No. _____

# In the Supreme Court of the United States

FLYING T RANCH, INC., a Washington corporation,
*Petitioner,*

*v.*

STILLAGUAMISH TRIBE OF INDIANS,
a federally recognized Indian tribe,
*Respondent.*

*On Petition For Writ Of Certiorari*
*To The Supreme Court Of The State Of Washington*

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

The common-law immovable-property rule provides that sovereigns are not immune from suits relating to real property located in a foreign jurisdiction. In *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554 (2018), this Court left open the question of whether the immovable-property rule applies to an Indian tribe's assertion of rights in non-trust, non-reservation real property. *Id.* at 559-61.

The question presented is:

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

## LIST OF ALL PARTIES

Petitioner Flying T Ranch, Inc., was the Plaintiff in the Superior Court of Washington for Snohomish County; the Petitioner before the Court of Appeals of Washington; and the Petitioner before the Supreme Court of Washington.

Respondent Stillaguamish Tribe of Indians was a Defendant in the state trial court and the Respondent in the state court of appeals and supreme court.

Snohomish County was a Defendant in the state trial court, but the County subsequently transferred its interest in the property at issue to Respondent Tribe and did not participate in any of the appellate proceedings below.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Flying T Ranch, Inc., has no parent corporations and no publicly held company owns 10% or more of Petitioner's stock.

## STATEMENT OF RELATED CASES

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

*Flying T Ranch, Inc., a Washington corporation v. Stillaguamish Tribe of Indians, a federally recognized Indian tribe*, No. 22-2-07015-31, 2022 WL 22859181 (Wash. Super. December 22, 2022).

*Flying T Ranch, Inc., a Washington corporation v. Stillaguamish Tribe of Indians, a federally recognized Indian tribe*, No. 85739-8-I, 549 P.3d 727 (Wash. Ct. App. June 4, 2024).

*Flying T Ranch, Inc., a Washington corporation v. Stillaguamish Tribe of Indians, a federally recognized Indian tribe*, No. 103430-0, 577 P.3d 382 (Wash. October 9, 2025).

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## APPENDIX

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Flying T Ranch, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court.

## OPINIONS BELOW

The opinion of the Washington Supreme Court was filed on October 9, 2025, is published at 577 P.3d 382, and is reproduced at Pet. App. 1a-35a.

The opinion of the Washington Court of Appeals was filed on June 4, 2024, is published at 549 P.3d 727, and is reproduced at Pet. App. 36a-67a.

The order of the Snohomish County Superior Court dismissing Petitioner's case was filed on December 22, 2022. It is unpublished but is available at 2022 WL 22859181 and is reproduced at Pet. App. 72a-73a.

## JURISDICTION

The federal question of whether Respondent has sovereign immunity from Petitioner's quiet title suit was raised by Respondent in Respondent's motion to dismiss before the Snohomish County Superior Court. *See* Pet. App. 72a-73a. On December 22, 2022, the superior court granted the motion to dismiss, holding that Respondent enjoys sovereign immunity from suit. *Id.* *See* Pet. App. 68a-69a (denying motion for clarification or certification for appeal). Petitioner appealed, and the federal question was raised and argued before the Washington Court of Appeals. *See* Pet. App. 36a-67a. On June 4, 2024, the state court of appeals affirmed. *Id.* Petitioner sought review of the federal question in the Washington Supreme Court. *See* 1a-35a.

The judgment of the Washington Supreme Court affirming the case's dismissal on sovereign immunity grounds was entered on October 9, 2025. On December 15, 2025, Petitioner filed an application to extend the time to file a petition for writ of certiorari from January 7, 2026, to February 18, 2026. *See Flying T Ranch, Inc., a Washington Corporation, Applicant v. Stillaguamish Tribe of Indians, a Federally Recognized Indian Tribe, et al.*, No. 25A715. The application was granted on December 18, 2025.

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

## INTRODUCTION

Petitioner Flying T Ranch, Inc., seeks review of a question of federal law that the Court has already recognized as important—whether, under the immovable-property rule, sovereign immunity does not bar an Indian tribe from being sued in a State court to quiet title to real property located in that State but outside of the tribe's reservation. *See Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 560 (2018) ("Determining the limits on the sovereign immunity held by Indian tribes is a grave question . . . ."); *id.* at 563 (Roberts, C.J., concurring) ("consideration of the immovable-property rule" "need[s] to be addressed in a future case").

Under traditional common law principles, sovereign immunity does not extend to disputes over title to real property located in a foreign jurisdiction. *See Lundgren*, 584 U.S. at 566 (Thomas, J., dissenting) ("The immovable-property exception [to sovereign immunity] has been hornbook law almost as long as there have been hornbooks."); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145

(1812) ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction . . . ."); *Georgia v. City of Chattanooga*, 264 U.S. 472, 481 (1924) ("[Georgia] occupies the same position there [in Tennessee] as does a private corporation authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity.").

To be sure, "unless and 'until Congress acts, [Indian] tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). But that "historic sovereign authority" does not include immunity from suit to determine ownership of real property located in another sovereign's territory. *See generally Cayuga Indian Nation of New York v. Seneca Cnty.*, 978 F.3d 829, 836 (2d Cir. 2020) ("American common law has long recognized an 'exception to sovereign immunity for actions to determine rights in immovable property.'" (quoting *Lundgren*, 584 U.S. at 563 (Roberts, C.J., concurring))).

Below, the Washington Supreme Court held that Indian tribes like Respondent enjoy by default an absolute immunity from suit and, because Congress has not expressly authorized suits against Indian tribes to resolve disputes over real property, Petitioner's action seeking to quiet title to its rangeland must be dismissed. Pet. App. 24a-25a. The court thus recognized an immunity from suit for Indian tribes that is enjoyed by no other sovereign on the planet. *Cf. Lundgren*, 584 U.S. at 576 (Thomas, J., dissenting).

This Petition presents the Court with an excellent vehicle for review of that momentous, yet deeply flawed, holding. The facts of Flying T's case are very similar to those in *Lundgren*: Flying T has a strong claim to ownership through adverse possession; the property at issue has never been part of any tribal reservation or trust; Flying T's dispute with the Tribe is not of Flying T's making—Flying T exercised dominion over the disputed property for three decades prior to the Tribe's unsolicited attempted acquisition; and, without the ability to bring a quiet title action, Flying T has no reasonably equivalent means to resolve its dispute with the Tribe. But unlike *Lundgren*, here the question of whether to apply the immovable-property rule was fully addressed below: by the trial court, the court of appeals, and the state supreme court. Hence, this Court can and should address the "grave question" presented by Flying T's petition.

## STATEMENT OF THE CASE

### I. Factual Background

Flying T runs a cattle ranch on about 165 acres in Snohomish County, Washington. *See* Pet. App. 97a ¶ 2.1. Owned and operated by the Blakey family, Flying T formally acquired the ranch in 1991, the year after the land had been purchased by Tammy Blakey and her late husband. Pet. App. 99a ¶¶ 3.3-3.6. Flying T's rangeland lies between, to the north, a former railroad easement that is now a public hiking trail and, to the south, the North Fork of the Stillaguamish River. Pet. App. 37a, 103a.

At the time of the Blakeys' purchase, the property was bordered on its north side by a three-stranded barbed wire fence running parallel to the old railroad

easement. Pet. App. 100a-101a ¶ 3.13. The fence, which has been maintained by Flying T or its predecessors in interest since 1962, encloses not only the 165 acres described in Flying T's deed, but also an additional, narrow strip located on the west side of Flying T's rangeland. This strip is the subject of the instant litigation. *Id.*

In 1995, Snohomish County purchased from a private landowner a parcel that lies to the west of Flying T's property. Pet. App. 100a ¶ 3.11. Like Flying T's property, the land that the County acquired lies between the barbed wire fence on the south side of the old railroad easement, and the river. Pet. App. 105a. In 2021, the Tribe purchased a narrow parcel that lies, in part, between the County's and Flying T's parcels.[1] Pet. App. 100a ¶ 3.8. Just like the County's, the Tribe's parcel includes a portion of land lying between the barbed wire fence on the south side of the old railroad easement, and the river. Pet. App. 104a. (These parcels, along with the hiking trail on the old railroad easement, the barbed wire fence, and the river, are depicted in an exhibit to Flying T's complaint which is reproduced at Pet. App. 106a). The Tribe's parcel has never been part of any reservation, nor has it been taken into trust by the United States. *See* Pet. App. 100a ¶ 3.9.

## II. Procedural Background

When the County and the Tribe rebuffed a request for a quitclaim deed of the fenced portion of their

[1] At the same time, the Tribe purchased seven additional parcels, comprising about 140 acres, on the south side of the river. *See* Pet. App. 39a; Suppl. Br. of Pet'r Flying T Ranch at 4 & App. 1 at 8, No. 103430-0, Wash. S. Ct.

parcels, Flying T filed a quiet title lawsuit in Washington State Superior Court, alleging that it owned the fenced area through adverse possession. *See* Pet. App. 97a-106a; *cf. Wood v. Nelson*, 358 P.2d 312, 314 (Wash. 1961) ("Where a fence purports to be a line fence, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence."). The Tribe moved to dismiss, arguing that, under federal law, it had sovereign immunity against any quiet title suit. *See* Pet. App. 72a-73a. The trial court granted the motion on this ground and the court of appeals affirmed.[2] *Id.*; Pet. App. 36a-37a, 67a.

On review of Flying T's petition for review, the Washington Supreme Court likewise affirmed. Pet. App. 1a-2a, 25a-26a. The Court held that, although Washington state courts have *in rem* jurisdiction over non-reservation land within the State, they lack subject matter jurisdiction to hear quiet title cases against tribal governments because Indians tribes have absolute immunity from any suit unless Congress has explicitly waived that immunity, which it hasn't done here. Pet. App. 25a. In reaching that conclusion, the court rejected Flying T's argument that the common-law immovable-property rule prevents the Tribe from asserting sovereign immunity

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[2] The superior court dismissed the County from the suit following the latter's transfer to the Tribe of the County's portion of the disputed property. *See* Pet. App. 68a. The transfer was effected while the Tribe's motion to dismiss was pending. Pet. App. 3a. The County did not participate in the appellate proceedings below.

over a dispute to real property on non-reservation land. *Id.*

## REASONS FOR GRANTING THE PETITION

As several members of this Court have observed, the immovable-property rule's applicability to tribal sovereign immunity is an important issue of federal law that has not been, but should be, settled by this Court. *See Lundgren*, 584 U.S. at 562 (Roberts, C.J., concurring); *id.* at 564 (Thomas, J., dissenting). In *Lundgren*, this question was raised but, because the Court decided the dispute on a different ground, the question's resolution was left for an appropriate future case. *See id.* at 560 (majority opinion); *id.* at 562 (Roberts, C.J., concurring); *id.* at 564 (Thomas, J., dissenting). Flying T's dispute is that case.

### I. The Washington Supreme Court's Absolute Immunity Ruling Answered The Question This Court Left Open In *Lundgren* And Merits Review

In *Lundgren*, the Upper Skagit Indian Tribe purchased non-reservation land and informed its new neighbors that a pre-existing fence trespassed upon its newly acquired property. *See Lundgren*, 584 U.S. at 557. In response, the neighbors filed a quiet title suit in Washington state court, alleging that they had acquired title to the fenced land through adverse possession. *Id.* Relying on this Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), the Washington Supreme Court rejected the tribe's sovereign immunity defense, holding that a tribe is never immune in cases in which courts exercise *in rem*

rather that *in personam* jurisdiction. *See Lundgren*, 584 U.S. at 557-58.

Vacating the Washington Supreme Court's decision, this Court held that "*Yakima* did not address the scope of tribal sovereign immunity" at all but instead was limited to the "more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887." *Id.* at 558. Although the *Lundgren* property owners in their respondents' merits brief had raised, as alternative grounds to affirm, arguments based on the immovable-property rule, this Court decided to "leave it to the Washington Supreme Court to address these arguments in the first instance[.]" *Id.* at 560.

On remand, the parties settled their dispute, Pet. App. 107a-11a, so the Washington Supreme Court did not have the opportunity to decide whether the immovable-property rule applies to tribal sovereign immunity. But the court did decide the issue in this case, holding that Indian tribes enjoy absolute immunity from suits unless Congress says otherwise. Pet. App. 24a-25a. As *Lundgren* indicates, that question merits definitive resolution in this Court. 584 U.S. at 560; *id.* at 563 (Roberts, C.J., concurring).

The need for review is bolstered by the conflicts between the Washington Supreme Court's ruling and decisions of this Court. A default rule of absolute immunity for Indian tribes is contrary to the principle, repeatedly followed by this Court, that tribal sovereign immunity is not *sui generis* but instead is to be construed consistent with the general common law of sovereign immunity. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the *common-*

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

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

Some lower courts have refused to extend tribal sovereign immunity beyond what would have been recognized at common law, holding that tribes' immunity does not cover disputes over non-trust, non-reservation real property. *See Cass Cnty. Joint Water Resource Dist. v. 1.43 Acres of Land*, 643 N.W.2d 685, 694 (N.D. 2002) ("The land at issue in this case is

essentially private land which has been purchased in fee by an Indian tribe. . . . [T]he State may exercise territorial jurisdiction over the land . . . and the Tribe's sovereign immunity is not implicated."). *Accord Miccosukee Tribe of Indians of Fla. v. Dep't of Env't Prot.*, 78 So. 3d 31, 34 (Fla. Dist. Ct. App. 2011) (quoting *Cass County*).

Other lower courts, however, have adhered to a default rule of absolute immunity, thereby stretching tribal sovereign immunity well beyond any historical precedent. *See* Pet. App. 24a-25a; *Cayuga Nation v. Tanner*, 448 F. Supp. 3d 217, 244-45 (N.D.N.Y. 2020) (under this "avowedly broad principle" of "settled law," courts must "dismiss[ ] any suit against a tribe absent congressional authorization (or a waiver)" (quoting *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 761 F.3d 218, 220 (2d Cir. 2014))); *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 274 Cal. Rptr. 3d 255, 262 (Ct. App. 2021) ("For decades, the Supreme Court has set aside these and other concerns, treated tribal sovereign immunity as settled law, and deferred to Congress . . . . We see no reason to depart from this practice." (citation omitted)); *Haney v. Mashpee Wampanoag Indian Tribal Council, Inc.*, 205 N.E.3d 370, 2023 WL 2000259, at *2 (Mass. App. Ct. 2023) (table) ("We agree with the defendants that the issue is not ours to decide in the first instance but must be left to Congress.").

This Court should grant the Petition to decide the important issue left unresolved in *Lundgren*, thereby ensuring uniformity among the lower courts and their adherence to this Court's precedents.

## II. The Washington Supreme Court's Absolute Immunity Ruling Is Wrong

The Petition should be granted because the Washington Supreme Court incorrectly held that tribes have absolute immunity from suit unless modified by Congress. Pet. App. 24a-25a. There is no basis at common law for a default rule of absolute immunity, and no treaty or statute supports such a rule either. *See Lundgren*, 584 U.S. at 566-75 (Thomas, J., dissenting).

As noted, Indian tribes enjoy the immunity from suit traditionally accorded to sovereigns. *Bay Mills*, 572 U.S. at 788. In determining the precise contours of that immunity, this Court has found "instructive the problems of sovereign immunity for foreign countries." *Kiowa*, 523 U.S. at 759.

One aspect of the common law of nations that has remained consistent over centuries is that a sovereign is not immune from a quiet title suit concerning real property owned in another sovereign's territory. *Lundgren*, 584 U.S. at 566 (Thomas, J., dissenting). "Cornelius van Bynkershoek, a renowned 18th-century jurist, stated that it was 'established' that 'property which a prince has purchased for himself in the dominions of another . . . shall be treated just like the property of private individuals.'" *Id.* at 567 (quoting De Foro Legatorum Liber Singularis 22 (G. Laing transl. 2d ed. 1946)) (footnote omitted). Although there is some debate about the outer limits of the immovable-property rule—"for example, whether it applies to tort claims related to the property or to diplomatic embassies"—"there is no dispute that it covers suits concerning ownership of a

piece of real property used for nondiplomatic reasons." *Id.* at 566 n.2.

The Foreign Sovereign Immunities Act (FSIA) reflects this longstanding rule. *See* 28 U.S.C. § 1605(a)(4). The FSIA codified the "international law" of sovereign immunity, including "the pre-existing real property exception to sovereign immunity recognized by international practice[.]" *See Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 199-200 (2007) (quotations omitted). *See also id.* at 200 (observing that "a foreign sovereign's immunity does not extend to 'an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction") (quoting Restatement (Second) of Foreign Relations Law of the United States § 68(b) at 205 (1965)). Although the FSIA does not apply to Indian tribes, it is probative of the common law of sovereign immunity and therefore supports the immovable-property rule's application to the historic sovereign authority retained by Indian tribes.

Drawing a remarkably divergent conclusion, the Washington Supreme Court reasoned that the FSIA's failure to mention Indian tribes means that the immovable-property rule does not apply to tribes. Pet. App. 21a, 24a. This contortion of the maxim *expressio unius exclusio alterius* is unconvincing. "[T]he canon does not tell us that a case was provided for by negative implication unless an item unmentioned would normally be associated with items listed." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 169 n.12 (2003). The FSIA pertains only to "foreign" nations, 28 U.S.C. § 1604, whereas tribes are "domestic" sovereigns, *Bay Mills*, 572 U.S. at 788; hence, the

FSIA's omission of Indian tribes does not suggest that Congress wished to exempt Indian tribes from common-law limitations on sovereign immunity. Supporting that conclusion is the fact that the immovable-property rule has long been recognized to apply not just to foreign nations but also to the United States and the individual States. *See Lundgren*, 584 U.S. at 573 (Thomas, J., dissenting); *Georgia*, 264 U.S. at 481. *See also United States v. Wilder*, 28 F. Cas. 601, 604 (C.C.D. Mass. 1838) (Story, C.J.) (observing that "sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of courts of justice"); Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 260 & n.45 (discussing the longstanding distinction, recognized at the Founding, between *in rem* and *in personam* actions, relevant for determining sovereigns' immunity from suit).

That the immovable-property rule applies to the several States does not preclude its application to Indian tribes. True, limitations on the States' sovereign immunity do not always apply to Indian tribes. *See Lundgren*, 584 U.S. at 560 (majority opinion). The reason for this asymmetry is that Indian tribes did not participate in the Constitutional Convention and hence cannot be bound by the limitations on sovereignty that the States therein agreed to. *See Kiowa*, 523 U.S. at 755-56. Yet the immovable-property rule is a limitation on sovereignty that predates, and is independent of, anything negotiated by the States at the Constitutional Convention. Thus, the immovable-property rule's applicability to the States is no reason not to apply it to Indian tribes. *See Lundgren*, 584 U.S. at 573 (Thomas, J., dissenting).

Courts have consistently applied the immovable-property rule to sovereign immunity because ownership of property is not an inherently sovereign function. *Permanent Mission*, 551 U.S. at 199. Hence, the use of property merely for a valid governmental purpose—for example, restoring salmon habitat, as the Tribe proposes to do here, Pet. App. 20a—does not mean that disputes about the ownership of that property fall outside of the immovable-property rule. *See Lundgren*, 584 U.S. at 566 n.2 (Thomas, J., dissenting) ("[T]here is no dispute that [the immovable-property rule] covers suits concerning ownership of a piece of real property used for nondiplomatic reasons.") (citing Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Attorney General Phillip B. Perlman (May 19, 1952) (Tate Letter)).[3] *Accord Agostini v. De Antueno*, 99 N.Y.S.2d 245, 248 (Mun. Ct. 1950) ("There appears to be no doubt that real property held by diplomatic officers in a foreign state, and not pertaining to [their] diplomatic status, is subject to local laws.").

Finally, no principle of deference to the political branches counsels a different outcome. The pertinent political branch—Congress—has not spoken to this issue. The Washington Supreme Court assumed that congressional silence must mean immunity for the tribes. *See* Pet. App. 24a. That erroneous conclusion alone merits review, as it contradicts this Court's settled practice of proceeding to adjudicate disputes about sovereign immunity when the pertinent political branch has declined to state a definitive

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[3] *Reprinted in Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711-15 (1976).

position. *See Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945) ("In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist."); *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U.S. 68, 75 (1938) ("The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged."). *See also Lundgren*, 584 U.S. at 560 (majority op.) ("We leave it to the Washington Supreme Court," not Congress, "to address these arguments in the first instance."). Absent Congressional action, the tribes retain just their historic sovereign authority and—as is true of any other government—that authority does not provide immunity for quiet title suits over real property located in another sovereign's jurisdiction.

## III. The Petition Presents An Excellent Vehicle To Address Whether Tribal Sovereign Immunity Is Subject To The Immovable-Property Rule

This case presents facts that are essentially the same as in *Lundgren*.

Like *Lundgren*, Flying T has a strong claim, under the doctrine of adverse possession, to non-trust, non-reservation land, allegedly owned by an Indian tribe. *Compare* 584 U.S. at 557, *with* Pet. App. 100a ¶ 3.13. Like the property owners in *Lundgren*, Flying T's dispute with an Indian tribe is not of Flying T's making. *Cf.* 584 U.S. at 562 (Roberts, C.J, concurring)

("I am skeptical that the law requires private individuals—who, again, had no prior dealings with the Tribe—to pick a fight in order to vindicate their interests."). Flying T did not willingly choose to deal with the Tribe; it was the Tribe which chose to purchase property subject to Flying T's multi-decade adverse possession. Pet. App. 100a, 101a–102a ¶¶ 3.8, 3.14. Further, it was the County which chose to transfer its portion of the disputed property to the Tribe only after the dispute with Flying T had arisen. Pet. App. 3a. And like the property owners in *Lundgren*, Flying T has no other reasonably equivalent means to adjudicate its property dispute, which the lower courts' dismissal on sovereign immunity grounds does nothing to resolve. *Cf. Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983) (observing that a "title dispute remains unresolved" following a non-merits dismissal).

But unlike *Lundgren*, the issue of the immovable-property rule's application to Indian tribes was fully briefed by the parties and decided by the courts below. *Compare* 584 U.S. at 561 (noting that "the courts below and the certiorari-stage briefs before us said precisely nothing on the subject") *with* Pet. App. 15a-19a. Although the Washington Supreme Court did not address the question presented on remand in *Lundgren*, Pet. App. 107a-111a (*Lundgren* settlement documents), it did address the question here, Pet. App. 25a. Thus, the question presented has been subject to "the virtues of . . . full adversarial testing" and is ready for this Court's review. *Lundgren*, 584 U.S. at 561.

Resolution of the question presented in Flying T's favor would not, however, require this Court to revisit its other tribal immunity precedents, such as the broad commercial immunity recognized in *Kiowa* and *Bay Mills*. *See Kiowa*, 523 U.S. at 760; *Bay Mills*, 572 U.S. at 804. As the famed Tate Letter explains, there are "two conflicting concepts of sovereign immunity, each widely held and firmly established." Tate Letter, *reprinted at* 425 U.S. at 711. "According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Id.* "According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Id.* Under the classical, near-absolute theory of sovereign immunity, foreign sovereigns enjoyed immunity from all commercial activity. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). But both theories recognized an exception for suits involving immovable property. *Permanent Mission*, 551 U.S. at 199. Thus, this Court could affirm the application of the immovable-property rule to Indian tribes while also maintaining, without historical inconsistency, Indian tribes' broad immunity for commercial activities.

Such a distinction would be defensible given the plausible argument that Congress has ratified the Court's commercial immunity rulings, *see Bay Mills*, 572 U.S. at 801-03, whereas there is no basis to infer Congressional ratification for the absolute immunity rule adopted by the Washington Supreme Court. Similarly, although there are plausible reasons for why tribes need broad commercial immunity to

vindicate their basic governmental interests (e.g., tribes cannot sue the States, and tribes face unique obstacles to raising revenue, *see id.* at 806-13 (Sotomayor, J., concurring)), there is no such need with respect to title disputes, *see Lundgren*, 584 U.S. at 563 (Roberts, C.J., concurring) ("The consequences of the Court's decision today thus seem intolerable, unless there is another means of resolving property disputes of this sort."). Applying the immovable-property rule to Indian tribes might even enhance tribal authority and independence. *See* Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 Mont. L. Rev. 11, 18-20 (2019). Moreover, this Court itself has recognized that, even in the commercial context, exceptions to tribal sovereign immunity may be warranted. *See Bay Mills*, 572 U.S. at 799 n.8. Hence, there should be no precedential objection to recognizing the applicability to Indian tribes of a well-established, real-property-based exception to sovereign immunity.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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