No. _____

In the Supreme Court of the United States

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Petitioner,

v.

THE MENOMINEE INDIAN TRIBE OF WISCONSIN; GUY KESHENA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The common-law immovable-property rule provides that a sovereign is not immune from suit for claims concerning rights and obligations inhering in real property that it owns in a foreign jurisdiction. In *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554 (2018), this Court left open the question of whether the immovable-property rule applies to litigation initiated against an Indian tribe concerning real property acquired by the tribe outside of its reservation. *Id.* at 559-61.

The question presented is:

Under the immovable-property rule, may a party sue an Indian tribe, without the latter's consent, in a State court to adjudicate a dispute over real property located in that State but which, at the time the suit is initiated, is not within the boundaries of the tribe's reservation and is not held in trust by the United States?

LIST OF ALL PARTIES

Petitioner Legend Lake Property Owners Association, Inc. was the Plaintiff in the Circuit Court of Wisconsin for Menominee County, the Appellant before the Court of Appeals of Wisconsin, and the Appellant before the Supreme Court of Wisconsin.

Respondents Menominee Indian Tribe of Wisconsin and Guy Keshena were Defendants in the State trial court, Respondents before the State court of appeals, and Respondents in the State supreme court.

CORPORATE DISCLOSURE STATEMENT

Petitioner Legend Lake Property Owners Association, Inc. has no parent corporations and no publicly held company owns 10% or more of Petitioner's stock.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Legend Lake Property Owners Association, Inc. v. Guy Keshena and the Menominee Indian Tribe of Wisconsin, No. 2018-cv-007, 2022 WL 21699520 (Wis. Cir. Ct. Apr. 18, 2022).

Legend Lake Property Owners Association, Inc. v. Guy Keshena and the Menominee Indian Tribe of Wisconsin, No. 2022AP937, 2025 WL 262361 (Wis. Ct. App. Jan. 22, 2025)

Legend Lake Property Owners Association, Inc. v. Guy Keshena, et al., No. 2022AP937, 36 N.W.3d 641 (Wis. June 23, 2026).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Legend Lake Property Owners Association, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Supreme Court.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court was filed on June 23, 2026, is published at 36 N.W.3d 641, and is reproduced at Petitioner's Appendix (Pet. App.) 1a.

The opinion of the Wisconsin Court of Appeals certifying the case to the Wisconsin Supreme Court was filed on January 22, 2025. It is unpublished but is available at 2025 WL 262361 and is reproduced at Pet. App. 49a.

The order of the Menominee County Circuit Court dismissing Petitioner's case was filed on April 18, 2022. It is unpublished but is available at 2022 WL 21699520 and is reproduced at Pet. App. 96a.

JURISDICTION

The federal question of whether Respondents enjoy sovereign immunity from Petitioner's suit was raised by Respondents in their motion to dismiss before the Menominee County Circuit Court. *See* Pet. App. 96a. On March 22, 2022, the Circuit Court issued an oral ruling granting the motion to dismiss, followed by a written order on April 18, 2022, holding, inter alia, that Respondents enjoy sovereign immunity from suit. *Ibid.* Petitioner appealed, and the federal question was raised before the Wisconsin Court of Appeals. *See* Pet. App. 49a. On January 22, 2025, the court of

appeals certified the appeal to the Wisconsin Supreme Court. *Id.* at 50a.

The judgment of the Wisconsin Supreme Court affirming the case's dismissal on the basis of sovereign immunity was entered on June 23, 2026. On September 2, 2026, Petitioner filed an application to extend the time to file a petition for writ of certiorari from September 21, 2026, to November 20, 2026. *See Legend Lake Property Owners Ass'n, Inc. v. Guy Keshena, et al.*, No. 26A300. The application was granted on September 8, 2026.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

INTRODUCTION

Petitioner Legend Lake Property Owners Association, Inc., seeks review of an unresolved question of federal law that the Court has already recognized as important—whether the immovable-property rule permits a private party to sue an Indian tribe in a State court to resolve questions concerning real property located in that State but outside of the tribe's reservation. *See Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 560 (2018) ("Determining the limits on the sovereign immunity held by Indian tribes is a grave question . . . ."); *id.* at 563 (Roberts, C.J., concurring) ("consideration of the immovable-property rule" "need[s] to be addressed in a future case").

Under traditional common law principles, sovereign immunity does not extend to disputes over title to real property located in a foreign jurisdiction. *See Lundgren*, 584 U.S. at 566 (Thomas, J., dissenting) ("The immovable-property exception [to

sovereign immunity] has been hornbook law almost as long as there have been hornbooks."); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812) ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction . . . ."); *Georgia v. City of Chattanooga*, 264 U.S. 472, 481 (1924) ("[Georgia] occupies the same position there [in Tennessee] as does a private corporation authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity.").

It is true that, "unless and 'until Congress acts, [Indian] tribes retain' their historic sovereign authority," *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). But that authority provides no greater protection than the traditional common law immunity accorded to sovereigns, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)—which does not include immunity from suit to determine rights and obligations concerning real property located in another sovereign's territory. *See generally Cayuga Indian Nation of New York v. Seneca Cnty.*, 978 F.3d 829, 836 (2d Cir. 2020) ("American common law has long recognized an 'exception to sovereign immunity for actions to determine rights in immovable property.'" (quoting *Lundgren*, 584 U.S. at 563 (Roberts, C.J., concurring))).

Ruling to the contrary, the Wisconsin Supreme Court held below that Indian tribes like Respondent Menominee Tribe enjoy by default an absolute immunity from suit, including lawsuits concerning property acquired outside of a tribe's reservation. Pet. App. 34a. And because Congress has not expressly

acted to change that supposed default, the Wisconsin Supreme Court concluded that it must affirm the dismissal of the Association's action seeking a declaration that the Association's restrictive covenants remain valid and enforceable with respect to land, otherwise subject to those covenants, which is ultimately taken into trust by the United States pursuant to federal legislation directing the restoration of the Tribe's reservation. *Ibid.* In so holding, the court recognized an immunity from suit for Indian tribes that is enjoyed by no other sovereign on the planet. *Cf. Lundgren*, 584 U.S. at 576 (Thomas, J., dissenting).

The Wisconsin Supreme Court's decision, which follows that of the Washington Supreme Court and other lower courts, conflicts with decisions of this Court, *see infra* Arg. Parts I-II, as well as with other lower court decisions, *see infra* Arg. Part III, that construe Indian sovereign immunity as consistent with traditional common law principles, including the immovable-property rule.

This Court should therefore grant the Petition to decide the important issue left unresolved in *Lundgren*, thereby ensuring uniformity among the lower courts and their adherence to this Court's precedents. Such review would also facilitate needed adjudication in the lower courts of disputes, like this one, concerning the scope of clauses within tribal restoration legislation that purport to preserve non-Indian rights in property taken back into trust.

STATEMENT OF THE CASE

I. Factual Background

In 1854, the United States concluded a treaty with Respondent Menominee Tribe which assigned to the latter a reservation of several hundred thousand acres within Wisconsin's Menominee County. *See Menominee Tribe v. United States*, 391 U.S. 404, 405-06 (1968). A century later, Congress passed the Menominee Indian Termination Act, which ended federal recognition of the Menominee Tribe and federal supervision over most of the Tribe's property and members. *See* Pub. L. No. 83-399, 68 Stat. 250 (June 17, 1954); Pet. App. 3a. The Act directed the Secretary of the Interior to "transfer to the tribe . . . all property, real and personal, held in trust by the United States for the tribe" unless "the tribe obtains a charter for a corporation . . . and requests such transfer to be made to such corporation . . . ." Pub. L. No. 83-399, § 8, 68 Stat. at 252.

Over the next several years, Menominee Enterprises, Inc.—the corporate successor entity to the Tribe—began selling off parts of the original reservation real estate. *See* Pet. App. 3a-4a. In the 1960s, the land was developed for residential use—including conversion of the pre-existing swamp into today's scenic Legend Lake—improvements funded by the developers and ultimately paid for by the lots' purchasers. In conjunction with this work, restrictive covenants were recorded.[1] Pet. App. 101a. These covenants contained commercial use prohibitions,

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[1] In Wisconsin, a restrictive covenant is "an equitable servitude upon the land, and constitutes a valuable property right which a court of equity will enforce . . . ." *Hall v. Church of the Open Bible*, 89 N.W.2d 798, 799 (Wis. 1958).

building size and setback rules, restrictions on camping, and restrictions on tree cutting. *Id.* at 101a-102a. The covenants also set out a process for forming a mandatory landowners association that would govern the lot owners of the Legend Lake area. *Ibid.* In 1972, the property owners completed that process and formed the Association through articles of incorporation.[2] *Id.* at 102a.

In 1973, Congress passed the Menominee Restoration Act, returning full federal recognition to the Menominee Tribe. Pub. L. No. 93-197, 87 Stat. 770, *previously codified at* 25 U.S.C. § 903 *et seq.* (1976)).[3] The Act provides that the "Secretary shall accept [into trust] the real property . . . of members of the Menominee Tribe" as part of a renewed tribal reservation, "but only if transferred to him by the Menominee owner or owners." 25 U.S.C. § 903d(c) (1976). The immediately following sentence of the same provision confirms, however, that such re-trusted properties "shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, and any other obligations." *Ibid. Accord id.* § 903a(d) ("Except as specifically provided in this subchapter, nothing contained in this subchapter shall alter any property rights or obligations, any contractual rights or

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[2] These were re-stated in 1998 along with amended bylaws. The 1998 bylaws adopted many of the provisions of the original covenants, which were set to expire the following year.

[3] The Menominee Restoration Act, like similar Restoration Acts of other tribes, was omitted from the U.S. Code as being of special, not general, application. *Legend Lake Prop. Owners Ass'n, Inc. v. Keshena*, No. 2022AP937, 2025 WL 262361, at *2 n.4 (Wis. Ct. App. Jan. 22, 2025); 25 U.S.C. § 903 editorial note on codification.

obligations, including existing fishing rights, or any obligations for taxes already levied.").

The act thus reflects a balanced compromise. On the one hand, the Tribe would receive the benefit of automatic trust restoration so long as former reservation properties were acquired by tribal members and presented to the Secretary of the Interior for taking into trust. *See id.* § 903d(c). That contrasts favorably with the default rule in federal Indian law, which generally leaves the decision whether to take tribal land into trust to the Secretary's discretion. *See id.* § 5108 (2024). On the other hand, land taken automatically into trust for the Tribe would still be subject to all existing rights and obligations. *See id.* § 903d(c) (1976).

In 2009, the members of the Association—seeking to ensure a continuing tax base for the local school district as well as continued association fees for the maintenance of common areas—amended the bylaws again to adopt the version of the restrictive covenants at issue in this case. Pet. App. 103a-107a.[4] The covenants were recorded with the Menominee County Register of Deeds on June 18, 2009, and were "binding upon all parties acquiring or holding any right, title or interest in [the Properties] (or any part thereof), their heirs, personal representatives, successors or assigns." *Id.* at 104a.

The covenants contain several provisions designed to prevent owners of property within the Association

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[4] The amended by-laws are also available at Exhibit 22 to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, *Legend Lake Properties Owners Ass'n, Inc. v. Guy F. Keshena, et al.*, Menominee County Case No. 2018CV000007, Doc. 122 (filed Feb. 1, 2021).

from seeking to have the federal government take such property into trust as part of the Tribe's restored reservation and thereby removing the properties from the local tax base. Pet. App. 104a-105a. Besides these transfer-related provisions, the restrictive covenants seek to maintain the Association's ability to impose its rules concerning single-family-residential use and related standards, as well as its authority to assess membership dues and fines on members. Pet. App. 106a; *see also id.* at 8a n.5. The covenants also impose a consent-to-venue-and-jurisdiction clause, requiring that any disputes arising out of the covenants be brought for resolution in the Menominee County Circuit Court, and providing that "the title owner waives any defense to an action filed with respect to these Restrictive Covenants by the Association based on sovereign immunity[.]" *Id.* at 107a.

II. Procedural Background

In 2017, Respondent Guy Keshena, a tribal member, acquired on behalf of the Tribe about thirty lots within the Association's boundaries. Pet. App. 5a-6a. Early in 2018, Keshena applied to the Secretary of the Interior to take these properties into trust as part of the Tribe's restored reservation. *Id.* at 6a. Shortly thereafter, the Association commenced an action for declaratory relief, in Menominee County Circuit Court, against Keshena and the Tribe. *Ibid.* The action sought a declaratory judgment that the restrictive covenants remain fully enforceable against the Tribe as beneficial owner of the Keshena lots, pursuant to the Menominee Restoration Act's rights-preservation clause. *Ibid.*

In 2022, the State circuit court granted Respondents' motion to dismiss, concluding that the

Tribe and its agents are immune from suit and that, on the merits, the restrictive covenants are preempted by the Menominee Restoration Act. Pet. App. 6a.

The Association then appealed to the Wisconsin Court of Appeals. While that matter was pending, the Tribe continued to press the federal government to take the Keshena properties into trust. Pet. App. 6a-7a. The Association contested those efforts administratively and judicially but lost at each stage on the ground that the Menominee Restoration Act gives the Secretary no discretion to refuse to take qualifying properties into trust and thus that the Act preempts the restrictive covenants' anti-transfer provisions. *Ibid.*; *see also Legend Lake Prop. Owners Ass'n, Inc. v. U.S. Dep't of Interior*, No. 23-C-480, 2024 WL 449287, at *5 (E.D. Wis. Feb. 6, 2024).

Back in the Wisconsin Court of Appeals, the Association continued to argue that—despite the properties now having been taken into trust by the United States as part of the Tribe's restored reservation—the Association's declaratory judgment action should still proceed, at least with respect to those provisions of the restrictive covenants that do not purport to prohibit the transfer of property into trust. Pet. App. 7a-8a. Specifically, the Association contended that the Tribe doesn't enjoy sovereign immunity, arguing among other points that immunity should not apply to lawsuits like the Association's concerning disputed rights to real property. *Ibid.* Rather than resolve these arguments itself, the court of appeals certified the question of tribal sovereign immunity to the Wisconsin Supreme Court. *Id.* at 8a.

In a 4-3 decision, the Wisconsin Supreme Court ruled that the Tribe and its agents are immune from

suit, rejecting the Association's various arguments to the contrary. Pet. App. 1a-48a. As for the Association's reliance on the immovable-property rule, the court held that tribal sovereign immunity is by default absolute, is therefore *sui generis*, and hence that analogies to foreign or State sovereign immunity are inapt. *Id.* at 27a-33a. Moreover, the court concluded that allowing an immovable-property exception to tribal sovereign immunity would interfere with Congress's prerogative to establish the limits of such immunity. *Id.* at 31a. Finally, the court held that the properties' transfer to the United States while the Association's appeal was pending provided an additional basis to reject application of the immovable-property exception, for two reasons: the properties at issue are no longer within the exclusive sovereign control of Wisconsin, a supposed prerequisite to application of the exception; and judicial review of the Association's claims would directly threaten the Tribe's prerogatives of self-governance over its own reservation.[5] *Id.* at 31a-33a.

[5] Three justices dissented in two opinions. All three dissenters agreed that the court, instead of ruling on the question of tribal sovereign immunity, should have remanded the case to determine whether the United States has become a necessary and indispensable party, given that it is now the legal owner of the properties in question. Pet. App. 43a (Hagedorn, J., dissenting). Two of the three justices went further to argue that the immovable-property rule should apply to Indian tribes. *Id.* at 35a (Bradley, J., dissenting).

REASONS FOR GRANTING THE PETITION

As several members of this Court have observed, the immovable-property rule's applicability to tribal sovereign immunity is an important issue of federal law that has not been, but should be, settled by this Court. *See Lundgren*, 584 U.S. at 562 (Roberts, C.J., concurring); *id.* at 564 (Thomas, J., dissenting). In *Lundgren*, this question was raised but, because the Court decided the dispute on a different ground, the question's resolution was left for an appropriate future case. *See id.* at 560 (majority opinion); *id.* at 562 (Roberts, C.J., concurring); *id.* at 564 (Thomas, J., dissenting). This case provides an opportunity to settle the question presented, thereby ensuring uniformity among the lower courts on a "grave question" of federal Indian law, *id.* at 560 (majority opinion), while also supporting Congress's restoration-act policy of balancing tribal interests in the swift re-establishment of reservations with the preservation of non-tribal property and contract rights.

I. The Wisconsin Supreme Court's Ruling Resolves A "Grave Question" Of Federal Law In Conflict With Decisions Of This Court

In *Lundgren*, the Upper Skagit Indian Tribe purchased non-reservation land and informed its new, non-tribal neighbors that a pre-existing fence trespassed upon the tribe's newly acquired property. *See Lundgren*, 584 U.S. at 557. In response, the neighbors filed a quiet title suit in Washington State court, alleging that they had acquired title to the fenced land through adverse possession. *Ibid.* Relying on this Court's decision in *County of Yakima*

v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992), the Washington Supreme Court rejected the tribe's sovereign immunity defense, holding that a tribe is never immune in cases in which courts exercise *in rem* rather that *in personam* jurisdiction. *See Lundgren*, 584 U.S. at 557-58.

Vacating the Washington Supreme Court's decision, this Court held that "*Yakima* did not address the scope of tribal sovereign immunity" at all but instead was limited to the "more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887." *Id.* at 558. Although the *Lundgren* property owners in their respondents' merits brief had raised, as alternative grounds to affirm, arguments based on the immovable-property rule, this Court decided to "leave it to the Washington Supreme Court to address these arguments in the first instance." *Id.* at 560. Thus, *Lundgren* left the immovable-property question unresolved, although the Court acknowledged that the issue merits definitive resolution in this Court. *See ibid. See also id.* at 563 (Roberts, C.J., concurring). The Wisconsin Supreme Court's ruling directly addresses that question. This Petition, seeking review of that ruling, allows the Court to resolve the issue left open by *Lundgren*.

The need for that review is bolstered by the conflicts between the Wisconsin Supreme Court's ruling and decisions of this Court. A default rule of absolute immunity for Indian tribes is contrary to the principle, repeatedly followed by this Court, that tribal sovereign immunity is not *sui generis* but instead is to be construed consistent with the general common law of sovereign immunity. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58 ("Indian tribes have long

been recognized as possessing the *common-law* immunity from suit traditionally enjoyed by sovereign powers.") (emphasis added). *Accord Lewis v. Clarke*, 581 U.S. 155, 163-64 (2017) (holding that the lower court erred when it "extended sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees"). And pursuant to that common law, sovereign immunity does not extend to disputes over title to property located in a foreign jurisdiction. *See Lundgren*, 584 U.S. at 566-72 (Thomas, J., dissenting). *See also infra* Part II.

Indeed, this Court has repeatedly expressed concern over the extension of tribal sovereign immunity beyond what would have been recognized at common law, especially in circumstances where the plaintiff has not willingly entered into a relationship with an Indian tribe. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) ("There are reasons to doubt the wisdom of perpetuating the doctrine."); *Bay Mills*, 572 U.S. at 799 n.8 ("We have never, for example, specifically addressed . . . whether immunity should apply in the ordinary way if a . . . plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation . . . conduct.").

That is precisely the Association's circumstance: it did not invite the Tribe's purchase, yet now its suit—meant to protect restrictive covenants which ostensibly are preserved by the very restoration act motivating the Tribe's acquisition of the properties at issue—is supposedly barred because of the Wisconsin Supreme Court's extension of sovereign immunity beyond any common-law precedent. *See* Pet. App. 31a, 33a. This outcome, which effectively vacates the

Association's restrictive covenants, thwarting Congress's restoration-act promise to preserve existing rights and undermining the investments of landowners like the Association's members, rests upon a profound misreading of tribal sovereign immunity that merits this Court's review.

II. The Wisconsin Supreme Court's Ruling Is Wrong

The Wisconsin Supreme Court incorrectly held that tribes have absolute immunity from suit unless specifically modified by Congress. Pet. App. 31a, 34a. "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." *Lundgren*, 584 U.S. at 562 (Roberts, C.J., concurring). As Justice Bradley aptly observed in her dissent below, the Wisconsin Supreme Court "confer[ed] the sword of sovereign immunity on tribes, replacing 'the common-law immunity from suit traditionally enjoyed by sovereign powers[,]' with absolute immunity subject only to Congress's specific articulations of exceptions to sovereign immunity." Pet. App. 35a (Bradley, J., dissenting) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). There is no basis at common law, in treaty, or in statute, for such a rule of absolute immunity. *See Lundgren*, 584 U.S. at 566-75 (Thomas, J., dissenting); Pet. App. 35a (Bradley, J., dissenting) ("The majority has no authority to require Congress to enact common-law exceptions, and it has no basis in law for granting tribes immunity beyond what the common law provides.").

Indeed, one of the few aspects of the jurisprudence governing sovereign immunity that has remained consistent over centuries is that a sovereign is not immune from suit concerning rights and obligations in real property owned in another sovereign's territory. *Lundgren*, 584 U.S. at 566 (Thomas, J., dissenting). "Cornelius van Bynkershoek, a renowned 18th-century jurist, stated that it was 'established' that 'property which a prince has purchased for himself in the dominions of another . . . shall be treated just like the property of private individuals.'" *Id.* at 567 (quoting De Foro Legatorum Liber Singularis 22 (G. Laing transl. 2d ed. 1946)) (footnote omitted). Although there is some debate about the outer limits of the immovable-property rule—"for example, whether it applies to tort claims related to the property or to diplomatic embassies"—"there is no dispute that it covers suits concerning ownership of a piece of real property used for nondiplomatic reasons." *Id.* at 566 n.2. Given that Indian tribes enjoy only that immunity from suit traditionally accorded to sovereigns, *Bay Mills*, 572 U.S. at 788, it therefore follows that tribal immunity should be subject to the immovable-property rule. *Cf. Kiowa*, 523 U.S. at 759 (finding "instructive the problems of sovereign immunity for foreign countries" in determining the scope of tribal sovereign immunity).

The Foreign Sovereign Immunities Act (FSIA) supports that result. *See* 28 U.S.C. § 1605(a)(4). The FSIA codified the "international law" of sovereign immunity, including "the pre-existing real property exception to sovereign immunity recognized by international practice[.]" *See Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 199-200 (2007) (quotations omitted). *See also id.*

at 200 (observing that "a foreign sovereign's immunity does not extend to 'an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction") (quoting Restatement (Second) of Foreign Relations Law of the United States § 68(b) at 205 (1965)). Although the FSIA does not apply to Indian tribes, it is probative of the common law of sovereign immunity and therefore supports the immovable-property rule's application to the historic sovereign authority retained by Indian tribes.[6]

Drawing a starkly different conclusion, the Wisconsin Supreme Court accepted Respondents'

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[6] Application of the immovable-property rule to tribal sovereign immunity would, however, raise no conflict with the Court's decisions affording a broad immunity to tribes concerning commercial disputes. There are "two conflicting concepts of sovereign immunity, each widely held and firmly established." Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Attorney General Phillip B. Perlman (May 19, 1952) (Tate Letter), *reprinted at Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976). "According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Ibid.* "According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Ibid.* Under the classical, near-absolute theory of sovereign immunity, foreign sovereigns enjoyed immunity from all commercial activity. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). But both theories recognized an exception for suits involving immovable property. *Permanent Mission*, 551 U.S. at 199. Thus, this Court could affirm the application of the immovable-property rule to Indian tribes while also maintaining, without historical inconsistency, Indian tribes' broad immunity for commercial activities.

argument that, because "Congress has codified an immovable-property exception to sovereign immunity applicable to foreign states" in the FSIA, but did not mention tribes in the same statute, the immovable-property rule must not apply to tribes. Pet. App. 28a. This contortion of the maxim *expressio unius exclusio alterius* is unconvincing. "[T]he canon does not tell us that a case was provided for by negative implication unless an item unmentioned would normally be associated with items listed." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 169 n.12 (2003). The FSIA pertains only to "foreign" nations, 28 U.S.C. § 1604, whereas tribes are "domestic" sovereigns, *Bay Mills*, 572 U.S. at 788; hence, the FSIA's omission of Indian tribes does not suggest that Congress wished to exempt Indian tribes from common-law limitations on sovereign immunity. Supporting that conclusion is the fact that the immovable-property rule has long been recognized to apply not just to foreign nations but also to the United States and the individual States. *See Lundgren*, 584 U.S. at 573 (Thomas, J., dissenting); *Georgia*, 264 U.S. at 481. *See also United States v. Wilder*, 28 F. Cas. 601, 604 (C.C.D. Mass. 1838) (Story, C.J.) (observing that "sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of courts of justice").

That the immovable-property rule applies to the several States does not preclude its application to Indian tribes. *But see* Pet. App. 28a n.15. True, limitations on the States' sovereign immunity do not always apply to Indian tribes. *See Lundgren*, 584 U.S. at 560 (majority op.). The reason for this asymmetry is that Indian tribes did not participate in the Constitutional Convention and hence cannot be bound by the limitations on sovereignty that the States

therein agreed to. *See Kiowa*, 523 U.S. at 755-56. Yet the immovable-property rule is a limitation on sovereignty that predates, and is independent of, anything negotiated by the States at the Constitutional Convention. Thus, the immovable-property rule's applicability to the States is no reason not to apply it to Indian tribes. *See Lundgren*, 584 U.S. at 573 (Thomas, J., dissenting).

Courts have consistently applied the immovable-property rule to sovereign immunity because ownership of property is not an inherently sovereign function. *Permanent Mission*, 551 U.S. at 199. Hence, the use of property merely for an asserted governmental purpose—here, for example, the objective of restoring the Tribe's original reservation—does not mean that disputes about rights and obligations inhering in that property fall outside of the immovable-property rule. *See Lundgren*, 584 U.S. at 566 n.2 (Thomas, J., dissenting) ("[T]here is no dispute that [the immovable-property rule] covers suits concerning ownership of a piece of real property used for nondiplomatic reasons.") (citing Tate Letter, *reprinted in Alfred Dunhill of London, Inc.*, 425 U.S. at 711-15). *Accord Agostini v. De Antueno*, 99 N.Y.S.2d 245, 248 (Mun. Ct. 1950) ("There appears to be no doubt that real property held by diplomatic officers in a foreign state, and not pertaining to [their] diplomatic status, is subject to local laws.").

Finally, no principle of deference to the political branches counsels a different outcome. The pertinent political branch—Congress—has not spoken to this issue. The Wisconsin Supreme Court assumed that congressional silence must mean immunity for the tribes. *See* Pet. App. 31a. That erroneous conclusion

alone merits review, as it contradicts this Court's settled practice of proceeding to adjudicate disputes about sovereign immunity when the pertinent political branch has declined to state a definitive position. *See Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945) ("In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist."); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 75 (1938) ("The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected were appropriate subjects for judicial inquiry upon proof of the matters alleged."). *See also Lundgren*, 584 U.S. at 560 (majority op.) ("We leave it to the Washington Supreme Court," not Congress, "to address these arguments in the first instance."). Moreover, the Wisconsin Supreme Court's erroneous inference from Congressional silence overlooks the most plausible default rule—namely, Indian tribes retain just their historic sovereign authority and (as is true of any other government) that authority does not provide immunity for suits over real property located in another sovereign's jurisdiction.

III. The Wisconsin Supreme Court's Ruling Furthers A Split Among Lower Courts About Whether The Immovable-Property Rule Applies To Tribal Sovereign Immunity

Despite this Court's concerns about extending tribal sovereign immunity beyond sovereign immunity's traditional limits, lower courts are split over the

question of whether Indian tribes enjoy, by default, absolute immunity from suit. This Court should therefore grant the Petition to ensure that State and federal courts apply the same standard for determining when a tribe is immune from suit.

On one side of the split, some lower courts have (correctly) refused to extend tribal sovereign immunity beyond what would have been recognized at common law, holding that tribes' immunity does not cover disputes over non-trust, non-reservation real property. *See Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W.2d 685, 694 (N.D. 2002); *Miccosukee Tribe of Indians of Fla. v. Dep't of Env't Prot. ex rel. Bd. of Trs. of Internal Improvement Tr. Fund*, 78 So. 3d 31, 34 (Fla. Dist. Ct. App. 2011) (quoting *Cass County*).

For example, in *Cass County*, the North Dakota Supreme Court held that the trial court could exercise jurisdiction over a condemnation action to take property that was recently conveyed to a tribe, notwithstanding the tribe's claims of sovereign immunity. 643 N.W.2d at 694. In support of its decision, the court analogized to this Court's ruling in *Georgia v. Chattanooga*, which held that Tennessee could exercise jurisdiction over an action to condemn land owned by the State of Georgia in Tennessee. *Id.* at 692 (citing *Georgia*, 264 U.S. 472). Applying *Georgia*, the North Dakota Supreme Court concluded that "[t]he land at issue in this case is essentially private land which has been purchased in fee by an Indian tribe. . . . [T]he State may exercise territorial jurisdiction over the land . . . and the Tribe's sovereign

immunity is not implicated." *Cass Cnty.*, 643 N.W.2d at 694.[7]

The Florida Court of Appeal followed the North Dakota Supreme Court in *Miccosukee Tribe of Indians*, holding that State courts have jurisdiction over a State agency's condemnation action of tribal land. 78 So. 3d at 34. In reaching that decision, the Florida Court of Appeal relied upon the important distinction between litigation arising over obligations personal to a sovereign, and litigation concerning property merely owned by a sovereign. *See id.* at 33.

Thus, in *Cass County* and *Miccosukee Tribe of Indians*, the courts rejected a claim of absolute tribal sovereign immunity. They instead analogized to sovereign immunity in other contexts, recognizing the limits of sovereign immunity when the dispute is over a sovereign's real property located in another sovereign's jurisdiction.

Other lower courts, however, have adhered to a default rule of absolute immunity, thereby stretching tribal sovereign immunity well beyond any historical precedent. *See Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians*, 577 P.3d 382, 384 (Wash. 2025); *Cayuga Nation v. Tanner*, 448 F. Supp. 3d 217, 244-45 (N.D.N.Y. 2020) (under this "avowedly broad

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[7] In deciding *Cass County*, the North Dakota Supreme Court favorably cited *Yakima*. 643 N.W.2d at 691. But even in doing so, the court recognized *Yakima*'s limits, stating that "[t]he Court's resolution [in *Yakima*] of this issue turned in part upon interpretation of federal statutes governing allotment of Indian land to individual tribal members." *Ibid.* Hence, unlike the Washington Supreme Court in *Lundgren*, *see* 584 U.S. at 558, the North Dakota Supreme Court did not hold that *Yakima* controlled, but only cited *Yakima* as one of many persuasive authorities. 643 N.W.2d at 691.

principle" of "settled law," courts must "dismiss[ ] any suit against a tribe absent congressional authorization (or a waiver)" (quoting *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 761 F.3d 218, 220 (2d Cir. 2014))); *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 274 Cal. Rptr. 3d 255, 262 (Ct. App. 2021) ("For decades, the Supreme Court has set aside these and other concerns, treated tribal sovereign immunity as settled law, and deferred to Congress . . . . We see no reason to depart from this practice." (citation omitted)); *Haney v. Mashpee Wampanoag Indian Tribal Council, Inc.*, 205 N.E.3d 370, 2023 WL 2000259, at *2 (Mass. App. Ct. 2023) (table) ("We agree with the defendants that the issue is not ours to decide in the first instance but must be left to Congress.").

Because *Lundgren* did not decide the limits—if any—of tribal sovereign immunity, the split among these lower courts will continue unless and until the Court decides the issue.

Increasing the need for that review is that this case involves one of several similarly worded restoration acts that govern the re-establishment of Indian reservations. Congress began adopting these statutes—the first of which was the Menominee Restoration Act—in the 1970s, when it reversed its prior policy of tribal assimilation and resumed a policy of restoring full federal recognition. *See, e.g.*, Pub. L. No. 99-398, 100 Stat. 849 (Aug. 27, 1986) *previously codified at* 25 U.S.C. § 566 *et seq.* (Klamath Tribe of Indians Restoration Act); Pub. L. No. 100-89, 101 Stat. 666 (Aug. 18, 1987), *previously codified at* 25 U.S.C. § 1300g *et seq.* (Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas Restoration Act); Pub. L. No. 98-481, 98 Stat. 2250

(Oct. 17, 1984), *previously codified at* 25 U.S.C. § 714 *et seq.* (Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians Restoration Act); Pub. L. No. 101-484, 104 Stat. 1167 (Oct. 31, 1990), *previously codified at* 25 U.S.C. § 983b *et seq.* (Ponca Tribe of Nebraska Restoration Act).[8]

As a rule, these restoration acts require the Secretary of the Interior to accept real property from tribal members in the name of the United States in trust for the respective tribes. *See* Pub. L. No. 99-398, § 6, 100 Stat. at 850; Pub. L. No. 98-481, § 7, 98 Stat. at 2253; Pub. L. No. 100-89, § 105, 101 Stat. at 667-68; Pub. L. No. 101-484, § 4(c), 104 Stat. at 1167-68. Importantly, however, the statutes provide that the re-trusted property will still be subject to all valid existing rights. Pub. L. No. 99-398, § 6, 100 Stat. at 850; Pub. L. No. 98-481, § 3(d), 98 Stat. at 2251; Pub. L. No. 100-89, § 103(d), 101 Stat. at 667; Pub. L. No. 101-484, §§ 4(c), 4(d), 104 Stat. at 1167-68.

The Menominee Restoration Act, as the template for other restoration acts, is of a piece. As noted, it provides that "[t]he Secretary shall accept the real property . . . of members of the Menominee Tribe" and that "[s]uch property shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, and any other obligations." Pub. L. No. 93-197, § 6(c), 87 Stat. at 773. But critically, it also declares that "nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights,

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[8] This is not a comprehensive listing of the restoration acts; others have been at times codified in Title 25, Chapter 14 of the U.S. Code.

or any obligations for taxes already levied." *Id.* § 3(d), 87 Stat. at 770-71.

The Wisconsin Supreme Court's decision frustrates that Congressional guarantee because the Tribe's new-found immunity means that the Association has no practicable means to enforce valid existing rights ostensibly preserved by the Menominee Restoration Act. And if other courts follow the Wisconsin Supreme Court, property owners will be left without a way to determine if they have valid existing rights under any of the restoration acts, thereby suffering injury to their reasonable, investment-backed expectations.

Congress could not plausibly have intended that result when it shifted from a policy favoring assimilation to one favoring restoration. As noted, the restoration acts depart from the default rule of federal Indian law in that they require the Secretary to take property into trust. Normally, the Secretary has discretion whether to do so, and one of the important factors governing that discretion is precisely what is at issue here—whether the property proposed to be taken into trust is subject to existing title or other disputes that ought to be resolved before the property is taken into trust. *See* 25 C.F.R. § 151.14(b). Under the default process, a party aggrieved by the Secretary's decision to take land into trust may seek judicial review under the Administrative Procedure Act. *See id.* § 151.13(c). Although Congress departed from some of these default rules in the restoration acts, there is no evidence that Congress wished to deprive non-tribal parties of the opportunity to obtain judicial review of claims arising from pre-existing

rights.[9] Indeed, the acts' preservation clauses clearly indicate a contrary intent. Yet the Wisconsin Supreme Court's ruling subverts this fair compromise, turning Congress's protection of valid existing rights into a false promise and leaving parties like the Association with no reasonable means for obtaining judicial review of their grievances. That unjust outcome, which conflicts with the common law of sovereign immunity articulated by this Court across the centuries, merits review. *Cf. Lundgren*, 584 U.S. at 562 (Roberts, C.J., concurring) ("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.").

IV. The Petition Presents An Appropriate Vehicle Through Which To Address Whether Tribal Sovereign Immunity Is Subject To The Immovable-Property Rule

The Wisconsin Supreme Court's decision squarely presents the question left open by *Lundgren*. But unlike *Lundgren*, the issue of the immovable-property rule's application to Indian tribes was fully briefed by the parties here and decided by the courts below. *Compare* 584 U.S. at 561 (noting that "the courts below and the certiorari-stage briefs before us said precisely nothing on the subject"), *with* Pet. App. 27a-33a. Thus, the question presented has been subject to "the virtues of . . . full adversarial testing" and is

[9] Applying the immovable-property rule to Indian tribes might even enhance tribal authority and independence, *see* Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 Mont. L. Rev. 11, 18-20 (2019), a result also fully consistent with Congress's restoration-act policies.

ready for this Court's review. *Lundgren*, 584 U.S. at 561.

Although Respondents raised alternative grounds for dismissing the Association's action, the Wisconsin Supreme Court chose not to address them. Pet. App. 42a-43a (Bradley, J., dissenting) ("the court's error was entirely avoidable. . . . The majority could have reached the result it wanted without rewriting the law in the process.").[10] To be sure, the court did acknowledge that the properties were transferred to the United States (as required by the Menominee Restoration Act) after the Association initiated its suit. *See* Pet. App. 32a. But the Court did not hold that the Association's case was thereby precluded. It held simply that the Tribe's sovereign immunity barred the suit. Pet. App. 33a. In the court's own words: "To summarize [the holding], nothing abrogates, waives, or otherwise precludes the Tribe's sovereign immunity. Accordingly, the Tribe is immune from the Association's lawsuit." *Ibid.* Thus, the issues of whether the United States is now a necessary party to the Association's action and, if so, whether the United States enjoys immunity from the suit, can be resolved on remand after this Court vacates the actual judgment of the Wisconsin Supreme Court. *Cf. Black v. Cutter Lab'ys*, 351 U.S. 292, 297 (1956) ("This Court, however, reviews judgments, not statements in opinions.").

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[10] The court issued a second holding that Respondent Keshena is no longer a proper defendant in the action. Pet. App. 33a-34a. Although Keshena is listed as a Respondent here because he was a party in the court whose judgment is sought to be reviewed, S. Ct. Rule 14.1(b), the Association does not seek review of that holding.

Finally, the fact that the properties at issue here are now held in trust by the United States as part of the Tribe's restored reservation—and are therefore no longer located outside of the Tribe's jurisdiction—is no obstacle to this Court's review of the question presented, or to the lower courts' review of the merits on any remand. Contrary to the view of the Wisconsin Supreme Court, Pet. App. 32a, the immovable-property rule doesn't depend on *exclusive* sovereignty; rather, what matters is that the defendant sovereign freely chose to acquire property outside of its own sovereign territory. *See The Schooner Exchange*, 11 U.S. at 145. Moreover, the fact that now the Tribe must defend a suit concerning its reservation property is a problem of the Tribe's making—no one forced the Tribe to petition the federal government to take the properties into trust after the Association had filed its suit. And in any event, the question is not whether a new suit could be initiated today concerning these now within-reservation properties, but whether the Association's existing suit, litigated for nearly five years prior to the properties' trust transfer, may continue. The correct answer is yes: when the Tribe acquired, through its agent, the various properties at issue, it effectively waived its immunity from this suit when it was filed. That waiver continues to bind the Tribe with respect to this same suit. *See C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) ("We are satisfied that the Tribe in this case has waived, with the requisite clarity, immunity from the suit C & L brought to enforce its arbitration award.").

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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