No. 17-387

In the Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE, PETITIONER

v.

SHARLINE LUNDGREN AND RAY LUNDGREN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the sovereign immunity of a federally recognized Indian tribe bars an action against the Tribe to quiet title to property purchased by the Tribe outside of its reservation, where the Tribe has not waived its immunity and Congress has not unequivocally abrogated the Tribe's immunity.

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INTEREST OF THE UNITED STATES

The Washington Supreme Court held that tribal sovereign immunity did not bar respondents' action to quiet title to land owned by an Indian tribe, based on the rationale that the state court could exercise *in rem* jurisdiction over the land itself without obtaining personal jurisdiction over the sovereign landowner. The United States has long been "committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). A tribe's sovereign immunity from suit is one important protector of tribal autonomy. Additionally, the United States, as a sovereign landowner that has waived its immunity from suit only in specific circumstances and only in federal court, see Quiet Title Act, 28 U.S.C. 2409a, has an interest in ensuring that state courts do not quiet title to land owned

by the United States based on the rationale adopted by the Washington Supreme Court.

STATEMENT

1. a. Petitioner, a federally recognized Indian tribe, has a reservation that includes land along the east side of Interstate 5 north of the town of Burlington, Washington. See 46 Fed. Reg. 46,681 (Sept. 21, 1981) (establishing Upper Skagit Indian reservation). In 2013, petitioner purchased an approximately 40-acre parcel of forested land just west of Interstate 5, across from petitioner's reservation. See J.A. 33. Petitioner purchased the tract of land from the heirs of Annabell Brown and received a statutory warranty deed. Pet. App. 3a; Clerk's Papers (C.P.) 17, 85-88.

In anticipation of asking the Secretary of the Interior to take the parcel of land into trust for petitioner pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 5108, petitioner had the parcel surveyed. Pet. App. 3a. The surveyors alerted petitioner to the presence of an old barbed-wire fence running generally east-west across the parcel through the forest near its southern boundary. *Id.* at 2a-3a; J.A. 39-41. Since 1981, respondents, Sharline and Ray Lundgren, have owned the approximately 10-acre parcel of land to the south of the parcel purchased by the Tribe. Pet. App. 2a; C.P. 14, 96.

The fence, which is 1306 feet long with a 12-foot gate in the middle, is about 19 feet north of the property line between the two parcels on the east end and about 42 feet north of the property line on the west end, creating an approximately one-acre strip between the fence and the southern boundary of the property line. J.A. 38 (map with dimensions); J.A. 40. After the fence was dis-

covered, tribal officials communicated with respondents, who initially expressed interest in purchasing the strip from petitioner or trading another nearby parcel for the strip. J.A. 39-41.

b. When petitioner decided to retain the strip, respondents filed a quiet-title action in the Superior Court for Skagit County, naming petitioner as the defendant and personally serving petitioner pursuant to Washington Revised Code Annotated § 7.28.010 (West 2017). Pet. App. 4a; J.A. 11-16; C.P. 225-227. Respondents contended that they had acquired title to the strip by adverse possession before petitioner bought the land or, alternatively, that there was mutual acquiescence that the fence was the boundary. Pet. App. 4a. Petitioner entered a special appearance to assert its sovereign immunity from suit. C.P. 256.

Respondents moved for summary judgment. C.P. 191-216. They submitted declarations stating, *inter alia*, that the fence was in its present location in 1947, when Sharline Lundgren's grandmother purchased the parcel now owned by respondents. Pet. App. 3a; C.P. 60; see C.P. 60-63, 110-113; J.A. 17-27.

Petitioner moved to dismiss the action for lack of subject matter jurisdiction based on its sovereign immunity. Pet. App. 4a; C.P. 232-235. Alternatively, petitioner contended that the case must be dismissed because, under Washington Superior Court Civil Rule 19, petitioner was a necessary and indispensable party that could not be joined because of its sovereign immunity. Pet. App. 4a-5a & n.2; C.P. 235-240.

2. a. The superior court denied petitioner's motion to dismiss. Pet. App. 5a-6a, 39a-40a. The court concluded that petitioner's argument was foreclosed by *Smale* v. *Noretep*, 208 P.3d 1180 (Wash. Ct. App. 2009).

C.P. 134; J.A. 75-76. In *Smale*, the Court of Appeals of Washington had held that the superior court could continue to exercise jurisdiction over an action seeking to quiet title based on an adverse possession claim, even though an Indian tribe had acquired the disputed property from the original non-Indian defendants after the action was commenced. 208 P.3d at 1180. The court of appeals had reasoned that "[b]ecause courts exercise in rem jurisdiction over the property subject to quiet title actions, * * * transferring the disputed property to a tribal sovereign does not bar the continued exercise of subject matter jurisdiction over the property." *Ibid.*

b. After petitioner's motion to dismiss was denied, the superior court granted summary judgment in favor of respondents. Pet. App. 5a; C.P. 158-160, 224. The court concluded that all of the elements of adverse possession under state law had been established. J.A. 95-97. The court further concluded that "[t]he doctrine of recognition and acquiescence also applies" based on "manifestations of mutual recognition and acceptance" of the fence as the boundary line. J.A. 97.

3. The Washington Supreme Court accepted discretionary direct review of both superior court orders, Pet. App. 5a-6a, and it affirmed in a 5-4 decision, *id.* at 1a-38a.

a. i. The Washington Supreme Court explained that "[s]uperior courts in Washington have jurisdiction to exercise in rem jurisdiction to settle disputes over real property." Pet. App. 7a. The court characterized quiet-title actions as proceedings "in rem" in which "the court has jurisdiction over the property itself." *Id.* at 7a-8a. The court stated that "[p]ersonal jurisdiction over the landowner is not required" in such proceedings. *Id.* at 8a.

The Washington Supreme Court reasoned that "[a] court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity." Pet. App. 8a. According to the court, that principle was recognized by this Court in *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992). The court noted that, in *County of Yakima*, this Court reached the conclusion that the Indian General Allotment Act (General Allotment Act), ch. 119, 24 Stat. 388, allowed the county to impose ad valorem taxes on reservation fee land "by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the [Tribe]." Pet. App. 8a. The court also relied upon state-court precedent "uph[olding] a superior court's assertion of in rem jurisdiction over tribally owned fee-patented land." *Id.* at 9a; see *id.* at 9a-11a (citing *Anderson & Middleton Lumber Co.* v. *Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996), and *Smale*, *supra*). The court concluded that, under those precedents, Washington state courts "have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted." *Id.* at 11a.

ii. The Washington Supreme Court further rejected petitioner's argument that, under Superior Court Civil Rule 19, petitioner is a necessary and indispensable party to respondents' quiet-title suit. Pet. App. 11a-16a.

Under Civil Rule 19(a), a person who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest" must be joined if feasible. Pet. App. 27a-28a. The Washington

Supreme Court concluded that adjudicating respondents' quiet-title action would have no impact on petitioner's interests—and thus petitioner was not a necessary party—because respondents had proven their claim of adverse possession. *Id.* at 13a-16a. The court reasoned that because respondents had established adverse possession of the disputed strip, see *id.* at 14a-16a, they "are not seeking to divest a sovereign of ownership or control," but rather "are attempting to retain what they already own," *id.* at 13a.

The Washington Supreme Court further concluded that, even though its conclusion that petitioner is not a necessary party eliminated any need to consider whether the action should nevertheless proceed in petitioner's absence, see Civil Rule 19(b), it would be inequitable to dismiss respondents' suit because "dismissal would result in no adequate remedy for the plaintiff." Pet. App. 17a. In the court's view, "allowing [petitioner] to employ sovereign immunity in this way runs counter to the equitable purposes underlying compulsory joinder." *Id.* at 18a.

b. Justice Stephens, joined by three other justices, dissented, concluding that respondents' action should be dismissed. Pet. App. 19a-38a.

Justice Stephens agreed with the majority that "the existence of in rem jurisdiction gives a court authority to quiet title to real property without obtaining personal jurisdiction over affected parties." Pet. App. 20a; see *id.* at 20a-22a. She explained, however, that "[t]he court's authority to exercise in rem jurisdiction does not obviate the need to determine which parties must be joined to fully and justly adjudicate the action." *Id.* at 22a-23a. In her view, Civil Rule 19 "counsels against

exercising this authority in the face of a valid assertion of sovereign immunity." *Id.* at 20a.

Justice Stephens concluded that petitioner was a necessary party given its record-title claim to the disputed strip. Pet. App. 28a-29a. She explained that the majority had erred by first deciding the merits of respondents' adverse possession claim and holding on that basis that petitioner was not a necessary party. *Id.* at 26a-27a. She stated that it "make[s] no sense that a court evaluating the interests of a party who cannot be joined to an action could summarily decide the party will lose, and therefore has no interests to protect." *Id.* at 27a. In her view, Civil Rule 19 "*precludes* a court from considering the merits when one of the parties validly asserts sovereign immunity." *Id.* at 26a.

Justice Stephens further concluded that, under the factors set forth in Civil Rule 19(b), respondents' quiet-title action should not proceed without petitioner. Pet. App. 29a-37a. In her view, a judgment for respondents in petitioner's absence "would not bind [petitioner]," *id.* at 32a, and proceeding without petitioner could thus "prevent [respondents] from providing marketable title should they someday wish to sell their property." *Id.* at 33a; see *id.* at 34a-35a. Justice Stephens acknowledged that dismissal would leave respondents without a judicial forum in which to pursue relief. *Id.* at 35a. She explained, however, that sovereign immunity often produces that result. *Id.* at 35a-36a.

SUMMARY OF ARGUMENT

I. State courts cannot circumvent tribal sovereign immunity by exercising *in rem* jurisdiction over tribal property.

A. This Court's cases establish the principle that sovereign immunity from suit bars suits against the sovereign's property. In *United States* v. *Alabama*, 313 U.S. 274 (1941), the Court held that state tax liens could not be enforced through a judicial sale of property subsequently purchased by the United States because "[a] proceeding against property in which the United States has an interest is a suit against the United States." *Id.* at 282. The Court has also held that the States are entitled to Eleventh Amendment immunity in federal court from suits that would effectively quiet title to state-owned land. *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 267-268 (1997). Tribal sovereign immunity is "a matter of federal law," *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct 2024, 2031 (2014) (citation omitted), and the principle that a suit against the sovereign's property is a suit against the sovereign itself therefore applies to Indian tribes. A state-law classification of an action as *in rem* cannot determine federal rights.

B. This Court's decision in *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), does not provide a basis for an *in rem* exception to tribal sovereign immunity. In *County of Yakima*, the Court characterized an ad valorem tax on fee-patented land within a reservation as "*in rem* rather than *in personam*" to distinguish the real property tax from cigarette sales taxes and personal property taxes that had been invalidated in an earlier case. *Id.* at 265. That characterization for the purpose of determining the validity of a particular tax does not support the conclusion that state courts can adjudicate rights in tribal property notwithstanding tribal immunity from suit.

C. The Washington Supreme Court's joinder analysis did not overcome its erroneous adoption of an *in rem* exception to tribal sovereign immunity. Application of a rule like Civil Rule 19 makes little sense where the sole entity claiming an interest in the property is the only named defendant. In any event, petitioner was a necessary party under that rule because it claimed an interest in the disputed strip based on its record title. In concluding that respondents' suit should nevertheless proceed, the court overlooked many alternative ways in which the parties' dispute could be resolved.

II. If respondents' suit had been brought against a foreign state or a sister state that had purchased real property in Washington, sovereign immunity would not have barred the suit. The immunity of foreign states is governed by the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*), which provides a statutory exception to immunity in any case "in which rights * * * in immovable property * * * are in issue." 28 U.S.C. 1605(a)(4). And another State would not be entitled to immunity from a quiet-title action unless Washington granted that other State immunity. *Nevada* v. *Hall*, 440 U.S. 410, 416 (1979). But neither of those exceptions provide a basis for a similar exception here. Congress has not adopted an immovable-property exception to tribal sovereign immunity like the one that applies to foreign states in the FSIA. And the States surrendered their immunity with respect to one another by mutual concession at the Constitutional Convention. Tribal sovereignty, by contrast, is a "special brand of sovereignty" that "rests in the hands of Congress." *Bay Mills*, 134 S. Ct. at 2037. This Court has properly de-

clined to fashion exceptions to tribal sovereign immunity, and there is no occasion to depart from that established rule here.

ARGUMENT

I. STATE COURTS CANNOT CIRCUMVENT TRIBAL SOVEREIGN IMMUNITY BY EXERCISING *IN REM* JURISDICTION OVER TRIBAL PROPERTY

Indian tribes are "domestic dependent nations that exercise inherent sovereign authority." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (citations and internal quotation marks omitted). One of the "core" aspects of sovereignty that Indian tribes possess is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Ibid.* (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978)). That immunity from suit is "a necessary corollary to Indian sovereignty and self-governance." *Ibid.* (quoting *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)); see *ibid.* ("It is 'inherent in the nature of sovereignty not to be amenable' to suit without consent.") (quoting The Federalist No. 81, at 511 (Alexander Hamilton) (Benjamin Wright ed. 1961)). This Court accordingly has long recognized that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998); see *Bay Mills*, 134 S. Ct. at 2030-2031; *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Three Affiliated Tribes*, 476 U.S. at 890-891; *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S.

165, 172-173 (1977).[1] Tribal sovereign immunity applies to suits based on activities (including commercial activities) both on and off the tribe's reservation. *Bay Mills*, 134 S. Ct. at 2031, 2036-2039; *Kiowa*, 523 U.S. at 758. And any abrogation of that immunity by Congress must be clear and unequivocal. *Bay Mills*, 134 S. Ct. at 2031-2032.

The Washington Supreme Court recognized, and respondents do not dispute, that petitioner is entitled to immunity from suit based on its status as a federally recognized Indian tribe. Pet. App. 7a. The court held, however, that petitioner's immunity from suit did not bar respondents' action to quiet title to land in which petitioner claimed an interest because the court could exercise *in rem* jurisdiction over the land itself, and therefore "[p]ersonal jurisdiction over the landowner is not required." *Id.* at 7a-8a. That holding is incorrect.

Tribal sovereign immunity is a matter of federal law, *Bay Mills*, 134 S. Ct. at 2031, and this Court's federal sovereign immunity precedents have made clear that a suit against the sovereign's property is a suit against the sovereign itself. The Washington Supreme Court erred in relying on this Court's decision in *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), for its conclusion that there is an *in rem* exception to tribal sovereign immunity from suit (Pet. App. 8a-9a), and the court's consideration of tribal sovereign immunity through a joinder analysis under Superior Court Civil Rule 19 failed to overcome that error.

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[1] See also *Adams* v. *Murphy*, 165 F. 304, 308 (8th Cir. 1908); *Thebo* v. *Choctaw Tribe of Indians*, 66 F. 372, 375 (8th Cir. 1895).

A. Sovereign Immunity Bars Suits Against The Sovereign's Property

1. This Court's cases establish the principle that sovereign immunity from suit bars suits against the sovereign's property. In *United States* v. *Alabama*, 313 U.S. 274 (1941), the Court held that state tax liens that had been imposed on property subsequently purchased by the United States could not be enforced through a judicial sale of the property. *Id.* at 282. The Court explained that "[a] proceeding against property in which the United States has an interest is a suit against the United States," and that the suit was therefore barred by sovereign immunity. *Ibid.* (citing *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869) ("[T]here is no distinction between suits against the government directly, and suits against its property.")).

Similarly, in *Minnesota* v. *United States*, 305 U.S. 382 (1939), the Court held that Minnesota's state-court condemnation action to obtain a right of way for a highway across land held in trust by the United States for individual Indians could not proceed in state court. *Id.* at 386-387. The Court explained that "[a] proceeding against property in which the United States has an interest is a suit against the United States," and the suit therefore could not go forward without the United States—the "own[er] [of] the fee of the[] parcels." *Id.* at 386. Because Congress had not waived the United States' immunity from condemnation actions in state courts, the suit had to be dismissed. *Id.* at 388.

And in *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), the Court held that the State of Idaho had Eleventh Amendment immunity from a suit brought in federal court by an Indian tribe seeking injunctive relief that would effectively quiet title to the submerged lands

and bed of Lake Coeur d'Alene. *Id.* at 264 (opinion of Kennedy, J.); *id.* at 281 (describing Tribe's suit as "the functional equivalent of a quiet title action"). The Court explained that the Eleventh Amendment, which "enacts a sovereign immunity from suit" for the States in federal court, barred the Tribe's suit. *Id.* at 267-268.

2. The Washington Supreme Court's holding is inconsistent with that fundamental principle of sovereign immunity. If the Washington Supreme Court were correct that a state court's assertion of *in rem* jurisdiction over a sovereign's property rendered the sovereign's immunity from suit irrelevant, Pet. App. 8a, then Washington courts would in theory have the authority to quiet title even to property owned by the United States. It is firmly established, however, that sovereign immunity bars quiet-title actions against the United States, and that such actions may proceed only pursuant to the waiver of sovereign immunity contained in the Quiet Title Act, 28 U.S.C. 2409a. See *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983).

The Washington Supreme Court's *in rem* jurisdiction principle would also imply that Washington state courts could quiet title to land owned by the State without a waiver of immunity. But the Washington Supreme Court had previously held that an action to determine title to real property may proceed against the State in its own courts only pursuant to the State's statutory waiver of immunity. See *State* v. *Superior Court*, 94 P.2d 505, 506-507 (1939) (stating that "an action * * * to determine the title to real property" "may not be maintained against the [S]tate without its consent").[2]

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[2] Washington has waived its sovereign immunity in its own courts as to "[a]ny person or corporation having any claim against the

3. The Washington Supreme Court did not offer any justification for why a principle of *in rem* jurisdiction could be fashioned to apply only to Indian tribes, and no justification exists.

a. The contours of tribal sovereign immunity are "a matter of federal law," *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756), and the principle that a suit against the sovereign's property is a suit against the sovereign itself therefore applies to Indian tribes, just as it applies to other sovereigns. See, *e.g.*, *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1291-1292 (2017) (following federal precedent on the distinction between official-capacity and individual-capacity suits in the context of tribal sovereign immunity); *Cayuga Indian Nation of N.Y.* v. *Seneca County*, 761 F.3d 218, 220-221 (2d Cir. 2014) (per curiam) (holding that tribal sovereign immunity barred foreclosure proceedings against real property owned by an Indian tribe to recover unpaid property taxes and "declin[ing] to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings—that Seneca County has urged [the court] to adopt") (citing *The Siren*, 74 U.S. (7 Wall.) at 154); *First Bank & Trust* v. *Maynohonah*, 313 P.3d 1044, 1056 (Okla. Civ. App. 2013) (rejecting argument that tribal sovereign immunity did not bar the exercise of *in rem* jurisdiction over money in a tribal bank account).

This Court has previously cautioned that state-law "classification of an action as *in rem* or *in personam*" cannot determine federal rights. *Shaffer* v. *Heitner*, 433 U.S. 186, 206 (1977). *Shaffer* involved a Delaware statute that established state-court jurisdiction over a lawsuit "by sequestering any property of the defendant

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[S]tate of Washington." Wash. Rev. Code Ann. § 4.92.010 (West 2017).

that happens to be located in Delaware." *Id.* at 189. The Delaware courts had rejected the defendants' argument that the state court lacked personal jurisdiction over them "by noting that this suit was brought as a *quasi in rem* proceeding * * * based on attachment or seizure of property present in the jurisdiction." *Id.* at 196.

This Court concluded, however, that the same due-process standard for personal jurisdiction articulated in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), must also be satisfied to obtain *in rem* jurisdiction over the defendants' property. *Shaffer*, 433 U.S. at 207. The Court reasoned that a state-court's "jurisdiction over a thing" (*i.e.*, *in rem* jurisdiction) was a "customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *Ibid.* (quoting Restatement (Second) of Conflict of Laws § 56, intro. note (1971)). The Court relied on *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), in which it had explained that Fourteenth Amendment due-process rights "cannot depend on the classification of an action as *in rem* or *in personam*," because that is "a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." *Shaffer*, 433 U.S. at 206 (quoting *Mullane*, 339 U.S. at 312).

b. This case well illustrates why a state-law *in rem* label should not determine an Indian tribe's immunity from suit. For its explanation that "[q]uiet title actions are proceedings in rem" in which personal jurisdiction over the defendant is unnecessary, Pet. App. 7a, the Washington Supreme Court cited *Phillips* v. *Thompson*, 131 P. 461 (1913). In *Phillips*, the Washington Su-

preme Court explained that States, including Washington, had addressed the problem of quiet-title suits that involve "unknown heirs, and unknown parties, who may be [outside] the jurisdiction of the state in which the real estate is located," by enacting statutes that allow for service by publication rather than personal summons in some circumstances. *Id.* at 463.

The relevant Washington statute requires a plaintiff to name as defendant the "tenant in possession" or other "person claiming the title or some interest therein," and to serve a summons on the defendant unless the defendant is absent from Washington or cannot be found within Washington, in which case service may be made by publication. Wash. Rev. Code Ann. § 7.28.010 (West 2017). The Washington Supreme Court's statement that "[p]ersonal jurisdiction over the landowner is not required" in proceedings *in rem* (Pet. App. 8a) thus appears to be overbroad even as a matter of state law, as personal service on in-state defendants is required to the extent possible.

Furthermore, this is not a case in which petitioner was absent from Washington or could not be found. In fact, respondents named petitioner as the sole defendant in their quiet-title action and personally served petitioner with a summons at its offices within the State. Pet. App. 4a; J.A. 11-17; C.P. 225-227. The *in rem* label has no apparent significance in cases in which the process for obtaining personal jurisdiction has been accomplished. See, *e.g.*, 4A Charles Alan Wright et al., *Federal Practice and Procedure* § 1070, at 442 (2015) ("in rem or quasi-in-rem jurisdiction represents an alternative to in personam jurisdiction" "when one or more of the defendants or persons with potential claims to the

property are nonresidents or jurisdiction over their person cannot be secured in the forum state").

In any event, this Court has characterized tribal sovereign immunity as a matter of subject matter jurisdiction, not personal jurisdiction, as the rationale for sovereign immunity goes beyond concerns about fair notice and the burden of defending litigation in an out-of-state forum. See *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137, 153 n.6 (2009); *United States* v. *Alabama*, 313 U.S. at 282; *Minnesota* v. *United States*, 305 U.S. at 389; see also *Bodi* v. *Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1014-1015 (9th Cir. 2016); *Alabama* v. *PCI Gaming Auth.*, 801 F.3d 1278, 1286 (11th Cir. 2015); *Breakthrough Mgmt. Grp., Inc.* v. *Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1177 (10th Cir. 2010), cert. dismissed, 564 U.S. 1061 (2011); *Miner Elec., Inc.* v. *Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). The Washington Supreme Court's distinction between *in rem* and *in personam* jurisdiction thus does not withstand scrutiny.

B. *County Of Yakima* Does Not Provide A Basis For An *In Rem* Exception To Tribal Sovereign Immunity

The Washington Supreme Court relied on this Court's decision in *County of Yakima* to support its conclusion that state courts could exercise *in rem* jurisdiction over tribal property. The Washington Supreme Court reasoned that, in *County of Yakima*, this Court reached the conclusion that the General Allotment Act allowed the county to impose ad valorem taxes on fee-patented land "by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the [Tribe]." Pet. App. 8a. *County of Yakima* does not support the Washington Supreme Court's decision.

In *County of Yakima*, this Court considered whether the county could impose an ad valorem tax on fee-patented land within the Yakima Indian Reservation and whether it could impose an excise tax on the sale of such lands. 502 U.S. at 253. The parcels of land at issue, although within the Tribe's reservation, were owned in fee by individual Indians, by non-Indians, or by the Tribe. *Id.* at 256. That situation resulted from land patents issued pursuant to Section 6 of the General Allotment Act, which provided for the allotment of reservation lands to individual Indians, to be held in trust by the United States (and therefore restricted from alienation or encumbrance) for 25 years. At the conclusion of that 25-year period (unless extended by subsequent statutes), a fee patent would be issued to the individual Indian allottee, freeing the land of its restrictions. *Id.* at 254. The "allotment era" ended with the passage of the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, which "halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands." *County of Yakima*, 502 U.S. at 255-256. The Indian Reorganization Act did not, however, attempt "to undo the dramatic effects of the allotment years on the ownership of former Indian lands," because it did not "encumber [the] fee-patented lands [or] impair [] the rights of those non-Indians who had acquired title to over two-thirds of the Indian lands." *Id.* at 255.

In determining that the county could impose the ad valorem tax on fee-patented land within the reservation, the Court characterized the tax as "*in rem* rather than *in personam*," *County of Yakima*, 502 U.S. at 265, in order to distinguish it from the cigarette sales taxes and personal property taxes imposed on Indian residents of

a reservation that the Court had invalidated in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, the State of Montana had asserted that, under Section 6 of the General Allotment Act, it had reservation-wide taxing jurisdiction because "a[] scheme of divided jurisdiction would be inequitable." *County of Yakima*, 502 U.S. at 261. The Court in *Moe* rejected that argument and further held that, in light of Congress's 1934 repudiation of the policies behind the General Allotment Act, "the Act could no longer be read to provide Montana plenary jurisdiction even over those Indians residing on reservation fee lands." *Ibid.* (quoting *Moe*, 425 U.S. at 479).

The Court explained in *County of Yakima* that "*Moe* was premised * * * on the implausibility, in light of Congress' postallotment era legislation, of Montana's construction of [Section] 6 that would extend the State's *in personam* jurisdiction beyond the section's literal coverage." 502 U.S. at 262. But, the Court continued, Congress had specifically provided that the issuance of a fee patent to an individual allottee "would free the *land* of 'all restrictions as to sale, incumbrance, or taxation,'" thus explicitly subjecting fee-patented land to real property taxes. *Id.* at 264 (citing 25 U.S.C. 349). The Court therefore concluded that the ad valorem tax was not "*Moe*-condemned" because the State's authority to impose the tax was "*in rem* rather than *in personam*." *Id.* at 264-265.[3]

The Court's characterization of the county's jurisdiction to tax fee-patented land within the reservation as

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[3] In contrast, the Court held that the county could not impose an excise tax on the sale of fee-patented reservation land because Congress had authorized state jurisdiction to tax only the land, not its sale. *County of Yakima*, 502 U.S. at 268.

"*in rem*" for the specific purpose of determining its validity under Section 6 of the General Allotment Act does not support the conclusion that state courts can exercise *in rem* jurisdiction over reservation lands generally or that they may do so to adjudicate rights in tribal property notwithstanding a tribe's immunity from suit. See *Cayuga Indian Nation*, 761 F.3d at 221 (rejecting county's reliance on *County of Yakima* and distinguishing between "the common-law tribal immunity *from suit*—as opposed to immunity from other, largely prescriptive, powers of the states such as the levying of taxes"). The Court had no occasion to address tribal sovereign immunity from suit in *County of Yakima* because the Tribe itself had commenced that suit in federal district court to obtain declaratory and injunctive relief regarding its tax liability. 502 U.S. at 256. And although the Court resolved those questions about the Tribe's tax liability, finding the necessary express authorization of state taxation in Section 6 of the General Allotment Act, it had no occasion to consider whether the Tribe would be entitled to sovereign immunity in a subsequent foreclosure proceeding to collect taxes owed. Accordingly, nothing in *County of Yakima* suggests that Congress had given the clear and unequivocal authorization that would be necessary to abrogate the Tribe's sovereign immunity to such a proceeding, and indeed both the majority and dissent characterized the Court's holding as concerning taxability, with no mention of sovereign immunity from suit. *Id.* at 270 ("We hold that the General Allotment Act permits Yakima County to impose an ad valorem tax on reservation land patented in fee pursuant to the Act."); *ibid.* (Blackmun, J., concurring in part and dissenting in part) ("I dissent from [the majority's] conclusion that the county may

impose ad valorem taxes on Indian-owned fee-patented lands."). *County of Yakima* therefore does not support the Washington Supreme Court's conclusion that tribal sovereign immunity does not bar respondents' quiet-title action or any other action that might be characterized as *in rem*.

C. The Washington Supreme Court's Joinder Analysis Under Civil Rule 19 Failed To Overcome Its Erroneous Adoption Of An *In Rem* Exception To Tribal Sovereign Immunity

1. Despite the Washington Supreme Court's mistaken reliance on a distinction between *in rem* and *in personam* actions, the court did not completely reject all consideration of tribal sovereign immunity from suit. Instead, it considered petitioner's immunity by analyzing whether petitioner was a necessary party to respondents' quiet-title action under Superior Court Civil Rule 19. Pet. App. 11a-16a. Although petitioner was named as the only defendant in the suit and was personally served with a summons, *id.* at 4a; J.A. 11-17; C.P. 225-227, the court apparently conceptualized the parcel of land as the defendant and petitioner as a potential additional defendant that claimed an interest in the property.

Application of a rule like Civil Rule 19 makes little sense where, as here, the sole entity claiming an interest in the property is the only named defendant. But even if a Civil Rule 19 approach made sense, the majority's holding that petitioner was not a necessary party under that rule failed to respect tribal sovereign immunity. Justice Stephens correctly explained that petitioner was a necessary party because it claimed an interest in the disputed strip based on its record title. Pet. App. 28a-29a; cf. *United States* v. *Alabama*, 313

U.S. at 282 ("The United States was an indispensable party to proceedings for the sale of the lands [in which the United States has an interest], and in the absence of its consent to the prosecution of such proceedings, the county court was without jurisdiction and its decrees * * * were void.").

The majority, in contrast, reached ahead and decided the merits of respondents' adverse-possession claim and on that basis determined that petitioner had no interest at stake in the dispute. Pet. App. 13a-16a. The majority's approach was incompatible with the Tribe's federally protected sovereign immunity. Cf. *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 864 (2008) (explaining that the court of appeals' "consideration of the merits" to determine whether a foreign sovereign had an interest in disputed property sufficient to make it a required party under Federal Rule of Civil Procedure 19 "was itself an infringement on foreign sovereign immunity"). Indeed, that approach, if applied to sovereign immunity generally, would improperly allow claims of adverse possession to be adjudicated against land owned by the United States or a State—without regard to a waiver of sovereign immunity—on the theory that plaintiffs who have proved their claim of adverse possession are "not seeking to divest a sovereign of ownership or control" but are merely "attempting to retain what they already own." Pet. App. 13a.[4]

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[4] Respondents' argument (Br. in Opp. 8-9) that sovereign immunity is not implicated when a quiet-title plaintiff claims title by adverse possession is without merit. Under Washington law, an adverse possessor obtains "original title" when the legal requirements of adverse possession are met for ten years. *El Cerrito, Inc.* v. *Ryndak*, 376 P.2d 528, 532 (Wash. 1962). But the adverse possessor does not simply file a notice of "original title" in the property records like

The Washington Supreme Court also overlooked important federal interests protected by tribal sovereign immunity in concluding that, even if petitioner was a necessary party, respondents' suit should nevertheless proceed "in equity and good conscience." C.R. 19(b); See Pet. App. 16a-18a.[5] The court was primarily concerned with what it perceived to be respondents' lack of any forum in which to quiet title to the disputed strip if petitioner's immunity prevented the case from going forward. Pet. App. 18a. This Court has explained, however, that if a sovereign asserts immunity in a quiet-title action, "[n]othing prevents the claimant from continuing to assert his title, in hope of inducing the [sovereign] to file its own quiet title suit, in which the matter would finally be put to rest on the merits." *Block*, 461 U.S. at 291-292. Respondents could, for example, log trees on the disputed strip, commence building a structure

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filing a lien. The adverse possessor must file suit against the title holder if it wishes to quiet title. In that suit, the record title holder may challenge the claim of adverse possession, and the court decides whether the legal requirements of adverse possession have been satisfied. See, *e.g.*, *Gorman* v. *City of Woodinville*, 283 P.3d 1082, 1083 (Wash. 2012); *El Cerrito*, 376 P.2d at 532.

[5] In the view of the dissenting justices, a judgment entered without petitioner's participation in the suit would not bind petitioner. Pet. App. 32a-33a. But presumably a judgment quieting title to tribal property would be recorded in the official property records. Section 7.28.010 authorizes the state court to appoint a trustee for absent or nonresident defendants served by publication, but does not provide for appointment of a trustee for a resident tribe that is personally served and specially appears to assert its sovereign immunity. If a sovereign declines to participate in a quiet-title action and the court declines to dismiss the action, Civil Rule 19 could become a tool for entering default judgments against sovereigns that assert their immunity.

there, or take other similar actions that would induce petitioner to file a quiet-title action.

In addition, if a Tribe plans to request that the Secretary take a disputed parcel of land into trust, as petitioner evidently intends here (Pet. App. 3a; J.A. 39), there must be a title examination in connection with the land-into-trust application, which could induce the Tribe to file a quiet-title suit. See 25 C.F.R. 151.13 ("The Secretary may require the elimination of any * * * liens, encumbrances, or infirmities prior to taking final approval action on the acquisition, and she shall require elimination prior to such approval if she determines that the liens, encumbrances or infirmities make title to the land unmarketable."). Further, a Tribe, mindful that Congress has the power to abrogate tribal sovereign immunity and desirous of good relationships with its neighbors, may choose to waive its immunity with respect to a quiet-title action, particularly where there has been a good-faith effort to resolve the title dispute prior to suit. And in this case, respondents (or their predecessors-in-interest) could have initiated a quiet-title action any time during the 56-year period between 1957, when they claim the strip was obtained by adverse possession, J.A. 86, and 2013, when Annabell Brown's land was sold to the Tribe.

All of those possible avenues for resolution to one side, however, the Washington Supreme Court improperly relied upon Civil Rule 19 to circumvent petitioner's sovereign immunity.

II. AN EXCEPTION TO IMMUNITY FOR SUITS TO DETERMINE RIGHTS IN IMMOVABLE PROPERTY THAT APPLIES TO OTHER SOVEREIGNS DOES NOT APPLY TO INDIAN TRIBES

For the reasons stated above (pp. 10-24, *supra*), the Washington Supreme Court erred in concluding that tribal sovereign immunity did not bar respondents' quiet-title action on the theory that the court could exercise *in rem* jurisdiction over the land itself. To be sure, if respondents' suit had been brought against a foreign state or a sister state that had purchased real property in Washington, sovereign immunity would not bar the suit because of a special exception or special principles of sovereign immunity in those contexts. But neither the Washington Supreme Court nor respondents in their brief in opposition urged an exception to tribal sovereign immunity by reference to such an immovable-property exception for foreign or sister states.

If this Court nevertheless were to consider that argument, the Court should reject it. This Court has repeatedly held that it is for Congress, not the courts, to fashion any exceptions to tribal sovereign immunity, and any such exception must be clear and unequivocal. Congress has enacted no such exception for real property disputes involving tribally owned land.

A. An Immovable-Property Exception To Sovereign Immunity From Suit Has Been Adopted With Respect To Foreign Sovereigns, And Sovereign Immunity Does Not Bar A Suit Against Sister States

1. Since 1976, the immunity of foreign sovereigns from suit has been governed by the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*). The FSIA states a general rule that a foreign state is immune from suit,

see 28 U.S.C. 1604, and a court may exercise jurisdiction over a foreign state only if the suit comes within a statutory exception to that general rule of immunity. See 28 U.S.C. 1330(a), 1605; *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). Under one such exception, "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which rights * * * in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4).

The general rule that foreign states are immune from suit in the United States "began as a judicial doctrine" when Chief Justice Marshall held in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), that United States courts had no jurisdiction over an armed ship of a foreign state, even while in an American port. *Kiowa*, 523 U.S. at 759 (citing *Schooner Exchange*, *supra*). The Court's opinion in *Schooner Exchange* "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden B.V.*, 461 U.S. at 486. Accordingly, before 1952, the United States followed a policy under which "foreign sovereigns and their public property [we]re * * * not * * * amenable to suit in our courts without their consent." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938). The *Schooner Exchange* made clear, however, that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V.*, 461 U.S. at 486. This Court therefore "consistently * * * deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions

against foreign sovereigns and their instrumentalities." *Ibid.*

In 1952, the Department of State announced the adoption of the "restrictive" theory of foreign sovereign immunity, under which foreign states are granted immunity only for their sovereign or public acts (*jure imperri*), and not for their commercial acts (*jure gestionis*). See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) (Tate Letter), reprinted in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976); see *Verlinden B.V.*, 461 U.S. at 487. In 1976, in response to difficulties in implementing the Tate Letter, see *Kiowa*, 523 U.S. at 759; *Verlinden B.V.*, 461 U.S. at 488-489, Congress enacted the FSIA "to codify the restrictive theory's limitation of immunity to sovereign acts." *Permanent Mission of India* v. *City of New York*, 551 U.S. 193, 199 (2007).

The immovable-property exception to foreign sovereign immunity in the FSIA was grounded in international practice that preexisted the Tate Letter. See *Permanent Mission of India*, 551 U.S. at 200 (FSIA's immovable-property exception was "meant to codify . . . [a] pre-existing real property exception to sovereign immunity recognized by international practice") (citation and internal quotation marks omitted). Even under the "absolute" theory of sovereign immunity, it was recognized that immunity did not bar certain claims "with respect to real property." Tate Letter (*Alfred Dunhill*, 425 U.S. at 711) ("There is agreement by proponents of both [the absolute and restrictive] theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property."). The immovable-property exception codified in

the FSIA reflects the territorial sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985).

2. For somewhat different reasons, a sister State also would not be entitled to immunity from a quiet-title action unless Washington granted that State immunity. In *Nevada* v. *Hall*, 440 U.S. 410 (1979), the Court held that a State is not entitled to immunity in the courts of another State absent "an agreement * * * between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Id.* at 416; see *Haberman* v. *Washington Pub. Power Supply Sys.*, 744 P.2d 1032, 1066-1067 (Wash. 1987), appeal dismissed, 488 U.S. 805 (1988).[6]

Even before *Hall*, the Court had recognized that when a State purchases real property in another State, it does not have immunity from suit with respect to rights to that real property. In *Georgia* v. *City of Chattanooga*, 264 U.S. 472 (1924), Georgia had purchased land in Chattanooga, Tennessee, for a railroad yard. *Id.* at 478. Georgia brought suit to enjoin the city from condemning a right of way through the railroad yard on the ground that, *inter alia*, "Georgia has never consented to be sued in the courts of Tennessee." *Id.* at 479. The Court held that "[t]he power of Tennessee * * * to take land for a street is not impaired by the fact that a sister State owns the land for railroad purposes." *Ibid.* "Having acquired land in another State for the purpose of using it in a private capacity," the Court explained,

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[6] In *Franchise Tax Board* v. *Hyatt*, 136 S. Ct. 1277 (2016), the Court divided 4-to-4 on the question whether to overrule *Nevada* v. *Hall*. *Id.* at 1281.

"Georgia can claim no sovereign immunity or privilege in respect to its expropriation." *Id.* at 479-480. Instead, "[l]and acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership." *Id.* at 480.

B. The Court Should Not Adopt An Immovable-Property Exception To Tribal Sovereign Immunity

The existence of an immovable-property exception in the context of foreign and state sovereign immunity does not mean that such an exception may be fashioned by the courts for Indian tribes. The contexts for those exceptions differ significantly from tribal sovereign immunity.

1. Foreign sovereign immunity is not a judge-made doctrine. Rather, the Judicial Branch has deferred to the determinations of the political Branches—first to the Executive Branch, and now to Congress following enactment of the FSIA. *Verlinden B.V.*, 461 U.S. at 486. Congress can and does act in the sphere of foreign sovereign immunity, *Kiowa*, 523 U.S. at 759, and it has enacted statutory exceptions to foreign sovereign immunity in the FSIA even as it has declined to enact parallel exceptions to the established immunity of Indian tribes. For example, although the FSIA codified the Executive's decision to adopt the restrictive theory of foreign sovereign immunity and therefore does not afford immunity to foreign sovereigns for their commercial activities in the United States, 28 U.S.C. 1605(a)(2), Indian tribes remain immune from suit based on commercial activities both on and off reservation land. *Bay Mills*, 134 S. Ct. at 2031, 2036-2039; *Kiowa*, 523 U.S. at 758. The same is true with respect to the FSIA's immovable-property exception. "In both fields, Congress is in a position to weigh and accommodate the competing policy

concerns and reliance interests." *Kiowa*, 523 U.S. at 759.

Similarly, with respect to state sovereign immunity, this Court has recognized that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa*, 523 U.S. at 756. States lack immunity in one another's courts because "each State at the Constitutional Convention surrendered its immunity from suit by sister States." *Bay Mills*, 134 U.S. at 2031. This Court has recognized, however, that the Tribes did not participate in the Constitutional Convention and therefore did not surrender their immunity as part of the plan of the Convention. *Ibid.* ("'[I]t would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity against state-initiated suits.") (quoting *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 782 (1991)).

2. While the Court has deferred to the Executive Branch and later to Congress in the realm of foreign sovereign immunity, and while the States surrendered their immunity with respect to one another by mutual concession, tribal sovereignty is a "special brand of sovereignty" that "rests in the hands of Congress." *Bay Mills*, 134 S. Ct. at 2037. This Court has held that tribal sovereign immunity is qualified only in that "a tribe's immunity, like its other governmental powers and attributes, [is] in Congress's hands." *Id.* at 2030. Congress could enact a statute that abrogated Indian tribes' immunity from certain quiet-title actions in either state or federal court, as it has done for the United States in the Quiet Title Act, 28 U.S.C. 2409a, and for foreign states in the FSIA, 28 U.S.C. 1605(a)(4). But the Court has properly declined to take it upon itself to fashion exceptions to tribal sovereign immunity, concluding

that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Bay Mills*, 134 S. Ct. at 2037; cf. 28 U.S.C. 2409a(a) (excepting "trust or restricted Indian lands" from the waiver of the United States' immunity from suit under the Quiet Title Act); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 215 (2012).

There is no occasion to depart from that established rule here. As described above (pp. 23-24, *supra*), an Indian tribe's invocation of immunity in a quiet-title suit does not eliminate the possibility that the title dispute will be resolved. And if Indian tribes invoke immunity to avoid adjudication of quiet-title actions and unresolved title disputes become problematic, Congress can "weigh and accommodate the competing policy concerns and reliance interests" and abrogate tribal sovereign immunity in whatever circumstances it sees fit, and subject to whatever conditions it deems appropriate. *Kiowa*, 523 U.S. at 759. Of relevance to this case, for example, although Congress waived the sovereign immunity of the United States to federal-court quiet-title suits in the Quiet Title Act, 28 U.S.C. 2409a(a), it did not waive immunity to such a suit based on adverse possession, 28 U.S.C. 2409a(n); see also 28 U.S.C. 2409a(a) (excepting "water rights" from Quiet Title Act waiver). And Congress enacted a special statute of limitations for actions under the Quiet Title Act. 28 U.S.C. 2409a(g).

If Congress were to consider enacting some form of immovable-property exception to tribal sovereign immunity for off-reservation real property, still further questions would arise concerning the proper scope of any such exception. With respect to foreign sovereign

immunity, for example, pre-FSIA legal scholarship described the immovable-property exception in narrow terms. The Restatement (Second) of Foreign Relations Law of the United States stated that the exception permitted "actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction." § 68 cmt. d, at 207 (1965). The Restatement explained that it did not include "a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." *Ibid.*

Foreign states are now subject to a somewhat broader statutory exception to immunity for any case in which "rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). In *Permanent Mission of India*, the Court noted that Section 1605(a)(4) "does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession" but "focuses more broadly on 'rights in' property," and the Court held that a suit to establish the validity of a tax lien could proceed because it implicates rights in immovable property. 551 U.S. at 198. But at the same time, the Court noted New York City's concession that, even if the city taxes were declared to be valid, the foreign states would be immune from foreclosure proceedings. *Id.* at 196 n.1; see also *Cayuga Indian Nation*, 761 F.3d at 220-221 (holding that tribal sovereign immunity barred foreclosure proceedings to collect unpaid ad valorem property taxes on land owned by Indian tribe); *Oneida Indian Nation of N.Y.* v. *Madison County*, 605 F.3d 149, 156-160 (2d Cir. 2010) (same), vacated and remanded, 562 U.S. 42 (2011).

In sum, under this Court's decisions, whether and to what extent an immovable-property exception to tribal sovereign immunity should be adopted is to be determined by Congress, which can weigh various considerations such as those just discussed and can impose limits and conditions on any such abrogation.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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JANUARY 2018