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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), every member of this Court agreed that the question presented in this case—whether the immovable-property exception applies to tribal sovereign immunity—merits the Court's review. Unlike in *Upper Skagit*, the immovable-property exception has been the focus of this case from the start and was the sole basis for the decision below. The Court should grant review to resolve the question left open in *Upper Skagit*, which is exceptionally important to private individuals like petitioners, to the States, *see* States Br. 1, and to the tribes themselves.

Respondent asserts a host of meritless vehicle concerns. But there are no obstacles to this Court's review. This case involves a live property dispute; it is a quiet-title action over a public easement running across respondent's land. The immovable-property question was outcome determinative below, and the arguments on each side were fully aired in the separate opinions. And petitioners unquestionably have Article III standing. This Court has held that a petitioner has Article III standing when a state-court judgment turns on federal law and inflicts a cognizable injury, *see ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989), and that loss of the "right to sue" in state court is a cognizable injury, *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 77 (1991). Finally, the proceedings before the Bureau of Indian Affairs and the California Coastal Commission pose no obstacle to this Court's review.

The question presented has become ever more important as, in the words of the coalition of States supporting this petition, "Indian tribes have acquired significant acreage outside their reservations." States Br. 15. This Court should grant certiorari to answer the important question left open in *Upper Skagit* and reverse.

ARGUMENT

I. The Question Presented Merits Review.

Respondent argues that there is no circuit split on the question presented that would warrant this Court's review. Opp. 7-9. But in *Upper Skagit*, the Court emphasized the importance of the question presented, recognized that the Court had not answered it, and explained that the only reason the Court was not resolving the question at the time was that the question had not been subject to "full adversarial testing" in the lower courts and this Court. 138 S. Ct. 1649, 1654 (2018).

The Court did *not* say that it needed to await the development of a circuit split before answering the question. Indeed, respondent argues that "[p]rior to *Upper Skagit*, there was no circuit split on the applicability of the immovable property exception to tribal immunity." Opp. 9. Yet all nine Justices recognized the importance of resolving the question. The majority noted it was a "grave" and unsettled question that merits review, but thought it "wise" not to "take a 'first view'" on an issue that had not been fully briefed or addressed in the lower courts. 138 S. Ct. at 1654. Chief Justice Roberts, joined by Justice Kennedy, explained that if lower courts were to conclude that the immovable-property exception "does

not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would . . . need to be addressed in a future case." *Id.* at 1656 (Roberts, C.J., concurring). And Justice Thomas, joined by Justice Alito, stated that the Court should have answered the question, warning that by leaving the issue unsettled, the Court "cast[ ] uncertainty over the sovereign rights of States to maintain jurisdiction over their respective territories." *Id*. at 1657 (Thomas, J., dissenting).

Respondent does not dispute that this case has exactly what was missing in *Upper Skagit*: The issue has been subjected to "full adversarial testing." 138 S. Ct. at 1654 (majority op.). It was fully briefed below in the trial and appellate courts and was the sole basis for the Court of Appeal's ruling. It has been fully addressed in this Court in the certiorari-stage briefing, including by a coalition of State amici. And this case fits to a T the "future case" Chief Justice Roberts envisioned where the issue "would . . . need to be addressed"—the lower court expressly held that the immovable-property exception "does not extend to tribal assertions of rights in non-trust, non-reservation property." *Id.* at 1656 (Roberts, C.J., concurring).

Moreover, the uncertainty in the lower courts over the scope of tribal immunity results in large part from language in this Court's opinion in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)—a problem that lower courts are unable to solve on their own. In *Kiowa*, the Court stated that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Id.* at 756.

Lower courts frequently invoke that language as an excuse to expand tribal immunity beyond the traditional limits of sovereign immunity that apply to other sovereigns, as the amici States point out. *See* States Br. 10-12 (describing confusion in lower courts over *Kiowa*). Here too, the Court of Appeal misread *Kiowa* and *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), as requiring a departure from traditional limits on sovereign immunity. Pet. App. 9a, 12a. This Court should grant review to clarify that its decisions do not entitle tribes to a super sovereign immunity that neither states, nor foreign governments, nor even the United States enjoys.

II. Respondent's Vehicle Concerns Pose No Obstacle To Review.

Because respondent cannot seriously dispute the importance of the question presented, it raises a host of purported vehicle problems. All are baseless.

A. There Is An Actual Property Dispute.

Respondent argues that there is no "actual property dispute at issue." Opp. 10-11. That is clearly wrong. This is a dispute over an easement. "Interests in land can take several forms, including 'estates' and 'easements.'" *Hansen v. Sandridge Partners, LP*, 22 Cal. App. 5th 1020, 1032 (2018). Petitioners seek to quiet title to a common type of easement—"a right-of-way over another's land." *Id.* Specifically, petitioners brought this action to quiet title to a public easement allowing them a right of way across respondent's land so that they may access two public beaches. Pet. App. 59a-61a. Respondent criticizes California's "doctrine of implied dedication of a public easement over coastal lands," Opp. 10 & n.5, but its dislike of the rights

afforded under California property law has no bearing on the question presented, which concerns whether California courts can *entertain* this action seeking a public easement.

Respondent is correct to note that *Upper Skagit* involved a boundary dispute, whereas petitioners here are seeking a public easement rather than asserting a private property interest. Opp. 10-11. But even though the state property-law claims are different, the overarching federal question—whether the immovable-property exception permits state courts to resolve those state property-law claims—is precisely the same.

Contrary to respondent's claim, it makes no difference that petitioners are private individuals and not the government. Opp. 11. The same was true in *Upper Skagit*. There, the Lundgrens were private individuals seeking to litigate a quiet-title action against an Indian tribe in state court. 138 S. Ct. at 1652. No Justice suggested that the Lundgrens' status as private individuals made *Upper Skagit* a poor vehicle for deciding the immovable-property question. And for good reason. The immovable-property exception ensures that private individuals have "a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute . . . is an Indian tribe." *Id.* at 1655 (Roberts, C.J., concurring). Courts have therefore applied the exception in cases involving a private party and a sovereign. *See, e.g.*, *Eisenberg v. Permanent Mission of Equatorial Guinea to United Nations*, 832 F. App'x 38, 39-40 (2d Cir. 2020). This makes sense. The exception rests on the private identity that a sovereign assumes when it acquires

property within the territory of another sovereign; the nature of the opposing party (public or private) is irrelevant. *See Upper Skagit*, 138 S. Ct. at 1655 (Roberts, C.J., concurring); *accord id.* at 1658-60 (Thomas, J., dissenting).

The State amici emphasize this point when they point out that extending tribal sovereign immunity intrudes on state sovereignty *regardless* of whether a state itself is a party because it blocks state courts from adjudicating these disputes. "States have 'a primeval interest in resolving all disputes over use or right to use of real property within their own domains.'" States Br. 15-16 (brackets omitted) (quoting *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.)). That interest is negated by expansive conceptions of tribal immunity like the one adopted below.

B. Petitioners Have Article III Standing.

Respondent argues that petitioners lack Article III standing. Opp. 13-16. It contends that petitioners have not suffered an actual or imminent injury because the Tribe currently allows the public to cross its land and access the beach. Respondent attacks a straw man: a denial of beach access is *not* the Article III injury petitioners are claiming.

Petitioners suffered an Article III injury from a tribal sovereign immunity bar that deprived them of the opportunity to assert property rights that they otherwise could have litigated in California state court. Pet. 19-20. Under this Court's longstanding precedent, that injury—the only injury petitioners are

asking this Court to remedy—easily suffices to establish Article III jurisdiction.

"[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Accordingly, where, as here, a petitioner asks the Court to review a state-court judgment, the petitioner must demonstrate only the existence of a justiciable case or controversy under Article III measured as of the time the petitioner "seek[s] entry to the federal courts." *Id.* at 618.

A state-court ruling that turns on federal law establishes Article III injury where, as here, the ruling denies the petitioner rights to which it would otherwise be entitled under state law. In *ASARCO*, the Court held that a declaratory judgment obtained by respondents in state court constituted an injury-in-fact and satisfied Article III because the judgment turned on federal law and "cause[d] direct, specific, and concrete injury" to the petitioner. 490 U.S. at 618-19, 623-24. Similarly, in *International Primate Protection League v. Administrators of Tulane Educational Fund*, respondents' improper removal of petitioners' case from state court to federal court constituted a "clear" injury because petitioners "lost the right to sue in Louisiana court—the forum of their choice." 500 U.S. 72, 77 (1991). The remaining components of Article III standing (traceability and redressability) are also satisfied where, as here, the petitioner claims that the judgment below is invalid under federal law. *ASARCO*, 490 U.S. at 618-19. As the Court explained in *ASARCO*, "[i]f we were to agree

with petitioners, our reversal of the decision below would remove its disabling effects upon them." *Id.* In that circumstance, "Petitioners meet the requirements for federal standing." *Id.* at 624.

Petitioners have standing under this test. The decisions below rest solely on federal law. They caused petitioners "direct, specific, and concrete injury" by depriving them of the opportunity to assert property rights that they were otherwise entitled to litigate in state court. And if the Court reverses the judgment below, the disabling effects of the judgment will be removed and petitioners will be able to litigate their quiet-title action on the merits. Petitioners thus have Article III standing to ask this Court to "redress a real and current injury stemming from the application of federal law." *ASARCO*, 490 U.S. at 624.

All of respondent's arguments about standing—that petitioners currently have access to the beach, and that the Tribe has no plans to block public access (Opp. 13-16 & nn.9-13)—miss the mark. Even if respondent were correct in claiming that petitioners did not claim an Article III injury at the time they filed their quiet-title action, that is irrelevant because state courts are not bound by Article III. In fact, *ASARCO* and *International Primate Protection League* both recognized that the "plaintiffs in the original [state-court] action [had] no standing to sue under the principles governing federal courts." *ASARCO*, 490 U.S. at 623; *see Int'l Primate Prot. League*, 500 U.S. at 76-78 (lower court found that petitioner lacked standing to assert underlying monkey-protection claims). Nonetheless, this Court may "exercise [its] jurisdiction on certiorari if *the judgment of the state court* causes direct, specific, and

concrete injury to the parties who petition for our review." *ASARCO*, 490 U.S. at 623-24 (emphasis added). As the Court put it in *International Primate Protection League*, the injury-in-fact "is supplied not by petitioners' claim for the monkeys' protection but rather by petitioners' desire to prosecute their claims in state court." 500 U.S. at 78.

So too here. The Article III injury necessary to resolving the question presented—whether the immovable-property exception applies to tribal sovereign immunity—is established by petitioners' loss of their ability to litigate their state-law property claim in California state court.

C. The Related Proceedings Have No Bearing On The Question Presented.

Respondent notes that the land at issue is the subject of proceedings before the Bureau of Indian Affairs and the California Coastal Commission. Neither proceeding has any bearing on the question presented here and neither poses an obstacle to this Court's review.

Respondent notes that a regional office of the Bureau has indicated that it intends to take the property at issue into trust. Opp. 12. But respondent does not explain how the Bureau proceedings could be an "alternative remed[y]" for petitioners' quiet-title claim. *Id.* The Bureau plainly is not the proper forum, let alone the exclusive forum, to adjudicate quiet-title actions concerning state-law easements. If it were, state courts would be completely divested of their power to adjudicate disputes arising under their own laws and involving land within their own sovereign territory. Respondent does not argue that the

regional office's action poses any obstacle to this Court's review of the sovereign immunity question.

Respondent errs in suggesting that petitioners' interests were sufficiently protected through proceedings before the California Coastal Commission. Opp. 16-17. Although the Commission found respondent's trust application consistent with the California Coastal Act, it had no occasion to consider or resolve petitioners' easement claim. In any event, here too respondent does not contend that the Commission's ruling poses any obstacle to this Court's review.

III. The Decision Below Is Wrong.

Respondent fails to offer a persuasive defense of the decision below. Opp. 19-22.

Respondent invokes language from this Court's cases describing tribal immunity as both a "core aspect[] of sovereignty that tribes possess" and as the "baseline." Opp. 19 (citations omitted). But tribal immunity does not mean "that the tribe always wins no matter what." *Upper Skagit*, 138 S. Ct. at 1655 (Roberts, C.J., concurring). As the States' brief explains, "sovereign immunity is not absolute." States Br. 4. Assertions about tribal immunity's existence or importance do not answer questions concerning its scope. *See id.* at 10-12.

Respondent notes that Congress has not explicitly authorized courts to adjudicate disputes regarding land owned by tribes within the territory of another sovereign. Opp. 19-20. But "a deferential posture toward Congress does not mean 'that courts can abdicate their judicial duty to decide the scope of tribal immunity' or 'ignore longstanding limits on

sovereign immunity, such as the immovable-property exception.'" Pet. 17 (quoting *Upper Skagit*, 138 S. Ct. at 1661-62 (Thomas, J., dissenting)). Nor is congressional silence on this point surprising. The immovable-property exception is a well-settled limitation on sovereign immunity, leaving nothing for Congress to abrogate. *See* States Br. 8, 14.

Finally, respondent argues that tribal immunity is neither analogous to foreign sovereign immunity nor coextensive with state sovereign immunity. Opp. 20-22. But respondent offers no principled reason for expanding tribal immunity to make it broader than foreign immunity, state immunity, or the immunity enjoyed by the United States itself. Doctrine and first principles alike suggest that tribal sovereign immunity is, at most, only as broad as other forms of sovereign immunity. *See Upper Skagit*, 138 S. Ct. at 1661 (Thomas, J., dissenting); States Br. 12-14.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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