No. 21-477

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the sovereign immunity of a federally recognized Indian tribe bars suit against that tribe by private individuals seeking a judicial declaration of an alleged public easement for recreational use of tribally owned fee property in the absence of any alleged injury or claim of ownership interest in the subject property.

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INTRODUCTION

This case stems from Petitioners' attempt to seek a judicial declaration of an alleged public easement for recreational use of coastal property owned by Respondent, Cher-Ae Heights Indian Community of the Trinidad Rancheria (Tribe), a federally recognized Indian tribe. Petitioners allege that they have used the Tribe's coastal property to access the beach for recreation, but they "do not allege that the Tribe has interfered with their coastal access or that it plans to do so." Pet. App. 6a. Petitioners' Complaint is instead based on vaguely alleged "information and belief" that an unnamed prior owner, between 1967 and 1972, either expressly or impliedly offered to make a common law dedication of an undefined portion of the subject property for public recreation. *See* Pet. App. 6a, 59a–60a. Their Complaint is rooted in California's expansive application of the doctrine of implied-in-law public easements to coastal lands, which has been criticized as amounting to an unconstitutional taking of property rights without compensation.[1] "Consistent with decades of Supreme Court precedent," the Court of Appeal declined Petitioners' invitation to carve out an exception to the Tribe's sovereign immunity "for immovable property." Pet. App. 2a. Instead, the Court of Appeal adhered to fundamental separation-of-powers principles and this Court's long-established "standard practice of deferring to Congress to determine limits on tribal immunity." Pet. App. 8a.

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[1] *See* note 5, *infra*, discussing this criticism in the amicus brief filed by the Pacific Legal Foundation and other parties in the California Supreme Court's consideration of *Scher v. Burke*, 395 P.3d 680 (Cal. 2017).

Review of the Court of Appeal's decision by this Court is not warranted. First, although this case involves no split of federal or state authorities, Petitioners seek review based on this Court's recent decision in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), raising questions concerning the applicability of the "immovable property exception" to tribal immunity, which lower courts are just now beginning to review. The Court should follow its ordinary course, deny the petition, and allow lower courts to review the questions left open in *Upper Skagit* before considering the issue.

Moreover, Petitioners' suit does not present the question at issue in *Upper Skagit*, which arose out of a boundary dispute between a tribe and an adjacent landowner. *Id.* at 1652. By contrast, in this case, Petitioners "do not claim an ownership interest in the property," and do not allege that the Tribe has interfered with their use or the public's use of the Tribe's property for beach access. Rather, Petitioners "attempt[] to establish a public easement for coastal access based on their concern that, sometime after the federal government takes the property into trust, the Tribe might interfere with access," Pet. App. 17a—a concern that the State of California does not share.

In addition, Article III stands as a bar to the Court's review because Petitioners, who allege no injury, only allege hypothetical concerns, premised on a series of contingent events that might occur at some unspecified future time. Petitioners ask this Court to carve out a broad exception to tribal sovereign immunity that would allow any private person, without asserting a personal property interest in the subject property or any specific injury to themselves or the public, to hale an Indian tribe into court based on vague concerns

that the tribe may do something in the future, "even generations from now," *see* Pet. for Review in Cal. Sup. Ct. 24, if the United States were to take title to the property in trust for the tribe's benefit pursuant to the Indian Reorganization Act (IRA), 25 U.S.C. § 5108. This case is precisely the type of case that the doctrine of tribal sovereign immunity is intended to prevent. Notably, following the filing of the petition, the Bureau of Indian Affairs (BIA), pursuant to its authority under the IRA, approved the Tribe's trust acquisition request, and Petitioners have filed an administrative appeal challenging the BIA's decision—substantially changing the posture of this case. The proper venue for consideration of Petitioners' alleged concerns is their pending administrative appeal and not this case.

Although Petitioners point to the concerns expressed by Justices Thomas and Alito in *Upper Skagit* regarding the sovereign authority of "the several States," Pet. 11, those concerns do not apply to the vague concerns asserted in this case. Here, neither the State nor any local government brought any action against the Tribe, and this case involves no dispute over a recorded or other specific property interest of Petitioners. In fact, because this case arises out of the Tribe's request to have the United States take coastal property into trust, it triggered the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 *et seq.*, and the resulting comprehensive review of that proposed action by the California Coastal Commission. The Court of Appeal observed that the Coastal Commission, which is responsible for protecting the State's interest in ensuring the public's access to the shore, concluded that the Tribe's proposed trust acquisition was entirely consistent with the California Coastal Act, Cal. Pub. Res. Code § 3000 *et seq.*, including the public access requirements provided therein. Pet. App. 5a–6a.

Finally, the Court should deny certiorari because the Court of Appeal's decision is correct. This Court has directed that the "baseline position" is that Indian tribes enjoy "immunity from suit" absent a tribal waiver or congressional abrogation. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790–91 (2014). Following this Court's precedents, the Court of Appeal held that "the [T]ribe's sovereign immunity bars the action" as "Congress has not abrogated tribal immunity for a suit to establish a public easement." Pet. App. 2a. Deference to Congress in this case is especially justified "given the importance of land acquisition to federal tribal policy," Pet. App. 2a, and the absence of any state sovereignty concerns. The Court should deny the petition.

STATEMENT OF THE CASE

A. The Tribe's Property and Trust Acquisition Request.

The Tribe acquired the subject property in the year 2000. Pet. App. 59a. The California Coastal Commission Report (Commission Report), of which the Court of Appeal took judicial notice in its decision below, *see* Pet. App. 4a, provides a specific description of the Tribe's uses of the subject parcel (as a commercial pier serving fishing and recreational angling vessels, restaurant, parking lot, and a planned visitor center),[2] which rely upon public patrons and demonstrate the implausibility of the Petitioners' conjecture that the Tribe "might" someday preclude public access across the property. The Commission Report further notes that the Tribe entered into an agreement with the California Coastal Conservancy, which requires that the Tribe maintain public access to the pier, and

[2] Commission Report at 1–2, 10–11.

that the pier is included in the National Tribal Transportation Facility Inventory, which requires the facility to remain open and available for public use. Commission Report at 11; *see also* 23 U.S.C. § 101(a)(31); 25 C.F.R. § 170.114.

As a means of furthering tribal self-determination and economic development, the Tribe petitioned the Secretary of the Interior to acquire the subject property in trust for the benefit of the Tribe pursuant to the IRA, 25 U.S.C. § 5108. *See* Pet. App. 4a, 61a. Because the Tribe's proposed trust acquisition involves coastal property, the CZMA imposes additional requirements. *See* Pet. App. 5a. "After securing commitments from the Tribe to protect coastal access and coordinate with the state on future development projects, the [Coastal] Commission concluded that the Tribe's proposal 'would not interfere with the public's right to access the sea' and would be consistent with public access policies." Pet. App. 5a–6a. On November 1, 2021, following the filing of the petition for certiorari, the BIA issued a decision to take the property involved in this case into trust for the Tribe's benefit, and Petitioners subsequently filed an administrative appeal.[3]

B. The Trial Court's Dismissal and the Court of Appeal's Affirmance.

In 2019, Petitioners sued the Tribe in a California state court seeking a judicial declaration of an alleged public easement over the Tribe's property.[4] Petitioners did not and cannot allege any present injury, but

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[3] *J. Bryce Kenny, HARP, Jason Self, and Thomas W. Lindquist v. Pac. Reg'l Dir., Bureau of Indian Affairs*, Dkt. No. IBIA 22-016 (IBIA, appeal filed Dec. 1, 2021).

[4] Petitioners do not allege that the alleged public use was adverse to the owner's interest.

only broadly claim that if the land is taken into trust by the United States, the Tribe might interfere in some unspecified way with their access to the coast at an undetermined time in the future. *See* Pet. App. 59a. In the trial court, the Tribe entered a special appearance and, while asserting tribal sovereign immunity, also moved to quash service of process and dismiss Petitioners' complaint for lack of subject-matter jurisdiction. Pet. App. 37a. In response, Petitioners asserted 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 granted the Tribe's motion and dismissed the case with prejudice. Pet. App. 29a. The Court of Appeal affirmed. It declined Petitioners' invitation to apply the immovable property exception to limit the Tribe's sovereign immunity, explaining that "[c]onsistent with decades of Supreme Court precedent, we defer to Congress to decide whether to impose such a limit, particularly given the importance of land acquisition to federal tribal policy." Pet. App. 2a.

The Court of Appeal noted that this Court in *Bay Mills* reaffirmed the "settled" rule that a "tribe is immune from suit in the absence of waiver or congressional abrogation of the tribe's immunity." Pet. App. 7a. (citing *Bay Mills.*, 572 U.S. at 788–90). Deferring to the legislative branch, the Court of Appeal found, is "particularly appropriate" in this case as Congress "has been active in the subject matter at issue." Pet. App. 13a.

For decades, the Court of Appeal explained, Congress has "support[ed] tribal land acquisition [as] a key feature of modern federal tribal policy, which

Congress adopted after its prior policy divest[ing] tribes of millions of acres of land." Pet. App. 13a. Following the IRA's enactment, the Court of Appeal noted that Congress "returned to the policy of supporting tribal self-determination and self-governance," in part, by "empower[ing] the federal government to take land into trust for the benefit of a tribe, as the Tribe has requested here." Pet. App. 14a.

Following the Court of Appeal's decision, Petitioners filed a petition for review in the California Supreme Court. The petition was denied on April 28, 2021. Pet. App. 1a.

REASONS FOR DENYING THE PETITION

Further review is not warranted. First, Petitioners' suit involves no split of authorities. Second, this case is distinct from *Upper Skagit* because there is no actual property dispute at issue, there is no present or imminent injury to Petitioners needing a remedy, and their pending administrative appeal is the proper forum for review of their ambiguously stated concerns about trust acquisition. Third, this case is an exceptionally poor vehicle to decide these issues, because the Petitioners lack Article III standing. Finally, the Court of Appeal's decision is fully consistent with this Court's longstanding precedent on tribal sovereign immunity, which defers to Congress on matters of tribal immunity, including any limitation of that immunity.

I. There Is No Split Authority Among the Federal Circuit or State Courts.

No circuit split exists on the question of the applicability of the immovable property exception to tribal sovereign immunity. Petitioners do not even attempt to suggest otherwise.

In *Upper Skagit*, the Court reserved the question of whether the common-law "immovable property exception" limits tribal sovereign immunity. 138 S. Ct. 1649, 1654 (2018). Indeed, the majority opinion contemplated that the Court would follow its ordinary course and allow the immovable property question to continue to percolate in the lower courts before reviewing it. *Id.* If and when lower courts have an opportunity to address the immovable property question, the Court indicated that it would consider addressing it in an appropriate case—but it would not review the question beforehand because it might be more complex than anticipated. *See id.* ("[W]hat if, instead, the question turns out to be more complicated than the dissent promises? In that case the virtues of inviting full adversarial testing will have proved themselves once again. Either way, we remain sanguine about the consequences.").

While this Court in *Upper Skagit* left it to the Washington Supreme Court to address the immovable property exception "in the first instance," *id.*, the parties resolved that case before the state court had the opportunity to answer the question. Aside from the Court of Appeal's decision below, the Second Circuit is the only other court to have reviewed *Upper Skagit* in any substantive way since it was decided. The Second Circuit, however, found that it "need not reckon with" and "need not rule on the existence of such an exception to tribal immunity." *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 978 F.3d 829, 831, 835–36 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2722 (2021); *see also Oneida Indian Nation v. Phillips*, 981 F.3d 157, 169 (2d Cir. 2020) (explaining that "*Upper Skagit* does not suggest, much less compel, a different result here"), *cert. denied*, 141 S. Ct. 2878 (2021). Petitioners cite no decisions contrary to the Court of Appeal's

decision in this case, and the broader question involving the immovable property exception has not to our knowledge been considered by any other state or federal appellate courts.

Prior to *Upper Skagit*, there was no circuit split on the applicability of the immovable property exception to tribal immunity. Rather, the Court in *Upper Skagit* resolved a split on the precise issue that "[l]ower courts disagree about" whether "*County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, [502 U.S. 251 (1992)] . . . means Indian tribes lack sovereign immunity in *in rem* lawsuits." 138 S. Ct. at 1651, 1651 n.*. The Court agreed that "*Yakima* did not address . . . tribal sovereign immunity." *Id.* at 1652 (rejecting the argument that there is any broad *in rem* exception to tribal sovereign immunity that applies to suits seeking to resolve competing claims to land). In *Upper Skagit*, this Court declined to take a "first view" of the applicability of the immovable property exception to tribal immunity as "the courts below and the certiorari-stage briefs . . . said precisely nothing on the subject." *Id.* at 1654.

In the short time since *Upper Skagit* was decided, no split among the lower courts has developed on the immovable property question. Addressing the scope of tribal sovereign immunity is a "grave question"—one that "will affect all tribes, not just the one before" the Court. *Upper Skagit*, 138 S. Ct. at 1654. As such, following this Court's usual practice of having issues thoroughly ventilated in the lower courts before granting review is particularly warranted here.

II. This Case Is Distinct from *Upper Skagit* and There Is No Alleged Injury in Need of a Remedy.

In *Upper Skagit*, this Court addressed whether tribal sovereign immunity bars an *in rem* action "to quiet title in a parcel of land [allegedly] owned by a Tribe." 138 S. Ct. at 1652. In that case, adjacent landowners filed a quiet title action in Washington State court, asserting that they—not the Indian tribe involved—had title over certain property. *Id.* In response, the tribe asserted sovereign immunity. *Id.* The plaintiffs and the tribe disputed who had title to the subject parcel of land.

Unlike *Upper Skagit*, this case involves "something of a non-event" as Petitioners "do not claim an ownership interest in the property" owned by the Tribe, "allege no injury," and base their claims on a highly attenuated chain of possibilities of what might occur if the United States takes the subject property into trust. Pet. App. 17a. Nor do they seek a prescriptive right, nor allege adverse possession. Unlike the parties involved in *Upper Skagit*, Petitioners are not seeking to "litigate the threshold question whether they can litigate their indisputable right to their land" or anything remotely comparable.[5] *Upper Skagit*, 138

[5] Petitioners' lawsuit is rooted in the California Supreme Court's expansive application of the doctrine of implied dedication of a public easement over coastal lands, under which it is not necessary to make a separate finding of "adversity" if the public has used the land without objection or interference for more than five years, *see Gion v. City of Santa Cruz*, 465 P.2d 50, 56 (Cal. 1970), or to make "a personal claim of right," *see Scher v. Burke*, 395 P.3d 680, 683 (Cal. 2017). In *Scher v. Burke*, the Pacific Legal Foundation and other parties filed an amicus brief criticizing California's application of the doctrine of implied-in-law public dedication as being unconstitutional because the

S. Ct. at 1663 (Thomas, J., dissenting). Rather, Petitioners are merely private individuals that represent no state or local government or agency purporting to represent the public. The public's interest, however, was vigorously protected by the State, *see* Pet. App. 5a–6a, as Congress intended in the CZMA.

This case also does not involve the Chief Justice's concern expressed in *Upper Skagit* that there should be a way of resolving a property title dispute short of the landowners "crossing onto the disputed land and firing up their chainsaws." *Id.* at 1655–56 (Roberts, C.J., concurring). Unlike the facts underlying the Chief Justice's concerns involving the landowners' need for a remedy in a property boundary dispute, Petitioners have not alleged any dispute about the public's use of the subject property to access the coast, nor have they alleged that the Tribe has denied, or has plans to deny, them or the public access to the coast.[6] Pet. App. 17a. Because the public continues to access the coast over the Tribe's property, there is no demonstrated need for a remedy. In particular, after

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doctrine allows private property to be taken for public use without compensation and without any showing of the intent of the owner or adversity. *See* Br. for Pac. Legal Found. et al. as Amici Curiae Supp. Defs. & Affirmance at 6–15, *Scher v. Burke*, 395 P.3d 680 (Cal. 2017) (No. S230104). Petitioners here do not allege that the owner intended to dedicate the land to public recreational use or that the alleged public use was adverse to the owner's interest.

[6] On the contrary, it is clear from the facts regarding the Tribe's commercial uses of the subject parcel (e.g., commercial pier serving fishing and recreational angling vessels, restaurant, parking lot, and a planned visitor center), all of which encourage public patronage, that it would be undeniably and directly against the Tribe's own economic interests for it to deny public access as Petitioners assert.

examining the proposed trust acquisition, the California Coastal Commission "concluded that the Tribe's proposal 'would not interfere with the public's right to access the sea' and would be consistent with public access policies." Pet. App. 5a–6a.

Additionally, Petitioners' claim that they lack alternative remedies, Pet. 16–17, is wrong. Petitioners' only alleged injury is their concern that the Tribe may do something objectionable in the future if the subject property is taken into trust by the United States. There are alternatives for Petitioners to seek remedies to address such a concern. As noted above, the proper venue for resolution of Petitioners' concerns is their administrative appeal of the BIA's trust acquisition decision currently pending before the Interior Board of Indian Appeals.[7] Following the issuance of a final decision by the agency, Petitioners would also have the opportunity to raise their concerns in a challenge under the Administrative Procedures Act (5 U.S.C. § 551 *et seq.*) to a final agency action.

Petitioners do not provide any compelling reason as to why the Court should grant certiorari to adopt a broad exception to tribal sovereign immunity under these circumstances.

III. This Case Is a Poor Vehicle in Which to Consider Expanding the Immovable Property Exception to Tribes.

Petitioners contend that this case presents an "ideal vehicle" to address the immovable property exception. Pet. 4, 9, 18, 20. But as the Court of Appeal explained, "the facts of this case make it a poor vehicle for

[7] As discussed, *infra* Section III, the CZMA provides the State with an alternative remedy.

extending the immovable property rule to tribes." Pet. App. 17a. This is true for several reasons.

First and foremost, Article III imposes a barrier to this Court's review. "To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). "[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is *sufficiently imminent* and substantial." *Id.* at 2210 (emphasis added). This Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1974)). Clearly, any potential injury to Petitioners is not only not "sufficiently imminent and substantial," but also highly implausible, because it is in the Tribe's commercial and economic interests to continue to ensure that public access be provided, as it has been. *See* note 6, *supra*.

In addition, Petitioners have not alleged any "certainly impending" threatened injury that constitutes injury in fact. As the Court of Appeal observed, Petitioners filed their suit merely out of "an abundance of caution," Pet. App. 6a, based on a "speculative" concern and implausible contingencies about what they think might occur if the Tribe's land is taken into trust status by the United States, Pet. App. 17a.[8]

[8] Petitioners falsely claim that they "suffer their own concrete, particularized harms in the absence of a legally enforceable right to access" the Tribe's property, which will benefit the public. Pet.

Petitioners "allege no injury" and their hypothetical concerns are premised on a series of contingent events.[9] Pet. App. 17a. In fact, Petitioners specifically acknowledged in their Petition for Review to the California Supreme Court that their alleged personal harm may never occur or may happen "generations from now."[10] Pet. for Review 24.

Since this case was adjudicated below in state court, Petitioners are required to establish Article III standing requirements at the time they first invoke federal jurisdiction. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 619 (1989). Further, there is settled precedent, in

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20. The standing question does not arise because Petitioners claim to represent the public, but because they fail to allege *any* injury (or the immediate threat of injury) to themselves or the public.

[9] Petitioners' claim is based on a highly attenuated chain of possibilities, which includes, among other things, title to the subject property being taken by the United States in trust, the Tribe removing the pier from the National Tribal Transportation Inventory, the BIA failing to fulfill its assurances to the California Coastal Commission, the Coastal Commission failing to reopen its concurrence determination if the Tribe should take some undefined adverse action, and the Tribe acting contrary to its enforceable commitments to the State of California and City of Trinidad and its own economic interest. *See* Commission Report 10–14.

[10] Contrary to Petitioners' and Seneca County's assertions, *see* Pet. 16; Seneca Cnty. Amicus Br. 15–16, this case does not implicate footnote 8 of *Bay Mills*, which reserved the question of whether the Court might find a "'special justification' for abandoning precedent" when "a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative . . . relief for off-reservation commercial conduct." 572 U.S. at 799 n.8 (citation omitted). Unlike a tort victim, who has suffered an alleged personal injury, Petitioners only seek to protect the public from what is no more than a highly speculative future scenario.

these kinds of circumstances, that this Court may only exercise "jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met."[11] *Id.* at 623–24. Petitioners claim that they "have a justiciable interest in the question whether federal law bars them from asserting property rights that they could otherwise litigate in state court," Pet. 19–20, but that does not constitute a judicially cognizable case or controversy that can be brought in federal court. Petitioners have no Article III standing to pursue such a claim in this Court based entirely on hypothetical and highly contingent concerns where there is no alleged imminent or existing injury,[12] and thus neither the trial court's nor the Court of Appeal's decisions below confers standing in this Court under Article III.[13]

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[11] Noting that it was "not confronted . . . [with] a decision advising what the law would be on an uncertain or hypothetical state of facts," the Court in *ASARCO Inc.* found that the state court's declaratory judgment "pose[d] a serious and immediate threat to the continuing validity of [the petitioners' property rights] by virtue of [the state court's] holding that they were granted under improper procedures and an invalid law," thereby "altering" the petitioners' "tangible legal rights." *Id.* at 618–19.

[12] *See* note 9, *supra*.

[13] Petitioners' claim is wholly unlike the situation in *Virginia v. Hicks*, 539 U.S. 113 (2003), in which the state itself suffered "an actual injury in fact" from a decision by the Supreme Court of Virginia because it was prevented from prosecuting a criminal trespass action, an injury that this Court found was "sufficiently 'distinct and palpable' to confer standing under Article III." *Id.* at 120–21 (citation omitted). Article III standing in a federal case can result from a state court decision, but only if that decision causes an injury that is "distinct and palpable."

Because the Petitioners' alleged concerns have not occurred and may never occur, any decision by the Court in this case would only be advisory. Federal courts, however, "do not adjudicate hypothetical or abstract disputes," or "issue advisory opinions." *TransUnion*, 141 S. Ct. at 2203; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). The Court's own decisions establish that, if it wants to decide the applicability of the immovable property exception to tribal immunity, it should await a case in which there is a concrete and particularized injury involved.

Second, the present case does not involve the exercise of sovereign authority by a state or local government nor any allegation that the Tribe has acted contrary to state or local law or has denied, or plans to deny, the public the right to access the coast over the Tribe's property. Thus, this case does not raise the state sovereignty concerns expressed in Justice Thomas's dissenting opinion in *Upper Skagit* or the amicus briefs filed by the State of Texas and the County of Seneca. Moreover, because the only alleged concerns are dependent on the possibility that the United States may take the subject property into trust, the CZMA provides California with mechanisms to protect its interest in the subject property. Prior to Petitioners' lawsuit, the California Coastal Commission reviewed the proposed trust acquisition pursuant to the CZMA and concluded that it was consistent with the State's public access policies.[14] Thus, the

[14] In response to the BIA's federal consistency determination, the California Coastal Commission, after securing commitments from the Tribe to protect coastal access and coordinate with the State on future development projects, concurred and concluded that the Tribe's proposal "would not interfere with the public's

appropriate state agency considered Petitioners' concerns and concluded that public beach access was adequately protected under existing arrangements.[15] Further, as the Court of Appeal below observed, "[i]n the future, if the Tribe violates the state's coastal access policies, the Coastal Commission may request that the [BIA] take appropriate remedial action."[16] Pet. App. 6a.

Third, abrogating the Tribe's immunity to allow Petitioners' private suit to proceed would be at odds with a core purpose underlying the shield of sovereign immunity in cases involving private parties.[17] The

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right to access the sea" and would be consistent with the State's public access policies. Pet. App. 5a–6a.

[15] Further, under the CZMA, the state agency concluded that the trust acquisition was consistent with State coastal access policies, and noted its rights under the CZMA regulations (15 C.F.R. §§ 930.45(b)(1), 930.46) to bring the matter back to the Commission should the Tribe violate the State's coastal access policies in the future. Commission Report 13–14; *see also* Pet. App. 5a–6a. In this case, the State was able to ensure that the interests of its citizens were not harmed by the Tribe's planned actions with respect to the subject property.

[16] In particular, the Court of Appeal cited 15 C.F.R § 930.45(b)(1), which provides that a state agency may request that a federal agency take appropriate remedial action where the state agency "later maintains" that the approved activity "is being conducted or is having an effect on any coastal use or resource substantially different than originally described" and "is no longer consistent" with the state's management program.

[17] While the amicus briefs filed by Seneca County and the State of Texas argue that local governments need the ability to enforce local land use regulations and taxes against tribes, the present case does not involve any such action by a local government or state agency nor any allegation that the Tribe has failed to comply with any state or local law. On the contrary, the Coastal Commission secured the Tribe's commitment to coordinate future

"preeminent purpose of . . . sovereign immunity is to accord . . . the dignity that is consistent with the[] status as sovereign entities," recognizing that it is "an impermissible affront to [this] dignity to be required to answer the complaints of private parties in . . . courts." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (explaining that sovereign immunity "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties'") (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

This Court recently held that states retain their sovereign immunity from private suits brought in the courts of other states, overruling its earlier decision in *Nevada v. Hall*, 440 U.S. 410 (1979). *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019). In explaining the grounds for overruling *Hall*, Justice Thomas described the understanding of state sovereign immunity at the time of the founding and observed that early debaters "found it 'humiliating and degrading' that a State might have to answer 'the suit of an individual.'" *Id.* at 1494 (quoting Brutus No. 13 (Feb. 21, 1788), *in* 4 The Founder's Constitution 238 (P. Kurland & R. Lerner eds., 1987)). This same basic principle applies in this case and provides a compelling reason to foreclose Petitioners' attempt in their private lawsuit to abrogate the Tribe's sovereign immunity.

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actions with the Commission. *See* Pet. App. 5a–6a; *see also* Commission Report at 13–14.

IV. The Court of Appeal's Decision Below Is Correct and Consistent with this Court's Precedent.

Finally, the Court should deny certiorari because the Court of Appeal's decision is a straightforward application of this Court's well-settled precedents on tribal sovereign immunity and does not conflict with any binding precedent from any court.

Indian tribes are "separate sovereigns pre-existing the Constitution." *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). One of the "core aspects of sovereignty that tribes possess" is their sovereign immunity, which this Court has regarded as "a necessary corollary to Indian sovereignty and self-governance." *Id.* (citation omitted). This immunity accords with the recognition that it "is 'inherent in the nature of sovereignty not to be amenable' to suit without consent." *Id.* at 788–89 (quoting The Federalist No. 81, at 511 (Alexander Hamilton) (B. Wright ed., 1961)).

In *Bay Mills*, this Court explained that "[t]he baseline position . . . is tribal immunity." 572 U.S. at 790. There are only two recognized exceptions to tribal sovereign immunity: (1) congressional authorization of suit, or (2) the tribe's own waiver of its immunity. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). This Court has thus "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred," applying immunity "both on and off [a] reservation," and declining to distinguish "between governmental and commercial activities of a tribe." *Id*. at 754–55 (citations omitted). Additionally, "Congress has consistently reiterated its approval of the immunity doctrine," which accords with its "desire to promote

the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'" *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (citations omitted). "[A] fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Bay Mills*, 572 U.S. at 803 (citing *Kiowa*, 523 U.S. at 758–60).

As the Court of Appeal below correctly stated, deference to Congress "is particularly appropriate when Congress has been active in the subject matter at issue." Pet. App. 13a. Because the Petitioners' sole concern arises only if the United States accepts title to the Tribe's coastal property, this case directly involves two areas in which Congress has actively legislated: (1) the IRA, which authorizes the Secretary of the Interior to take lands in trust for Indian tribes to promote tribal self-determination and self-governance; and (2) the CZMA, in which Congress has balanced the interests of the federal government and various states regarding the coastal areas of the United States.

Although Petitioners assert that tribes should not have broader immunity from suit than other sovereigns enjoy in real property disputes, Pet. 15, this case does not present facts in which such a fundamental issue should even be considered. Neither the federal law governing the immunity of foreign nations nor this Court's decisions regarding the sovereign immunity of states provides any basis for subjecting a tribe to a private lawsuit, such as the one filed in this case.[18]

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[18] Petitioners rely on the discussion of the Vienna Convention in *Permanent Mission of India* to support their assertion that the

The sovereign immunity of foreign nations is not analogous to tribal sovereign immunity;[19] however, it is governed by a similar deference to Congress in shaping the contours of that immunity. And, therefore, it is significant that Congress has exercised its authority regarding the immunity of foreign nations, including the immovable property exception, by enacting specific legislation—the Foreign Sovereign Immunity Act (FSIA), 28 U.S.C. § 1602 *et seq.* *See Permanent Mission of India*, 551 U.S. at 197 (2007) (explaining that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court" (citation omitted)).[20]

The FSIA sets forth "a baseline rule" in which "foreign states and their instrumentalities [are] immune from the jurisdiction of federal and state courts." *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020) (citing 28 U.S.C. §§ 1603(a), 1604). Rather than

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United States is subject to the immovable property exception, Pet. 15; however, in that case the Court found that "the Vienna Convention does not unambiguously support either party on the jurisdictional question," *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 202 (2007).

[19] *See Cherokee Nation v. Georgia*, 30 U.S. 1, 16, 18 (1831) (stating that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else" and noting that Article III, section 8 of the Constitution refers separately to "foreign nations" and "the Indian tribes").

[20] As this Court has made clear, "foreign sovereign immunity is a matter of grace and comity on the part of the United States . . . ." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (discussing *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812)). Prior to the FSIA, "this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Id*.

incorporating the immovable property exception as an aspect of the baseline of foreign sovereign immunity, *see* 28 U.S.C. § 1604, the FSIA includes a separate exception for suits "in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). Congress has not enacted a similar statute applying the immovable property exception to tribal sovereign immunity, but could certainly do so should it see the need.

With regard to the immunity of states, this Court noted in *Upper Skagit*, "[t]he immunity possessed by Indian tribes is not coextensive with that of the States." 138 S. Ct. at 1654 (quoting *Kiowa Tribe*, 523 U.S. at 756). Furthermore, the present case does not raise issues addressed by the Court in *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), which held that Georgia lacked immunity from a condemnation action brought by the City of Chattanooga regarding real property Georgia owned in Tennessee, because this Court reasoned that the eminent domain power is "essential to the life of the state." *Id.* at 480. This Court expressly limited its holding to that context. *Id*. at 482 ("[W]e need not decide the broad question whether Georgia has consented generally to be sued in the courts of Tennessee in respect of all matters arising out of the ownership and operation of its railroad property in that state."). In this case, however, there is no eminent domain action nor any other state sovereign right at stake because only private individuals have sued.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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