No. 21-____

IN THE

Supreme Court of the United States

JASON SELF AND THOMAS W. LINDQUIST,

Petitioners,

v.

CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Upper Skagit Indian Tribe v. Lundgren*, this Court declined to decide the "grave" question whether the "immovable-property" exception that applies to all other forms of sovereign immunity also applies to tribal sovereign immunity, because that question had not been pressed or passed upon below. 138 S. Ct. 1649, 1653-54 (2018). The Chief Justice did "not object to the Court's determination to forgo consideration of the immovable-property rule at th[at] time," but explained that the question would "need to be addressed in a future case." *Id.* at 1656 (Roberts, C.J., concurring). Justice Thomas, joined by Justice Alito, dissented on the ground that the exception "obviously applies to tribal immunity—as it does to every other type of sovereign immunity that has ever been recognized." *Id.* (Thomas, J., dissenting).

The question presented is:

Whether the immovable-property exception applies to tribal sovereign immunity.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are related to this case:

Jason Self, et al. v. The Cher-Ae Heights Indian Community of the Trinidad Rancheria, No. DR190353 (Cal. Super. Ct. Aug. 2, 2019) (granting motion to quash and motion to dismiss complaint).

Jason Self, et al. v. Cher-Ae Heights Indian Community of the Trinidad Rancheria, No. A158632 (Cal. Ct. App. Jan. 26, 2021) (affirming).

Jason Self, et al. v. Cher-Ae Heights Indian Community of the Trinidad Rancheria, No. S267419 (Cal. Apr. 28, 2021) (denying petition for review).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jason Self and Thomas W. Lindquist respectfully petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California.

OPINIONS BELOW

The judgment of the Superior Court for the State of California in and for the County of Humboldt is unpublished. Pet. App. 28a. The opinion of the Court of Appeal of the State of California (Pet. App. 2a-27a) is published at 60 Cal. App. 5th 209. The order of the Supreme Court of California denying the petition for review is unpublished. Pet. App. 1a.

JURISDICTION

The Supreme Court of California denied the petition for review of the California Court of Appeal's decision on April 28, 2021. Pet. App. 1a. On March 19, 2020, this Court issued an order extending the filing deadline for all petitions for certiorari to 150 days from the date of the lower court's order denying discretionary review. On July 19, 2021, this Court rescinded that order, but only for petitions for certiorari from judgments issued after that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT

This case presents the question whether Indian tribes have a sovereign immunity that is broader than the immunity possessed by all other sovereigns. The California Court of Appeal held that tribal immunity extends to a tribe's "immovable property"—such as

land or buildings—even when the property lies within the territory of another sovereign.

It would be surprising if tribes had such a super immunity. "Since the 18th century, it has been a settled principle of international law that a foreign state holding property outside its territory is treated just like a private individual." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1655 (2018) (Roberts, C.J., concurring). And "[t]he immovable-property exception has been hornbook law almost as long as there have been hornbooks." *Id.* at 1657 (Thomas, J., dissenting). For that reason, foreign nations do not have sovereign immunity with respect to land they own in the United States; states do not have sovereign immunity with respect to land they own in other states; and the United States itself does not have sovereign immunity with respect to land it owns in foreign countries.

The rule should be no different when tribes own land within the territory of another sovereign. Tribal immunity "is the 'common-law immunity from suit *traditionally* enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citation omitted; emphasis added). This Court has therefore been skeptical of attempts to make tribal immunity "broader than the protection offered by state or federal sovereign immunity." *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017). After all, tribes "no longer possess[] ... the full attributes of sovereignty." *United States v. Wheeler*, 435 U.S. 313 323 (1978) (internal quotation marks omitted). Because tribal immunity stems from traditional sovereign-immunity doctrines and because tribes are not fully sovereign, there is little reason to think

tribes would enjoy an immunity in this context that extends "beyond what common-law sovereign immunity principles would recognize for" state or foreign sovereigns. *Lewis*, 137 S. Ct. at 1292.

The California Court of Appeal's holding that tribes enjoy a non-traditional form of sovereign immunity that exceeds the immunity possessed by all other sovereigns has important ramifications for states and private individuals. A state's authority over property within its own borders is fundamental—states indisputably have "strong interests in assuring the marketability of property within [their] borders and in providing a procedure for peaceful resolution of disputes about the possession of that property." *Shaffer v. Heitner*, 433 U.S. 186, 208 (1977) (footnote omitted). Yet the lower court's refusal to apply the immovable-property exception strips states (and state courts) of their authority to adjudicate claims to property within their borders. And absent the immovable-property exception, private individuals wishing to resolve a dispute with a tribe have no recourse other than to infringe tribal claims to land and provoke the tribes to sue—an "intolerable" result. *Upper Skagit*, 138 S. Ct. at 1655 (Roberts, C.J., concurring).

In *Upper Skagit*, all nine Justices agreed that the question whether the immovable-property exception applies to tribal immunity is important. Yet the Court declined to answer the question because it had neither been pressed nor passed upon below—indeed, it was not even raised in this Court until late in the proceedings—and the majority thought it "wise" not to "take a 'first view'" of such a "grave" question that

would "affect all tribes." 138 S. Ct. at 1654 (majority op.).

The Chief Justice (joined by Justice Kennedy) agreed with the majority's decision not to address the immovable-property exception. 138 S. Ct. at 1656 (Roberts, C.J., concurring). But he explained that "if it turns out that the [exception] does not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would . . . need to be addressed in a future case." *Id.*

Justice Thomas (joined by Justice Alito) would have exercised the Court's discretion to resolve in that case whether the immovable-property exception applies to tribal immunity. 138 S. Ct. at 1656 (Thomas, J., dissenting). In his view, the answer was "straightforward": The immovable-property "exception is settled, longstanding, and obviously applies to tribal immunity—as it does to every other type of sovereign immunity that has ever been recognized." *Id.* The "Court's decision to forgo answering" the question whether the immovable-property exception applied "cast[] uncertainty over the sovereign rights of States to maintain jurisdiction over their respective territories." *Id.* at 1657. And it effectively left in place the very disagreement that the Court had granted certiorari to resolve—whether tribal immunity bars judicial resolution of off-reservation property disputes. *Id.* at 1656.

This case presents an ideal vehicle for the Court to answer the important question left open in *Upper Skagit*. Petitioners have pressed their argument that the immovable-property exception applies to tribal

immunity since the beginning of this suit. And that question was the sole basis for the California Court of Appeal's decision below. The lower court's holding that the immovable-property exception does not apply to tribal immunity prevents California from exercising its longstanding authority to adjudicate competing claims to property within its borders, deprives petitioners of a forum in which to adjudicate their property claims, and grants tribes a unique form of immunity enjoyed by no other sovereign. The Court should grant certiorari.

1. For many years, petitioners Jason Self and Thomas Lindquist have used two public beaches near Trinidad Harbor in Trinidad, California, for business and recreational purposes. To get to those beaches, Self and Lindquist must cross non-reservation, non-trust property owned in fee simple by the Cher-Ae Heights Indian Community of the Trinidad Rancheria. Pet. App. 58a. Doing so is critical to Self's livelihood. He owns a kayaking business, "Kayak Trinidad," which uses one of the beaches to launch kayaks. *Id.* Without crossing the Tribe's land to get to the beach, he cannot get kayaks into the harbor. *See id.* Lindquist, like Self and many other members of the local public, uses the beaches for recreation. *Id.* For the last forty years, Lindquist has crossed the land now owned by the Tribe to access the beaches, and cannot get to the beaches any other way. *Id.* Around 1970, a prior owner of the property now owned by the Tribe ensured the public's right to access the beaches by dedicating a portion of the property to public use. Pet. App. 6a, 59a-60a.

The Cher-Ae Heights Indian Community of the Trinidad Rancheria is a federally recognized tribe.

Pet. App. 58a. The Tribe purchased the non-reservation property at issue in this case—commonly known as the Trinidad Harbor parking area—around January 2000. Pet. App. 58a-59a.

In 2016, the Tribe applied to the Bureau of Indian Affairs to take the property into trust for the Tribe's benefit. Pet. App. 59a. If the land were placed in trust, federal law would give the Tribe veto authority over any right-of-way that the Bureau might otherwise grant over and across the land, 25 U.S.C. § 324, and federal sovereign immunity would prevent any attempt to confirm a right-of-way by means of a lawsuit, *see* 28 U.S.C. § 2409a; *United States v. Mottaz*, 476 U.S. 834, 842 (1986). The Bureau has not reached a final decision on the Tribe's application, and the Bureau generally will not take land into trust without first resolving outstanding questions concerning the land's title. *See* 25 C.F.R. § 151.13; *Title Evidence for Trust Land Acquisitions*, 81 Fed. Reg. 30,173, 30,174 (May 16, 2016) (noting the Bureau's "practice of requiring the elimination of any legal claims . . . determined by the Secretary to make title unmarketable, prior to acceptance in trust").

2. To protect their ability to access the beaches, petitioners brought this quiet-title action seeking recognition of a public easement across the property. The Tribe moved to quash service of process and to dismiss, asserting that tribal immunity blocked the suit. Pet. App. 7a, 54a. In response, petitioners explained that the land at issue is not on a reservation or in trust. They argued that under the immovable-property exception, "when a sovereign acquires property in a neighboring jurisdiction, it is not immune from suit in the neighboring jurisdiction's

courts for *in rem* suits that concern the real property." Pet. App. 38a.

The trial court sided with the Tribe, granting its motion to quash and dismissing petitioners' suit with prejudice as barred by tribal immunity. *See* Pet. App. 7a, 29a.

3. The California Court of Appeal affirmed. Pet. App. 18a. Its opinion focused solely on the immovable-property exception's applicability to tribal immunity. *See id.* at 7a-18a. The court acknowledged that "states and foreign sovereigns are not immune to suits regarding real property located outside their territorial boundaries." *Id.* at 8a. But it was "not persuaded" that "a common law exception extends to tribes." *Id.* The court viewed both state sovereign immunity and foreign sovereign immunity as distinguishable from tribal immunity. *Id.* at 7a-12a. And the court decided not to "depart from" what it described as "the standard practice of deferring to Congress to determine limits on tribal immunity." *Id.* at 8a.

One member of the panel wrote separately to express his view that tribal immunity, "as originally understood, includes an exception for the litigation of disputes over title to real (immovable) property." Pet. App. 20a (Reardon, J., concurring). In his view, "when one sovereign owns land of another sovereign, the second sovereign generally retains the authority to adjudicate disputes respecting that land." *Id.* at 22a. Thus, "the second sovereign's authority over issues of title to land within its boundaries supersedes the first sovereign's privilege to preclude a judicial challenge to the fact and scope of its ownership of that land." *Id.*

"Quite obviously," he explained, "the tribe's assertion of sovereign immunity to suit would operate to undermine the very foundation of the state's sovereignty." *Id.*[1]

The California Supreme Court denied Self and Lindquist's petition for discretionary review. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

Property ownership "is not an inherently sovereign function." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007). For centuries, it has thus "been a settled principle of international law that a foreign state holding real property outside its territory is treated just like a private individual." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1655 (2018) (Roberts, C.J., concurring). "The same rule applies as a limitation on the sovereign immunity of States claiming an interest in land located within other States." *Id.*

This Court has not yet decided whether this immovable-property exception also applies to tribal immunity. In *Upper Skagit*, every member of the Court agreed that this question is of crucial importance to states, tribes, property owners, and the public. But the Court declined to answer the question because it had not been addressed by the lower court

[1] Justice Reardon nevertheless concurred in the judgment on the theory that the Tribe's application to put the land at issue in trust preempted this lawsuit. Pet. App. 22a-26a (Reardon, J., concurring). The majority rejected that argument. Pet. App. 18a n.3 (majority op.).

or raised until merits briefing in this Court was well underway.

This case presents none of those obstacles and is the ideal vehicle for the Court to decide whether a tribe's immunity extends to property the tribe holds on non-reservation, non-trust land. The Court should grant certiorari and hold that tribes, like states and foreign nations, are not immune from suit with respect to claims concerning property they own within the jurisdiction of another sovereign.

I. The Question Presented Is Exceptionally Important.

Although *Upper Skagit* produced some disagreement, resulting in three opinions, on one point the Court was unanimous: The question whether the same immovable-property exception that applies to every other form of sovereign immunity also applies to tribal immunity is an important one that merits this Court's review. The Court should grant certiorari to resolve the question left open in *Upper Skagit*.

In *Upper Skagit*, this Court held that *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), did not preclude Indian tribes from claiming sovereign immunity in *in rem* lawsuits. 138 S. Ct. at 1651. After the Upper Skagit Tribe purchased non-trust, non-reservation land in Washington State, it concluded that a fence along the border of the property was misplaced. *Id.* at 1652. When the Tribe informed its neighbors that it would be tearing down and moving the fence, the neighbors brought a quiet-title action. *Id.* Relying on *Yakima*, the Washington Supreme Court held that the

Tribe was not entitled to sovereign immunity for *in rem* lawsuits. *Id.* This Court held that the Washington Supreme Court had misread *Yakima*, which "did not address the scope of tribal sovereign immunity." *Id.*

In so concluding, the Court did not reach the question whether the immovable-property exception applies to tribal immunity. 138 S. Ct. at 1654. That issue had not been raised in the Washington Supreme Court and "appeared only when the United States filed an *amicus* brief" in this Court. *Id.* As the Court explained, "[d]etermining the limits on the sovereign immunity held by Indian tribes is a grave question" and "the answer will affect all tribes, not just the one before" the Court. *Id.* Accordingly, the Court thought it "wise" to decline to address the question without the benefit of a lower court ruling or an opportunity for the Tribe's "other *amici*" to "ha[ve] their say." *Id.*

Four Justices in *Upper Skagit* expressed their view that, in the appropriate case, the Court should decide the question now presented by this case.

Chief Justice Roberts, joined by Justice Kennedy, did "not object to the Court's determination to forgo consideration of the immovable-property [exception]" in *Upper Skagit*. 138 S. Ct. at 1656. He emphasized, however, that "[t]he correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right." *Id.* at 1655. To the contrary, "[t]here should be a means of resolving a mundane dispute over property ownership." *Id.* And it would be "intolerable" if the only available means were for

individuals to "pick a fight"—by trespassing, for example. "Such brazen tactics may well have the desired effect of causing the [t]ribe to waive its sovereign immunity" by filing a quiet-title suit. *Id.* But it is unlikely "that the law requires private individuals—who . . . ha[ve] no prior dealings with the [t]ribe—to pick a fight in order to vindicate their interests." *Id.* The immovable-property exception might provide a solution to this problem, the Chief Justice explained. *Id.* at 1656. And "if it turns out that the rule does *not* extend to tribal assertions of rights in non-trust, non-reservation property," the Chief Justice concluded, then "the applicability of sovereign immunity in such circumstances would . . . need to be addressed in a future case." *Id.* (emphasis added).

Justice Thomas, joined by Justice Alito, stated that the Court should have considered and applied the immovable-property exception in *Upper Skagit* itself, rather than awaiting a later case in which to do so. *See* 138 S. Ct. at 1656-57 (Thomas, J., dissenting). He explained that there are centuries of case law establishing "the bedrock principle that each State is 'entitled to the sovereignty and jurisdiction over all the territory within her limits.'" *Id.* at 1662-63 (collecting cases). Refusing to apply the immovable-property exception to tribal immunity would thus "intrude on . . . a fundamental aspect of state sovereignty" and "contradict[] the Constitution's design, which leaves to the several States a residual and inviolable sovereignty." *Id.* at 1663 (internal quotation marks and citation omitted). Moreover, the "Court's decision to forgo answering" whether the immovable-property exception applies to tribal

immunity "cast[] uncertainty over the sovereign rights of States to maintain jurisdiction over their respective territories." *Id.* at 1657. And it effectively left in place "the disagreement" among lower courts that the Court had granted certiorari to resolve. *Id.* at 1656.

In sum, all Justices agreed in *Upper Skagit* that the question whether the same immovable-property exception that applies to every other form of sovereign immunity also applies to tribal immunity is an important one worthy of this Court's review in the right case.

II. The Lower Court's Decision Is Incorrect.

The California Court of Appeal erred in rejecting the immovable-property exception to tribal immunity. This Court has described Indian tribes as "separate sovereigns preexisting the Constitution" that possess the "common-law immunity from suit *traditionally* enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 58 (1978) (emphasis added).

At common law, a sovereign's immunity from suit traditionally did not extend to actions involving immovable property outside the sovereign's jurisdiction. Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l Law 220, 244 (1951); *see Upper Skagit*, 138 S. Ct. at 1655 (Roberts, C.J., concurring); *id.* at 1657-61 (Thomas, J., dissenting). This exception recognizes that "property ownership is not an inherently sovereign function," and that sovereigns owning property should be treated the same as any other property owner. *Permanent Mission of India*, 551 U.S. at 199.

"The immovable-property exception has been hornbook law almost as long as there have been hornbooks," predating the Founding and the United States's relationship with the Indian tribes. *Upper Skagit*, 138 S. Ct. at 1657 (Thomas, J., dissenting). It has been "established" for centuries that property that "a prince has purchased for himself in the dominions of another" "shall be treated just like the property of private individuals." *Id.* at 1657-58 (quoting Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis* 22 (G. Laing transl. 2d ed. 1946)); *see id.* at 1658 (when "sovereigns have fiefs and other possessions in the territory of another prince; in such cases they hold them after the manner of private individuals") (quoting Emer de Vattel, 3 *The Law of Nations* § 83, at 139 (C. Fenwick transl. 1916)).

The exception "is a corollary of the ancient principle" that "land is governed by the law of the place where it is situated." *Upper Skagit*, 138 S. Ct. at 1658 (Thomas, J., dissenting) (quoting Francis Wharton, *Conflict of Laws* § 273, at 607 (G. Parmele ed., 3d ed. 1905)). In the words of then-Judge Scalia, "it is 'self-evident' that '[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain.'" *Id.* (quoting *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (alteration in original)). Because "'land is so indissolubly connected with the territory of a State,' a State 'cannot permit' a foreign sovereign to displace its jurisdiction by purchasing land and then claiming 'immunity.'" *Id.* (citation omitted). "Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the

descent, distribution, and grants of the domain within its own boundaries." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 12 (1823) (Story, J.).

The immovable-property exception has been a core part of this Nation's sovereign-immunity doctrine since the Founding. *See Upper Skagit*, 138 S. Ct. at 1659-61 (Thomas, J., dissenting). Chief Justice Marshall, in *Schooner Exchange v. McFaddon*, wrote that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction" "and assuming the character of a private individual." 11 U.S. (7 Cranch) 116, 145 (1812).

This principle has applied for centuries to foreign sovereign immunity. *See Upper Skagit*, 138 S. Ct. at 1655 (Roberts, C.J., concurring); *id.* at 1660 (Thomas, J., dissenting). The Foreign Sovereign Immunities Act of 1976 codified a "pre-existing real property exception to sovereign immunity recognized by international practice," under which "a foreign sovereign's immunity does not extend to 'an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction.'" *Permanent Mission of India*, 551 U.S. at 199-200 (citations omitted); 28 U.S.C. § 1605(a)(4).

The immovable-property exception equally "applies as a limitation on the sovereign immunity of States claiming an interest in land located within other States." *Upper Skagit*, 138 S. Ct. at 1655 (Roberts, C.J., concurring). As this Court explained nearly a century ago, "[l]and acquired by one state in another state is held subject to the laws of the latter

and to all the incidents of private ownership," and a state thus "cannot claim sovereign privilege or immunity" "as to that property." *Georgia v. City of Chattanooga*, 264 U.S. 472, 480-81 (1924).

Even the United States is subject to the immovable-property exception with respect to property it owns in other nations. *See Permanent Mission of India*, 551 U.S. at 201 (discussing the Vienna Convention); U.N. GAOR, 59th Sess., 6th Comm., 13th mtg. at 9-10, U.N. Doc. A/C.6/59/SR.13 (Oct. 25, 2004) (statement of Eric Rosand, Deputy Legal Advisor, U.S. Mission to the U.N.) (noting the position of the United States that immunity is unavailable "with respect to rights or interests in real property within [a] foreign State" and that this principle is "widely recognized and had worked well").

There is no reason to think that the immovable-property exception does not also apply to tribal immunity. The exception applies to every "type of sovereign immunity that has ever been recognized." *Upper Skagit*, 138 S. Ct. at 1656 (Thomas, J., dissenting). It would thus be surprising if tribes—which "no longer possess[] . . . the full attributes of sovereignty," *Wheeler*, 435 U.S. at 323 (internal quotation marks omitted)—had a broader immunity from suit in this context than that enjoyed by foreign nations, states, or the United States itself.

The California Court of Appeal gave two reasons for refusing to apply the immovable-property exception, but neither has merit.

First, the court noted that tribal immunity "is not coextensive with that of States" or of foreign nations. Pet. App. 9a (quoting *Kiowa Tribe of Okla. v. Mfg.*

Techs., Inc., 523 U.S. 751, 756 (1998), and citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 797-98 (2014)).

Tribal immunity, however, has long been grounded in the ordinary rules applicable to other sovereigns. *Santa Clara Pueblo*, 436 U.S. at 56, 58. True, this Court refused in *Bay Mills* to reconsider *Kiowa*'s expansion of tribal immunity beyond the immunity of other sovereigns in the context of commercial, off-reservation activity. *See Bay Mills*, 572 U.S. at 803. But several Justices criticized that expansion as "a mess," "unjustifiable," and "exorbitant." *Id.* at 814 (Scalia, J., dissenting); *id.* at 814 (Thomas, J., dissenting); *id.* at 831 (Ginsburg, J., dissenting).

That this Court has recognized narrow differences between tribal immunity and the immunity of other sovereigns in the context of commercial, off-reservation activity is no reason to disregard a longstanding and universally applicable exception to sovereign immunity for immovable property. As the majority explained in *Bay Mills*, the state had "many other powers" to regulate the Tribe's commercial, off-reservation activity without suing the Tribe. 572 U.S. at 795. Refusing to apply the immovable-property exception, by contrast, would subvert states' fundamental authority over property within their own borders. And *Bay Mills* expressly reserved whether tribal immunity would bar a suit, like this one, by a "plaintiff who has not chosen to deal with a tribe" and "has no alternative way to obtain relief for off-reservation commercial conduct." *Id.* at 2036 n.8. Moreover, since *Bay Mills*, this Court has declined to make tribal immunity "broader than the protection

offered by state or federal sovereign immunity." *Lewis*, 137 S. Ct. at 1292. There is no reason this Court should depart from that sound approach here, especially given the powerful state interests in resolving property disputes within their own territory and the absence of any meaningful alternative for petitioners to obtain relief.

Second, the California Court of Appeal believed that it should follow what it described as "the standard practice of deferring to Congress to determine limits on tribal immunity." Pet. App. 8a. But a deferential posture toward Congress does not mean "that courts can abdicate their judicial duty to decide the scope of tribal immunity" or "ignore longstanding limits on sovereign immunity, such as the immovable-property exception." *Upper Skagit*, 138 S. Ct. at 1661-62 (Thomas, J., dissenting). In *Lewis*, for example, this Court recognized that tribal immunity did not extend beyond that of other sovereigns even without a limitation enacted by Congress. 137 S. Ct. at 1290-92. Similarly, in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, this Court noted, without citing any federal statute, that tribal immunity does not exempt a tribe from "the normal processes of the state court in which it has filed suit," or from "a counterclaim arising out of the same transaction or occurrence" as its suit. 476 U.S. 877, 891 (1986). Accordingly, the absence of Congress enacting an express statutory limit on tribal immunity was no justification for the lower court's decision to grant the Tribe "a sweeping and absolute immunity that no other sovereign has ever enjoyed—not a State, not a foreign nation, and not even the United States."

Upper Skagit, 138 S. Ct. at 1663 (Thomas, J., dissenting).

III. This Case Is An Excellent Vehicle In Which To Decide The Question Presented.

In *Upper Skagit*, the question whether the immovable-property exception applied to tribal immunity was never raised in the lower court. It was not raised even in this Court until the United States's merits-stage *amicus* brief—"after briefing on certiorari, after the Tribe filed its opening brief, and after the Tribe's other *amici* had their say." 138 S. Ct. at 1654 (majority op.). In the absence of a lower court opinion or full adversarial testing, that case was a poor vehicle to answer "a grave question" that would "affect all tribes." *Id.*

This case presents none of the obstacles that were present in *Upper Skagit* and is an ideal vehicle for answering the question presented.

Unlike in *Upper Skagit*, the immovable-property exception has been the focus of this case from the beginning. In their first filing after the Tribe asserted tribal immunity, petitioners argued that the immovable-property exception applied and that the Tribe was therefore not entitled to tribal immunity. Pet. App. 37a-51a.

The immovable-property exception was the sole basis for the lower courts' decisions. The Tribe's successful motion to quash service of process and to dismiss was premised entirely on tribal immunity. Pet. App. 54a. The Court of Appeal extensively discussed and (incorrectly) distinguished state sovereign immunity and foreign sovereign immunity as well as other considerations bearing on the

question. Pet. App. 7a-17a. And Justice Reardon argued that the immovable-property exception should apply to sovereign immunity in his concurring opinion. Pet. App. 20a-22a. Thus, unlike in *Upper Skagit*, the immovable-property exception was pressed and passed on below.

Nor are there any other vehicle problems that would prevent this Court from deciding whether the immovable-property exception applies to tribal sovereign immunity. The Tribe's land in Trinidad Harbor is non-trust, non-reservation property that, but for the lower court's sovereign-immunity holding, is subject to ordinary California property law. Although the Tribe asked the Bureau of Indian Affairs in 2016 to take the land into trust, the Bureau has not acted on this request, and under its regulations generally will not act on a request until disputes like this one are resolved.

The panel majority below stated that this case was "a poor vehicle" to apply the immovable-property exception because "Self and Lindquist do not claim an ownership interest in the property" and instead seek to "establish a public easement for coastal access." Pet. App. 17a. That statement concerns the court's (incorrect) view as to the ultimate *merits* of petitioners' quiet-title action. It does not concern the question presented by this petition—whether, under federal law, California courts can hear the case in the first place. *That* question is cleanly presented regardless of whether petitioners can ultimately establish an easement under California law.

Petitioners obviously have a justiciable interest in the question whether federal law bars them from

asserting property rights that they could otherwise litigate in state court. *See*, *e.g.*, *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77-78 (1991) (petitioners had standing to challenge district court's removal decision because they "lost the right to sue in Louisiana court"). Although other members of the public will also benefit from the public easement petitioners seek to establish, Self and Lindquist both suffer their own concrete, particularized harms in the absence of a legally enforceable right to access Trinidad Bay's beaches. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016) ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance."). Self must cross the Tribe's land to operate his kayaking business, and both Self and Lindquist must cross the land to access the beaches for recreational purposes.

In short, this case presents an ideal vehicle for this Court to resolve the question left open in *Upper Skagit*, which all nine Justices agreed was of critical importance to states, tribes, and individuals like Self and Lindquist. The decision below adds to the "uncertainty over the sovereign rights of states to maintain jurisdiction over their respective territories" that resulted from this Court's "decision to forgo answering" in *Upper Skagit* the question whether the immovable-property exception applies to tribal immunity. 138 S. Ct. at 1657 (Thomas, J., dissenting). And it confirms that "the disagreement that led [this Court] to take th[at] case" continues to "persist." *Id.* The Court should grant certiorari and hold that the immovable-property exception applies to tribal sovereign immunity.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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