No.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does sovereign immunity bar the federal courts' consideration of a declaratory judgment action to determine whether Respondent Tribes can exercise regulatory/taxing authority over real property owned in fee by Petitioners non-Indians, pursuant to allotments that were authorized by the Tribes' treaty with the United States?

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The October 25, 2018 unpublished Memorandum of the Ninth Circuit Court of Appeals is attached as Appendix A-1–A-3. The district court's November 2, 2017 Order granting the Tribes' motion to dismiss is attached as Appendix A-4–A-9.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND TREATIES INVOLVED

The relevant provisions of 25 U.S.C. § 349, 28 U.S.C. § 1331, and 28 U.S.C. § 2201, and of the 1854 Treaty with the Omaha and 1855 Treaty of Point Elliott, as follows:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside;

25 U.S.C. § 349.

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331.

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201.

> The President may . . . cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

1855 Treaty of Point Elliott, Article 7.

> The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, . . . to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home . . . And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for

> such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions.

1854 Treaty with the Omaha, Article 6.

INTRODUCTION

The Petitioners are non-Indian fee owners of residential properties within the boundaries of the reservation of the Respondent Tulalip Tribes of Washington (hereafter "Tribes"). After the properties now owned by Petitioners were allotted to tribal members and patented in fee, they were platted and sold to non-Indian owners in the second quarter of the last century. They have since remained in private non-Indian ownership, subject to taxation and land use regulation by the State of Washington and Snohomish County. 25 U.S.C. § 349.

The Tribes have recorded in the Snohomish County Auditors' Office, pursuant to Wash. Rev. Code ch. 65.04, Memoranda of Ordinances purporting to exercise land use regulatory authority over and to impose an excise tax on transfer of Petitioners' properties. Both Ordinances create a cloud on title on properties held in fee by Petitioners. Wash. Rev. Code ch. 65.08; Wash. Rev. Code § 7.28.010; *Robinson v. Kahn,* 89 Wash. App. 418, 948 P.2d 1347, 1349 (1998). They are listed as Special Exceptions to Coverage in preliminary commitments

for title insurance on Petitioners' properties, and Petitioners allege they render title to their properties unmarketable. (Order, A-5)

The State court dismissed Petitioners' action, brought pursuant to Wash. Rev. Code § 7.28.010 to remove these clouds on title, ruling the Tribes could not be sued in State court. Petitioners then brought this action in U.S. District Court for the Western District of Washington under 28 U.S.C. § 2201, for a declaration that the Tribes lacked authority to exercise regulatory or taxing authority over Petitioners or their properties held in fee. The District Court dismissed this case under Fed. R. Civ. P. 12(b)(6) on the ground that the action was not "ripe" because there was no pending or imminent tribal regulatory or taxation actions. (Order, A-7–A-9)[1] The Petitioners seek review of the Ninth Circuit's

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[1] The District Court concluded the action was not "ripe" based on its belief that there was no "immediate hardship" to Petitioners, and any "injury" was contingent on "a real estate transaction" and "contract that would require marketable title." (Order, A-8) Washington State, however, provides a statutory cause of action for a party with an existing interest in real property to obtain a judgment "quieting or removing a cloud from title." Wash. Rev. Code § 7.28.010. Regardless of any "immediate hardship," "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,* 89 Wash. App. 418, 948 P.2d 1347, 1349 (1998) (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."). The Ninth Circuit did not rely on the District Court's reasoning in affirming its Order dismissing this action.

Memorandum affirming that decision on the different ground that the Tribes could not be sued under the doctrine of sovereign immunity. (Memorandum, A-3)

JURISDICTIONAL STATEMENT

This cause of action relating to the scope of tribal jurisdiction raises a federal question under 28 U.S.C. § 1331. *National Farmers Union Ins. Companies v. Crow Tribe of Indians,* 471 U.S. 845, 852, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).

STATEMENT OF THE CASE

The Petitioners' properties are in "Snoqualmie Jim's Plat," originally "Tulalip Allote 56" to "Snoqualmie Jim and Jennie Snoqualmie, husband and wife." This allotment was made pursuant to the 1855 Treaty of Point Elliott, which incorporated Article Six of the 1854 Treaty with the Omaha, authorizing the President to allot and issue a patent to individual tribal members of land within the Tulalip Reservation, "until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions."

Washington became a State in 1889; Article XXVI of its Constitution provides that "Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, . . . *Provided*, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who . . . has obtained from the United States or from any person a title thereto by patent or other grant." Wash. Const. art. XXVI (emphasis in original).

The 1887 General Allotment Act, 25 U.S.C. § 349, was utilized in facilitating the transfer to fee ownership to Snoqualmie Jim and Jennie Snoqualmie, and thereafter to Petitioners' predecessors in interest. Under the General Allotment Act, an allottee was required to hold land for 25 years before it could be patented in fee. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 331, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008). As the original patent in fee to Snoqualmie Jim and Jennie Snoqualmie was made in May 1924 and recorded in Snohomish County in December 1924, the allotment would have been made some time before 1899. (ER 23) [2]

Following the issuance of the patent in fee the allottee, any subsequent conveyance, and any subsequent owner, was subject to state laws and jurisdiction:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside;

25 U.S.C. § 349. Petitioners' properties at issue therefore passed out of trust into fee ownership, and tribal jurisdiction over the properties ceased, over 90 years ago. One Petitioner's family members have owned land within the boundaries of the reservation

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[2] Additional references are to the Excerpts of Record ("ER") in the Ninth Circuit.

since 1928. (ER 6) The area has become a quiet residential neighborhood, with on the order of 200 single family residences. (ER 7)

In 1999, the Tribes passed and caused to be recorded under Snohomish County recording No. 9904090798, a Memorandum of Ordinance purporting to exercise land use regulatory authority over properties owned in fee by non-Indians located within the Tulalip Reservation. (ER 23) The recorded Memorandum of Ordinance has been identified as a Special Exception to Coverage in each Petitioners' Title Commitment. (*See, e.g.,* ER 42, ER 52)

In 1987, the Tribes passed an Ordinance purporting to impose a 1% excise tax on the sale of property owned by non-Indians located within the Tulalip Reservation. (Order, A-5) The Ordinance provides that the Tribes' tax "may be enforced in the manner prescribed for foreclosure of mortgages as provided under state law." Tulalip Tribal Code § 12.20.170(16). The Tribes purported to create a lien securing payment of the excise tax by recording the Ordinance with the Snohomish County Auditor's Office. This claim also appears as a Special Exception to Coverage in Petitioners' title commitments. (*See* ER 33, ER 53)

Petitioners presented evidence that the Ordinances as recorded pursuant to State law in Snohomish County have caused lenders to refuse to make loans on fee properties owned by non-Indians within the boundary of the Tulalip Reservation (ER 7), and that title companies have refused to close transactions without payment of the excise tax, except under very onerous conditions. (ER 7, ER 8)

REASONS FOR GRANTING THE PETITION

Petitioners filed this action in the Western District Court of Washington challenging the jurisdiction of the Tribes to regulate the use of land owned by Petitioners in fee, and to levy an excise tax on any transfer of Petitioners' land. Whether an Indian tribe retains the power to exercise civil jurisdiction over non-Indians and their land is a question of federal law under 28 U.S.C § 1331, and is the basis for subject matter jurisdiction in the federal courts. *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851-52, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985) (in deciding "questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians," "the governing rule of decision has been provided by federal law"); *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1473 (9th Cir. 1989) (whether a tribal ordinance can be applied to non-Indians tests "the outer boundaries of an Indian tribe's powers over non-Indians, which federal law defines," citing *National Farmers,* 471 U.S. at 851)); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) (the extent to which treaties and federal case law divest an Indian tribe's power to exercise civil jurisdiction over non-Indian is a sufficient basis for 28 U.S.C. §1331 jurisdiction), *cert. denied*, 466 U.S. 926 (1984).

Tribal authority over non-Indian activities, particularly non-Indian activities on land owned in fee simple by non-Indians, is limited. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328, 128 S. Ct. 2709, 2718-9, 171 L. Ed. 2d 457 (2008). Once tribal land is converted into

fee simple, a Tribe loses plenary jurisdiction over it. *Plains Commerce Bank,* 554 U.S. at 328. A Tribe generally "has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." *Plains Commerce Bank,* 554 U.S. at 329 (quoting *Brendale v. Confederated Tribes and Bands of Yakima Nation,* 492 U.S. 408, 430, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) (opinion of White, J.)). Tribal authority to tax non-Indian activity occurring on non-Indian fee land is similarly limited. "An Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 653, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001); *see County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 268-69, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992) (excise tax on the sale of land is personal and not a "taxation of land").

A Tribe's sovereign authority to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance among members, does not extend to a Tribe's "external relations," and regulation of non-Indians on lands no longer owned by the Tribe "bears no clear relationship to tribal self-government or internal relations." *Montana v. U.S.*, 450 U.S. 544, 564, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) (citing *U.S. v. Wheeler,* 435 U.S. 313, 326, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)). Tribal immunity from a suit challenging the Tribes' authority over non-Indians and non-Indian fee land is not necessary to promote "Indian self-government" or "tribal self-sufficiency." *See Oklahoma Tax*

Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 510, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (recognizing that tribal immunity from suits enforcing tax assessments against Tribe promoted "the goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," citing *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987)).

Because "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid,'" *Plains Commerce Bank,* 554 U.S. at 330 (citing *Atkinson,* 532 U.S. at 659), a Tribe should not be immune from suit in an action seeking a declaration that a Tribe's exercise of authority is outside its jurisdiction. Petitioners are not seeking money damages, or an injunction implicating the Tribes or its members. *See Puyallup Tribe, Inc. v. Dep't of Game of State of Washington,* 433 U.S. 165, 172-73, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977) (tribal members were not immune from suit in an action to enjoin violations of state law by individual tribal members for fishing off the reservation, but Tribe was immune from suit seeking an order requiring Tribe to identify members engaged in the steelhead fishery and to report the number of fish they caught each week).

The Ninth Circuit dismissed Petitioners' action solely on the Tribes' claimed sovereign immunity, without first addressing whether the Tribes had sovereign authority over the Petitioners and their land. This case raises the question, not yet directly addressed by this Court, whether a Tribe can avoid

scrutiny of its exercise of regulatory or taxing authority over land owned in fee by non-Indians merely by asserting its sovereign immunity from suit. *See Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 799, n. 8, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) ("We have never . . . specifically addressed . . . whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct."). Absent recourse to the federal courts, Petitioners, and others like them, are subject to presumptively invalid taxes and regulatory ordinances clouding their title under State law that 25 U.S.C. § 349 provides should control:

> There 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.

Upper Skagit Indian Tribe v. Lundgren, __ U.S. __, 138 S. Ct. 1649, 1655, 200 L. Ed. 2d 931 (2018) (Roberts, C.J., concurring). This Court should grant the writ to address whether tribal immunity extends to suits for declaratory relief by non-Indians from presumptively invalid actions by the Tribes to regulate and tax them and their land.

A. Tribes Have No Sovereign Authority Over Non-Indian Fee Land.

Indian tribes exercise sovereign authority over their members and territories as "domestic dependent nations." *Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 788, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014). "[T]hrough their original incorporation into the United States as well as through specific treaties and statutes, Indian tribes have lost many of the attributes of sovereignty." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001) (quoting *Montana v. U.S.*, 450 U.S. 544, 563, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)). "The sovereignty retained by tribes includes 'the power of regulating their internal and social relations.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82, 6 S. Ct. 1109, 30 L. Ed. 228 (1886)). But a Tribe's sovereign authority does not extend to the activities of non-members, and is thus divested to the extent it "involves a tribe's 'external relations.'" *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425-26, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) (quoted case omitted; holding Tribe had no authority to zone fee lands owned by non-members); *Montana v. U.S.*, 450 U.S. 544, 565, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

As a result, a Tribe loses plenary jurisdiction over tribal land once it is converted to fee simple, as was the Petitioners' land. "Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it," including the authority to

regulate the use of non-Indian fee land by tribal ordinance or tribal court action. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328-29, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008) (cited sources omitted). "[W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others." *South Dakota v. Bourland*, 508 U.S. 679, 689, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993) (footnote omitted; holding Tribe no longer had regulatory authority over former trust land taken by the United States under the Flood Control Act).

Tribal "power over nonmembers on non-Indian fee land is sharply circumscribed." *Atkinson,* 532 U.S. at 650. Efforts by a Tribe to regulate non-members, especially on fee land owned by non-Indians, therefore are presumptively invalid. *Atkinson,* 532 U.S. at 659. A Tribe has no authority to prevent the sale of land owned in fee by non-Indians, and generally lacks the authority to regulate its use. *Plains Commerce Bank,* 554 U.S. at 329. "[E]xercise 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*, 450 U.S. at 564.

This Court has established only two exceptions to this principle that tribes lack civil jurisdiction over fee land owned by non-Indians within a reservation. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Montana,* 450 U.S. at 565. Second, a Tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S. at 566. But when regulations asserted on non-Indians bear no clear relationship to tribal self-government or internal relationships, the Tribe has no authority to impose those regulations under its retained sovereign authority. *Montana,* 450 U.S. at 564-65.

Montana delineates the "bounds of the powers tribes retain" over non-Indians. *Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). "Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana,* the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally do not extend to the activities of nonmembers of the tribe." *Strate,* 520 U.S. at 453 (internal quotations omitted).

The Tribes had the burden of proving that one of these exceptions exists. *Plains Commerce Bank,* 554 U.S. at 330; *see also Atkinson,* 532 U.S. at 654 ("it is incumbent upon the Navajo Nation to establish the existence of one of *Montana's* exceptions"). Yet the

Petitioners have been prevented from even obtaining a determination that the Tribes have not proven an exception by the Ninth Circuit's decision dismissing this action solely on the basis that "[t]he tribe's immunity is not defeated by an allegation that it acted beyond its powers." (Memorandum, A-3 (quoting *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991))

B. Tribal Immunity Does Not Prevent The Federal Courts From Determining Tribal Authority.

"Among the core aspects of sovereignty that tribes possess—subject to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) (inner quotations omitted, citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)). 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). "[I]mmunity from suit is an attribute of sovereignty." *Nevada v. Hall,* 440 U.S. 410, 415, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979).

However, "[i]f 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). As this Court has recognized, the doctrine of tribal immunity was "developed almost

by accident," *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998), and it is beyond dispute that tribal sovereign immunity is not absolute. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983). 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).

While tribal immunity thus is "an enduring principle of Indian law," *Bay Mills*, 572 U.S. at 790, this Court "draw[s] the bounds of tribal immunity." *Kiowa,* 523 U.S. at 759. Courts, including the Ninth Circuit, have regularly addressed the reach of an Indian tribe's regulatory power over non-Indians and their land, even when located within a reservation. *See e.g. Plains Commerce Bank,* 554 U.S. at 330 (tribal court had no jurisdiction over non-Indian bank's sale of fee land within the reservation to non-Indians); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001) (Tribe lacked authority to impose tax on non-Indian guests of a hotel owned by non-Indian on non-Indian fee land within the reservation); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 428, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) (Tribe had no authority to impose its zoning and land use laws on fee land owned by non-Indian within reservation); *Montana v. United States,* 450 U.S. 544, 569, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) (Tribe had no power to regulate non-Indian fishing and

hunting on reservation land owned in fee by non-Indians); *Evans v. Shoshone-Bannock Land Use Policy Comm'n,* 736 F. 3d 1298, 1307 (9th Cir. 2013) (Tribe lacked authority to regulate non-Indian's construction of a single-family home on non-Indian land located within the reservation); *Big Horn County Elec. Co-op, Inc. v. Adams,* 219 F.3d 944, 952-53 (9th Cir. 2000) (Tribe lacked authority to impose an ad valorem tax on non-Indian co-op's utility property located within the reservation).

Further, as this Court acknowledged in *Bay Mills,* the question remains open whether sovereign immunity of a Tribe should apply "if no alternative remedies were available." 572 U.S. at 799, n. 8. In this case, there is no alternative remedy available to Petitioners to obtain a determination on the lawfulness of the Tribes' authority to levy an excise tax on any transfer of Petitioners' land, or to regulate its use. By recording its Memorandum of Ordinance and asserting a right to foreclose its ad valorem tax as a mortgage in the Washington state courts, the Tribes invoked Washington law to create a cloud on Petitioners' title to their land held in fee, yet have successfully evaded a determination of the validity of that cloud, which would otherwise be subject to litigation under Washington law.[3] Wash.

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[3] Clearly, and contrary to the Tribes' claims in the lower courts, the State court's dismissal of Petitioners' quiet title action for lack of jurisdiction over the Tribes had no res judicata effect on Petitioners' subsequent federal action for declaratory relief challenging the Tribes' authority over them and their real property held in fee. "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); *see also Southern Pacific Co. v. Bogert,* 250 U.S. 483, 490, 39 S. Ct. 533, 63 L. Ed. 1099 (1919).

Rev. Code § 7.28.010; *see Robinson v. Khan,* 89 Wash. App. 418, 948 P.2d 1347, 1349 (1998) (statute authorizes action to remove as cloud on title any claim "that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership"; quoted case omitted). The Tribes' assertion in the courts below that Petitioners should look to the tribal courts for relief ignores that this Court has never held that a non-Indian is subject to the jurisdiction of a tribal court, *see Nevada v. Hicks*, 533 U.S. 353, 367-68, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), and ignores the presumption that the Tribes lack authority over non-Indians and their fee land. [4]

This Court should grant the writ to hold that when a non-Indian challenges a Tribe's jurisdiction to impose a tax or regulate a non-Indian property owner's use of land owned in fee, the Tribe must first meet its burden, under *Plains Commerce Bank*, to rebut the presumption that the Tribe lacks authority over non-Indians and their fee land.

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[4] "[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). 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).

C. As the Fifth Circuit Has Held, The Federal Courts Can Entertain A Non-Indian's Declaratory Judgment Action To Determine The Scope Of Tribal Authority.

"The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity." *Lewis v. Clarke*, __ U.S. __, 137 S. Ct. 1285, 1292, 197 L. Ed. 2d 631 (2017). This Court held in *Ex parte Young*, 209 U.S. 123, 129, 28 S. Ct. 441, 52 L. Ed. 714 (1908) that the federal courts always have jurisdiction to determine whether a party can assert a claim of immunity from suit, and to seek declaratory relief. "[I]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks 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) (brackets in original; quoted case omitted).

Tribal officials exercising authority that their Tribe itself is powerless to assert are not immune to suit; this Court has relied on *Ex Parte Young* when recognizing that tribal immunity is not absolute. *See Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 796, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) (recognizing that a suit for an injunction could be brought against tribal officials for an off-reservation casino that lacked a license because "tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal

officers, responsible for unlawful conduct"; emphasis in original); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 514, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) (holding that a tribal officer is not necessarily protected by the Tribe's immunity from suit).[5] The Fifth Circuit has extended the reasoning of *Ex Parte Young* to allow suits against a Tribe itself for declaratory or injunctive relief. *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 Ninth Circuit's decision here conflicts with *Comstock Oil,* and with the practical consequence of the Ninth Circuit's own decisions. Even the Ninth Circuit has recognized that tribal sovereign immunity does not prevent actions by non-Indians for prospective or declaratory relief that has the effect of limiting the Tribe's authority. *See Evans v. Shoshone-Bannock Land Use Policy Comm'n,* 736 F.3d 1298, 1307, n.10 (9th Cir. 2013) (tribal officials

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[5] *See also TTEA v. Ysleta del Sur Pueblo,* 181 F.3d 676, 680-81 (5th Cir. 1999); *State of Wisconsin v. Baker,* 698 F.2d 1323, 1333 (7th Cir.), *cert. denied,* 463 U.S. 1207 (1983); *Baker Elec. Co-op., Inc. v. Chaske,* 28 F.3d 1466, 1471 (8th Cir. 1994); *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1155 (10th Cir. 2011); *Tamiami Partners, Ltd. By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Florida,* 63 F.3d 1030, 1050 (11th Cir. 1995); *Vann v. Kempthorne,* 534 F.3d 741, 750 (D.C. Cir. 2008).

were not immune from suit because non-Indian plaintiff alleged they exceeded their authority under federal law in seeking to stop construction on land owned by plaintiff in fee simple within the reservation); *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (tribal officials were not immune from suit seeking declaratory and injunctive relief against their efforts to enforce or collect Tribe's tax against railroad for use of its right-of-way through the reservation); *Big Horn County Elec. Co-op, Inc. v. Adams,* 219 F.3d 944, 954 (9th Cir. 2000) (affirming district court order prohibiting any future assessment of ad valorem tax by Tribe on utility property within reservation; injunction did not violate principles of sovereign immunity because "the officials acted in violation of federal law in enforcing the tax"). The Fifth Circuit has properly recognized in *Comstock Oil* that such declaratory relief also can be sought against the Tribe itself.

In dismissing the Petitioners' action, the Ninth Circuit relied on its decision in *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991), for the proposition that "the tribe's immunity is not defeated by an allegation that it acted beyond its power." (Memorandum, A-3) In *Imperial Granite Co.,* the plaintiff, a non-Indian company that leased fee property surrounded by a reservation, challenged the Tribe's denial of access to a road that was its only means to its leased property. But unlike the Petitioners here, the company did not allege any property right in the road over tribal land that it was denied access. Because the Ninth Circuit determined that the company's complaint "fails to

allege facts giving it any property right in the road at all. It follows that the defendant tribal officials acted within the proper scope of their authority in exercising jurisdiction over the road." *Imperial Granite Co.,* 940 F.2d at 1271-72. Since, unlike in this case, no facts were alleged to support a claim that the Tribe acted beyond its power, the Ninth Circuit's statement that "the tribe's immunity is not defeated by an allegation that it acted beyond its power" is mere dicta. Regardless, the Ninth Circuit's reasoning merely confirms its conflict with the Fifth Circuit's decision in *Comstock Oil*.

Before it reaches the question of whether a Tribe is immune from suit, the district court should conduct an inquiry whether the complaint alleges an ongoing violation of federal law – specifically, a challenge to a Tribe's authority to regulate non-Indians and non-Indian fee land – and the relief sought is prospective. *See Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007); *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1155 (10th Cir. 2011). This Court should grant the writ to resolve the conflict between the Fifth Circuit and the Ninth Circuit and hold that the federal courts can entertain a non-Indian's declaratory judgment action against a Tribe to determine the scope of tribal authority.

CONCLUSION

This Court should accept review, reverse the Ninth Circuit, and remand for resolution of the Tribes' authority to exercise regulatory and taxing authority over non-Indian owners of fee property.

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