his individual capacity for his negligent and injurious actions, the injured party is left without a remedy in our State courts. This result is unjust and unacceptable, and must be reversed.

The Connecticut Supreme Court's decision does more than offend the basic right of injured persons to seek redress in our nation's courts. In so doing, it also improperly expands the doctrine of tribal immunity beyond the principles of sovereign immunity that shield both States and the federal government, which are not limitless and which permit lawsuits against officers *in their personal and individual capacities*. There is no reason why this case, based in simple negligence against the Respondent in his individual capacity for injuries stemming from a car accident that he negligently caused, justifies a rule by which tribal

immunity is extended to shield tribe employees to a greater degree than State and federal officials. If anything, it demonstrates why tribal immunity should *not* be so extended: the Petitioners did not and could not have anticipated that they would be involved in a traumatic car accident caused by someone else's negligence and they did nothing to subject themselves to the sovereignty of the tribe. To preclude them from filing suit against the individual who caused the car accident simply because of the nature of that individual's employment is patently unfair and actually *furthers* their harm. *See Kiowa Tribe of Oklahoma v. Mfg. Technologies., Inc.*, 523 U.S. 751, 754 (1998) ("immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims").

The critical point to consider is that this Court's resolution of this question will create a rule affecting *all* persons across this country who find themselves victim to a tribe employee's negligence, regardless of which tribe that employee works for, where the tribe is located, or what, if any, limited remedies are offered by the tribe. Because the right to seek justice and access our nation's courts is absolute and should not rise and fall with the identity of an individually-named tortfeasor's employer, the judgment of the Connecticut Supreme Court to the contrary must be reversed and the matter remanded for further proceedings.

ARGUMENT

I. THE CONNECTICUT SUPREME COURT'S DECISION WILL LEAVE PERSONS WHO ARE INJURED BY TRIBE EMPLOYEES WITHOUT A REMEDY AND MUST BE REVERSED.

The Connecticut Supreme Court improperly concluded that tribal sovereign immunity extends to include the Petitioners' tort claims against the Respondent tribal employee in his individual capacity. That Court so held because (1) the Respondent was an employee of the tribe, and (2) he was acting within the scope of his employment when the accident that injured the Petitioners occurred. Pet. App. 16a. That Court held that the Petitioners therefore were precluded from pursuing their claims for damages in Connecticut state court against the Respondent individually. *Id.* at 16a-17a. That Court's decision leaves the Petitioners with no remedies in State court for the injuries they suffered on Connecticut roads due to the Respondent's individual negligence. The law should not permit the Respondent to use the sovereign immunity of a tribe for which he is merely employed as a shield from any liability stemming from his individual negligence against others. This result is contrary to the administration of justice in our nation's courts, to the States' rights to provide civil remedies for their tort victims, and to the notion that *all* individuals whose person or property has been injured should be able to seek redress. This decision cannot stand.

Tribal sovereign immunity finds its roots in tribal sovereignty. It is undisputed that "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436

U.S. 49, 55 (1978) (internal citations and quotation marks omitted). It is also undisputed that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id*. at 58; *see also Michigan v. Bay Mills Indian Community*, __ U.S. __, 134 S.Ct. 2024, 2030 (2014). "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma*, 523 U.S. at 754. Any waiver of sovereign immunity must be unequivocally expressed. *Santa Clara Pueblo*, 436 U.S. at 58; *see also F.A.A. v. Cooper*, __ U.S. __, 132 S.Ct. 1441, 1448 (2012).

However, that immunity is not without its limits. Tribal sovereign immunity does not always extend to suits against individual tribe members, for example. "[W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible." *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171 (1977); *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."). This is similar to well-established principles governing the limitations on States' sovereign immunity to State officials sued in their individual capacity. *Ex Parte Young*, 209 U.S. 123 (1908) (if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the individual in sovereign immunity); *see also Alden v. Maine*, 527 U.S. 706, 757 (1999) ("Even a suit for money damages may be prosecuted against a state officer in his individual capacity for

unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally."). Mere employment alone is an insufficient basis upon which to decide the application of sovereign immunity.

Yet, mere employment is the only basis upon which the Connecticut Supreme Court relied in extending tribal immunity to the Respondent in this case. There is no dispute that the Respondent is named individually. Pet. App. 3a. He was driving on Connecticut roads, off tribal lands, when he is alleged to have negligently caused an accident resulting in injuries to others. *Id.* at 2a.

That the Respondent was working for, and driving a vehicle belonging to, an Indian tribe at the time that his negligent act occurred is not a sufficient basis for a finding of tribal immunity and the dismissal of the suit. The fact of his employment at the time, or the ownership of the car, however, is only relevant for the purposes of vicarious liability under Connecticut law,[2] which would allow a plaintiff to sue the employer for the actions of the employee made in the course of his employment. Here, of course, vicarious liability ultimately was not at issue. Although initially bringing suit against both the Respondent and his employer, the Mohegan Tribal Gaming Authority ("MTGA"), an

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[2] Connecticut General Statutes § 52-183 provides in relevant part: "In any civil action brought against the owner of a motor vehicle to recover damages for the negligent or reckless operation of the motor vehicle, the operator, if he is other than the owner of the motor vehicle, shall be presumed to be the agent and servant of the owner of the motor vehicle and operating it in the course of his employment. The defendant shall have the burden of rebutting the presumption."

arm of the Mohegan Tribe of Indians of Connecticut, the Petitioners voluntarily dismissed the MTGA as a defendant and filed an amended complaint against only the Respondent. Pet. App. 3a.

The case as it remained, then, was one of simple negligence by the Petitioners against the Respondent in his individual capacity. The Indian tribe, by way of the MTGA, was not involved as a party, nor would it be liable for any judgment. Yet, the Respondent claimed that the Petitioners' claims were barred under the doctrine of tribal sovereign immunity because the complained-of actions arose in the course of his employment with the MTGA. Pet. App. 22a. The Connecticut Supreme Court, agreeing with the Respondent, *extended* tribal sovereign immunity to shield him from liability, dismissing the Petitioners' suit. *Id.* at 16a-17a. The Court based its holding on the simple fact that the Respondent was an employee of the tribe and was acting within the scope of his employment when the accident occurred. *Id.* ("the plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he acted outside the scope of his authority"). The only basis for the application of tribal immunity in this case was the nature of his employment at the time of the accident. That is not enough to warrant the extension of tribal immunity to a defendant sued for his own individual negligence.

Case law and prudent policy reasons do not support the Connecticut Supreme Court's extension of tribal immunity over a tribe employee *sued in his individual capacity*. The relief sought, significantly, is against

the individual employee himself, and not the tribe. The money damages claimed would come from the employee personally and not the tribe and its members. Accordingly, the tribe is not implicated in any capacity and is not "the real, substantial party in interest." *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945)). Tribal immunity should not extend to shield employees who are sued in their individual capacity, regardless of whether they are sued for simple or gross negligence, as *they alone are implicated* in either case. Such a rule gives persons who are injured by a tribe employee guidance, reliability and consistency in pursuing their claims for damages. Moreover, and perhaps more to the point, such a rule gives persons who are injured by a tribe employee an opportunity to seek damages in the first place.

The holding of the Connecticut Supreme Court, on the other hand, eliminates any such opportunity because it expands the scope of tribal sovereign immunity far beyond other comparable immunities applicable to States and the federal government. Each State is "a sovereign entity in our federal system," and thus is inherently immune from suit. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). Yet, as noted earlier, injured persons may file a suit for money damages against a State officer in his individual capacity for wrongful or negligent conduct attributed to the State officer himself, as long as the relief requested is from the officer personally. *Alden*, 527 U.S. at 757. In that same vein, the United States is shielded by sovereign immunity from suit in the absence of an express statutory waiver. *U.S. v. Bormes*, __ U.S. __, 133 S.Ct. 12, 15-16 (2012). Yet this Court has acknowledged that exceptions exist that

permit, for example, a cause of action against individual federal officers for certain constitutional violations. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *see* Pet. Cert. at 17-18. Neither State nor federal sovereign immunities are limitless and both permit lawsuits against officers *in their personal and individual capacities*.

There is no legal or policy basis for extending the doctrine of tribal sovereign immunity beyond the principles of sovereign immunity that shield both States and the federal government. As this Court recently has acknowledged: "Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills*, __ U.S. at __, 134 S.Ct. at 2030. It is critical that these sovereign powers *continue* to share these principles, and that they not be treated differently or be extended and limited in different ways. *See Bay Mills*, __ U.S. at __, 134 S.Ct. at 2042 (noting that States and Tribes should *not* be treated differently for purposes of sovereign immunity and that "comity would be ill-served by unequal treatment of States and Tribes") (Sotomayor, J., concurring). This extension of sovereign tribal immunity by the Connecticut Supreme Court created precisely this difference in scope of immunity. Such difference cannot stand.

In addition to extending the scope of tribal sovereign immunity, the Connecticut Supreme Court's holding severely limits the rights of persons injured by the negligence of a tribe employee to pursue that employee in search of a damages remedy. As members of the CTLA and AAJ know very well, persons who are injured rely on state tort law in order to seek redress for their injuries. This principle is well settled and,

indeed, serves as the bedrock of our society. *See, e.g.*, *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) ("The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty.") (quoting 2 F. Harper & F. James, Law of Torts § 25-1, p. 1299 (1956) (emphasis in original)); *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."). Yet if tribal immunity is extended to include a tribe's employees, there will be no recovery for persons who are injured by the tortious actions of those employees. This conclusion is at odds with this Court's recognition that "[u]nless federal law provides differently, Indians going beyond reservation boundaries are subject to any generally applicable state law." *Bay Mills*, __ U.S. at __, 134 S.Ct. at 2034 (internal quotation marks omitted). It also is counterintuitive to the notion that tribal immunity does not bar "a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct," *id.* at 2035 (emphasis omitted). Individual tribe employees are subject to the criminal laws of each State, regardless of tribal immunity.[3] They should likewise be subject to the tort laws of each state when acting in their individual capacity.

It is critical to the fairness and administration of justice in our nation's courts that persons injured are able to seek redress. In this case, the Petitioners were merely driving down the highway, miles away from

[3] In fact, the Respondent in this case was cited for violating C.G.S. § 14-240 for following a vehicle too closely. Resp. Conn. Super. Ct. Mot. to Dismiss, Ex. B (Dec. 31, 2013).

the tribe's reservation and in the opposite direction, when the Respondent negligently drove his limousine into the rear of their car, injuring them and pushing their car to rest partially on top of the concrete barrier on the side of the highway. Pet. App. at 2a. They did not and could not have anticipated that they would be involved in such a traumatic car accident at the hand of someone else's negligence or that the person whose negligent actions caused the accident would be employed by an Indian tribe and possibly shielded by tribal immunity. They did nothing to subject themselves to the sovereignty of the tribe. Rather, as motorists on Connecticut state roads, their expectations undoubtedly were that Connecticut tort laws would apply. *See* Restatement (Second) of Conflict of Laws §145(1) (1971) ("[t]he rights and liabilities of the parties with respect to an issue [in tort] are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6"). To preclude them from filing suit against the individual who caused the car accident simply because of the nature of his employment is patently unfair, contrary to the well-settled principles of tort law and an unnecessary and impermissible extension of tribal immunity beyond its sovereignty. *See Kiowa Tribe of Oklahoma*, 523 U.S. at 758 ("immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims").

It is true that some tribes choose to waive immunity to allow tort suits. But this waiver is not guaranteed, it is not consistent, and it is not coextensive in scope with other existing law. In Connecticut, for example,

there are two federally recognized tribes,[4] and both offer different—and severely limited—remedies and rights than the state judicial system. For example, their tribal laws do not provide for a right to a jury trial in tort actions;[5] 12 Mashantucket Pequot Tribal Laws ch. 1 § 5; Mohegan Tribe of Indians of Conn. Code art. 4 § 3-248(d); carry only a one-year statute of limitations; 12 M.P.T.L. ch. 1 § 4(a)(2); Mohegan Tribe Code art. 4 § 3-246(a); and limit the amount of damages; 12 M.P.T.L. ch. 1 § 2(b); Mohegan Tribe Code art. 4 § 3-251(a). These remedies are in sharp contrast to the remedies under Connecticut state law, where plaintiffs have the right to a trial by jury; Conn. Const. art. 1, § 19; where there is a longer statute of limitations on tort claims; Connecticut General Statutes §§ 52-577, 52-555 & 52-584; and where there is no limit on damages; C.G.S. § 52-572h.

Significantly, not all tribes offer such limited remedies in tort, either. Many offer no tort claim procedure at all, and many do not maintain tribal courts. Such limited remedies therefore are created at the whim of each tribe and vary dramatically across the country. This inconsistency is unreliable and provides *no* guidance for persons who are injured by a tribe employee. *See* Pet. Br. at 28. Moreover, this Court's decision will result in a rule that applies nationally. Because of this, it should render a decision that provides *all* injured persons with the right to access a remedy in our courts, not merely those who were injured by a

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[4] They are the Mohegan Tribe of Indians of Connecticut and the Mashantucket Pequot Tribal Nation.

[5] Like the right to access to the courts, the fundamental right to a civil jury trial is one that has a long and evolved history in our country. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

tribe employee working for a tribe that maintains a limited tort claim procedure. An injured person's rights to redress from an individual acting negligently should not rise and fall based on the random happenstance of who employs such individual.

To that end, this Court must continue to protect the constitutional right of access to the courts and right to redress for injury that has become a bedrock principle of Anglo-American society. This Court has "grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection, and Due Process Clauses." *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (internal citations omitted). At least forty states protect, through their constitutions, an individual's right to a remedy. *See* Thomas R. Philips, *The Constitutional Right to a Remedy*, 78 N.Y.U.L.R. 1309, 1310 n.6 (2003); *see also* Conn. Const. art. 1, § 10.

Access to courts requires more than merely open doors. *See Tennessee v. Lane*, 541 U.S. 509, 533 (2004) (requiring state courts to make accommodations allowing disabled persons equal physical access to the courts). The right encompasses the "meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). "The fundamental requisite of due process law is the opportunity to be heard." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). In a civil personal injury action, the meaningful opportunity to be heard includes the determination of liability and damages for the tortfeasor's wrong. *See Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) ("The cardinal principle of damages in

Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty.") (emphasis in original) (citation omitted).

The Connecticut Supreme Court's decision in this case destroys the Petitioners' right to *any* opportunity—nevermind any *meaningful* opportunity—to be heard in a State court in pursuit of their claim for damages caused by the Respondent's negligent acts. Their access to our nation's courts effectively has been foreclosed. This result is both unjust and antithetical to the constitutional right to access our courts. This Court now has the opportunity to remedy this wrong and reverse the underlying judgment, in turn protecting the rights of injured persons across our nation. It should do so.

This is not a case about the retention of tribal sovereignty, but rather it is a judicially-based extension of such immunity beyond that intended by Congress and precedent. Tribal immunity, like all sovereign immunity, is based on the need to safeguard a tribe's self-governance. A suit against a tribe's employee seeking individual liability for his negligence does not impact that sovereignty. This extension of tribal immunity to shield a tribe's employee from liability for his negligent actions constitutes an unwarranted and improper expansion of tribal immunity that unfairly blocks an injured plaintiff's access to our justice system. The Connecticut Supreme Court's decision perpetuates this severe injustice and cannot stand.

CONCLUSION

Amici curiae Connecticut Trial Lawyers Association and American Association for Justice respectfully urge that the judgment of the Supreme Court of Connecticut be reversed and the matter remanded for further proceedings.

Respectfully submitted,

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