No. 17-387

IN THE

Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN, *et vir*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR VILLAGE OF UNION SPRINGS, TOWN OF SPRINGPORT, AND CAYUGA COUNTY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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I. INTEREST OF AMICI CURIAE

A. General Interests

Each of the *amici* local governments, Village of Union Springs (NY), Town of Springport (NY), and Cayuga County (NY)[1], exercises territorial sovereignty over real property located within its respective domains. As a natural incident of its territorial sovereignty, each local government imposes ad valorem real property taxes, exercises regulatory jurisdiction over real property that includes zoning and land use requirements, and, when appropriate, exercises eminent domain powers to acquire private lands for public benefit.

When a local government acts in relation to real property located within its territorial boundaries, it often does so through *in rem* legal proceedings. The enforcement of real property taxes, for example, is accomplished through tax foreclosure proceedings—foreclosing on a tax lien on the property—which is a quintessential *in rem* action against the property itself. It is not an action against the delinquent taxpayer. Revenue collected through *in rem* tax foreclosure proceedings—and publicly maintaining the legal right to

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[1] The authorized legal officer for each of the Village, Town and County amici is serving as co-counsel and listed on the brief, in accordance with Supreme Court Rule 37.4.

enforce its tax laws—is essential to raise revenue for local governments, including for law enforcement and emergency services. *See Dows v. City of Chicago*, 78 U.S. 108, 110 (1870) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.")

Eminent domain is another essential governmental power exercised through *in rem* proceedings. It enables local governments to create public roads, utility rights-of-way, and water and sewer service, for the benefit of the public.

Amici thus exemplify the powers, interests, and responsibilities of the local government subdivisions of the sovereign states. [2]

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[2] When this issue was last before the Court it attracted a great deal of support from state and local governments given the importance of the question presented: whether tribal immunity from suit blocks *in rem* tax foreclosure proceedings. Twelve states submitted a joint amicus brief in support of the Counties' petition for certiorari (New York, Alabama, Colorado, Florida, Idaho, Illinois, Michigan, New Mexico, North Dakota, South Dakota, Utah and Wyoming). The California State Association of Counties likewise filed an amicus brief, as did several New York counties and municipalities including the Town of Lennox. The case at bar has not drawn this kind of interest from state and local governments because the

B. Specific Experience of *Amici* with Tribal Sovereign Immunity Blocking Essential Government Enforcement Powers in Central New York.

The Village of Union Springs is located within the Town of Springport in Cayuga County, New York. These three related governmental entities lie within the Cayuga Indian Nation's historic land claim area. The actions taken by the Cayuga Indian Nation (CIN), detailed below, most directly impact the Village of Union Springs[3] but also harm the Town of Springport[4] and Cayuga County.[5]

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case arises from a private lawsuit involving quiet title and adverse possession claims. That action does not involve governmental authority to collect taxes or condemn property located within a state sovereign's domain. Yet it is the potential for this Court's decision to reach those issues that makes an amicus submission from local governments appropriate on the merits.

[3] The Village was incorporated in 1848. Its population was recorded as 1,197 in the 2010 census. The Village consists of 1,120 acres located along Cayuga Lake. In contrast, CIN's historic land claim area—i.e., what the CIN unsuccessfully sought compensation for through a lawsuit in federal court (*Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 271 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006))—extends over a 64,000 acre swath of central New York. The land claim area covers large portions of Seneca and Cayuga Counties, and completely subsumes the Village of Union Springs.

[4] The Town of Springport was formed in 1823 and contains the Village of Union Springs. It has a

Each suffers the same obstructions against collection of taxes for public services. In demonstrating their respective interests as *amicus curiae*, the experience of the Village should be viewed as applying to the Town and County as well.

The Village is engaged in litigation in the Northern District of New York with a group of individuals who purport to represent the Cayuga Indian Nation (CIN). *See Cayuga Nation v. Tanner*, 824 F.3d 321, 326-30 (2d Cir. 2016).[6] The dispute arises from the CIN's decision to purchase land within the Village—acquired in open-market transactions from non-Indians in recent years and held in fee—

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population of 2,367 as reported in the 2010 Census. It covers an area of approximately 26.8 square miles.

[5] Cayuga County was established in 1799. It has a population of 80,026 as stated in the 2010 Census. The County is 864 square miles in area.

[6] The Cayuga Indian Nation has sued the Village and its code enforcement officer (and other Village officials) in the Northern District of New York on multiple occasions, as reported in the following decision: 293 F. Supp. 2d 183 (N.D.N.Y. 2003); 317 F. Supp. 2d 128 (N.D.N.Y. 2004); and 390 F. Supp. 2d 203 (N.D.N.Y. 2005). The Second Circuit decision cited above addressed "a long-standing leadership dispute within the Nation" that has divided the tribe into two groups. 824 F.3d at 326-30. For ease of reference here, this brief will refer to the individuals in their claimed representative capacity—as the Cayuga Indian Nation or CIN—although that capacity has not been legally determined and may never be resolved.

and unilaterally declare that land to be under tribal jurisdiction. The CIN claims the land is located within the Nation's historic former reservation, which has not been legally disestablished.

This Court's landmark decision in *City of Sherrill v. Oneida Indian Nation of N.Y.,* 544 U.S. 197 (2005) was supposed to have resolved all such disputes over whether a tribe or local government exercises sovereign authority over such "reacquired" former reservation lands. *Sherrill* rejected the Oneida Indian Nation (OIN)'s theory that "sovereign dominion" had somehow been "unified" with title when the tribe purchased the land on the open market. *Id*. at 213-14; *see id*. at 221 (rejecting "the piecemeal shift in governance this suit seeks unilaterally to initiate"). The OIN cannot "unilaterally revive its ancient sovereignty, in whole or in part," over aboriginal tribal lands that it reacquires "through open-market purchases from current titleholders." *Id*. at 203, 220-21. "Sovereign dominion" and "authority" therefore remain vested with New York and its county and local governments. *Id*. at 213; 216-217; *see id*. at 202-203.

Sherrill's rejection of OIN's unilateral assertion of sovereignty in whole or in part arose in the context of local assessments of ad valorem real property taxes. The OIN had resisted paying the taxes on its real property dating back to 1999. OIN sued in federal court to block the counties' *in rem* proceedings,

which had been filed in state court under state law, to foreclose on tax liens, as well as related state court proceedings to evict the tribe from the property. *Sherrill* is properly read to hold that the OIN was not only obligated to pay the real property taxes imposed on its fee-owned parcels, but was also subject to the county's *in rem* tax foreclosure proceedings to collect the taxes that it lawfully owed on its real property.

In direct defiance of *Sherrill*, the CIN has declared that it possesses sovereign authority over the fee lands it "reacquired" through open-market purchased from current titleholders. It has unilaterally declared the land "Indian Country" and opened a gaming parlor on it, and in furtherance of that gambling enterprise, refused to pay real property taxes, refused to abide by zoning and land use ordinances, and refused to comply with a Village ordinance prohibiting gaming.

The CIN has acknowledged the legal rule of *Sherrill* but avoids it in practice by raising tribal immunity from suit as a defense to any and all local government enforcement actions including with respect to payment of real property taxes. *See Cayuga Indian Nation of N.Y. v. Seneca County*, 890 F. Supp. 2d 240, 241 (W.D.N.Y. 2012) ("Plaintiff contends that it is entitled to injunctive relief because the foreclosure actions are barred by sovereign immunity. Specifically, Plaintiff contends that '[a]s a federally-recognized Indian nation, [it]

possess[es] tribal sovereign immunity [from suit], which bars administrative and judicial proceedings against the [Indian] Nation,' even if the taxes are properly owed.").

By its past and ongoing actions in the Village (and similar actions throughout its historic reservation area in Cayuga and Seneca Counties) the Nation has eviscerated *Sherrill*, turning it into an "elaborate academic parlor game" where the "authority to tax [real] property is meaningless." *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008).[7]

The same impairment of Village governing authority occurs when enforcing zoning and land use regulations. The Nation has raised tribal immunity from suit to block enforcement of zoning and land use regulations. A recurring issue is the CIN's violation of a Village ordinance requiring a flashing traffic sign by its gaming establishment. This is an important highway

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[7] The quote from *Village of Hobart* reads more fully as follows:

> Land is either exempt from state law, or it is not. . . . Unless a state or local government is able to foreclose on Indian property for nonpayment of taxes, the authority to tax such property is meaningless, and the Court's analysis in *Yakima*, *Cass County*, and *Sherrill* amounts to nothing more than an elaborate academic parlor game.

542 F. Supp. 2d at 921.

safety rule that the CIN has refused to abide by, and as to which the tribe has stated its intention to assert tribal immunity from suit should the Village try to enforce it.

The CIN's wrongful and aggressive assertion of sovereignty over its fee lands creates jurisdictional conflicts and confusion beyond that described above. Local law enforcement officers have delayed responding, or not responded at all, to emergencies reported at the CIN's property because the Nation claims absolute sovereign authority over the lands. The CIN's jurisdictional claims also make it difficult for local fire services to plan responses to emergencies on those lands.

In addition, the jurisdictional cloud created by the CIN has immobilized the Village from acting to condemn a small tract of tribally-owned property (to convert a private street into a public thoroughfare) for fear of further lawsuits by the Nation.

The CIN's illegal assertion of tribal sovereignty within the Village has been facilitated by federal court decisions that embrace the CIN's tribal immunity from suit without reference to (1) the immovable-property exception to sovereign immunity from suit applicable to States and foreign states, and (2) the facts and holdings in *Sherrill* and *Yakima* which upheld the right of local governments to bring *in rem* tax foreclosure actions concerning tribally-owned property for

nonpayment of taxes. *See Cayuga Indian Nation*, 890 F. Supp. 2d at 242 ("Even assuming that Seneca County has the right to impose property taxes on the subject parcels owned by the Cayuga Indian Nation, it does not have the right to collect those taxes by suing to foreclose on the properties . . ."). The Second Circuit in 2014 affirmed the district court's ruling that makes tribes effectively super-sovereigns. *Cayuga Indian Nation of N.Y. v. Seneca County*, 761 F.3d 218, 219 (2d Cir. 2014) (per curiam).

The CIN's actions in the Northern District of New York illustrate the highly disruptive, practical problems that arise when a tribe asserts sovereignty over real property that is unmistakably within the taxing and regulatory authority of a local government (*see Sherrill*, 544 U.S. at 219, 221) and the local government's legal right to enforce its laws is eviscerated by assertions of tribal immunity from suit. This right-without-a-remedy outcome "defies common sense," as the Second Circuit observed in *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149, 163 (2d Cir. 2010). In its 2010 decision, the Second Circuit expressed frustration with Supreme Court precedent in this area, which it felt compelled a finding that the OIN was free to assert tribal sovereign immunity from suit to block *in rem* tax foreclosure proceedings by Madison County and Oneida County:

> The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed.

Id. at 163 (Cabranes and Hall concurring); *see id.* at 164 ("This result, however, is so anomalous that it calls out for the Supreme Court to reconsider *Kiowa* and *Potawatomi*. . . . If law and logic are to be reunited in this area of the law, it will have to be done by our highest Court, or by Congress.").[8]

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[8] The Second Circuit's "majority" decision by Judge Sack also noted the nonsensical nature of its holding:

> The Counties argue that the notion that they may tax but not foreclose is inconsistent and contradictory. To be sure, the result is reminiscent of words of the nursery rhyme:
>
> > Mother, may I go out to swim?
> >
> > Yes, my darling daughter; Hang your clothes on a hickory limb, And don't go near the water.
>
> Or, as the Counties more soberly assert, such a rule "eviscerates" *Sherrill*, "making that essential right of government [to tax properties] meaningless."

Oneida Indian Nation, 605 F.3d at 159 (citations omitted).

This Court understood the need for "law and logic to be reunited in this area of the law" and granted the Counties' petition for certiorari in Case No. 10-72.

The OIN feared the Court would do exactly that and reunite law and logic by applying the foundational principle that sovereign immunity does not preclude a court from exercising jurisdiction over immovable property located in another sovereign's dominion. This point was made by the amicus brief submitted by the Town of Lennox. This traditional principle of sovereign immunity law completely disposes of the purported right-without-a-remedy "anomaly." It does so by requiring the OIN and every other tribe that purchases land in open-market transactions from current titleholders to "lay down the prince" so that it cannot raise tribal immunity from suit to block the territorial sovereign's right to bring an *in rem* tax foreclosure proceeding if the tribe refuses to pay lawful property taxes. *See* Points III.A and B*, infra,* at 17-25; Respondents' Br. at 13-17, 31.

With that writing on the wall, the OIN abandoned its decades-long resistance to pay real property taxes——first asserted in 1999—and strategically enacted a tribal ordinance promising to pay past due amounts and future taxes on fee-owned parcels located in the two counties, in perpetuity. The Counties learned of the new tribal ordinance when counsel for the OIN sent a letter to this Court advising of

the development. The Counties' merits brief was at the printers. Based on the OIN's letter, this Court vacated the Second Circuit's decision and remanded for further proceedings. The OIN's successful tactic to avoid a decision on the merits by this Court left unanswered whether the immovable-property rule is the answer to the Second Circuit's nonsense nursery rhyme and prevents the "anomalous" result that "defies common sense."

The Second Circuit's per curiam decision in 2014 was free of nursery rhymes and other expressions of frustration. It simply found the Cayuga Nation immune from *in rem* tax foreclosures proceedings brought by Cayuga County, relying on this Court's tribal immunity cases (*Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998) and *Michigan v. Bay Mills*, 134 S. Ct. 2024 (2014)) and this Court's old maritime decision in *The Siren*, 74 U.S. 152 (1868), but never discussing the immovable-property rule that limits every other sovereigns' immunity. The circuit court cited *The Siren* for the proposition that there is no difference between *in rem* and *in personam* jurisdiction when it comes to immunity from suit. But as explained below, in Point III.D *infra* at 34-38, *The Siren* is inapposite and not even minimally instructive because it does not address what claims are permitted when one sovereign enters the territory of another and purchases land—a

circumstance specifically governed by the immovable property exception to immunity.

In light of these district and circuit court decisions in 2010 and 2014, and further actions taken by the CIN in central New York, the Village, Town and County have a direct interest in this case. Any failure by this Court to recognize ordinary *in rem* power of a state court to foreclose on real property taxes will strengthen the Nation's grip over fee lands that are, as a matter of law, within the taxing and regulatory authority of New York and its political subdivisions according to *Sherrill*.

II. SUMMARY OF ARGUMENT

As explained by Respondents (Br. at 13-25), sovereign immunity does not bar actions relating to immovable property held by one sovereign in the territory of another sovereign. The immovable-property rule that limits sovereign immunity from suit is rooted in principles of absolute territorial sovereignty that extend back centuries and inform not only the laws of the United States—as articulated by this Court—but guide the development of international law as well. In short, when a sovereign purchases real property located within the territory of another sovereign, that land is held subject to the laws of the latter and to all the incidents of private ownership. The interloping sovereign (whether a sovereign State, a sovereign Nation, or a "quasi-sovereign" Indian tribe) is required to

"lay down the prince"—that is, waive its sovereign powers with respect to real property located within the jurisdiction of the territorial sovereign. *See The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) and *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924).

This traditional rule of immunity places the interloper-sovereign on a footing similar to a private citizen or corporation that buys land on the open market. It holds title just like any other landowner, and is subject to the taxing and regulatory authority of the territorial sovereign with respect to those lands, just like any other landowner. This includes being subject to *in rem* actions to collect real property taxes through tax foreclosure proceedings and *in rem* actions to condemn property.

In this case the interloping sovereign is the Petitioner Upper Skagit Indian Tribe. Petitioner has a reservation in the State of Washington. Those lands and others that the Tribe previously acquired are held in trust by the federal government and provide a land base for the Tribe. *See* 46 Fed. Reg. 46681 (Sept. 21, 1981) (proclaiming Upper Skagit Indian Reservation).

When the Tribe purchased the subject lands in 2013, it did so on the open market, acquiring title from the non-Indian titleholders who had owned the land for many

decades. The property purchased by the Tribe is without question real property that is located within the taxing and regulatory jurisdiction of the State of Washington as the territorial sovereign. While the lands in question may one day become the subject of a land-into-trust application by the Tribe, they are currently, and have been for the last century or so, held in fee–and until 2013 in non-Indian ownership and possession. The Tribe has no governmental authority over these fee lands as a matter of law, *Sherrill*, 544 U.S. at 219, 221, and fact.

In this context, the territorial sovereign (State) retains its inherent sovereign authority to adjudicate disputes over title and ownership of real property located within its borders, including through the adjudication of *in rem* adverse possession and quiet title actions.

State and local governments also are empowered to collect taxes through *in rem* tax foreclosure proceedings and to acquire land for public use through eminent domain powers through *in rem* condemnation proceedings, without regard to identity of the titleholder of the real property located within their domain. It does not matter if the entity holding title to that land is the State of Oregon, the Kingdom of Spain, or the Upper Skagit Indian Tribe. All sovereigns hold the land subject to the laws of the territorial sovereign.

To hold otherwise would improperly anoint the Upper Skagit Indian Tribe—and the other 568 recognized Indian tribes in the United States—"super-sovereigns" that enjoy greater immunity from suit than States or foreign states. Tribes are not entitled to "super-sovereign authority". *Okla Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995). Such elevated status for Indian tribes cannot be reconciled with the common law requirement that tribal immunity from suit be analyzed under traditional immunity principals applicable to States and foreign states. Even the Upper Skagit Indian Tribe says its sovereign immunity is akin to that possessed by States and exists on the same "plane as independent states." (Resp. Br. at 15). But "super-sovereign" status does not exist for any State or foreign state as the United States is forced to concede (see U.S. Br. at 25), and if recognized here would exist on a much higher plane than either. That outcome cannot be reconciled with the heavily qualified nature of tribal sovereignty. *See* Point D, *infra,* at 38-39.

The decision of the Washington State Supreme Court should be affirmed as it is consistent with this Court's precedents in the area of tribal immunity from *in rem* tax foreclosures (*Sherrill* and *Yakima*) and the long-standing, traditional immovable-property exception to sovereign immunity. It means the Upper Skagit Indian Tribe holds the fee lands

just like a private landowner, subject to the law of Washington State, and cannot assert tribal sovereign immunity from suit with respect to any *in rem* proceedings taken with respect to that real property.

III. ARGUMENT

A. Petitioner's Argument is Contrary to Well-Established Limits on Sovereign Immunity Defenses to *In Rem* Proceedings.

Under "primeval" principles, a foreign country cannot purchase property in a state, put it to commercial use, refuse to pay property taxes or comply with zoning or "local regulatory controls," and then defeat state *in rem* enforcement actions against the property by invoking sovereign immunity. *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984). That rule should control the immunity claimed here.

This Court repeatedly has looked to the nature of, and limits on, foreign sovereign immunity as "instructive" for tribal sovereign immunity. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998). Most recently, this Court has declined to "extend[ ] [tribal sovereign immunity] beyond what common-law sovereign immunity principle would recognize." *Lewis v. Clarke*,

137 S. Ct. 1285, 1292 (2017). One long-standing principles of sovereign immunity concerns immovable real property. That limitation is found in the federal common law of foreign sovereign immunity, which "long predated" the enactment of the Foreign Sovereign Immunities Act of 1976 ["FSIA"], 28 U.S.C. § 1602 et seq. As a general matter, "when owning property here, a foreign state must follow the same rules as everyone else." *City of New York v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 374 (2d Cir. 2006), *aff'd sub nom. Permanent Mission of India of the U.N. v. City of New York*, 551 U.S. 193 (2007).

This Court first embraced this rule concerning immovable property nearly two centuries ago, observing that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction [of the foreign country]; he may be considered as so far laying down the prince, and assuming the character of a private individual." *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812). The reason for exempting "immovable property" within U.S. jurisdiction from the scope of foreign sovereign immunity is "self-evident":

> A territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain. As romantically

> expressed in an early treatise: "A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil."

Asociacion de Reclamantes, 735 F.2d at 1521 (quoting 1 F. Wharton, Conflict of Laws § 278, at 636 (3d ed. 1905)). The alternative concern is that the foreign nation's courts are ill-suited to deciding *in rem* property interests or rights to possession in land outside their jurisdiction. *Id*. at 1521-22.

The Treatises also recognize the rule "[u]nder international law, [that] a [foreign] state is not immune from the jurisdiction of the courts of another state with respect to claims . . . to immovable property in the state of the forum." Restatement (Third) of Foreign Relations Law § 455(1)(c) (1987). This established view of the inherent limits of sovereign immunity also protects the enforcement of judgments concerning such real property. "Immovable property" owned by foreign states is "subject to execution" if "the judgment relates to that property" and the property is "used for commercial activity" rather than "a diplomatic or consular mission

or for the residence of the chief of such mission." *Id.* at § 460(2)(e).[9]

Congress has also validated this same view of foreign nation sovereign immunity. It did so when it codified the "immovable property" exception in FSIA. That Act provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United 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). Moreover, any such property "used for a commercial activity" is subject to execution if "the execution relates to a judgment establishing rights in [the] property" and the property "is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission[.]" *Id.* at § 1610(a)(4)(B). These provisions were intended to codify, not alter, "the pre-existing real property exception to

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[9] See also Restatement (Second) of Foreign Relations Law § 68(b) (1965) ("The immunity of a foreign state . . . 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."); Letter from Jack B. Tate of May 19, 1952, 26 Dep't of State Bull. 984-85 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (despite conflicts between immunity theories, "[t]here is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property exempted)").

sovereign immunity recognized by international practice." *Asociacion de Reclamantes,* 735 F.2d at 1521; *see also Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. at 199-200; H.R. Rep. No. 94-1487, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618-19.

The Washington Supreme Court's rule is squarely consistent with the international rule. It prevents one entity's sovereign immunity from becoming a weapon to harm another sovereign. This rule fits perfectly to the situation where a tribal enterprise chooses to acquire real property in fee subject to the laws of the sovereign States. That rule, in turn, protects the interests of the *amici* from a sovereign immunity that would eviscerate their power to tax and regulate.

B. The Petitioner's Expansive View of Tribal Sovereign Immunity Exceeds State Sovereign Immunity.

Amici local governments ask this Court to apply to Petitioner the same rule that would apply to any State. Just as the *amici*'s courts would have *in rem* jurisdiction over real property owned by another state, it should have that same *in rem* jurisdiction over real property owned by a tribal government.

In *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), Georgia purchased eleven acres in Tennessee for use as a railroad yard. Later,

Georgia brought an original action claiming the City could not condemn the property because of Georgia's sovereign immunity. This Court unanimously rejected that claim:

> The power of Tennessee, or of Chattanooga as its grantee, to take land for a street is not impaired by the fact that a sister State owns the land …. Land acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership. … The sovereignty of Georgia was not extended into Tennessee. … [Georgia] cannot claim sovereign privilege or immunity. … [Georgia's] property [in Tennessee] is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. The power of the city to condemn does not depend upon the consent or suability of the owners.

Id. at 479-82 (citations and paragraph breaks omitted).

The rule of *Georgia v. Chattanooga* has been invoked in *in rem* enforcement contexts long before Washington State decided its cases applying *in rem* jurisdiction to real property owned by a tribal government. The Minnesota Supreme Court explained that "a state acquiring ownership of property in another state does not thereby project its sovereignty

into the state where the property is situated. The public and sovereign character of the state owning property in another state ceases at the state line[.]" *State v. City of Hudson*, 42 N.W.2d 546, 548 (Minn. 1950) (re proceedings to enforce property taxes on portion of bridge owned by Wisconsin city but located in Minnesota). The Illinois Supreme Court recognized that "[i]f it were otherwise, the acquisition of land in [one State] by another State would effect a separate island of sovereignty within [the home State's] boundaries. Such possibility can find no support in the law or reason." *People ex rel. Hoagland v. Streeper*, 145 N.E.2d 625, 630 (Ill. 1957) (re court-imposed receivership over portion of bridge owned by Missouri county but located in Illinois).

If States cannot create "separate island[s] of sovereignty" by purchasing land within another sovereign's jurisdiction, *id.*, neither should tribes have that power engrafted onto tribal immunity. See *Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W.2d 685, 688, 691, 694 (N.D. 2002) (relying on *Georgia v. Chattanooga* in holding that tribal sovereign immunity does not bar a "purely *in rem* action against land held by the Tribe in fee" that is "not held in trust by, or otherwise under the superintendence of, the federal government"; such land "is essentially private land," "the State may exercise territorial

jurisdiction" over it, "and the Tribe's sovereign immunity is not implicated").

The Amicus United States recognizes these principles (Br. 25-30) but asks the Court to brush them aside as if not raised by the question presented. That argument ignores the fact that the rule applied by the Washington Supreme Court and now on review reflects these fundamental principles limiting sovereign immunity. Indeed, this Court framed *Georgia v. Chattanooga* as an example of when "sovereign privilege or immunity" from suit would not prevent the application of a state's law to real property. 264 U.S. at 480-81. The immovable property rule is necessary to resolving this case and ignoring the rule will only harm *amici* and similarly situated public entities across the country.

In short, Petitioner's view of sovereign immunity as a defense that avoids *in rem* jurisdiction cannot be reconciled with long-standing limits on core principles of sovereign immunity. The better view is that provided by Respondents. Only that view will ensure that sovereign states cannot impose upon each other the very harms that Petitioner's arguments seek to impose upon Respondents, and which Petitioner would undoubtedly impose upon state and local governments if they choose not to pay property taxes. Most importantly, only the Respondents' rule protects the *amici*'s critical interests in

effective real property taxation and *in rem* jurisdiction over real property.

C. The Washington Supreme Court's Decision is Harmonious with this Court's Tribal Sovereign Immunity Cases.

This Court's decisions in *Kiowa*, *Potawatomi*, and *Michigan v. Bay Mills*, 134 S. Ct. 2024 (2014), affirmed earlier decisions of the Court that extended the immunity from suit possessed by sovereigns—like foreign nations and states—to Indian tribes in light of their recognized powers of self-governance. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). But nothing in these decisions suggests that the immunity of tribes is greater than that enjoyed by foreign or State sovereigns. Nor do these decisions stand as an obstacle to affirming the Washington Supreme Court.

First, none of these cases involved *in rem* enforcement actions against tribally-owned real property, and thus none speaks to the circumstances of immovable-property located within another sovereign's domain. That situation is directly addressed by the longs-standing rule that limits sovereign immunity from suit with respect to such immovable property. None of the cases can be read to overrule that traditional restriction on immunity from suit.

To the contrary, *Bay Mills* endorsed the central notion that a State should retain "the ability to enforce its laws on its own lands." *Bay Mills*, 134 S.Ct at 2035, and the recently acquired tribal fee lands in that case were subject to state and local real property taxes. See *Bay Mills Indian Cmty. v. State of Michigan*, 626 N.W.2d 169, 174 (Mich. Ct. App. 2001). *Kiowa* dealt with a tribe's immunity from private contract claims, a matter of immunity from personal jurisdiction. See *C & L Enters*., 532 U.S. at 418-23. *Potawatomi* barred claims for money damages against tribal treasuries, another matter of personal jurisdiction, while emphasizing numerous "adequate alternatives" to damage claims. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. at 514 . Indeed, this Court's grant of certiorari in *Oneida*, and the avoidance of that review as discussed above at 9-12, confirms that the issue in this case is not foreclosed by any prior decision.

Meanwhile, the Court's decisions in *Sherrill* and *Yakima* upheld the exercise of State *in rem* power regarding forced tax sales of tribal property over the tribe's assertion of tribal immunity from suit.

1. *Sherrill* and *Yakima* Permit the *In Rem* Tax Foreclosure of Taxable Tribal Real Property — Over Tribal Assertions of Immunity from Suit.

Sherrill and *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), both support applying the immovable property rule in the tribal immunity context so as to prevent a tribe from asserting immunity from suit with respect to real property it purchases within the absolute and complete jurisdiction of another territorial sovereign (New York State and Washington State). Both decisions unmistakably upheld the county's right to impose real property taxes on tribally-owned real property *and* to enforce that right through *in rem* tax foreclosure actions—over any and all defenses asserted by the tribe, including tribal immunity from suit that both tribes raised to resist tax enforcement proceedings.

In *Sherrill*, the OIN asserted tribal immunity from suit in state court *in rem* tax foreclosure proceedings. Specifically, the OIN's Answer to the City of Sherrill's Complaint seeking foreclosure and eviction of tribally-owned properties sets forth, as a "Second Defense," that:

> The Nation is a federally recognized Indian tribe, and its sovereign immunity bars defendant's efforts to tax

> and to take the Nation's lands, bars this suit, and precludes the exercise of jurisdiction over the Nation and the award of any relief requested by defendant. 63 Fed. Reg. 71941 (Dec. 30, 1998).

See Sherrill, Joint Appendix at 58.[10] The decision of this Court in *Sherrill* further addressed the OIN's sovereign immunity from suit when it stated that the tribe's sovereign status would not even prevent its eviction from the premises once title was acquired by the city. *Id.* at 214, n.7.

In *Yakima*, the tribe specifically argued it retained its "sovereign immunity from suit," citing this Court's decision in *Potawatomi*, which had just been handed down. Resp. Br., 1991 WL 521292 at *35.[11]

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[10] Under New York law, the unpaid property taxes are liens upon the OIN's parcels, and the proceedings to foreclose the tax liens are proceedings *in rem*. *See* N.Y. Real Prop. Tax Law §§ 902, 1120 (McKinney 2000). Consequently, tax foreclosure actions against the OIN, CIN, and other tribes that purchase land on the open market and fail to pay taxes are subject to the same *in rem* remedies, including foreclosure, as were the taxable tribal parcels in *Yakima*.

[11] The Yakima Tribe further noted that it had brought the lawsuit "to invalidate the County's imposition and collection of real estate taxes on fee lands of the Tribe and of tribal members." *See* Yakima Tribe Respondent's Brief at 9 (Resp. Br., 1991 WL 521292 at *9); *see also* Jt. App., Nos. 90-408, 90-577, at

Yakima nonetheless held that the tribe's taxable land was subject to "forced sale for taxes." *Yakima*, 502 U.S. at 264. In doing so, the Court observed that unlike *in personam* jurisdiction, the "mere power to assess and collect a tax on certain real estate" is not significantly disruptive of tribal self-government. *Id.* at 265; *see also Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007) ("[a]s a threshold matter, property ownership is not an inherently sovereign function"). In permitting the county's forced tax sale of tribal property, the Court in *Yakima* necessarily articulated and applied to the *in rem* tax collection proceedings a different legal standard from that applied in *Potawatomi,* which addressed immunity from suit with respect to *in personam* actions against the tribe. Indeed, the Petitioner has not shown that paying taxes or defending title is a significant disruption to

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5 (Complaint ¶ XI ["The defendants have scheduled a public tax sale of approximately 40 parcels of real estate located within the Yakima Indian Reservation in which the Yakima Nation and/or its members have a fee patent interest"]); Pet Br., *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, Nos. 90-408, 90-577, 1991 WL 521727, at *5 (U.S. Aug. 21, 1991) (county commenced foreclosure proceeding in state court against "several properties owned in fee by the Yakima Tribe or individual Yakima members"). By making these points, the Yakima Tribe necessarily acknowledged that tribally-owned properties were subject to the forced tax sale.

tribal self-government. Nor can it be so, given that it is not a significant disruption to the sovereignty of States or nations, as shown above.

Thus, under *Yakima*, tribal sovereign immunity from suit does not preclude a State from exercising *in rem* jurisdiction to adjudicate an adverse possession claim / quiet title action, or to collect real property taxes through foreclosure proceedings.

The record in *Sherrill* is even stronger. The Court in *Sherrill* upheld the taxing authority's right not only to bring *in rem* foreclosure actions to collect the unpaid taxes but also to bring related eviction proceedings to oust the tribe from the property after the city acquired title through foreclosure. The holding in *Sherrill* was utterly unnecessary if all the OIN needed to do in that case was decline to pay taxes and then invoke sovereign immunity to *in rem* foreclosure.

Under *Sherrill* and *Yakima*, then, a tribe owns real property just as any private landowner, holding it subject to the laws of the territorial sovereign. This is consistent with the immovable-property rule limiting immunity from suit when an inter-loping foreign or State sovereign holds real property in another State, subject to the laws of that territorial sovereign.

Petitioner and its *amici* nonetheless argue that *Yakima* is inapposite and does not support the right of local governments to subject tribally-owned fee lands to a forced tax sale for nonpayment of taxes. The brief of the United States spends the most time trying to distinguish *Yakima*, including suggesting this Court drew only an academic distinction between *in rem* jurisdiction and *in personam* jurisdiction. Br. at 18-20. The United States' brief goes even further in contending that "the Court had no occasion to address tribal sovereign immunity from suit because the Tribe itself had commenced that suit in federal district court to obtain declaratory and injunctive relief regarding its tax liability." Br. at 20. It is not clear what point the Unites States is trying to make, but it is not consistent with recognized principles of sovereign immunity.

A tribe can bring a declaratory judgement action in federal court to seek a declaration that its immunity from suit bars a forced tax sale (or other enforcement action) without waiving its immunity from suit as to that enforcement proceeding. *See Cayuga Indian Nation of N.Y. v. Seneca County,* 890 F. Supp. 2d at 242. Indeed, it would be a meaningless sovereign right to require the sovereign to waive its immunity from suit to establish immunity from suit. And, of course, that is not what the CIN did in *Cayuga*, what the Yakima Tribe did in *Yakima,* or what the OIN

did in *Sherrill*. These tribes each brought an action in federal district court for declaratory and injunctive relief in which the tribe asked the district court to declare it immune from—and permanently enjoin—tax enforcement proceedings pending in state court that sought to force a tax sale. And in both *Sherrill* and *Yakima* this Court held the local government taxing authority had the right not only to impose the real property taxes on tribally-owned property but also to collect those taxes—uniting law and logic and avoiding the right-without-a-remedy result that defies common sense.

As a further example, *Oklahoma Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe* instructs that States may take off-reservation *in rem* action against tribally-owned property, emphasizing that States may "of course" enforce their cigarette tax laws by "seizing unstamped cigarettes off the reservation" that had been purchased by tribally owned retailers and were on their way to reservation outlets. 498 U.S. 505, 514 (1991). That ruling reinforces the holding in *Washington v. Confederated Tribes of the Colville Indian Reservation*, which upheld seizures of "cigarettes in transit" where the affected tribes "have refused to fulfill collection and remittance obligations which the State has validly imposed." 447 U.S. 134, 161-62 (1980). *Colville* explained that, "[b]y seizing cigarettes en route to the reservation, the

State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." *Id*. at 162.

Yakima, *Potawatomi*, and *Colville* thus recognize that state and local governments may take *in rem* action against tribally owned movable property that violates applicable state or federal substantive laws. ***38***

Keweenaw Bay Indian Cmty. v. Rising, 477 F.3d 881, 894-95 (6th Cir. 2007) ("[T]he Court was well aware of the issue of tribal sovereign immunity when it approved the seizures in question [in *Potawatomi* and *Colville*]. … [T]he Supreme Court has clearly endorsed state seizures as a remedy where sovereign immunity prevents in-court remedies.") (citations omitted). *In re 1650 Cases of Seized Liquor*, 721 A.2d 100 (Vt. 1998).

If tribally-owned movable property is not immune from *in rem* actions outside a reservation boundary, where federal supremacy preempts the substantive state laws, then surely tribally-owned immovable property should not be immune from *in rem* jurisdiction. That is particularly true given the unique concerns for sovereignty, jurisdiction, and regulatory authority implicated by one sovereign's ownership of immovable property in another sovereign's dominion. *See supra*, Argument III.A.

Depriving local governments of their enforcement authority would inevitably result in the disruptive practical consequences, including jurisdictional "checkerboard[ing]," that led this Court to reject the OIN's unilateral revival of sovereignty in the first place. *Sherrill*, 544 U.S. at 219; *see id.* at 220 and n.13 (observing that the OIN's claim would also immunize it "from local zoning or other regulatory controls that protect all landowners in the area"); *see New York v Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (finding of immunity from enforcement would "completely undermine" *Sherrill*'s holding because the state and local governments could not use the courts to avoid the disruptive impacts that the Court clearly stated they have the equitable right to prevent) (reversed on other grounds [Second Circuit]).

2. Petitioner and Its *Amici* Misunderstand and Misapply This Court's Old Maritime Case, *The Siren*.

The Siren, 74 U.S. 152 (1868), addressed Civil War maritime activities, starting with the federal government's seizure of a blockade-running steamer outside Charleston, South Carolina, the federal government's conscription of that steamer into U.S. naval service, and the unfortunate collision of that steamer with a private sloop that sunk as a result. *Id.* at 162-164.

The case addresses the particular and peculiar question of what compensation was available to the owner of the sunken sloop. The owner sued the federal government in federal court. Because the United States had not waived its sovereign immunity from suit in its own courts, this Court concluded that the United States was immune with respect to claims for monetary damages directly against it as well as "seizure" of the offending U.S. ship against which a judgment could be satisfied (a form of *in rem* jurisdiction). *Id.* at 154-55. *The Siren* stated in that specific context that "there is no distinction between suits against the government directly, and suits against its property.") *Id.* at 154.

The facts, reasoning, and holding of *The Siren* are limited to cases where the United States is the sovereign and pertains only to the scope of the United States' waiver of its own immunity within its own courts. In that particular setting, *The Siren* did not draw a distinction between *in rem* and *in personam* jurisdiction.

Sherrill and *Yakima*—not *The Siren*—provide the controlling legal standards and expressly treat *in rem* tax collection proceedings against tribally-owned property differently from *in personam* actions against the tribe itself. In both cases the tribe could not block a forced tax sale of real property owned by the tribe, demonstrating *in rem* jurisdiction is different from *in personam*

jurisdiction blocked in *Potawatomi, Kiowa* and *Bay Mills*. An *in rem* tax foreclosure for nonpayment of real property taxes does not implicate tribal governance in the same way that a direct action against the tribe does. *Yakima*, 502 U.S. at 265.

The Siren says nothing about what rule of law to apply when one sovereign enters the territory of another sovereign, purchases real property there, and then wrongly refuses to pay taxes that are lawfully imposed. Beyond the rulings in *Sherrill* and *Yakima* that conclusively demonstrate the territorial sovereign's authority to collect real property taxes through forced tax sales, the law of sovereign immunity provides the underlying principles that logically explain those holdings. When a State—or foreign country, or Indian tribe—purchases land outside its domain and located in the territorial jurisdiction of another State, the immovable-property rule dictates the outcome: The interloper-sovereign must "lay down the prince" and submit to the territorial sovereign's "absolute and complete jurisdiction," at least with respect to *in rem* proceedings directed at that real property.

Despite *The Siren*'s lack of relevance to the situation of dueling sovereigns, *amici* have been harmed because the Second Circuit in *Cayuga*, 761 F.3d at 221, relied on it to deny Seneca County the right to bring an *in rem* enforcement action to collect unpaid taxes. It

did so despite the holdings of *Sherrill*, 544 U.S. at 221, and *Yakima,* 502 U.S. at 265, permitting the counties to conduct a forced tax sale of tribal property, consistent with the immovable property exception.

The Siren's inapplicability to the case at bar did not stop Petitioner (Br. at 23) and each of its supporting *amici* (U.S. Br. at 12, 14; Brief of National Congress of American Indians et al., at 15-16; Brief of Cayuga Nation et al., at 9-10; Brief of The Fond du Lac Band of Lake Superior Chippewa Indians, et al., at 6, 17, 25) from quoting *The Siren*'s soundbite that *in rem* jurisdiction is no different than an action against the United States. They do so—as did the Second Circuit itself—without addressing that decision's unique facts, reasoning, and holding which is limited to the sovereign immunity of the United States.

Sherrill and *Yakima*, along with the immovable-property rule, provide the controlling legal standards by which to resolve the claims of competing sovereigns where one holds real property located in the other. These rules fully endorse the right of state and local governments, as the absolute territorial sovereign, to foreclose on real property for nonpayment of taxes even if the land in question is owned by another sovereign (State, foreign country, or Indian tribe). *See The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) and *Georgia v. Chattanooga*, 264 U.S. 472 (1924).

D. Elevating Tribes to Be "Super-Sovereigns" Cannot be Reconciled With Their Legal Status As Limited, Self-Governing Sovereigns.

Tribes are "quasi-sovereigns" or "domestic dependent" semi-sovereigns under the law. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Morton v. Mancari*, 417 U.S. 535, 554 (1974). Tribal self-governing power is "of a unique and limited character," *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Tribes do not possess the full territorial sovereignty of States or foreign countries even on Indian reservations. *See Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 327 (2008); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g,* 476 U.S. 877, 890 (1986). And even as to internal tribal affairs, where tribes exercise their maximum sovereign authority over their members and their sovereign territory, tribal sovereignty is subject to total defeasance by Congress. *See Wheeler*, 435 U.S. at 323.

Thus, while tribes retain some immunity from lawsuits, tribes do not enjoy greater immunity from suit than foreign countries or the fifty States. In contrast to the limited "quasi-sovereignty" of tribes, States possess "a residuary and inviolable sovereignty" under the Constitution. *Alden v. Maine*, 527 U.S. 706, 715 (1999); *id.* at 713 ("The founding document specifically recognizes the States as sovereign entities") (internal quotations and

citations omitted). *Accord*, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact").

Given the robust nature of State sovereignty under the Constitution, and the "limited character" of tribal self-governing power outside the Constitution, a lack of parity exists between State and tribal sovereignty. Tribes cannot logically or legally be deemed to possess a super-sovereign power to displace *in rem* jurisdiction of a state court over immovable real property.

E. **Elevating Tribes to Super-Sovereigns Would Create the Disruptive Effects That *Sherrill* Sought to Foreclose**.

Petitioner and the United States acknowledge that the law requires tribal immunity from suit to construed in reference to traditional immunity rules applicable to States and foreign countries, and concede, as they must, that no State or foreign country could do what they argue the tribe should be able to do, namely enter the territory of another sovereign, purchase real property subject to the territorial sovereign's laws, but not be required to "lay down the prince" and submit to *in rem* enforcement actions directed to that property. Petitioner's argument is a transparent result-oriented plea that asks this Court to carve out for it and other tribes, on no

principled basis whatsoever, an extraordinary exception from the traditional sovereign immunity rules that apply to the States and foreign countries.

This Court should decline that request. Strong policy reasons counsel against making tribes the uniquely empowered "super-sovereigns" that they ask to be made. Endowing tribes with much broader immunity than possessed by States or foreign nations would enable them to purchase land within a State, unilaterally declare it Indian Country under tribal control, and effectively achieve a transfer of jurisdiction by blocking the local government's enforcement actions through its assertion of immunity from suit—as is happening in the Village of Union Springs. That is precisely the disruptive jurisdictional "checker-boarding" harm that *Sherrill* sought to avoid and that led this Court to reject the OIN's unilateral revival of sovereignty in the first place. *Sherrill*, 544 U.S. at 219; *see id.* at 220 and n.13 (observing that the OIN's claim would also immunize it "from local zoning or other regulatory controls that protect all landowners in the area"); *see New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (finding of immunity from enforcement would "completely undermine" *Sherrill*'s holding because the state and local governments could not use the courts to avoid the disruptive impacts that the Court "clearly stated they have the equitable

right to prevent), *rev'd on other grounds*, 686 F.3d 133 (2d. Cir. 2012)).

Such unilateral and unlawful land grabs are prohibited and unnecessary because tribes can apply to the federal government to have lands taken into trust. *See Sherrill*, 544 at 220-221 (citing Indian Reorganization Act of 1934 now codified at 25 U.S.C. § 5108).

The divestiture of local government jurisdiction that is occurring piecemeal in the Village of Union Springs and elsewhere in central New York will be repeated across the country if Indian tribes are free to buy land anywhere, refuse to pay taxes, and—by asserting sovereign immunity from suit—face no consequences. By taking that aggressive approach, tribes create jurisdictional voids in which they can unilaterally declare tribal sovereign control over the land and effectively create Indian Country "islands" within States. That outcome not only defies the holding in *Sherrill* and common sense, but disrespects the sovereign status of States under the Constitution.

IV. CONCLUSION

No sovereign should have the type of sovereign immunity claimed by Petitioner against the *in rem* powers of the Washington courts. The judgment of the Washington Supreme Court should be affirmed.

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