No. 11-1485

In the Supreme Court of the United States

CHRIS YOUNG, AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF JEFFRY YOUNG, PETITIONER

v.

JOSEPH S. FITZPATRICK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON, DIVISION I

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

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This case presents the question whether the sovereign immunity of an Indian tribe bars a damages action against an individual tribal officer based on conduct within the scope of the officer's duties. The Washington Court of Appeals answered that question in the affirmative. That decision contributes to a conflict in the lower courts. It is contrary to this Court's decisions explaining the difference between official-capacity and individual-capacity actions against government officers. And it yields the intolerable result that a citizen who is the victim of unlawfully excessive force by tribal police officers has no remedy at all—not

against the tribe and not against the officers, and not in tribal court or in state court or in federal court. That decision warrants this Court's review and correction.

In response to this Court's invitation, the government asserts that no circuit conflict exists, but it does not address all of the cases giving rise to the conflict, let alone distinguish them. Without defending the holding of the Washington Court of Appeals, the government argues that this case is an inappropriate vehicle for considering the application of tribal sovereign immunity to suits against individual officers because, it says, that issue is not within the scope of the question presented, and because petitioner's claims against respondents will ultimately fail on other grounds. Those arguments lack merit, and they provide no basis for denying review.

A. The decision below contributes to a conflict in the lower courts

The Washington Court of Appeals held that the sovereign immunity of an Indian tribe "extends not only to the tribe itself, but also to tribal officers and tribal employees, as long as their alleged misconduct arises while they are acting within their official capacity and within the scope of their authority." Pet. App. i. In support of that proposition, the court cited *Cook* v. *Avi Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), cert. denied, 556 U.S. 1221 (2009). A subsequent Ninth Circuit decision, however, has made clear that the court below misinterpreted *Cook*. The law of the Ninth Circuit is in direct conflict with the

decision below, and that decision contributes to a division among the lower courts.

1. In *Maxwell* v. *County of San Diego*, 708 F.3d 1075 (2013), the Ninth Circuit held that a suit "brought against individual officers in their individual capacities * * * does not implicate sovereign immunity." *Id.* at 1088. The plaintiffs in that case had brought state-law tort claims against paramedics employed by a tribal fire department who, they alleged, had improperly delayed the treatment of a shooting victim. *Id.* at 1080-1081. The paramedics argued that the claims were barred by sovereign immunity, but the court of appeals rejected that argument, explaining that the "paramedics do not enjoy tribal sovereign immunity because a remedy would operate against them, not the tribe." *Id.* at 1087. The court expressly addressed *Cook*, acknowledging "language in many of our cases stating that '[t]ribal sovereign immunity 'extends to tribal officials when acting in their official capacity and within the scope of their authority.'" *Id.* at 1088 (quoting *Cook*, 548 F.3d at 727) (brackets in original). It went on to explain, however, that

> [i]n *Cook*, the plaintiff had sued the individual defendants in their official capacities in order to establish vicarious liability for the tribe. Thus, when *Cook* invoked the "scope of authority" principle, it was because the tribe was the "real, substantial party in interest." The plaintiff could not "circumvent tribal immunity through 'a mere pleading device.'" In short, *Cook* conflated the "scope of authority" and "remedy sought" principles because they are coextensive in official capacity suits.

Ibid. (citations omitted). The court concluded that *Cook* "does not change the rule that individual capacity suits related to an officer's official duties are generally permissible." *Ibid.*

2. The government attempts to reconcile *Maxwell* with the decision below by suggesting (Br. 15) that the court in this case "did not consider the state-law tort claims to be truly individual-capacity ones." That is not a refutation of the conflict with *Maxwell*; it is a description of it. The complaint in this case seeks relief only from the individual defendants, not from the tribe. Pet. App. f-g. And it is black-letter law that "[p]ersonal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law," while "[o]fficial-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985) (internal quotation marks and citation omitted); accord *Hafer* v. *Melo*, 502 U.S. 21, 26 (1991) ("[T]he phrase 'acting in their official capacities,'" when used in describing official-capacity claims, "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury."). The court in *Maxwell* correctly applied those principles, while the court below did not. This case involves individual-capacity claims, and the government makes no effort to argue otherwise.

Nor is it significant that the decision below is from an intermediate state court (Br. 16). This case does not create the conflict; it contributes to an existing conflict created by decisions that the government does

not address. Like the court below, the Second Circuit has applied tribal sovereign immunity to bar actions against tribal officers based on their official conduct, even when the only relief sought is damages from the individual officers. *Chayoon* v. *Chao*, 355 F.3d 141, 143 (2d Cir.) (tribal sovereign immunity barred damages action against tribal officials under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*), cert. denied, 543 U.S. 966 (2004); *Romanella* v. *Hayward*, 933 F. Supp. 163, 167-168 (D. Conn. 1996) (tribal sovereign immunity barred damages action against tribal officials responsible for maintenance of parking lot where plaintiff slipped), aff'd, 114 F.3d 15 (2d Cir. 1997).

The Supreme Court of Connecticut and the Supreme Court of Montana have taken the same side of the conflict, as have intermediate appellate courts in Arizona, California, and New York. *Kizis* v. *Morse Diesel Int'l, Inc.*, 794 A.2d 498, 503 (Conn. 2002) (tribal sovereign immunity barred damages action against tribal officials responsible for maintenance of walkway where plaintiff slipped); *Koke* v. *Little Shell Tribe of Chippewa Indians of Mont., Inc.*, 68 P.3d 814, 817 (Mont. 2003) (tribal sovereign immunity barred damages action against tribal officials "[s]ince the tribal officials here were acting in their official capacities" in the events giving rise to the litigation); *Filer* v. *Tohono O'Odham Nation Gaming Enter.*, 129 P.3d 78, 85-86 (Ariz. Ct. App. 2006) (tribal sovereign immunity barred damages action against tribal officials who allegedly served alcohol to intoxicated casino patron who later caused accident); *Trudgeon* v. *Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 72 (Cal. Ct. App.

1999) (tribal sovereign immunity barred damages action against tribal officials who allegedly failed to prevent fight in casino parking lot); *Zeth* v. *Johnson*, 765 N.Y.S.2d 403, 403-404 (N.Y. App. Div. 2003) (tribal sovereign immunity barred damages action against tribal employee who struck plaintiff's vehicle while operating snowplow).*

B. The decision below is erroneous

The government makes no effort to defend the holding of the court below—*i.e.*, that tribal sovereign immunity bars damages actions against individual tribal officers—and with good reason. Sovereign immunity protects the sovereign, not its officers. Thus, while an official-capacity suit against an officer may be barred by sovereign immunity (because it is effectively a suit against the government itself), an individual-capacity damages action is not. See *Hafer*, 502 U.S. at 27-29; cf. *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

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* The Tenth Circuit appears to have taken inconsistent positions. Compare *Native Am. Distrib.* v. *Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1297 (10th Cir. 2008) (Where "the plaintiffs' suit seeks money damages from the officer 'in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself,' sovereign immunity does not bar the suit 'so long as the relief is sought not from the [sovereign's] treasury but from the officer personally.'") (quoting *Alden* v. *Maine*, 527 U.S. 706, 757 (1999) (brackets in original)), with *Burrell* v. *Armijo*, 603 F.3d 825, 832 (10th Cir. 2010) (reversing award of damages against tribal governor on the ground that "[t]ribal sovereign immunity generally extends to tribal officials acting within the scope of their official authority").

There is no reason why tribal sovereign immunity should extend to tribal officers sued in their individual capacities when the immunities of the United States and of individual States do not similarly extend to federal and state officers. This Court has expressed "doubt" about "the wisdom of perpetuating the doctrine" of tribal sovereign immunity. *Kiowa Tribe of Okla* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 758 (1998). While *stare decisis* may compel its retention, at least in the absence of congressional action, that is hardly a basis for extending it beyond that of any other sovereign in our system of government. There is, in short, no reason to confer upon the officers of the Puyallup Tribal Police Department what is effectively an absolute immunity from civil liability of the sort otherwise enjoyed only by judges, legislators, and the President of the United States.

And that is what the decision below does. If sovereign immunity bars an individual-capacity damages action against a tribal officer, then so long as the officer is acting within the scope of his duties, it does not matter what he does, where he does it (on or off the reservation), or who he does it to (Indian or non-Indian)—he is absolutely immune from liability. For individuals who have been injured by a tribal officer, the remedy is not "damages or nothing," but simply nothing. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

The government suggests (Br. 14 n.9) that petitioner should sue the tribe in tribal court, arguing that petitioner "would not have the same problem proceeding against the Tribe" under the Puyallup Tribal Tort Claims Act as he would in proceeding against the

United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* He would, however, have a different problem: the waiver of immunity in the tribal statute applies only to "[i]njuries proximately caused by the *negligent* acts or omissions of the Tribe, its agents, employees, or officers" and to "[i]njuries proximately caused by the condition of any facility." Puyallup Tribal Code § 4.12.030(c) (emphasis added). Because the excessive-force claims at issue here do not sound in negligence, the tribal statute does not provide relief. The decision below leaves petitioner with no remedy at all.

C. The question presented is important and warrants this Court's review

Because the Ninth Circuit's decision in *Maxwell* is consistent with this Court's cases distinguishing official-capacity from individual-capacity suits, further consideration is unlikely to lead that court to change its position and adopt the view of the courts that have agreed with the court below. Conversely, enough courts have taken the other side of the conflict that there is little chance that they will all change their positions. Additional percolation in the lower courts is therefore unlikely to resolve the conflict, and intervention by this Court is necessary.

There are now nearly 180 different tribal law-enforcement agencies in the United States, employing almost 4800 full-time personnel. Brian A. Reaves, *Tribal Law Enforcement, 2008*, at 1 (U.S. Dep't of Justice 2011) <http://www.bjs.gov/content/pub/pdf/tle08.pdf>. As on-reservation commercial activity—especially gaming—continues to expand, interactions

between tribal officials and non-Indians will become more frequent, giving even greater importance to the standards governing the liability of tribal officers. This Court should resolve the uncertainty in the lower courts and clarify that tribal officers, like federal and state officers, are not protected by sovereign immunity when sued in their individual capacity for actions taken in the course of their duties.

D. This case is an appropriate vehicle for considering the question presented

The government argues (Br. 17) that, "even assuming that the state court's decision could be read as implicitly applying tribal sovereign immunity to state-law tort claims beyond the official-capacity context * * * , that question is not fairly included in the question presented." But there is no need to "assum[e]" an "implicit[]" holding of the court below: the court expressly held that sovereign immunity bars this suit, which it acknowledged to be one seeking damages from individual officers. Pet. App. f-g, i. And the immunity issue is at the heart of the question presented as stated in the petition, which asks whether, in the circumstances of this case, tribal officers "are subject to * * * U.S. Civil Rights Laws, and State Tort Law." Pet. i. If sovereign immunity bars suits against tribal officers, then those officers cannot reasonably be described as "subject to" 42 U.S.C. 1983 or state tort law. Cf. *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993) (noting that "government officials are not *subject to* damages liability" when qualified immunity applies) (emphasis added). This case thus squarely pre-

sents the immunity issue that has divided the lower courts.

The government devotes much of the remainder of its brief (Br. 8-14) to arguing that petitioner's claims will fail on the merits. But there is no need for this Court to reach the merits of those claims. The focus of the Washington Court of Appeals' opinion was sovereign immunity, Pet. App. h-m, and if this Court were to correct the lower court's error on that issue, it could leave the other issues in the case to be addressed on remand. See, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009). Those issues include whether petitioner has alleged a violation of any right, whether any constitutional or statutory provision creates a cause of action, and whether, on the facts of this case, respondents are entitled to any individual immunity (Br. 16 n.10). However those issues are ultimately resolved, they provide no basis for denying review now. In any event, the government's merits arguments are unpersuasive because the facts alleged in the complaint support relief under both Section 1983 and state tort law.

1. The Washington Court of Appeals rejected petitioner's Section 1983 claim on the grounds that "the officers' action did not constitute state action," and, relatedly, that "actions taken by tribal employees under color of tribal law are beyond the reach" of Section 1983. Pet. App. q-r. Those statements were unnecessary because the court's sovereign-immunity holding was sufficient to decide the case. If this Court were to grant certiorari and resolve the immunity question in petitioner's favor, the appropriate course would be to vacate the decision of the Washington Court of Ap-

peals and remand for further proceedings, leaving that court free to reconsider its analysis of Section 1983.

Reconsideration would be appropriate because the facts alleged in the complaint establish that respondents were acting under color of state law. The "under color of state law" requirement of Section 1983 is identical to the "state action" requirement of the Fourteenth Amendment. *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 929 (1982). In evaluating a claim that the acts of nominally private parties constitute state action, this Court has asked "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority" and whether, taking account of all the facts, the parties "may be appropriately characterized as 'state actors.'" *Id.* at 939.

In this case, both components of that test are satisfied because respondents were cross-deputized as state peace officers, and they exercised state authority in arresting Jeffry Young. Because Young was a non-Indian, tribal officers exercising only tribal authority would have been able to detain him pending delivery to state officers, but they would not have been able to conduct a full-scale custodial arrest. *Duro* v. *Reina*, 495 U.S. 676, 696-697 (1990); see *State* v. *Schmuck*, 850 P.2d 1332, 1339 (Wash.), cert. denied, 510 U.S. 931 (1993). Here, respondents' conduct—including, in particular, their apparent failure to contact any state officers during their encounter with Young—supports an inference that they were arresting him, not merely detaining him as a non-Indian trespasser on tribal land. Such an arrest must therefore have been con-

ducted in the exercise of their authority as state officers.

Because respondents were state actors, the force they employed in arresting Young would violate the Fourth Amendment if it was unreasonable. *Graham* v. *Connor*, 490 U.S. 386 (1989). And while such a claim is potentially subject to a defense of qualified immunity, immunity is unavailable if a reasonable officer would have understood the level of force to be excessive. *Saucier* v. *Katz*, 533 U.S. 194 (2001). On the basis of the facts alleged in the complaint, the unreasonableness of the force used would have been apparent, and qualified immunity is unavailable.

2. As an independent basis for relief, petitioner may also assert state-law tort claims against respondents. As permitted by Public Law No. 280, ch. 505, § 7, 67 Stat. 590 (1953), Washington exercises jurisdiction over civil claims against non-Indians arising on Indian reservations. Wash. Rev. Code § 37.12.010 (2012). In this case, respondents are non-Indians. Pet. App. n. As the Washington Court of Appeals recognized, were it not for sovereign immunity, Washington law would therefore "confer subject matter jurisdiction on the state, based on the officers' interaction with Young, also a nonmember." *Ibid.*

Under Washington law, petitioner has alleged facts that, if proved at trial, would entitle him to relief. Washington permits state-law tort actions against individual police officers, and although it provides a defense of qualified immunity with respect to certain claims, that immunity is *not* available "for claims of assault and battery arising out of the use of excessive

force to effectuate an arrest." *Staats* v. *Brown*, 991 P.2d 615, 627-628 (Wash. 2000).

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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