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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether police officers who are employed by the Puyallup Indian Tribe, but trained, certified, and cross-commissioned by the State of Washington, and armed, equipped, and provisioned by the United States pursuant to a federal contract, are subject to a civil damages action in state court for alleged violations of the Constitution, federal civil-rights laws, or state tort law.

2. Whether the Treaty of Medicine Creek—which precludes the Tribe from "shelter[ing] or conceal[ing] offenders against the laws of the United States"—and additional sources of federal and state law, preempt any claims of qualified immunity by individual tribal-police-officer defendants in a suit alleging violations of the Constitution, federal civil-rights laws, and state tort law.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. Federally recognized Indian tribes have "long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," although that immunity is subject to Congress's "plenary control" when unequivocally expressed. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). Moreover, "[a]s separate sovereigns pre-existing the Constitution, [Indian] tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Id.* at 56. In the Indian Civil Rights Act of 1968 (ICRA),

25 U.S.C. 1301 *et seq.*, Congress "impos[ed] certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo*, 436 U.S. at 57. As relevant here, ICRA prohibits tribes from violating a provision identical to the Fourth Amendment and from "depriv[ing] any person of liberty or property without due process of law." 25 U.S.C. 1302(a)(2) and (8) (Supp. V 2011). In *Santa Clara Pueblo*, the Court held that ICRA does not expressly or impliedly authorize "the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions." 436 U.S. at 51-52; see *id.* at 60 ("Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in [25 U.S.C.] 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

b. The Court has recognized that an Indian tribe may "relinquish its immunity" from suit provided that such a waiver is "clear." *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) (quoting *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)). This case involves a contention that a provision in the Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132, constitutes a waiver of immunity. That provision, Article VIII of the Treaty, states that "the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." *Id.* at 1134.

2. The Puyallup Tribe is a federally recognized Indian tribe with a reservation in the State of Washington.

Pet. App. e. On May 12, 2007, Jeffry Young, a non-Indian and petitioner's brother, left the Tribe's casino and went to an inpatient drug-treatment facility, which was operated by the Puyallup Tribal Health Authority and located on trust land in the City of Tacoma and within the boundaries of the Puyallup Reservation.[1] *Id.* at e, n; Super. Ct. Clerk's Papers (C.P.) 3 (Compl. ¶¶ 3.1-3.2); C.P. 296 (title status report reflecting that the parcel is held in trust and not fee). Young "acted in a bizarre and irrational manner," posing as a medical doctor and attempting to gain access to the facility to see patients. Pet. App. e. A residential attendant denied him access and called a security officer, who in turn called the Puyallup Tribal Police. *Id.* at e-f.

Respondents—three tribal police officers who are non-Indians—arrived at the facility. Pet. App. f, n. Young "continued to act erratically, refusing to leave or comply with instructions." *Id.* at f. The officers decided to detain Young, who "resisted and struggled." *Ibid.* In the struggle, the officers used a stun gun and applied restraints. *Ibid.* A fourth officer arrived and noticed that Young was not breathing and had no pulse. *Ibid.*; C.P. 5 (Compl. ¶ 3.8). The officers called paramedics, who temporarily resuscitated Young, but he was pronounced dead at the hospital. C.P. 5 (Compl. ¶ 3.9).

The Pierce County Medical Examiner concluded that Young's death was accidental and caused by "excited delirium syndrome." Pet. App. f. The Pierce County Prosecutor's Office declined to file criminal charges against respondents; the Chief Criminal Deputy con-

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[1] "Trust land" is held in trust by the United States for the benefit of an Indian tribe or individual Indian. See 25 U.S.C. 465; *Oklahoma Tax Comm'n*, 498 U.S. at 511 (treating tribal trust land as reservation land "for tribal immunity purposes").

cluded that "the officers made reasonable decisions in dealing with Mr. Young and that a reasonable amount of force was used to subdue him." C.P. 255. The Bureau of Indian Affairs (BIA) in the Department of the Interior investigated an allegation of excessive force and concluded that the actions of all three respondents "were lawful and proper." C.P. 256-258.

3. In April 2009, petitioner, acting as the personal representative of Jeffry Young's estate, filed a suit in tribal court against the Tribe and respondents, alleging claims under the Puyallup Tribal Tort Claims Act and violations of the Fourth and Fifth Amendments enforceable under ICRA. Pet. App. f; C.P. 153-158.[2] Petitioner later filed a motion to dismiss his own suit with prejudice, which was granted by the tribal court on January 26, 2010. Pet. 8-9; Pet. App. kk-*ll*.

4. a. On February 9, 2010, petitioner filed this action in Pierce County Superior Court, naming respondents (and two other individuals who have since been dismissed) as defendants. Pet. App. f-g. The complaint alleged claims for "excessive force," "violation of civil rights (Constitution)" (specifically referring to the Fourth and Fifth Amendments), "violation of civil rights (42 U.S.C. § 1983)," wrongful death, and loss of consortium. *Ibid.*; C.P. 5-8 (Compl. ¶¶ 4.0-4.9). Petitioner sought monetary damages plus prejudgment interest, attorney's fees, and costs. C.P. 9 (Compl. ¶¶ 8.1-8.3). Respondents moved to dismiss, and, on May 7, 2010, the state trial court dismissed the complaint for lack of

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[2] The Tribal Tort Claims Act is at Puyallup Tribal Code §§ 4.12.010 *et seq.*, www.codepublishing.com/WA/puyalluptribe. The record contains a copy of its 2002 codification. C.P. 168-178.

subject-matter jurisdiction, without issuing an opinion. Pet. App. ff-jj.[3]

b. The state court of appeals affirmed. Pet. App. d-t. It first considered whether tribal sovereign immunity precluded respondents from being "held personally liable for their conduct under a theory of agency." *Id.* at i. Although the court noted that petitioner had sued respondents "both 'in their individual capacity and in their official capacity as agents/employees of the Tribe,'" it concluded that "the record shows that the tribal police, the Bureau of Indian Affairs, and the Pie[r]ce County Prosecutor's Office all found that the officers were carrying out their duties in a lawful and proper way. No evidence directly contradicts this conclusion or suggests they acted in their individual capacity." *Ibid.* The court concluded that "[s]overeign immunity 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 in their official capacity and within the scope of their authority." *Ibid.* It further determined that respondents were, at the relevant time, "acting in their official capacity"; that they were "acting solely in their capacity as tribal officers"; and that they were exercising the Tribe's "rights to exclude persons from tribal lands and to detain alleged criminal offenders and turn them over to government officials for prosecution." *Id.* at h, j, *l.*

The court of appeals rejected petitioner's contention that "the 1854 Treaty of Medicine Creek constituted a

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[3] Petitioner acknowledged in the trial court that the motion to dismiss should be treated "as one for summary judgment," because he had "presented briefing and factual allegations not contained in the complaint." C.P. 38 (Pet's Resp. to Mot. to Dismiss 3). See Pet. App. gg-ii (listing declarations and exhibits considered by the trial court).

limited but express Congressional abrogation of the Puyallup Tribe's sovereign immunity." Pet. App. *l*. The court found the Treaty "inapplicable on its face," because the Tribe "is not concealing any offenders accused of violating United States law" and because the shelter-or-conceal clause would not constitute an "explicit and unequivocal" waiver of sovereign immunity. *Id*. at m.

The court of appeals next concluded that Public Law No. 280, ch. 505, 67 Stat. 588 (1953), which it described as generally permitting state-court jurisdiction in Washington over a "dispute between nonmembers," was inapplicable here. Pet. App. m-n. The court explained that respondents had not been "acting in their individual and private capacities as nonmembers," but had instead been "acting in their official capacity as tribal employees, within the scope of the tribe's authority." *Ibid*.

Finally, the court of appeals turned to petitioner's "constitutional claims arising under 42 U.S.C. § 1983." Pet. App. n. Rather than resolve those claims on jurisdictional grounds, the court concluded that they should be dismissed for failure to prove two "essential elements" of a Section 1983 claim. *Ibid*. First, the court found that petitioner could not establish that respondents "were state actors," because they were "not enforcing state law" but were instead "enforcing tribal law on tribal lands." *Id*. at o. Although petitioner invoked respondents' "state certification" as police officers, the court concluded that "[t]here are no facts demonstrating that they acted jointly with, or under authority of any agency of Washington State government, nor were they enforcing Washington State laws." *Id*. at p-q. Second, the court held that petitioner had failed to establish that respondents "deprived him of a constitutionally protected right," because the Constitution, unlike ICRA, does

not apply to Indian tribes, and because actions under color of tribal law are beyond the scope of Section 1983. *Id.* at q-r.

c. Petitioner sought discretionary review in the Washington Supreme Court, which was denied. Pet. App. a-c.

DISCUSSION

Petitioner contends (Pet. 11-17) that there must be some non-tribal-court forum in which he may pursue his damages claims against tribal police officers for alleged violations of federal civil-rights laws. He also contends (Pet. 17-26) that a provision of the Treaty of Medicine Creek requires state courts to hear private actions for alleged civil-rights violations without regard for qualified-immunity defenses. In the circumstances of this case, there is no merit to either of those contentions. The decision below was rendered by a state intermediate appellate court, and thus does not represent a definitive ruling even within the judicial system of the State of Washington. Nor does petitioner assert that the decision below conflicts with any decision of this Court or of a federal court of appeals or state court of last resort. And, even if there were merit to petitioner's legal arguments, this case would be a poor vehicle for considering them, because the state court of appeals has already found that there is no evidence in the record to contradict the findings of "the tribal police, the Bureau of Indian Affairs, and the Pie[r]ce County Prosecutor's Office" that respondents "were carrying out their duties in a lawful and proper way." Pet. App. i. The petition for a writ of certiorari should be denied.

A. Because Respondents Were Not Acting On Behalf Of The State Of Washington Or The United States, They Are Not Subject To A State-Court Damages Suit For Alleged Violations Of The Constitution Or Of Federal Civil-Rights Laws

With respect to the first question presented, petitioner contends (Pet. 12-13) that "[p]olice officers who are employed by a federally recognized Indian tribe, but trained, certified, and cross-commissioned by state law, and provisioned, armed, and otherwise equipped by the United States, ought to be held to the same Constitutional standards as their state and federal colleagues." In petitioner's view, a non-tribal-court forum should be available in which tribal police officers are "subject to U.S. civil rights laws." Pet. 11 (capitalization modified). While there might be circumstances in which federal civil-rights claims could be pursued against tribal officers in state or federal court, they are not present here, because respondents were not acting on behalf of either the State of Washington or the United States.

1. Petitioner's complaint asserts a claim under 42 U.S.C. 1983 and alleges that respondents violated Jeffry Young's Fourth and Fifth Amendment rights. C.P. 7 (Compl. ¶¶ 4.5-4.7). The state court properly rejected that claim, holding in part that respondents' conduct "did not constitute state action" because "[t]here are no facts demonstrating" that respondents were "enforcing Washington State laws" or otherwise acting "under authority of any agency of Washington State government." Pet. App. q. The petition proffers no persuasive reason to conclude otherwise.

a. Section 1983 applies to persons who act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Co-

lumbia." 42 U.S.C. 1983. As a result, "[a]nyone whose conduct is 'fairly attributable to the state' can be sued as a state actor under § 1983." *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1661 (2012) (citation omitted). On that rationale, the Ninth Circuit concluded in *Bressi* v. *Ford*, 575 F.3d 891 (2009), that tribal officers were state actors for purposes of Section 1983 when their operation of a roadblock involved the enforcement of state law. *Id.* at 897. As the state court of appeals recognized, however, "*Bressi* is plainly distinguishable from the facts" of this case, because respondents were not enforcing state law but were instead exercising "authority under tribal law to detain a non-Indian trespasser on tribal lands." Pet. App. o; see, *e.g.*, *Burrell* v. *Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (dismissing Section 1983 claim alleging that "tribal officials acted under color of tribal law, as opposed to state law"), cert. denied, 549 U.S. 1167 (2007).

b. Petitioner's counter-argument consists of his assertions that respondents were "trained and certified by the State of Washington" and that they "were also cross-commissioned by the State, pursuant to an agreement with Pierce County and the City of Tacoma, and a separate agreement with the City of Fife." Pet. 8. But those assertions are insufficient to support petitioner's Section 1983 claim and were, in part, neither passed upon by nor properly pressed in the court below.

The "training and certification" to which petitioner refers meant only that the officers completed "basic law enforcement training" that complied with standards adopted by the Washington State Criminal Justice Training Commission. Wash. Rev. Code Ann. §§ 43.101.010(1), .095(1), .200(1) (West 2007). As petitioner acknowledged in the state court (Pet. C.A. Br. 7,

16 n.1), respondents were certified pursuant to a provision under which "Tribal governments may voluntarily request certification for their police officers." Wash. Rev. Code Ann. § 43.101.157(1) (West 2007). That provision specified that a tribal police officer is someone "employed and commissioned by a tribal government to enforce the criminal laws *of that government*." *Id.* § 43.101.157(3) (emphasis added). The state court was therefore correct in concluding that respondents' training and certification "does not establish that they were conducting state action when they detained Jeffry Young." Pet. App. p.

Petitioner also asserts (Pet. 8) that respondents were "cross-commissioned by the State" under two separate agreements.[4] The state court of appeals did not expressly pass upon that proposition, perhaps because petitioner's opening brief had relied only on the tribal-police-officer certification discussed above (Pet. C.A. Br. 7) and petitioner did not mention the Tribe's supposed agreement with the City of Tacoma and Pierce County until his reply brief (Pet. C.A. Reply Br. 9-10). See *Cowiche Canyon Conservancy* v. *Bosley*, 828 P.2d 549, 553

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[4] The record contains a copy of a June 15, 1990 agreement (C.P. 81-86) that is signed by officials of the Tribe and Pierce County, but the signature lines for the Tacoma City Manager and Clerk are blank. So is the line for the representative of the Secretary of the Interior, although the Secretary's approval would arguably have been necessary at the time to prevent the Tribe's agreement from being rendered "null and void." 25 U.S.C. 81 (1994). The record does not appear to contain an agreement with the City of Fife, though it includes a city council resolution under which the city's police chief could authorize Puyallup Tribal Police Officers "to exercise [City of Fife Police commissions] upon all trust lands within the City of Fife." C.P. 88. Petitioner has not suggested that the events in this case occurred on such lands.

(Wash. 1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."); *Brown ex rel. Richards* v. *Brown*, 239 P.3d 602, 607 n.10 (Wash. Ct. App. 2010) (following same rule).[5]

c. In any event, even assuming—despite the absence of such a determination by either state court—that respondents were in fact cross-commissioned by the City of Tacoma or Pierce County, that would nevertheless be insufficient to show that they were acting under color of state law during the events at issue. As the state court of appeals explained, tribal officers have "authority under tribal law to detain a non-Indian trespasser on tribal lands." Pet. App. o; see *id.* at h; see also *Strate* v. *A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997) ("We do not here question the authority of tribal police * * * to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law"); *Duro* v. *Reina*, 495 U.S. 676, 696-697 (1990) ("Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them."); *State* v. *Schmuck*, 850 P.2d 1332, 1342 (Wash. 1993) ("[A]n Indian tribal officer has inherent authority to stop and detain a non-Indian who has allegedly violated state and tribal law while on the reservation until he or she can be turned over to state authorities for charging and prosecution.").

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[5] Washington law now provides a mechanism under which tribes may take steps to allow their officers to be given "the same powers as any other general authority Washington peace officer to enforce state laws in Washington," but that provision did not take effect until July 1, 2008—after the events at issue in this case. Wash. Rev. Code Ann. § 10.92.020(1) (West 2012).

After considering the specific circumstances of this case, the state court of appeals determined that respondents were exercising tribal-law and not state-law authority. Pet. App. o, q. That determination, which is not independently worthy of this Court's review, is sufficient to defeat petitioner's Section 1983 claim because it means that respondents' conduct cannot be fairly attributed to the State.

2. Petitioner mentions repeatedly that respondents "were armed, equipped, and provisioned by the United States, pursuant to a * * * contract with the U.S. Bureau of Indian Affairs" under the Indian Self-Determination Act, 25 U.S.C. 450f *et seq.* Pet. 8; see also Pet. i, 12. The Tribe did have such a contract with the BIA.[6] But petitioner does not explain why that should render respondents liable to suit in state or federal court. He does not contend that respondents were "federal agent[s] acting under color of [their] authority" for purposes of a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971). Nor could petitioner raise such a contention at this point, as the issue was never pressed or passed upon in the state

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[6] In a self-determination contract, a tribe agrees to undertake "the planning, conduct and administration of programs or services which are otherwise provided [by the Secretary of Health and Human Services or the Secretary of the Interior] to Indian tribes and their members pursuant to Federal law." 25 U.S.C. 450b(i) and (j), 450f(a)(1); see *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186-2187 (2012). But federal regulations specify that "Tribal law enforcement officers operating under a BIA contract * * * are not automatically commissioned as Federal officers." 25 C.F.R. 12.21(b). Such commissions may be granted "on a case-by-case basis" (*ibid.*), but petitioner conceded in the court of appeals that respondents did not have them. Pet. C.A. Br. 7-8.

courts. See *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (per curiam). In any event, that question has precipitated no disagreement in the lower courts and would not warrant this Court's review.[7]

Similarly, Congress has provided that tribal employees may be "deemed" to be federal employees for purposes of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, "while acting within the scope of their employment in carrying out [a self-determination] contract." 25 U.S.C. 450f note. But the FTCA's law-enforcement proviso allows a claim against the United States for certain intentional torts, including "assault" and "battery," only when they are committed by an "officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of *Federal* law." 28 U.S.C. 2680(h) (emphasis added). Here, the Department of the Interior rejected petitioner's administrative claim seeking damages under the FTCA, because it concluded that respondents "were not commissioned to enforce federal law by the BIA, and, at the time of the incident, they

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[7] The Court has been "reluctant to extend *Bivens* liability 'to any new context or new category of defendants,'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (citation omitted), and it has never held that it can be extended to the actions of non-federal officials. Cf. *Schweiker* v. *Chilicky*, 487 U.S. 412, 418 n.1 (1988) (assuming without deciding that, if a *Bivens* remedy were available against "federal employees," it "would also be available against" a state official found to be acting under color of federal law). Lower courts have declined to find that tribal police officers were federal actors for *Bivens* purposes when they were enforcing tribal law. See *Dry* v. *United States*, 235 F.3d 1249, 1255 (10th Cir. 2000); *Boney* v. *Valline*, 597 F. Supp. 2d 1167, 1177 (D. Nev. 2009); see also *Bressi*, 575 F.3d at 898 (finding *Bivens* inapplicable after determining that tribal officers were "acting pursuant to both tribal and city authority in making arrests").

were not enforcing federal law." Letter from Richard A. De Clerck, Office of the Solicitor, Portland Region, U.S. Dep't of the Interior, to O. Yale Lewis, *Re: Tort Claim by the Estate of Jeffry Young* 2 (Aug. 26, 2009).[8] The agency advised petitioner's counsel of the right to seek review in federal district court of the administrative decision to deny the FTCA claim (*ibid.*), but no such suit was filed.[9]

3. The first question presented also mentions "[s]tate [t]ort [l]aw" (Pet. i), but the body of the petition fails to explain what that reference means, focusing instead on the application of "U.S. Civil Rights Laws" (Pet. 11), "Constitutional Rights" (Pet. 13), and treaty obligations (Pet. 17). Under these circumstances, there is no basis for this Court to consider any federal-law question that could be implicitly associated with pursuit of a state-law tort claim. That is especially true in light of the court of appeals' conclusion that, under the facts of this case, petitioner's tort claims were barred in part because respondents were found to be "carrying out their duties in a lawful and proper way." Pet. App. i.

4. Petitioner does not assert that the state court's decision with respect to the first question presented conflicts with "relevant decisions of this Court" or with

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[8] The letter is not in the state-court record, but petitioner filed a copy of it in the tribal-court proceedings.

[9] Petitioner would not have the same problem proceeding against the Tribe under its tort claims act. That act includes a parallel law-enforcement proviso, which applies to "any acts or omissions of investigative or law enforcement officers giving rise to claims for assault [and] battery," when they are committed by "any agent, employee or officer of the Tribe who is empowered to execute searches, to seize evidence, or to make arrests *under Tribal law*." Puyallup Tribal Code § 4.12.070(c)(3) (emphasis added); C.P. 176 (identical provision as codified in 2002).

"the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b) and (c). Nor are we aware of any such conflict.

In rejecting petitioner's state-law tort claims—but not his Section 1983 claim, which it considered and rejected on the merits—the state court of appeals relied on decisions of the Ninth Circuit and Washington Supreme Court holding that tribal sovereign immunity extends to "tribal officers and tribal employees, as long as their alleged misconduct arises while they are acting in their official capacity and within the scope of their authority." Pet. App. i (citing *Cook* v. *Avi Casino Enters., Inc.*, 548 F.3d 718, 726-727 (9th Cir. 2008), cert. denied, 556 U.S. 1221 (2009), and *Wright* v. *Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1280 (Wash. 2006), cert. dismissed, 550 U.S. 931 (2007)). After the certiorari petition was filed, the Ninth Circuit elaborated upon its previous decision in *Cook*, explaining that tribal sovereign immunity typically will not protect an individual tribal officer from a suit brought against him in his individual capacity. See *Maxwell* v. *County of San Diego*, 708 F.3d 1075, 1087-1090 (2013).

Here, the state court of appeals recognized that petitioner's tort claims were brought against respondents in both their official and their individual capacity. Pet. App. i. The court found that sovereign immunity was applicable because there was no evidence suggesting that respondents "acted in their individual capacity." *Ibid.* It also characterized petitioner's suit as an "attempt[] to sue the tribe in a civil suit in state court," *id.* at k, suggesting that it did not consider the state-law tort claims to be truly individual-capacity ones. But the court did not expressly address whether sovereign immunity would bar a suit under state tort law brought

against a tribal officer in his individual capacity.[10] And any conclusion that sovereign immunity would apply in that context would be inconsistent with the Washington Supreme Court decision on which the court of appeals relied. See *Wright*, 147 P.3d at 1280 ("tribal sovereign immunity would not protect [an individual defendant] from an action against him in his individual capacity").[11] There is, accordingly, no direct conflict between the decision below and *Maxwell*, much less a basis for this Court's review, especially because the decision below was not rendered by a state court of last resort. See Sup. Ct. R. 10(b); *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (declining to decide a question "the Alabama Supreme Court did not expressly address").

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[10] Even if *sovereign* immunity is not directly applicable to a state-law tort claim brought against a tribal officer in his individual capacity, a tribal officer who was acting in his official capacity and within the scope of his authority might still have a defense. An attempt to make a tribal officer liable under state law for such actions could be precluded by a form of official immunity based on federal-law protections for tribal autonomy and governance. Cf. *Westfall* v. *Erwin*, 484 U.S. 292, 296-300 (1988) (federal officers are entitled to absolute immunity from state-law tort suits arising out of discretionary acts within the scope of their official duties). Or, especially when a claim arises, as here, from official acts on the tribe's reservation, state law could be preempted by the weight of countervailing federal and tribal interests. See *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 333-335 (1983); see also *Nevada* v. *Hicks*, 533 U.S. 353, 365 (2001) (noting that an individual-capacity suit against state officers under tribal law would arrest the operations of state government at the will of the tribe).

[11] The other tribal-sovereign-immunity cases on which the state court of appeals relied (Pet. App. i-j) involved application of that doctrine only to official-capacity suits. See *Cook*, 548 F.3d at 727; *Linneen* v. *Gila River Indian Cmty.*, 276 F.3d 489, 491-492 (9th Cir.), cert. denied, 536 U.S. 939 (2002).

In any event, 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 referred to in the cases on which it relied, that question is not fairly included in the question presented, nor even alluded to in the body of the petition. See Sup. Ct. R. 14.1(a), (g), and (h); *Wood* v. *Allen*, 558 U.S. 290, 304 (2010); *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 352 n.13 (2005).

B. The Shelter-or-Conceal Clause In The Treaty Of Medicine Creek Does Not Waive Qualified-Immunity Defenses That May Otherwise Be Available To Tribal Officials

The Treaty of Medicine Creek provides in part that the "tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." Art. VIII, 10 Stat. 1134. The second question presented in the certiorari petition is whether that so-called "shelter or conceal" clause "preempts any claims of qualified immunity by individual Puyallup Tribal police officer defendants in a suit for violation of the Constitution, U.S. civil rights laws, and state tort law." Pet. i (capitalization modified).[12] The answer to that question is no. Petitioner does not suggest that there is any disagreement in the lower courts about the meaning of that clause (or any other like it). And, while the Treaty's effect on sovereign immunity was pressed and passed upon in the state court, petitioner's state-court briefs did not link that argument to argument to the distinct subject of *qualified* immunity of tribal officials (Pet. C.A. Br. 20-21; Pet. C.A. Reply Br. 8-9), and the state court did not express-

[12] The second question presented also mentions "additional sources of federal and state law" (Pet. i), but they are not further identified.

ly pass upon any such link (Pet. App. *l*-m). See *Howell*, 543 U.S. at 443. Further review is unwarranted.

1. Petitioner contends (Pet. 20, 22-24) that, when the Treaty refers to "offenders against the laws of the United States," it encompasses not only criminal offenses but also civil violations of federal civil-rights laws. That reading is not supported by the Treaty's text, structure, or history.

a. At the time of the Treaty, the principal meaning of "offender" or "offense" involved violations of criminal law. See *Black's Law Dictionary* 1185 (9th ed. 2009) (defining "offender" as "[a] person who has committed a crime," and tracing the word to the 15th century); Henry Campbell Black, *A Dictionary of Law* 844 (1891) (defining "offense" as "[a] crime or misdemeanor; a breach of the criminal laws"); 2 Samuel Johnson, *A Dictionary of the English Language* s.v. "offender" (1755) (def. 1: "A criminal; one who has committed a crime; a transgressor; a guilty person"). That criminal-law connotation is reinforced by the context here, which refers to "deliver[ing]" offenders "for trial"—a construction that, as indicated by this Court's discussions of extradition statutes and treaties, is associated with criminal, not civil, trials. *E.g.*, *California* v. *Superior Ct.*, 482 U.S. 400, 404 (1987); *Collins* v. *O'Neil*, 214 U.S. 113, 121 (1909).

b. The criminal-offense interpretation is supported by the only decision of this Court dealing with similar treaty language. See Pet. 19. In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court discussed the parallel provision in the contemporaneous Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. The Court concluded that the language "implies that the [Indians] are to promptly deliver up any non-Indian

offender, rather than *try and punish him* themselves." 435 U.S. at 208 (emphases added). Similarly, the Supreme Court of Washington concluded that the same provision "appears to reflect a common concern of the federal government during treaty negotiations in the mid-1800's to prevent non-Indians from hiding out on reservations in the mistaken belief that they would be free from prosecution for their crimes." *Schmuck*, 850 P.2d at 1338. Petitioner notes that very few decisions have addressed the shelter-or-conceal clause or similar language (Pet. 19 & n.10), and he does not suggest there is any disagreement about its inapplicability in the civil context.

c. The criminal-offense interpretation is further supported by the House Report on which petitioner relies (Pet. 24). That report, which preceded the Treaty of Medicine Creek by 20 years, stated: "If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men. Some have eluded the pursuit of justice, and located themselves [in Indian country,] where they fancy themselves *free from punishment* for the past[.]" H.R. Rep. No. 474, 23d Cong., 1st Sess. 98 (1834) (emphasis added).

d. Nor is petitioner's reading aided by the two historical "narratives" he invokes. Pet. 21. As he acknowledges (Pet. 22), the first narrative is not "analog[ous]" to this case because it involved the trial of Chief Leschi for the capital crime of murder. The second narrative involved a trial in which a court-martial concluded that it lacked authority to try the "Muck Creek Five" for what petitioner describes (Pet. 23) as "civil charges, such as treason." But treason was plainly a criminal offense,

and references to "civil" courts were used in contrast with martial-law, not criminal, proceedings.[13]

2. Even if petitioner were correct in contending that the Treaty requires the Tribe to deliver offenders to non-tribal authorities for *civil* trials for alleged violations of federal or state law, he does not explain why that conclusion has any bearing on the entitlement to qualified immunity that an individual officer would otherwise have in a suit about his official actions. Because the clause does not expressly address qualified immunity, it cannot be construed as a relinquishment or abrogation of that immunity. Any ambiguity on that score would need to be resolved in favor of the Tribe and its officers. See, *e.g.*, *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 174 (1973).

3. The inference that petitioner urges the Court to draw from the Treaty about qualified immunity would also be inconsistent with petitioner's basic contention that tribal police officers should be held to the same standards "as their state and federal colleagues," Pet. 12-13, because it is well established that both federal and state officials are, as a matter of federal and state law, generally entitled to qualified immunity in civil suits for violations of federal law or Washington tort

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[13] See Richard Kluger, *The Bitter Waters of Medicine Creek* 168 (2011) (the Muck Creek Five were "told they would be tried for treason—a capital crime—not by a civil court but by a five-man military tribunal"); Murray Morgan, *Puget's Sound* 127 (1979) (the court-martial concluded "that the offense described 'constitutes the crime of treason and this court as a military court has no jurisdiction'"); Kent D. Richards, *Isaac I. Stevens* 285 (1979) (the governor later ordered the "prisoners released, revoked martial law, and allowed the civil courts jurisdiction over any criminal proceedings").

law.[14] In any event, construing the shelter-or-conceal clause as stripping respondents of any qualified-immunity defenses would be of no moment in the circumstances of this case, because petitioner presses only federal civil-rights claims (Pet. 20, 22-24, 26) that the state court rejected on the merits, Pet. App. n-r, and because that court has already determined that the record supports the conclusion that respondents "were carrying out their duties in a lawful and proper way," *id.* at i.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14] See, *e.g.*, *Filarsky*, 132 S. Ct. at 1667 (qualified immunity in Section 1983 suit); *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (qualified immunity in *Bivens* action); *McKinney* v. *City of Tukwila*, 13 P.3d 631, 640-641 (Wash. Ct. App. 2000) (municipal police officers were "entitled to state law qualified immunity for" state-law tort claims of "assault and battery" because their "use of force was reasonable"); *Estate of Lee* v. *City of Spokane*, 2 P.3d 979, 989-990 (Wash. Ct. App. 2000) (city police officers had qualified immunity for state-law tort claims, including wrongful death).