No. 18-970

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS MITCHELL AND PATRICIA S. JOHANSON-MITCHELL, husband and wife, AND BUCKLEY EVANS AND TINA EVANS, husband and wife, AND ROBERT C. DOBLER AND LIZBETH K. DOBLER, husband and wife,

Petitioners,

v.

TULALIP TRIBES OF WASHINGTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLES OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

State Cases

Statutes

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REPLY ARGUMENT

This case involves two different aspects of tribal sovereignty – a Tribe's immunity from suit, and the limits to its authority to regulate non-Indians. Sovereign immunity is intended as a "shield" to suit. In arguing that the issue of sovereign immunity is "antecedent" to the question of the Tribes' authority over non-Indians and land owned in fee (Opposition Br. 14), the Tribes insist and rely upon an unjust and unjustified gap in the law to deprive Petitioners any means of obtaining relief from the Tribes' unauthorized exercise of authority over them and their land owned in fee. When acting outside their sovereign authority, the Tribes should not be entitled to prevail without consideration of the merits by unsheathing sovereign immunity as a "sword" – leaving Petitioners, and others similarly situated, without any "alternative way" to obtain relief from the unauthorized regulation by Tribes.

The sovereignty possessed by Indian tribes is of a "unique and limited character," and "centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008) (cited sources omitted). "If a sovereign's powers are limited, then so too must the immunity of that sovereign's officials be limited." *State of Wisconsin v. Baker*, 698 F.2d 1323, 1333 (7th Cir.), *cert. denied*, 463 U.S. 1207 (1983). If a Tribe's common law sovereignty is a

"necessary corollary" to its sovereignty and self-governance, *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986), must not the courts first address whether a Tribe's challenged actions are those of a sovereign?

This Court has held that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation," *Montana v. U. S.*, 450 U.S. 544, 564, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); *see also Plains Commerce Bank*, 554 U.S. at 328, and that because tribal "power over nonmembers on non-Indian fee land is sharply circumscribed," efforts by a Tribe to regulate non-members, especially on fee land owned by non-Indians, are presumptively invalid. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650, 659, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001). These principles are inconsistent with those cases holding that tribal immunity is "settled law" absent Congressional authorization or waiver. *Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 798, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) (citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) (Opposition Br. 9); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). (Opposition Br. 16) This Court should grant the writ and reconcile this Court's decisions addressing the dual aspects of tribal sovereignty.

A. The Relief Petitioners Seek Is Not Solely Prospective, And They Have No Alternative Way To Remove The Cloud On Title Created By The Tribes' Unauthorized Regulation Of Their Fee Property.

Petitioners seek to remove a cloud on title that renders their property unmarketable and has "a tendency . . . to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership." *Robinson v. Kahn,* 89 Wash. App. 418, 948 P.2d 1347, 1349 (1998). Claiming that the relief Petitioners seek is "an order prospectively preventing Tulalip from enforcing its laws against them" (Opposition Br. 16), the Tribes argue that Petitioners have an "obvious alternative remedy: a declaration or injunction against tribal officials under *Ex parte Young,* 209 U.S. 123 (1908)." (Opposition Br. 15) The nature of the cloud on title created by the Tribes' assertion of regulatory and taxing authority reveals the limitations of the supposed "solution" of a hypothetical *Young* suit against tribal officers. Should Petitioners sue the tribal officials responsible for promulgating the 1983 excise tax? Or the 1999 land use regulations? Instead, as it is the Tribes that continue to assert sovereign taxing and regulatory authority over Petitioners and their land owned in fee, it is the Tribes that are the proper defendants in this declaratory judgment action, necessary to remove a cloud on title.

Washington State provides a statutory cause of action to a party with an existing interest in real property, to obtain a declaratory judgment "quieting or removing a cloud from title." Wash. Rev. Code

§ 7.28.010. Regardless of any "immediate hardship" (Appendix A-7), "any tendency to impair the fee owner's ability to exercise the rights of ownership" is sufficiently a "cloud upon title" to entitle a plaintiff to redress. *See Robinson v. Kahn,* 948 P.2d at 1349 (recorded agreement was a cloud on title because it had the "potential to stand in the way of plaintiffs' exercise of their ownership" and was an "unnecessary complication that will have to be explained to a buyer or title insurer."). This Court has likewise recognized a cause of action to quiet title based on a challenge to the validity "of the instrument or record sought to be eliminated as a cloud upon the title." *See Hopkins v. Walker*, 244 U.S. 486, 490-91, 37 S. Ct. 711, 61 L. Ed. 1270 (1917) (addressing action to remove cloud from the recording of "certificates of location" "when they are apparently valid, but, under the mining laws, are actually invalid, as is asserted here, they becloud the title injuriously").

Whether the Tribes (or tribal officials) will "enforce the regulatory ordinance or real estate tax against" Petitioners (Opposition Br. 6) therefore is not the sole issue. And Petitioners do not "merely seek reassurance that the tribe will not seek to impose a tax in the event of a hypothetical sale." (Opposition Br. 13) Regardless whether the Tribes (or tribal officials) enforce the tribal excise tax, Petitioners are harmed *now* by the cloud on title created by the Tribes' ordinances. While prospective injunctive relief might relieve Petitioners from the imposition of excise tax in the future (if they could sell their property), it cannot lift the cloud on title

already created by the Tribes' recording the regulatory ordinance.

Further, as the Tribes recognize (Opposition Br. 11, 13, 17), a *Young* action has its limits – most significantly here, the Tribes essentially admit they would assert sovereign immunity on behalf of tribal officials as well. Even had Petitioners named tribal officials as defendants, rather than the Tribes itself, the Tribes also claim that relief would not be available to the Petitioners because "no tribal official has ever threatened enforcement of any tribal law against Petitioners, so there is no illegal conduct to enjoin." (Opposition Br. 17) However, here the "illegal conduct" occurred when the taxation and regulatory ordinances were promulgated and created a cloud on Petitioners' title. Enjoining the Tribes (or tribal officials) at this stage would provide no relief to Petitioners. *Edelman v. Jordan*, 415 U.S. 651, 677, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (relief under *Young* "is necessarily limited to prospective injunctive relief").

Because Petitioners seek relief from past actions that created a cloud on their fee-simple title, the cases relied on by the Tribes to support the assertion that the Petitioners were required to sue tribal officials under the *Young* fiction are inapposite, because in each of those cases the plaintiffs sought only prospective relief. In *Atkinson,* 532 U.S. 645, as in the other cases cited by the Tribes, the plaintiff alleged an "ongoing violation" and sought "relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002) (citing *Idaho v. Coeur d'Alene Tribe of Idaho,*

521 U.S. 261, 296, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997)); *see also Evans v. Shoshone-Bannock Land Use Policy Comm'n,* 736 F. 3d 1298, 1307 (9th Cir. 2013) (non-Indian sued members of tribal land use commission, seeking determination that Tribe had no regulatory authority over construction of his home on fee land within reservation and preliminary injunction to enjoin tribal court proceedings); *Big Horn Cty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 947 (9th Cir. 2000) (plaintiffs sued tribal officials contending that Tribe exceeded its regulatory jurisdiction by placing an ad valorem tax on the value of plaintiffs' utility property) (all cited Opposition Br. 15).

Young was decided over one hundred years ago to address Eleventh Amendment bars to suits against *states.* It was first relied upon by analogy in the context of a suit against a Tribe in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978), which considered an action by a female tribal member against the Tribe and its Governor alleging violations of the Indian Civil Rights Act. This Court held that immunity barred suit against the Tribe, but sustained jurisdiction over the Governor. This Court also addressed *Young* in *dicta* in *Bay Mills,* noting that the State was not without a remedy because it could deny a license to the Tribe to operate an off-reservation casino, and could sue tribal officials if the Tribe persisted in running the casino. 572 U.S. at 795. But this Court has never affirmatively decided that the *only* means for non-Indians to obtain relief from a Tribe's unauthorized exercise of regulatory authority is by suing tribal officials, and not the Tribe itself.

Nor should it. The immunity granted to Tribes is not under the Constitution, but under the common law. Recognizing the limitations of the *Young* fiction, the Fifth Circuit correctly allowed suit against a Tribe directly in *Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 261 F.3d 567, 572 (5th Cir. 2001) *cert. denied,* 535 U.S. 971 (2002), The Tribes claim that *Comstock* is no longer good law after this Court's decision in *Bay Mills* (Opposition Br. 19), but *Bay Mills* does not address, much less abrogate, *Comstock*. And in *Bay Mills* the State was not completely without recourse. It had a "panoply of tools" to enforce State law on State lands: the State could deny a license to the Tribe for an off-reservation casino, and if the Tribe proceeded without a license, the State "could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license." 572 U.S. at 795-96. Here, however, Petitioners have no other recourse than suit against the Tribes, as that is the only means for Petitioners to obtain a determination that the Tribes lack regulatory and taxing authority over their fee land and to quiet title to their property.

The Tribes also assert sovereign immunity protects them from a resolution of limits on their sovereign authority because Petitioners "challenge laws that Tulalip enacted in its governmental legislative capacity that apply to *reservation* land." (Opposition Br. 11, emphasis in original) That argument begs the question; the Tribes cannot rely upon their "legislative capacity" to avoid scrutiny whether they indeed could exercise regulatory and

taxing authority over land owned in fee by non-Indians. As this Court has recognized repeatedly, tribal power over nonmembers on non-Indian fee land, even when located within the bounds of a reservation, is "sharply circumscribed," *Atkinson,* 532 U.S. at 650, and it is the Tribes' burden of proving an exception under *Montana* to allow it to exercise authority over non-Indian fee lands. *Plains Commerce Bank,* 554 U.S. at 330; *see also Atkinson,* 532 U.S. at 654. Yet by claiming sovereign immunity, the Tribes evade a determination of the sovereign authority for their actions (and the presumption that those actions were not valid), and Petitioners are left without recourse for the cloud on their title.

Finally, the Tribes rely on this Court's decision in *Upper Skagit Indian Tribe v. Lundgren,* __ U.S. __, 138 S. Ct. 1649, 200 L. Ed. 2d 931 (2018) to purportedly "further confirm Tulalip's immunity." (Opposition Br. 11) But in *Upper Skagit,* this Court remanded without deciding whether a Tribe can assert sovereign immunity if the "suit relates to immovable property located in the State of Washington purchased by *the Tribe* in the same manner as a private individual." 138 S. Ct. at 1650 (emphasis added). Far from "mak[ing] clear that Tulalip is immune from this suit" (Opposition Br. 14), *Upper Skagit* reflects an acknowledgment that a Tribe's sovereign immunity is not absolute, and there may be exceptions to immunity beyond Congressional mandate.

B. This Case Is A Proper Vehicle To Address Whether Sovereign Immunity Precludes A Determination Of The Scope Of Tribal Authority Over Non-Indians.

The Tribes claim that the dispute is "unripe" (rather than not *yet* ripe), because their asserted defenses would prevent it from ever becoming ripe. (Opposition Br. 3, 21) To avoid the question presented squarely by this case, the Tribes throw up additional procedural roadblocks in claiming that this case is a "poor vehicle" to consider the scope of sovereign immunity to resolve the Tribes' sovereign authority. (Opposition Br. 23) But Petitioners as non-Indians were not required to "exhaust" (non-existent) tribal remedies before the federal courts could review the Tribes' jurisdiction over Petitioners and their land. "[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 330, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008) (cited source omitted). When "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule," non-Indians are not required to exhaust their jurisdictional claims in tribal court. *Strate v. A-1 Contractors*, 520 U.S. 438, 459, fn. 14, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). This argument is no more than a baseless reboot of the Tribes' claim that they were acting in their "governmental legislative capacity" in purporting to exercise taxing and regulatory authority. *See* Reply 8, *supra*.

Res judicata also does not bar the Petitioners' suit. (Opposition Br. 22-23) The State court's dismissal of Petitioners' quiet title action for lack of

jurisdiction had no preclusive effect on Petitioners' subsequent federal action for declaratory relief challenging the Tribes' authority over them and their real property held in fee. Federal courts "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). Under Washington State law, "the dismissal of a suit for lack of jurisdiction is not res judicata." *Peacock v. Piper*, 81 Wash.2d 731, 504 P.2d 1124, 1126 (1973); *Stevedoring Services. of Am., Inc. v. Eggert,* 129 Wash.2d 17, 914 P.2d 737, 749 (1996).

The State court's dismissal was based on a lack of State court jurisdiction, because "the relief sought necessarily implicates the sovereign interests of the Tribes," and the "applicability of Tulalip Tribal law to properties located within the Tulalip Indian Reservation are subject to tribal court jurisdiction." (Mot. to Dismiss, Ex. B, ¶¶ 2, 4, D.Ct. EC7 No. 6-12) Consistent with the State court's decision, Petitioners agree that whether an Indian tribe has the power to exercise sovereign taxing and regulatory authority over non-Indians and their land is a question of federal law under 28 U.S.C. § 1331, and is thus properly heard in federal court. Therefore, the State court's dismissal due to a lack of jurisdiction cannot have any preclusive effect in this action now brought in federal court. *See Okoro v. Bohman,* 164 F.3d 1059, 1063 (7th Cir. 1999) ("But if he refiled his suit in state court, the defendant could not set up the dismissal by the federal court as res judicata, the lack of *federal* jurisdiction being

irrelevant to whether a suit can be maintained in a state court.") (emphasis in original). To the contrary, while Petitioners' relief from a cloud on title arises from State law, Wash. Rev. Code § 7.28.010, the action arises out of a dispute concerning the Tribes' treaty rights, and this action is properly brought in federal court under 28 U.S.C. § 349. *See Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 315, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005) ("quiet title actions hav[e] been the subject of some of the earliest exercises of federal-question jurisdiction over state-law claims.").

CONCLUSION

As Chief Justice Roberts recognized in his concurrence in *Upper Skagit*, "[t]here should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe. The 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." 138 S. Ct. at 1655. As this Court recognized in *Bay Mills,* where Petitioners, like those here, have no "alternative way to obtain relief" from the Tribes' unauthorized regulation of their fee property, "special justification," 572 U.S. at 799, n. 8, warrants resolution of this dispute on the merits. This dispute is not "mundane," as it concerns the Tribes' claimed right to tax and regulate land owned in fee by non-Indians, and this case is a proper "vehicle" for this Court to address the issues left unanswered in in *Bay Mills* and *Upper Skagit*.

DATED this 23rd day of May, 2019.

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