No. 18-970

IN THE
Supreme Court of the United States

THOMAS MITCHELL, et al.,
Petitioners,
v.
TULALIP TRIBES OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly concluded that Tulalip, a federally recognized Indian tribe, was immune from Petitioners' suit for prospective declaratory relief.

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INTRODUCTION

The Court should deny certiorari because the Ninth Circuit's unpublished decision follows directly from recent Supreme Court precedent and does not conflict with the extant precedent of any other circuit.

Respondent Tulalip Tribes of Washington ("Tulalip") is a federally recognized Indian tribe with a reservation in Western Washington. Petitioners are non-Indians who own land on the Tulalip reservation. Petitioners sued Tulalip, seeking a declaration that Tulalip could not exercise regulatory or taxation authority over activities related to their land under any circumstance.

The Ninth Circuit ruled that sovereign immunity barred Petitioners' suit. That holding is plainly correct in light of *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), and *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018). Thus, while Petitioners suggest that there is an exception to tribal sovereign immunity for cases involving injunctive or declaratory relief, this Court in *Bay Mills* reaffirmed that tribes are immune from suit—including suits seeking prospective relief—unless there is an unequivocal statement in federal law to the contrary. And while petitioners suggest that there is an exception to tribal sovereign immunity because this case involves regulation of their land, this Court in *Upper Skagit* rejected the notion that there is any broad *in rem* exception to tribes' sovereign immunity that applies to suits seeking to resolve competing claims to land. And while some Justices of this Court suggested in *Upper Skagit* that there might be an

"immovable property" exception to tribal sovereign immunity when the case involves land that is off the reservation, any such exception is of no consequence here, both because Petitioners have never invoked it and, more important, because the land at issue is *on the reservation*. Further, unlike *Upper Skagit*, this case involves no disputed claims to title or possession of Petitioners' land. In short, Petitioners sued Tulalip seeking a prospective ruling limiting Tulalip's regulatory authority over activities related to their reservation land. But Petitioners point to nothing in federal law that abrogates Tulalip's sovereign immunity for such a suit or otherwise suggests that immunity would not apply. Therefore, Tulalip is immune.

Petitioners assert that there is a circuit conflict between the decision below and a Fifth Circuit decision declining to confer immunity on a tribe for a suit seeking prospective relief. But that Fifth Circuit decision precedes *Bay Mills*, and is no longer good law—as a district court within the Fifth Circuit has subsequently recognized.

In addition to being splitless, this case suffers from multiple vehicle problems. First, this case arrives in an artificial posture. Petitioners seek purely prospective relief. Ordinarily, plaintiffs seeking prospective relief against governmental action sue government officials under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Here, however, Petitioners inexplicably failed to name tribal officials as defendants in their complaint. As such, Petitioners are forced to seek abrogation of the sovereign immunity of the tribe itself. In any

future case in which plaintiffs' counsel includes all potentially liable defendants in the case caption, the parties' dispute will center on whether the tribal officials can be sued under *Ex parte Young*, and the question raised by Petitioners—whether the tribe *itself* can be sued—will be immaterial.

In addition, there is a potential jurisdictional defect. As the District Court correctly concluded, there is no Article III case or controversy because this dispute is unripe, as the tribe has neither sought nor threatened to enforce the challenged tribal laws and regulations against Petitioners.

This case also presents two other threshold vehicle problems. First, this suit is likely barred by res judicata because Petitioners brought a nearly identical suit in state court, and lost. Second, Petitioners failed to exhaust their tribal court remedies, in contravention of the principle that tribal remedies must be exhausted before tribal jurisdiction is reviewed in federal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987).

The petition should be denied.

STATEMENT

Respondent Tulalip Tribes of Washington ("Tulalip") is a federally recognized Indian tribe. In 1855, the United States and several tribes, entered into the Treaty of Point Elliott, in which the tribes retained reservations in Washington in exchange for relinquishing the vast majority of their land. The Tulalip Reservation's boundaries were established by the 1855 treaty and an Executive Order issued in 1873,

and have never been diminished.

Tulalip regulates zoning and land use on the Tulalip Reservation. *See* Tulalip Tribal Code, tit. 7.[1] A 1999 Memorandum of Ordinance recorded with the Snohomish County Auditor gave notice to all reservation residents of Tulalip's then-current land use regulations. Pet. 7.

In addition, Tulalip collects an excise tax when real estate is sold. *See* Tulalip Tribal Code § 12.20.170(16). The tax is written so as to conform to this Court's case law concerning tribal authority within a reservation. By its terms, the ordinance does not apply to sales by non-Indians (such as Petitioners), "except (a) where authorized by Congress; or (b) where such nonmembers have consensual relationships with the Tribes through commercial dealing, contracts, leases, or other arrangements; or (c) where such nonmembers' conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribes." *Id.* § 12.20.040(1). Those three exceptions are the three scenarios in which this Court authorizes tribes to exercise civil jurisdiction over non-Indians on Indian reservations. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

Petitioners are non-Indians who own residential properties within the Tulalip Reservation. Petitioners do not allege any plans to develop or sell their land that might implicate Tulalip's land use regulations or excise

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[1] The Tulalip Tribal Code is available at https://www.codepublishing.com/WA/Tulalip/.

tax. Nor do Petitioners allege Tulalip has ever sought to enforce, or is threatening to enforce, its land use regulations or excise tax against them. Nor is there any allegation that Tulalip has ever sought to enforce those ordinances against any other non-Indian, or exceeded the boundaries of its authority under *Montana* in any respect. Indeed, one petitioner, Robert Dobler, has admitted that when he previously developed property on the reservation, he obtained the necessary permits from Snohomish County, not Tulalip. Supp. ER at SuppEx-1.[2] He has also acknowledged that when he sold land in 2009, he notified Tulalip that he was not a tribal member, and the tribe therefore did not collect the real estate excise tax. Supp. ER at SuppEX-1.

Notwithstanding the lack of any enforcement efforts by Tulalip, Petitioners sued Tulalip in Snohomish County Superior Court under Washington's Quiet Title Act. Supp. ER at SuppEx-2 to SuppEX-9. Petitioners sought a declaration that their properties were "free of and clear of any rights, claims or encumbrances" arising from the Memorandum of Ordinance or the excise tax. Supp. ER at SuppEx-8.

The Superior Court dismissed Petitioners' suit on the basis of sovereign immunity. It concluded that Tulalip "is a federally recognized American Indian tribe

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[2] Citations to "Supp. ER" are to Appellees' Supplemental Excerpts at Record, filed by Tulalip in the Ninth Circuit on February 20, 2018. The Supplemental Excerpts of Record are available on PACER. *See Mitchell v. Tulalip Tribes of Washington*, No. 17-35959 (9th Cir.), ECF No. 11.

with sovereign immunity from suit which has not been waived." Supp. ER at SuppEx-12. It further stated that "[a]lthough this action is pled as a quiet title complaint, the relief sought necessarily implicates the sovereign interests of the Tribes." *Id.*[3]

Petitioners did not appeal the Superior Court's ruling within the state judicial system. Instead, they elected to file a new lawsuit against Tulalip, this time in federal district court.[4] As with their unsuccessful state court suit, they sought a court order that would establish that the land use regulations and excise tax were unenforceable in relation to Petitioners' reservation properties under any set of facts. Pet. 4.

The District Court dismissed Petitioners' suit. The Court concluded that the case was unripe, and it therefore lacked subject matter jurisdiction under Article III. Pet. App. A-6 – A-7. The Court reasoned that "[t]he Tribes have not attempted to enforce the regulatory ordinance or real estate tax against Homeowners." Pet. App. A-7. It rejected Petitioners' argument that "the ordinances have rendered their title unmarketable," pointing out that any such injury would be "contingent on multiple future events: first, a real estate transaction, and second a contract that would require marketable title in order to close the

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[3] Petitioners characterize the state court as holding that "the Tribes could not be sued in State court." Pet. 4. Nothing in the state court's order, however, suggested that the result would be different in federal court. To the contrary, the state court relied on sovereign immunity, which would apply in any court.

[4] Two plaintiffs in the state-court suit did not join the federal suit.

transaction." Pet. App. A-7 - A-8. It similarly rejected Petitioners' suggestion that an escrow company might treat "the claimed tax as an enforceable lien," pointing out that "there is no allegation that Homeowners have plans to sell or convey their property or that an escrow company has treated the tax as an enforceable lien on their property." Pet. App. A-8. The District Court declined to reach two other asserted grounds for dismissing Petitioners' lawsuit: sovereign immunity, and res judicata in light of the state court's dismissal of Petitioners' prior suit. Pet. App. A-6.

The Ninth Circuit affirmed in an unpublished panel opinion without oral argument. With regard to ripeness, the Ninth Circuit stated that the District Court "did not address Washington law that recognizes cloud on title as a hardship fit for judicial determination." Pet. App. A-2 - A-3. But the Ninth Circuit nonetheless affirmed the dismissal on the basis of sovereign immunity. The court explained that Indian tribes have a common-law immunity from suit, including suits for injunctive and declaratory relief. Pet. App. A-3. Citing this Court's recent decision in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), the Ninth Circuit observed that "Congress must 'unequivocally express' its intent to abrogate immunity." Pet. App. A-3. The Ninth Circuit found that Congress had not abrogated Tulalip's sovereign immunity, and Tulalip therefore was immune from suit. *Id.*

ARGUMENT

This Court's review of the Ninth Circuit's unpublished judgment is unwarranted. Tulalip's

sovereign immunity from this suit follows directly from this Court's recent decisions in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), and *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018). No currently-binding circuit authority exists to the contrary. Although Petitioners cite one Fifth Circuit case pre-dating *Bay Mills* and *Upper Skagit* that declined to recognize a tribe's immunity in a suit for prospective non-monetary relief, that case is no longer good law—as a district court within the Fifth Circuit has since recognized.

This case is also a poor vehicle for several reasons. For one, the question presented arises solely because Petitioners made an unforced litigation error. Petitioners could have filed a suit against Tulalip's officers (as opposed to Tulalip itself), seeking prospective relief under *Ex parte Young*. If they had done so, the parties' immunity dispute would have centered on whether an *Ex parte Young* action is available, and any dispute over the immunity of the tribe itself would have been secondary. But Petitioners failed to name Tulalip's officers as defendants, which is why they are now forced to seek a ruling abrogating the immunity of the tribe itself. The Court should not grant certiorari to resolve a question that arises solely because Petitioners omitted parties from the case caption.

Moreover, the Court may lack jurisdiction because, as the District Court concluded, there is no ripe case or controversy under Article III. And Petitioners' suit is likely barred on two other grounds: res judicata based on a prior unsuccessful suit in state court, and failure to

exhaust tribal remedies. If the Court is interested in revisiting tribal sovereign immunity, it should await a case in which these complexities do not arise.

I. The Ninth Circuit's Decision Is Correct And Does Not Conflict With The Decision Of Any Other Court.

The Court should deny certiorari because the Ninth Circuit's decision is a straightforward application of this Court's recent decision in *Bay Mills* and *Upper Skagit* and does not conflict with any still-binding precedent from any other circuit.

A. Under *Bay Mills* and *Upper Skagit*, Tulalip is Immune.

Bay Mills and *Upper Skagit* establish that Tulalip is immune from this suit. In *Bay Mills*, the State of Michigan sued an Indian tribe, alleging that the tribe was illegally operating a casino off its reservation. 572 U.S. at 787. The District Court entered a preliminary injunction against Bay Mills, but the Sixth Circuit vacated the injunction on the ground that the suit was barred by the tribe's sovereign immunity. *Id.*

The Supreme Court affirmed the Sixth Circuit's decision. It explained that it had "time and again treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Id.* at 789 (internal quotation marks and brackets omitted). The Court further explained that the "baseline position" is "tribal immunity," and so "to abrogate such immunity, Congress must unequivocally express that purpose." *Id.* at 790 (internal quotation marks and brackets

omitted). The Court observed that this "rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* And that was so, the Court held, even though injunctive relief was at issue. *Id.* at 796. Finding that Congress had not unequivocally abrogated Bay Mills' sovereign immunity, the Court concluded that Bay Mills was immune from suit. *Id.* at 791-97.

Bay Mills resolves this case. Petitioners sued a tribe. Congress has not abrogated the tribe's immunity. Therefore, the tribe is immune.

Indeed, this is an easier case for sovereign immunity than *Bay Mills*. Although *Bay Mills* was a 5-4 decision, Tulalip would be immune from suit under the views expressed by all nine members of the Court. In *Bay Mills*, this Court followed precedent declining "to make any exception" to sovereign immunity "for suits arising from a tribe's commercial activities, even when they take place off Indian lands." *Id.* at 790. Justice Thomas, joined by three other dissenters, took issue with that portion of the Court's holding: he would have held that Indian tribes lack sovereign immunity for "off-reservation commercial acts." *Id.* at 815 (Thomas, J., dissenting). Justice Thomas explained that "comity is an ill-fitting justification for extending immunity to tribes' off-reservation commercial activities," given that "[e]ven with respect to fully sovereign foreign nations, comity has long been discarded as a sufficient reason to grant immunity for commercial acts." *Id.* at 817 (Thomas, J., dissenting).

He further explained that "[w]hen an Indian tribe engages in commercial activity outside its own territory, it necessarily acts within the territory of a sovereign State." *Id.* at 818 (Thomas, J., dissenting). He emphasized that "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* (quotation marks and bracket omitted).

Here, however, Petitioners' suit challenges activity that is *neither* commercial *nor* off-reservation. Rather, Petitioners challenge laws that Tulalip enacted in its governmental legislative capacity that apply to *reservation* land. Thus, even under the *Bay Mills* dissenters' reasoning, Tulalip is immune.

This Court's decision in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), further confirms Tulalip's immunity. In *Upper Skagit*, landowners filed a quiet title action in Washington state court, asserting that they—and not an Indian tribe—had title over certain off-reservation property. *Id.* at 1651-52. The tribe asserted sovereign immunity. *Id.* at 1652. The Washington Supreme Court held that the tribe was not immune. That court interpreted *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), to establish the principle that sovereign immunity does not apply when a court merely exercises *in rem* jurisdiction over a parcel of land, as opposed to *in personam* jurisdiction over the tribe itself. *Upper Skagit*, 138 S. Ct. at 1651. This Court reversed, holding that *Yakima* establishes no such principle. *Id.* at 1652-53.

Thus, under *Upper Skagit*, a tribe does not lose its immunity from suit simply because the suit is framed as an *in rem* suit against the land rather than as an *in personam* suit against the tribe. This suit is an *in personam* suit against the tribe itself; but even if Petitioners were to reconceptualize it as an *in rem* suit addressing Tulalip's authority over Petitioners' land, Tulalip would still be immune.

As with *Bay Mills*, although *Upper Skagit* was a divided decision, Tulalip would be immune under the approach of all nine members of the Court. In *Upper Skagit*, the land dispute related to *off-reservation* property that the tribe gave up as part of an 1855 treaty. 138 S. Ct. at 1651-52. The landowners argued that the tribe was not immune because the land was off-reservation: they pointed out that sovereigns have historically not been immune from claims relating to "immovable property located in the *territory of another sovereign*" that the tribe "purchased in the character of a private individual." *Id.* at 1653-54 (internal quotation marks omitted; emphasis added). Thus, in light of the "settled principle of international law that a foreign state holding real property outside its territory is treated just like a private individual," the "only question" in the case was "whether different principles afford Indian tribes a broader immunity from actions involving *off-reservation land*." *Id.* at 1655 (Roberts, C.J., concurring) (emphasis added). The Court declined to decide that question, leaving it to the lower court in the first instance. *Id.* at 1654-55 (majority opinion); *see also id.* at 1656 (Roberts, C.J., concurring) (expressing doubt as to whether tribes are immune as to "non-trust,

non-reservation property," but agreeing that the Court could forgo consideration of that question). The dissent, by contrast, would have decided that question and held that the tribe lacked sovereign immunity with respect to immovable property within the territory of another sovereign. *See id.* at 1657 (Thomas, J., dissenting).

But the debate in *Upper Skagit* over the immovable-property exception is irrelevant to this case, because the land at issue is *on-reservation* land. No member of the *Upper Skagit* Court expressed any doubt that a tribe would be immune from a lawsuit arising out of an on-reservation land dispute. And, accordingly, Petitioners do not even mention (much less invoke) the exception in their petition.

Moreover, this case differs from *Upper Skagit* in a different respect: the dispute centers on the tribe's regulatory authority, not its title over land. In *Upper Skagit*, non-Indian citizens and a tribe disputed who had title over a plot of land. The concurring opinion expressed concern that there should be a way of resolving the title dispute short of the non-Indians "crossing onto the disputed land and firing up their chainsaws." *Id.* at 1656 (Roberts, C.J., concurring). In this case, by contrast, there is no dispute that Petitioners own the land; Petitioners merely seek reassurance that the tribe will not seek to impose a tax in the event of a hypothetical sale. None of the *Upper Skagit* opinions suggested that this interest was sufficient to abrogate clear rules governing tribal immunity.

In sum, this Court's decisions in *Bay Mills* and

Upper Skagit make clear that Tulalip is immune from this suit. The Ninth Circuit's dismissal on the basis of sovereign immunity was correct.

B. Petitioners Cannot Distinguish *Bay Mills* and *Upper Skagit*.

Petitioners' efforts to distinguish *Bay Mills* and *Upper Skagit* lack merit. Petitioners begin by arguing at length that Tulalip lacks authority to impose its regulations upon them under any circumstance. Pet. 12-15. That question, however, is not presented in this case. Rather, this case presents the antecedent question of whether Tulalip has sovereign immunity from this suit.

Of course, if Tulalip ever filed suit seeking to enforce its regulations against Petitioners, then Petitioners could assert, as a defense, that Tulalip lacked authority to do so. However, Tulalip has never done so and never even threatened to do so. Rather, Petitioners have brought a freestanding suit against Tulalip. The Ninth Circuit correctly concluded that it was barred from reaching the merits of that suit because of Tulalip's sovereign immunity.

Next, Petitioners cite a series of cases in which courts "have regularly addressed the reach of an Indian tribe's regulatory power over non-Indians and their land, even when located within a reservation." Pet. 16. None of the cited cases, however, involved a lawsuit against an Indian tribe in which the tribe had any occasion to assert sovereign immunity. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 321-22 (2008) (suit between private

parties); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 648 (2001) (suit against tribal officials, as opposed to tribe itself); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 419 (1989) (suit brought by tribe); *Montana*, 450 U.S. at 549 (suit brought by United States); *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1307 n.10 (9th Cir. 2013) (suit against tribal officials); *Big Horn Cty. Elec. Co-op, Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (suit against tribal officials). Each case, therefore, is irrelevant to the question presented.

Petitioners then cite a footnote in *Bay Mills* stating that the Court "need not consider whether the situation would be different if no alternative remedies were available." *Bay Mills*, 572 U.S. at 799 n.8; *see also* Pet. 17. Petitioners claim that Tulalip is not immune because "there is no alternative remedy available to Petitioners" to obtain a determination of whether Tulalip may levy its tax. Pet. 17.

But Petitioners did not even attempt to seek the most obvious alternative remedy: a declaration or injunction against tribal officials under *Ex parte Young*, 209 U.S. 123 (1908). Under that doctrine, a plaintiff may bring suit against government officials in their official capacities, so long as the complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal quotation marks omitted). This Court has held that under *Young*, "tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for

unlawful conduct." *Bay Mills*, 572 U.S. at 796 (emphasis in original); *accord Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) ("As an officer of the Pueblo, petitioner … is not protected by the tribe's immunity from suit.").

Here, Petitioners seek an order prospectively preventing Tulalip from enforcing its laws against them. But Petitioners inexplicably named only the tribe as defendants, and not its individual officers. Thus, the *Ex parte Young* remedy is unavailable. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (*Ex parte Young* exception to sovereign immunity "has no application in suits against the States and their agencies, which are barred regardless of the relief sought"). Petitioners cannot now complain that they lack an alternative remedy when they failed to pursue the most obvious alternative.

Further, if Petitioners had raised an *Ex parte Young* action, the Court could have addressed whether that tailored remedy provides a better framework for balancing the interests of plaintiffs and tribes than the total abrogation of sovereign immunity that Petitioners advocate. In this Court's *Ex parte Young* jurisprudence, the Court has taken great care to craft a remedy that ensures plaintiffs have a meaningful prospective remedy against state action, while simultaneously preserving immunity in cases that "implicate[] special sovereignty interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). Yet the Court would be unable to even *consider* whether that option exists here because of Petitioners'

failure to name tribal officials as defendants.

To be clear, Tulalip agrees with the District Court that Petitioners could not have brought an *Ex parte Young* action on the facts of this case because there is no ripe case or controversy under Article III. The *Ex parte Young* remedy requires the plaintiff to allege that government officials have inflicted, or threaten to inflict, harm that violates federal law; mere passage of a law with which Petitioners disagree is not enough. Here, no tribal official has ever threatened enforcement of any tribal law against Petitioners, so there is no illegal conduct to enjoin. *See infra* at 21-22 (explaining why ripeness poses a vehicle problem).

Moreover, even if there was a ripe case or controversy, Tulalip does not concede that an *Ex parte Young* action would have been available here.[5] This Court has never addressed whether such actions are available in the specific scenario here, where the plaintiff contends that the tribe lacks regulatory authority under tribal law, but does not specifically contend that the exercise of such authority under any circumstance would violate any statute or constitutional provision. The Ninth Circuit did not

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[5] Moreover, Tulalip reserves any other defenses it might have in a suit filed under *Ex parte Young*, including, but not limited to, lack of subject matter jurisdiction, failure to exhaust tribal remedies and res judicata and collateral estoppel based on Petitioners' prior lawsuits. Tulalip also reserves the right to argue that suit in tribal court itself provides an adequate alternative remedy, and the right to contest whether, or in what circumstances, an alternative remedy must be provided in the event the tribe is otherwise immune, issues the Court did not decide in *Bay Mills*.

address that issue either, because Petitioners did not sue any tribal officials. Tulalip's point is that if Petitioners had brought an *Ex parte Young* action, the question presented here would have been irrelevant. If an *Ex parte Young* action *was* available, Petitioners would have an alternative remedy, and there would be no need to abrogate the sovereign immunity of the tribe itself. If an *Ex parte Young* action was *not* available, then the tribe's sovereign immunity would apply *a fortiori*: there is no reason that the tribal *officials* would be shielded by sovereign immunity but the tribe *itself* would not. The sole reason that the parties are litigating the sovereign immunity of the tribe itself is that Petitioners failed to list the tribal officials in the case caption.

C. There Is No Circuit Split.

Petitioners defer any claim of a circuit split until the closing section of their petition. They begin by observing that *Ex parte Young* actions can be brought against tribal officials. Pet. 19-20. In this case, however, Petitioners did not sue any tribal officials.

Next, Petitioners cite *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 572 (5th Cir. 2001), for the proposition that *Ex parte Young*'s reasoning permits a plaintiff to sue a tribe itself for prospective relief. Pet. 20-22. *Comstock*, however, involved a suit both against tribal council members, and against the tribe itself. 261 F.3d at 569-70 (addressing claims against tribal council members); *id.* at 571-72 (addressing claims against tribe). *Comstock* did not address the scenario presented by this case, where a plaintiff eschews claims against

council members, and then insists that the absence of an alternative remedy supports abrogating the immunity of the tribe.

Comstock did state that the tribe itself was not immune from suits for injunctive or declaratory relief (as opposed to suits for damages), relying on the Fifth Circuit's prior decision in *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999). *See Comstock*, 261 F.3d at 571-72. But those portions of *Comstock* and *TTEA* are no longer good law in view of *Bay Mills*. *Bay Mills* involved a claim for prospective injunctive relief. 572 U.S. at 787. This Court held that Bay Mills was immune from that claim. It held that the plaintiffs could seek an injunction "against tribal officials or employees," but not against "the Tribe itself." *Id.* at 796 (parenthesis omitted).

Recent authority from within the Fifth Circuit confirms that *Comstock* and *TTEA* are no longer good law in view of *Bay Mills*:

> [T]he Supreme Court stated in *Bay Mills Indian Community*, which was decided after *TTEA* and *Comstock*, that "[a]s this Court has stated before, analogizing to *Ex parte Young*, 209 U.S. 123 (1908), tribal immunity does not bar … a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Bay Mills Indian Cmty.*, 134 S. Ct. at 2035 (emphasis added) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)). In view of *Bay Mills Indian Community*, the court concludes that a suit for injunctive or declaratory relief may be brought against a tribal official, but not

against a tribe itself or a tribal agency.

In re Intramta Switched Access Charges Litigation, 158 F. Supp. 3d 571, 577-78 (N.D. Tex. 2015). Thus, there is no extant circuit split for this Court to resolve.

II. This Case Is A Poor Vehicle To Address The Question Presented.

This case would be a poor vehicle to consider the scope of a tribe's sovereign immunity for several reasons.

First and foremost, the question presented arises only because Petitioners made an unforced error. Petitioners seek prospective relief. If Petitioners had simply named tribal officers in the caption of their complaint, they could have invoked *Ex parte Young* and tried to obtain injunctive relief through that mechanism. Petitioners simply failed to do so.

Petitioners' failure to name tribal officers makes this case a poor candidate for certiorari for two distinct reasons. First, the question presented may have no practical significance. In future cases, where the plaintiff seeks prospective relief and names tribal officials as defendants, the parties' dispute will center on whether an *Ex parte Young* action is available. As such, the question of whether the tribe itself is immune may be irrelevant, *see supra* at 17; at the very least, the court's analysis of that question will color the court's analysis of the tribal immunity question.

Second, Petitioners' failure to name tribal officials as defendants makes it impossible for the Court to answer the question as framed by Petitioners: whether

there is an exception to tribal sovereign immunity when there is "no alternative remedy available." Pet. 17. An *Ex parte Young* action may, or may not, be available as an alternative remedy. But the Court cannot decide that question because Petitioners did not sue tribal officials, so the question is not properly before the Court. In sum, if the Court is inclined to revisit tribal sovereign immunity, it should await a case in which the plaintiff sues all potentially liable defendants.

Moreover, there is a possible jurisdictional defect in this case. The District Court concluded that it lacked subject matter jurisdiction under Article III because the case was unripe. Pet. App. A-6 – A-7; *see Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) ("We have noted that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."). The District Court reasoned that "[t]he Tribes have not attempted to enforce the regulatory ordinance or real estate tax against Homeowners" and "there is no allegation that Homeowners have plans to sell or convey their property or that an escrow company has treated the tax as an enforceable lien on their property." Pet. App. A-7 – A-8.

Rather than affirm on the basis of ripeness, the Ninth Circuit asserted summarily that "Washington law … recognizes cloud on title as a hardship fit for judicial determination." Pet. App. A-2 – A-3. But in support of this proposition, the Ninth Circuit cited only a Washington statute and case establishing that state law authorizes landowners to bring quiet title actions.

Id. These authorities do not demonstrate that Petitioner has suffered a sufficiently concrete injury to warrant a federal court's exercise of jurisdiction.

Because the District Court characterized ripeness as a jurisdictional defect under Article III, the Court would be obliged to address that issue before reaching the question presented. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below."). The Court should not grant certiorari in a case presenting an antecedent, fact-bound question.

In addition to the possible issue of jurisdiction under Article III, there are two other vehicle problems. The first is res judicata. Petitioners' quiet-title suit in the Snohomish County Superior Court was virtually identical to their federal suit: Petitioners were plaintiffs in the state-court suit, Tulalip was the defendant, and Petitioners sought to invalidate the same land use and excise tax ordinances. Indeed, in its brief discussion of ripeness, the Ninth Circuit pointed out that Petitioners' own case resembled a quiet-title action under Washington state law. Pet. App. A-2 – A-3.

But the state court dismissed Petitioners' prior suit on the basis of sovereign immunity. *See* Mot. to Dismiss, Ex. B, ¶ 2, D. Ct. ECF No. 6-2 ("This action is dismissed with prejudice for lack of jurisdiction over Defendant Tulalip Tribes on the grounds that the Tulalip Tribes is a federally recognized American Indian tribe with sovereign immunity from suit which has not been waived."). Petitioners could have

appealed that judgment, but instead they decided to file a new lawsuit in federal court in the hope of obtaining a more favorable ruling on the exact same issue in a different forum.

Res judicata bars that tactic. Although neither the District Court nor the Ninth Circuit resolved this argument, Tulalip has preserved this argument throughout these proceedings. *See* Pet. App. A-6 (noting Tulalip's argument that "Homeowners' claims are barred by res judicata because the Snohomish County Superior Court previously dismissed the identical claims with prejudice"); Tulalip 9th Cir. Br. 32-34, ECF No. 10. If the Court grants certiorari, Tulalip would pursue this alternative ground for affirmance, yielding yet another fact-bound issue.

The second vehicle problem is exhaustion. This Court has held that in disputes over the scope of tribal jurisdiction, "considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court." *See Iowa Mut. Ins. Co.*, 480 U.S. at 15. Tulalip has a long-standing and well-developed judicial system, with both trial and appellate courts. Petitioners could have sought a declaration in tribal court that Tulalip lacks authority under tribal law to enforce the laws at issue here. Such a lawsuit, if successful, would have obviated the need for a federal suit. Instead, however, Petitioners proceeded directly to state and then federal court. Thus, the exhaustion doctrine may prevent yet another barrier to this Court's review.

In view of the multiple vehicle problems associated with this case, the Court should deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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