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IN THE SUPREME COURT OF THE UNITED STATES
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UPPER SKAGIT INDIAN TRIBE,)
Petitioner,)
v.) No. 17-387
SHARLINE LUNDGREN, ET VIR.,)
Respondents.)

Washington, D.C.
Wednesday, March 21, 2018

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:11 a.m.

APPEARANCES:
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on behalf of the Petitioner.
ANN O'CONNELL, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on
behalf of the United States, as amicus curiae,
in support of the Petitioner.
ERIC D. MILLER, ESQ., Seattle, Washington; on behalf
of the Respondents.

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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 17-387, the Upper
5 Skagit Indian Tribe versus Lundgren.

6 Mr. Hawkins.

7 ORAL ARGUMENT OF DAVID S. HAWKINS

8 ON BEHALF OF THE PETITIONER

9 MR. HAWKINS: Mr. Chief Justice, and
10 may it please the Court:

11 The Respondents sued the tribe to
12 challenge the tribe's title of record to the
13 property at issue. This Court has consistently
14 held that sovereign immunity bars suits against
15 tribal governments. Respondents' own prayer
16 for relief establishes that their suit is an
17 attack on the tribe's interests in the
18 property, confirming that sovereign immunity
19 bars their claim.

20 JUSTICE GINSBURG: Is it -- is it not
21 --

22 CHIEF JUSTICE ROBERTS: What are the
23 -- go ahead.

24 JUSTICE GINSBURG: Is it not the case
25 that no other political entity would be immune

1 from such a -- from such a quiet-title suit,
2 not the United States, not a state of the
3 United States, not a foreign government? So
4 you're claiming a kind of super-sovereign
5 immunity for the tribe that no -- no one else
6 gets.

7 MR. HAWKINS: Justice Ginsburg, that,
8 in fact, is not the case. The United States
9 would not be subject to a claim along the same
10 factual lines as this. The quiet title action
11 --

12 JUSTICE GINSBURG: Because of the
13 adverse possession?

14 MR. HAWKINS: Correct.

15 CHIEF JUSTICE ROBERTS: What -- what
16 are the Lundgrens supposed to do in this
17 situation if they can't bring legal action
18 affecting the tribe?

19 MR. HAWKINS: Your Honor, the
20 Lundgrens are in a situation where -- similar
21 to other states that have been confronted with
22 sovereign immunity, for example, in the
23 Pottawatomie case where they were unable to
24 enforce their taxing authority and the tribe --
25 the Court recognized that sometimes sovereign

1 immunity will lead to results that preclude
2 individuals from being able to sue for relief.

3 That being said, in this instance, it
4 would be helpful for all of the parties to
5 understand their legal standing before they
6 engage in negotiations.

7 It's our anticipation that once this
8 case is removed or resolved -- I beg your
9 pardon -- that we would hopefully be able to
10 engage in a negotiation with the Lundgrens.

11 CHIEF JUSTICE ROBERTS: You -- well,
12 you would be in a better position when that
13 negotiation started, wouldn't you, if we have a
14 ruling saying that you can't be sued?

15 MR. HAWKINS: Either way, both parties
16 would be more informed as to what their legal
17 positions were during the negotiations, Your
18 Honor.

19 JUSTICE BREYER: What happens
20 generally if a tribe buys land or -- or thinks
21 it owns land in downtown Tulsa or New York City
22 or any other place off the reservation and they
23 -- they send members of the tribe there and
24 somehow they're in possession of at least part
25 of it. How is that dispute resolved?

1 MR. HAWKINS: I -- I don't understand
2 the question.

3 JUSTICE BREYER: Well, what worries me
4 is if there is sovereign immunity --

5 MR. HAWKINS: Uh-huh.

6 JUSTICE BREYER: -- and if members of
7 the tribe acting for the tribe obtain property,
8 they -- they -- they have a building or an
9 empty lot or somewhere, and they're -- they're
10 there and there's another person who believes
11 he owns the property or the lot, the building,
12 and so there are two different people, the
13 tribe and another group, both of which thinks
14 they own a lot in New York City or Tulsa.

15 How is that dispute resolved?
16 Normally, we resolve it in a court. But how,
17 in your opinion, will the dispute -- how has it
18 been resolved? What I'm thinking of is I
19 joined a case saying there was broad sovereign
20 immunity.

21 MR. HAWKINS: Yes.

22 JUSTICE BREYER: I thought Congress
23 would act, but it hasn't. And tribes have
24 business interests all over the country, all
25 over the place. And how are they resolved?

1 MR. HAWKINS: So I understand the
2 Kiowa decision, Your Honor, and, obviously,
3 that -- Congress did not act after that
4 decision, and --

5 JUSTICE BREYER: No. So that's why I
6 asked my question. Property disputes are
7 fairly common, and you could get into really a
8 bad situation where the only resolution is
9 force. That's why we have courts.

10 And I want to know how are they
11 resolved, how should they be resolved, if you
12 can't sue the tribe?

13 MR. HAWKINS: So the precedent that
14 this Court has recognized in both U.S. v.
15 Alabama and the Minnesota case is that
16 sometimes that will be the reality of sovereign
17 immunity.

18 That being said, by way of example,
19 the fact that states can enforce taxes against
20 tribes have not precluded --

21 JUSTICE BREYER: I'm not talking about
22 facts.

23 JUSTICE KENNEDY: What -- just for
24 Justice Breyer's question, suppose the tribe
25 owns property outside the reservation in Tulsa

1 or New York. The state wants to condemn the
2 land. Is there sovereign immunity or not?

3 MR. HAWKINS: Sovereign immunity
4 applies in that situation because the action is
5 against the -- the tribal government's
6 interests, and your holdings in Bay Mills
7 specifically provides that an action against
8 the tribe is barred. It's Congress's --

9 CHIEF JUSTICE ROBERTS: All right.
10 With respect to --

11 JUSTICE BREYER: Well, there's
12 sovereign immunity -- look, Joe Smith owns an
13 empty lot next door to his house. One morning,
14 because of some tribal legacy or something, he
15 wakes up and finds members of the tribe there
16 next to him on the lot.

17 He says: I own the lot next to my
18 house. I have my swimming pool there. He's
19 quite wealthy. The tribe members say: No,
20 this is ours.

21 Now how is that dispute -- since that
22 decision that I joined, how is that dispute,
23 kind of dispute which could arise all over the
24 place, how has it been resolved? I can't
25 believe there is no such thing in some form.

1 MR. HAWKINS: So -- so, again, that is
2 a dispute that would be resolved out of the
3 judicial process. Your case in the -- the
4 Philippines case establishes that if there is a
5 dispute, the court simply looks to the merits
6 of the claim as it pertains to the interests
7 that the pride -- the tribe has. If the action
8 is against the tribe's interests, and it is in
9 this instance, it's a registered title here,
10 you're not confronted with a non-frivolous
11 claim on the part of the tribe.

12 In the instances that you're
13 describing, it sounds as though the tribe's
14 claims probably are going to be somewhat
15 frivolous.

16 JUSTICE BREYER: Oh, no, I don't know
17 if they're frivolous. But suppose they are.
18 Suppose they are.

19 MR. HAWKINS: So -- so if --

20 JUSTICE BREYER: Why doesn't the tribe
21 -- how do you get around sovereign immunity if
22 they are frivolous?

23 MR. HAWKINS: The -- the threshold
24 issue is whether or not the action is directed
25 against the tribe. The tribe has to establish

1 a prima facie basis that it has an interest.

2 Once that interest is established, as
3 in this instance, where we have registered
4 title, the -- the -- the court would therefore
5 immediately lose its jurisdiction and the case
6 should be dismissed.

7 JUSTICE ALITO: What would happen in
8 -- in this situation? Let's say a state or the
9 federal government wants to construct a highway
10 or maybe it's a pipeline, and there's
11 opposition to this project, so the people who
12 are opposed to the project enlist an Indian
13 tribe to buy a little parcel of land along the
14 route of this highway or this pipeline.

15 That would be the end of the project,
16 would it not?

17 MR. HAWKINS: That potentially would
18 be the end of the project, yes. However, there
19 would be remedies available that the U.S.
20 Government could invoke, and it's important to
21 keep in mind that what Bay Mills stands for,
22 the prop -- specifically affords Congress the
23 ability to step in and act in this situation.

24 JUSTICE GINSBURG: What about the --

25 CHIEF JUSTICE ROBERTS: You mentioned

1 Bay Mills a couple of times. What about
2 Footnote 8 in Bay Mills? There, it says we
3 have never specifically addressed whether
4 immunity should apply in the ordinary way if a
5 tort victim or other plaintiff who has not
6 chosen to deal with the tribe has no
7 alternative way to obtain relief.

8 Doesn't that distinguish your reliance
9 on Bay Mills?

10 MR. HAWKINS: I -- in Lewis v. Clarke,
11 you address Footnote 8 in terms of if an action
12 is directed against a tribe, then you made the
13 decision that that action was barred by
14 sovereign immunity. Subsequent to Bay Mills
15 and Lewis v. Clarke, you clarified that an
16 individual action against a tribal employee
17 would potentially give relief to an innocent
18 victim.

19 CHIEF JUSTICE ROBERTS: Well, how does
20 that work? Yes, an individual action, I
21 remember that from Lewis and Clarke, but how
22 does that work here? Are the Lundgrens
23 supposed to sue anybody from the tribe who goes
24 on to the area that they claim to have adverse
25 possession of?

1 MR. HAWKINS: If they were able to
2 frame the -- the claim properly, Lewis v.
3 Clarke may provide them relief in that
4 instance, yes.

5 CHIEF JUSTICE ROBERTS: So every time
6 somebody from the tribe goes over the barbed
7 wire fence that they say for -- since time
8 immemorial has defined their property, they
9 should sue them? Just have a lawyer there
10 walking down -- along the line every time
11 somebody goes, serve him with process?

12 MR. HAWKINS: I understand --

13 CHIEF JUSTICE ROBERTS: Is that a
14 valid -- a viable alternative remedy to a
15 quiet-title action?

16 MR. HAWKINS: It is not. But, again,
17 I get back to the point that this Court has
18 continually affirmed as relates to the
19 significance of sovereign immunity.

20 This Court --

21 JUSTICE KAGAN: Well, Mr. Hawkins --

22 JUSTICE GINSBURG: Does it make any
23 difference that the -- that the Lundgrens had
24 no notice when they bought the property that
25 there was any tribe in the picture? I could

1 see if the Lundgrens bought the property and a
2 tribe is already there.

3 But why shouldn't the tribe, when it's
4 taking from someone who doesn't have any
5 immunity, step into the shoes of that person
6 and be disabled from asserting sovereign
7 immunity against someone who had no reason to
8 believe that there was an Indian tribe in the
9 picture?

10 MR. HAWKINS: Justice Ginsburg, in --
11 in -- in the instance where a case had already
12 been started, the tribe would step into
13 litigation and its immunity would not apply
14 because the jurisdiction of the court would
15 have already been asserted over the
16 proceedings.

17 JUSTICE GINSBURG: No, I -- I mean
18 there are no proceedings in court.

19 MR. HAWKINS: But -- but -- but -- but
20 if there is no proceedings that are at issue
21 and the tribe purchases a property, the -- the
22 tribe is exercising the rights that it has to
23 defend its claim against the Lundgrens.

24 Keep in mind the Lundgrens assert that
25 they've had this property for over 40 years,

1 never paying property taxes on it, never taking
2 any action for that period of time to legally
3 establish their claims.

4 And now, all of a sudden, when the
5 tribe comes in to title, they assert that they
6 have a right.

7 CHIEF JUSTICE ROBERTS: Well --

8 JUSTICE GORSUCH: Counsel --

9 CHIEF JUSTICE ROBERTS: -- they --
10 there -- the trial judge in the state said he
11 had never seen a case of adverse possession
12 clearer than this one. It seems to me you're
13 arguing the merits of their adverse possession
14 claim and they would love to have you do that
15 in court.

16 MR. HAWKINS: I don't mean to get into
17 the merits of the state case, Your Honor. This
18 is -- sovereign immunity is a federal issue
19 that preempts the state law and the merits of
20 the underlying decision as it pertains to that.

21 JUSTICE KAGAN: Mr. Hawkins, I mean, I
22 guess the question is, what is sovereign
23 immunity and what does it entail? Even beyond
24 the footnote in Bay Mills that the Chief
25 Justice referenced, I think when you look at

1 language of the kind that appears in Bay Mills
2 and in other cases, what -- which says that,
3 you know, if Congress wants to change it, it's
4 up to Congress to change it, but the question
5 is what is the "it"?

6 In other words, what's up to Congress
7 to change is deviations from the general law of
8 sovereign immunity. And I think what the
9 Lundgrens are saying here is that this is not
10 part of the general law of sovereign immunity.
11 And this goes back to Justice Ginsburg's
12 question, that sovereign immunity typically by
13 common law and historically includes this
14 exception for immovable property.

15 And so that's the baseline. It's,
16 well, sovereign immunity, as it historically
17 exists, except as it historically exists, it
18 just didn't include immunity from suits that
19 related to immovable property.

20 MR. HAWKINS: So, if you look at the
21 judicial history of the immovable property
22 issue and the -- in particular, as it pertains
23 to the cases involving foreign nations, the
24 court took action at the guidance of the State
25 Department.

1 And the court has consistently
2 deferred to the State Department, the political
3 branches as to whether or not it will exercise
4 jurisdiction or it's prudent to exercise
5 jurisdiction over those foreign sovereigns.

6 So the -- the court has consistently
7 recognized that immunity is in the hands of the
8 political branches. Now you ask how does this
9 relate to Indian tribes and the significance
10 and what is "it". For a landless tribe like
11 the Upper Skagit, sovereign immunity has
12 enabled it to purchase lands, take them into
13 trust, and establish their reservation
14 providing services for their members without
15 being subject to third-party claims.

16 That's essential where we are, because
17 if you allow third parties to bring frivolous
18 or meritorious claims against a tribe, the
19 purse of the tribe is going to be spent on
20 things --

21 JUSTICE GORSUCH: Counsel -- counsel,
22 along those lines, do you think you'd have a
23 stronger case if the land had been taken into
24 trust? And the land is purchased, as I
25 understand it, in 2013. I'm curious why it

1 hasn't been taken into trust.

2 MR. HAWKINS: We were in the process
3 of getting everything ready for taking it into
4 trust, but, first of all, I'm sorry, to answer
5 your question, no, we don't think that it would
6 -- that's not a distinction that makes a
7 difference.

8 JUSTICE GORSUCH: Go ahead. Why --
9 why doesn't -- why doesn't it make a difference
10 whether the land is held in trust or not?

11 MR. HAWKINS: Whether the land is in
12 trust or whether it's in fee, immunity travels
13 both on and off reservation. And in commercial
14 contexts, in Kiowa, you have a case where you
15 have a note that the tribe determines that
16 they're not going to comply with all the terms
17 of, commercial transaction, you say off
18 reservation, immunity bars relief from -- from
19 the other --

20 JUSTICE KENNEDY: Of course, there the
21 parties consented to deal with the tribe. They
22 knew they were dealing with a tribe.

23 MR. HAWKINS: That is correct, Your
24 Honor.

25 JUSTICE KENNEDY: And they -- and they

1 could have put in the note if they wanted a
2 waiver of sovereign immunity or not. So this
3 is different.

4 JUSTICE GORSUCH: I guess I'd like an
5 answer to my question, though.

6 MR. HAWKINS: Yes.

7 JUSTICE GORSUCH: Why -- why should it
8 make a difference whether it's in trust or not?

9 MR. HAWKINS: It does not make a
10 difference as to whether it's in trust or not.
11 The tribe is the party that the action is being
12 brought against. Immunity, therefore, is
13 appropriate and should be applied here.

14 JUSTICE GORSUCH: But if -- if it were
15 in trust, then we would treat it as the land of
16 the separate sovereign, right? It would be --

17 MR. HAWKINS: So --

18 JUSTICE GORSUCH: -- the tribe's land,
19 just as it might be France, now it's -- it's --
20 it's titled under the state's laws and is still
21 part of the state. Does that -- does that
22 resonate with you at all? And if that doesn't
23 make sense, tell me why not.

24 MR. HAWKINS: No, I -- I -- I think I
25 understand the question, Your Honor. And the

1 -- and the Minnesota case is a situation where
2 you have the land taken into trust and
3 Minnesota then sues the U.S., and the court
4 finds that it's barred by sovereign immunity
5 because the land -- the land is held in trust
6 on the -- for the benefit of the tribe.

7 But the reality is that the immunity
8 isn't subject to what the particular
9 transaction is. Your case law has been clear
10 that immunity applies regardless of what the --
11 the -- the action is. It applies if the relief
12 is being sought against the tribe because of
13 the significance of it. Were the tribe not
14 able to preclude suits from it, it could be
15 subject to countless claims taking away the
16 ability to provide for its membership.

17 JUSTICE SOTOMAYOR: Counsel, can I
18 just ask a question about the immovable
19 property argument which was just raised in the
20 merits brief here.

21 If you had more time, what more would
22 you argue to us? What more could you show us
23 to prove that you were right that this is not a
24 part of the common law?

25 Your suit, you made an argument in

1 saying it's a matter of -- of practice, not
2 common law, but what else could you show us if
3 we gave you more time?

4 MR. HAWKINS: That is difficult to
5 answer, not being -- not having had the time to
6 go back and look at what the law provides and
7 all of the cases that would be applicable here.
8 But what I would assert is that when you delve
9 into the application of that proposed exception
10 here, it is inherently in conflict with the
11 underlying request that they have made in their
12 original complaint.

13 And their --

14 JUSTICE SOTOMAYOR: Counsel, I -- I
15 fully accept that they only raise this in their
16 merits brief. I'm asking you a very directed
17 question. What other research would you do
18 that could help you prove your argument?

19 MR. HAWKINS: We would like -- we
20 would take the time to look at the application
21 as it relates to other tribes specifically, but
22 also how the state has -- the political
23 branches have been involved in that process and
24 how the U.S. has addressed it.

25 And the -- the reality is that giving

1 context to an exception to sovereign immunity
2 is a very complex matter, and how that applies
3 to tribes is a very complex matter. And it's
4 not something that we, in a very short period
5 of time, were fully able to respond to.

6 CHIEF JUSTICE ROBERTS: You had -- you
7 had a month since they filed their brief.

8 MR. HAWKINS: That is correct, Your
9 Honor.

10 JUSTICE BREYER: Suppose you just
11 said: Well, the tribe, being of the dignity of
12 a sovereign, has the same kind of immunity as a
13 sovereign nation would have?

14 MR. HAWKINS: That is -- that is our
15 position.

16 JUSTICE BREYER: Well, I don't know.
17 A sovereign nation, I think since about 1750,
18 there's been an exception for a sovereign
19 nation for immovable property. And, therefore,
20 if the nation of Canada comes and -- and has a
21 piece of land in North Dakota and the person
22 who lives there says, I'm sorry, this belongs
23 to me, not to Canada, and Canada says no, my
24 understanding was there has been a
25 long-standing exception to sovereign immunity.

1 MR. HAWKINS: But that exception has
2 been at the direction of the political
3 branches. And that is exactly what we are
4 asserting should occur here, should an
5 exception be considered by this Court.

6 If there are no further questions, I'd
7 like to reserve time for rebuttal.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Ms. O'Connell.

11 ORAL ARGUMENT OF ANN O'CONNELL

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

13 IN SUPPORT OF THE PETITIONER

14 MS. O'CONNELL: Mr. Chief Justice, and
15 may it please the Court:

16 I'd like to start with Justice Kagan's
17 question about what is the baseline here about
18 what sovereign immunity entails. The baseline
19 is sovereign immunity from suit.

20 This is the Alexander Hamilton quote
21 from the Federalist Papers. It is inherent in
22 the nature of sovereignty not to be amenable to
23 suit without consent.

24 The immovable property exception is an
25 exception that applies to other sovereigns, but

1 that's because an exception to that general
2 rule has been made.

3 In the United States, the political
4 branches control whether there are exceptions
5 to that general rule of sovereign immunity from
6 suit for the United States, for foreign states,
7 and for Indian tribes.

8 JUSTICE BREYER: Well, you say it's
9 been made --

10 JUSTICE KENNEDY: Well, of course,
11 this Court said in the Permanent Mission of
12 India case that the Foreign Sovereign
13 Immunities Act was meant to codify the
14 preexisting real property exception to
15 sovereign immunity recognized by international
16 practice.

17 MS. O'CONNELL: Correct. It was
18 recognized by international practice as a
19 matter of what the executive branch recognized
20 when it was asserting immunity.

21 JUSTICE KENNEDY: And so why doesn't
22 that same principle allow the Court to
23 recognize that there's a limit to sovereign
24 immunity here under the very same principle?

25 MS. O'CONNELL: Well, I -- I think

1 that's because it is -- it is up to Congress --
2 this Court has consistently said it's up to
3 Congress to control and make exceptions to the
4 immunity from suit of Indian tribes.

5 JUSTICE KAGAN: But I thought that we
6 explained in *Kiowa* that foreign sovereign
7 immunity actually started as a judicial
8 doctrine. It was only later that it was taken
9 over by the political branches.

10 MS. O'CONNELL: Well, I think what the
11 Court said there, and I think that that quote
12 was in -- well, I can't remember if it's
13 initially in *Verlinden B.V.* or *Kiowa*, but that
14 the -- the initial judicial doctrine was from
15 -- the *Schooner Exchange* versus *McFaddon*, was
16 that it's general immunity from suit. That's
17 the general rule, that it's --

18 JUSTICE BREYER: But it doesn't say in
19 the -- in the -- I mean, my law clerk has the
20 -- I guess he got out of the briefs -- I don't
21 know, we have *Vattel*, *Cornelius Van Bynkershoek*
22 in 1744, as well as *Lauterpacht*, who's
23 certainly big authority. They don't talk about
24 exceptions. They just say a prince -- that's
25 *Bynkershoek* -- he says -- he says -- or maybe

1 it's the other one -- he says in sovereign --
2 several sovereigns have fiefs and other
3 possessions in the territory of another prince.
4 In such case -- cases, they hold them in the
5 manner of private individuals.

6 And then we have Vattel and all these
7 others, and they say the same thing really.
8 They don't talk about exceptions or not
9 exceptions. So, if you were to have a quiz,
10 what was the law of sovereign immunity in 1760,
11 you know, I guess you'd have to say the law is
12 that the prince buys a department store in
13 Iowa, I'm sorry, he's just like another Iowan.

14 MS. O'CONNELL: I'm not -- I'm not
15 sure that any of those sources are talking
16 about sovereign immunity from suit. I mean,
17 those quotes could equally apply to whether the
18 prince has to pay property taxes, whether the
19 land is subject to the regulatory jurisdiction
20 of the state, as opposed to you could sue the
21 foreign nation in court.

22 JUSTICE KAGAN: But if you look at two
23 cases, Ms. O'Connell, one is Schooner Exchange,
24 which talks about foreign states, and then the
25 other is this Georgia v. Chattanooga, which is

1 individual states in another state's
2 jurisdiction, I mean, both of those seem to be
3 indicating that there's this long-standing rule
4 that when the prince goes someplace else and
5 buys land there, he's just going to be treated
6 like anybody else.

7 MS. O'CONNELL: I --

8 JUSTICE KAGAN: And it doesn't have
9 much to do with any kind of executive action.
10 It doesn't have much to do with the states all
11 agreeing about something at the Constitutional
12 Convention.

13 It's just a sort of rule that when the
14 prince pops up in some other jurisdiction and
15 buys a piece of land, he's no longer the
16 prince.

17 MS. O'CONNELL: That, Justice Kagan, I
18 think is an exception to the general rule of
19 immunity from suit. This Court called it an
20 exception in Permanent Mission of India.
21 Congress certainly called it an exception in
22 the Foreign Sovereign Immunities Act, where it
23 lays out that the baseline rule is that
24 sovereigns are completely immune from suit
25 unless an exception applies.

1 JUSTICE KAGAN: I guess what my point
2 is is not whether it should be denominated an
3 exception or not an exception but whether this
4 is the kind of historic, traditional,
5 long-standing rule that we -- we shouldn't
6 expect Congress to have to put in, that it just
7 sort of goes into the doctrine because that is
8 part of the doctrine from long, long ago, which
9 is a very different thing from saying, look,
10 it's up to Congress to really -- to -- to
11 treat -- you know, to -- to -- to start
12 modifying terms of the doctrine that have
13 existed for a long time.

14 MS. O'CONNELL: To the contrary, I
15 think that Congress's ability to create a
16 comprehensive exception or solution here and
17 weigh the policy interests on both sides is
18 what should counsel this Court not to begin
19 recognizing judicial exceptions to sovereign
20 immunity from suit in court.

21 JUSTICE KENNEDY: Well, of course, you
22 call it, again, as Justice Kagan's indicated,
23 you call it an exception. Others may call it
24 just a limit to the general rule.

25 MS. O'CONNELL: Right. But I think

1 the -- the point I --

2 JUSTICE KENNEDY: So that's just
3 playing with words.

4 MS. O'CONNELL: The point I want to
5 make is that, you know, when Congress passed
6 the Quiet Title Act to deal with this exception
7 from immunity from suit for suits against the
8 United States, it made various policy
9 judgments; the suits could only be brought in
10 federal court, it imposed a statute of
11 limitations, it made exceptions for adverse
12 possession claims, for water rights.

13 JUSTICE KENNEDY: Under your view of
14 this case, suppose the tribe, on land that it
15 owns in a state but outside the reservation,
16 puts up a high-rise building in violation of
17 the zoning law. They're -- they're exempt?
18 They can -- they can develop anywhere without
19 reference to zoning laws?

20 MS. O'CONNELL: They're not exempt
21 from the regulatory jurisdiction of the state,
22 if it's just fee land, but the -- the immunity
23 from suit would still attach.

24 JUSTICE GORSUCH: Ms. O'Connell, I --
25 I have been hoping to hear from you about what

1 the baseline rule was versus the exceptions.
2 And I'm still hopeful we might get an answer to
3 that question.

4 Why do you -- what's your best
5 authority for the proposition that the baseline
6 rule of common law was total immunity,
7 including in rem actions?

8 MS. O'CONNELL: I -- I think it's the
9 Federalist Papers, the Hamilton quote from the
10 Federalist Papers. Also, Schooner Exchange
11 versus McFaddon lays that out as a general rule
12 for foreign states at least.

13 But, again, I think that one important
14 point that I want to get out here is that if
15 Congress were to look at this and -- and decide
16 whether to create a judicial -- or a statutory
17 exception for tribal sovereign immunity, it may
18 very well make decisions like it made with
19 respect to the United States about a statute of
20 limitations or exceptions for adverse
21 possession claims or things that Congress is in
22 a position to weigh and create a comprehensive
23 solution. I think there would be --

24 CHIEF JUSTICE ROBERTS: Ms. O'Connell,
25 what -- there was one sentence in your brief

1 that really leapt off the page for me anyway.
2 It's the one between pages 23 and 24 where you
3 say the Respondents, the Lundgrens, you're
4 asking, well, what alternatives do they have?
5 And you say the Lundgrens could, for example,
6 log trees on the disputed strip, commence
7 building a structure, or take other similar
8 actions that would induce Petitioner to file
9 suit.

10 Is that really what you want them to
11 do? There's a dispute about this piece of
12 property and you say, well, go pick a fight.
13 Go cut down some trees.

14 MS. O'CONNELL: I think that --

15 CHIEF JUSTICE ROBERTS: That's a
16 surprising position for -- for the government
17 to take.

18 MS. O'CONNELL: That -- that
19 alternative way of resolving the dispute is
20 laid out in this Court's decision in Block
21 versus North Dakota. In that case, the Court
22 said, even though the state's claim against the
23 United States to quiet-title to land was barred
24 by the statute of limitations, that didn't mean
25 the title dispute was resolved. The state

1 could continue to assert its right to the
2 property and force the sovereign to sue you.
3 So --

4 CHIEF JUSTICE ROBERTS: So -- so if --
5 and -- and the tribe, I gather, said they're
6 going to build their own fence right on the
7 line and you're saying the Lundgrens should
8 jump over the fence with a chain saw and start
9 cutting down trees, and when the tribe comes up
10 to them, they're supposed to say: Oh, Ms.
11 O'Connell said I should do this.

12 MS. O'CONNELL: I think the -- well,
13 they probably shouldn't say that.

14 (Laughter.)

15 MS. O'CONNELL: The -- the point that
16 we're trying to make here is that when a suit
17 is dismissed because the sovereign has immunity
18 when a quiet-title suit is dismissed in those
19 circumstances, it doesn't mean that the tribe
20 now owns the land. It means title is still not
21 settled.

22 And so the -- the Lundgrens could
23 continue to assert their -- their ownership of
24 the property and force the tribe to
25 quiet-title. And I think one other thing I'd

1 like to point out there is that the -- the land
2 into trust process is another way that this
3 dispute could still be resolved in this
4 particular case. The tribe brought this land
5 with the intention of asking the United States
6 to take the land into trust for the Indian
7 tribe. In that process, the tribe has to
8 present the -- the Secretary of the Interior
9 with its deed and with title insurance and then
10 the Secretary conducts an investigation to see
11 if there are any infirmities to the title.

12 And so, in this case, obviously, there
13 is another claim to the land and the Secretary
14 would require the tribe to get that settled,
15 either through a negotiation or through its own
16 quiet-title action before that strip could be
17 taken.

18 JUSTICE GORSUCH: What difference --
19 what difference would that make? Let's say the
20 land were in title. How should that affect our
21 analysis, if at all?

22 MS. O'CONNELL: If the --

23 JUSTICE GORSUCH: If the land were --

24 MS. O'CONNELL: If the Secretary took
25 the land into trust?

1 JUSTICE GORSUCH: Yeah. Let's say --
2 let's say the land -- this land were in -- were
3 in trust. Then what? Why should that make any
4 difference?

5 MS. O'CONNELL: Well, then the United
6 States would have title to the land and the
7 Lundgrens' claim would have to come under the
8 federal Quiet Title Act against the United
9 States. There would be an adverse possession
10 exception in those circumstances.

11 JUSTICE BREYER: So -- so what -- what
12 -- I mean, Kiowa was 20 years ago. I did
13 really think Congress would do something. It's
14 done nothing, all right?

15 So in the meantime tribes, is not
16 necessarily this one, but many tribes have
17 business interests all over the country. And
18 -- and so how -- how do these in practice, how
19 are they getting resolved, if there is
20 sovereign immunity all over the place? What
21 happens?

22 MS. O'CONNELL: Congress does step in
23 from time to time. So there are certain
24 statutes where Congress has abrogated tribal
25 sovereign immunity with respect to a specific

1 water settlement agreements or required the
2 tribe to waive its immunity in order to
3 exercise statutory jurisdiction under various
4 statutes, but, you know, the -- I think the
5 Footnote -- the Footnote 8 problem in Bay Mills
6 doesn't come up here because, unlike a tort
7 plaintiff that's just out of luck if it can't
8 sue the tribe because of immunity, title is not
9 settled here.

10 There are other options for resolving
11 who owns the property than suing the tribe.
12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Miller.

16 ORAL ARGUMENT ON BEHALF OF ERIC D. MILLER
17 ON BEHALF OF THE RESPONDENTS

18 MR. MILLER: Mr. Chief Justice and may
19 it please the Court:

20 The core attribute of sovereignty is
21 the authority to adjudicate disputes over the
22 ownership of real property within the
23 sovereign's territory.

24 That authority is not displaced simply
25 because another sovereign claims an interest in

1 the property.

2 JUSTICE GINSBURG: Mr. Miller, this
3 was -- is an argument that you have pressed
4 vigorously here but it has nothing to do with
5 the decision of the Washington Supreme Court.
6 There was nothing about immovable property
7 exception.

8 So are you defending -- are you
9 presenting an alternative while at the same
10 time defending what the Washington Supreme
11 Court decided? Or are you saying, never mind
12 what they've decided, this immovable property
13 exemption takes care of it?

14 MR. MILLER: We -- we are defending
15 the holding of the court below, set out at
16 pages 7A to 11A of the petition appendix under
17 the heading "in rem jurisdiction" and what the
18 Court below said is that the courts of
19 Washington have in rem jurisdiction to resolve
20 disputes over real property within the state of
21 Washington.

22 And I think -- to -- to understand
23 what that means you have to look in this
24 Court's decision in Shaffer against Heitner and
25 that explains that the difference between an in

1 rem and an in personam action it's not about
2 pleading or who the defendant is or how you
3 write the caption, there is a substantive
4 difference and it turns on the source of the
5 Court's authority --

6 JUSTICE GORSUCH: But counsel, Justice
7 Ginsburg's question, I -- I really would
8 appreciate an answer to that because it
9 troubles me too. The state of Washington
10 relied on this Court's decision in Yakima and
11 said that there was no impediment to suit.

12 But Yakima, of course, was just an
13 interpretation of the General Allotment Act and
14 had nothing to do with in rem authority, writ
15 large, and I didn't see anything in your brief
16 defending the reasoning of the Washington
17 Supreme Court and its analysis of Yakima.

18 So can we just put that aside and
19 agree that that was wrong and then move on to
20 the arguments you've really pressed in your
21 brief?

22 MR. MILLER: Well, we -- we agree
23 that, you know, Yakima was a -- a statutory
24 case. Its holding is not controlling here.

25 JUSTICE GORSUCH: Okay, all right.

1 That's -- that -- I appreciate that concession.

2 MR. MILLER: I -- I -- I would say,
3 however, that Yakima reflects an understanding
4 that there is a difference between control over
5 property and --

6 JUSTICE GORSUCH: But -- fine. You
7 agree that Yakima doesn't control?

8 MR. MILLER: Yes, yes.

9 JUSTICE GORSUCH: Okay. All right.
10 In that case why isn't it enough for the day
11 for this Court to resolve a split of authority
12 over whether Yakima controls in cases like this
13 and return it to the Washington Supreme Court
14 where you can present all these wonderful
15 arguments you've raised here for the first
16 time?

17 MR. MILLER: Well a couple reasons,
18 Your Honor.

19 First of all, the -- the argument that
20 we are presenting is a response to the argument
21 that Petitioner has presented. So Petitioner's
22 argument in their opening brief, it's very
23 clear and straightforward and it has two parts
24 --

25 JUSTICE GORSUCH: I understand that.

1 I spot you all of that. My question, though,
2 remains, you've raised a new ground for
3 defending the result below and abandoned the
4 ground that was actually asserted.

5 This Court doesn't normally resolve
6 questions like that in the first instance.
7 Normally is a question of review, not first
8 view. Why shouldn't we exercise discretion
9 here and wait?

10 MR. MILLER: Well, again, you know, a
11 couple additional reasons. First, although the
12 Court did not use the language of the immovable
13 property rule, its references to in rem
14 jurisdiction, its emphasis on, you know, its
15 authority over land within the State of
16 Washington, necessarily encompasses the same --

17 JUSTICE KAGAN: I don't think that --

18 MR. MILLER: -- concepts that --

19 JUSTICE KAGAN: -- that's quite true,
20 Mr. Miller, unless -- I mean, tell me if I am
21 wrong, but I made a little Venn diagram for
22 myself. And it turns out that immovable
23 property and in rem jurisdiction, there's a
24 long sphere of overlap, but there are
25 definitely places where the two do not overlap.

1 So, you know, you have your in rem
2 about land, that's this sphere of overlap, but
3 you can have immovable property that the action
4 is about land and have an in personam suit,
5 that would be a particular trespass, something
6 like that.

7 And then on the other side you could
8 have an in rem suit that's about movable
9 property or you could have an in rem suit
10 that's about land within the jurisdiction. And
11 that would not fall within the sphere -- excuse
12 me, within the reservation itself, within the
13 Indian reservation, and that would not fall
14 within the sphere of overlap.

15 So I think there are real differences
16 in the scope of the immovable property
17 exception on the one hand and an in rem
18 exception on the other hand. And -- and
19 clearly the Washington court talked about the
20 in rem exception. Now you're coming in and you
21 have an extremely strong argument about this
22 immovable property rule, but it's not the same
23 argument that the court in Washington made.

24 It's not the same theory as Justice
25 Gorsuch pointed out. It's also just not the

1 same categorization.

2 MR. MILLER: With -- with respect,
3 Your Honor, I think it is the same
4 categorization and I -- I want to explain why.
5 So to take the second part of the Venn diagram,
6 it is true in the abstract that in rem
7 jurisdiction can be more than immovable
8 property.

9 You know, admiralty and bankruptcy and
10 so forth, but if you read the decision below,
11 there are 34 references to land. There is
12 nothing about boats.

13 The first sentence of the substantive
14 part of the analysis begins with the statement
15 that the Superior Court has the jurisdiction
16 and actions -- in rem jurisdictions and actions
17 involving real property. So the fairest
18 reading of the decision below is --

19 JUSTICE KAGAN: Even if it's land --

20 MR. MILLER: -- focused --

21 JUSTICE KAGAN: -- there is still a
22 question of where is the land, is the land on
23 the reservation or is the land outside the
24 reservation? If the land is on the
25 reservation, I took you to agree with the point

1 that that's the prince's land, and so the
2 prince would be immune from suit.

3 MR. MILLER: Well two points on that,
4 Your Honor. First, in the brief in opposition,
5 in our formulation of the question presented,
6 we emphasized that the case involved
7 off-reservation land. So we -- we raised that
8 clarification at that stage.

9 On reservation land, the analysis
10 would be somewhat different. If it is fee
11 land, and the Court doesn't need to resolve
12 that, but if it is fee land on the reservation,
13 we read Plains Commerce bank to say that that
14 is land that is not subject to tribal
15 jurisdiction, because --

16 JUSTICE KAGAN: I guess what I'm
17 saying is it becomes much -- a -- a different
18 question, a more complicated question if you
19 ask about a broad in rem exception or, you
20 know, in some ways the in rem exception is
21 broader, in some ways it's narrower.

22 It just becomes a different question
23 if you ask about in rem exception, one which
24 does take you into this question of: What
25 happens if the land is on the reservation?

1 Then if you say: Look under the immovable
2 property rule, if one sovereign owns land in
3 another sovereign's territory, that sovereign
4 is subject to suit there.

5 That's not -- that's not a general in
6 rem question. It's a question about the
7 immovable property rule.

8 MR. MILLER: But -- but, you know,
9 given -- going back to what I said earlier
10 under Shaffer, what in rem jurisdiction is, it
11 reflects an exercise of the power of the
12 foreign state over the property. And when
13 you're talking about off-reservation land, in
14 rem jurisdiction is an exercise of the
15 sovereign's power over --

16 JUSTICE GINSBURG: Mr. Miller, it's
17 odd that you bring up Shaffer against Heitner
18 because the whole effort in that case was to
19 say, yeah, there's a historical understanding
20 of why we divided things into in personam and
21 in rem, but this Court said we wanted to make
22 it clear that the notion that things have any
23 rights is fanciful, anything is a claim
24 involving a person, that is people have rights
25 in things.

1 So Shaffer said in the old style in
2 rem proceedings, you will have to meet -- you
3 will have to show the same kinds of connections
4 to the lawsuit that you would have to show for
5 in personam.

6 So the whole message of Shaffer
7 against Heitner is to break down that
8 distinction and say that we recognize that
9 litigation is against contending humans or
10 entities and we should not have different
11 connections for in rem versus in personam.

12 MR. MILLER: We -- we agree with that.
13 But nonetheless what that case teaches is there
14 can be different sources of the Court's power.
15 And the Court addressed -- obviously that case
16 was about the quasi-in rem jurisdiction where
17 you're just using the property as a hook to
18 regulate some other activity of the -- of the
19 defendant.

20 But the Court had an extended
21 discussion of the traditional in rem case that
22 we're talking about and said that, in -- in a
23 case where, you know, the dispute is about
24 property within the foreign state, the -- the
25 con -- minimum contacts test of International

1 Shoe is pretty much automatically going to be
2 qualified because of -- be satisfied because of
3 the state's strong interest in assuring the
4 marketability of property within its borders
5 and in providing a procedure for peaceful
6 resolution of disputes about the possession of
7 that property.

8 JUSTICE ALITO: I thought that Justice
9 Ginsburg's question which started off this line
10 of questioning was essentially this: Suppose
11 there were no such thing as the immovable
12 property exception, just doesn't exist or
13 doesn't apply in this situation.

14 Would the decision of the Washington
15 Supreme Court be correct based on the in rem
16 theory?

17 MR. MILLER: If -- if there were -- I
18 mean, no, it would not.

19 JUSTICE ALITO: Okay.

20 MR. MILLER: But as I've been
21 explaining, the in rem theory ultimately refers
22 to the same underlying concepts about the
23 foreign's power. And -- and we made this point
24 in the brief.

25 JUSTICE KAGAN: But Mr. -- this is the

1 way I sort of see what's happened in this case,
2 and again, you can tell me if I am wrong. You
3 took over this case and you read this opinion
4 and you said this is not a very good theory.

5 (Laughter.)

6 JUSTICE KAGAN: There is a really good
7 theory here. And I'm going to make that. And
8 that's what good lawyers do. I'm not at all
9 criticizing you.

10 It's just it's a new theory, and a new
11 -- it's not just even a new argument. It's
12 just a new -- it's a completely new way to win
13 this case.

14 MR. MILLER: Well, all right. We took
15 over the case and read the other side's brief
16 and Petitioner's brief says: Tribes should be
17 treated like other sovereigns and other
18 sovereigns would be immune in this kind of
19 case. And we're saying: No, they wouldn't.
20 And --

21 JUSTICE GORSUCH: Well but you --
22 that's not quite right, though, because we know
23 the United States would be immune from this
24 suit, right?

25 MR. MILLER: No, Your Honor, because

1 --

2 JUSTICE GORSUCH: Well, adverse
3 possession, I think we -- everyone acknowledges
4 that the United States would not be subject to
5 a suit like that. Maybe you can tell me why
6 that's wrong in response to Justice Ginsburg's
7 line of inquiry. But assuming it could be
8 immune, here if the land were in trust, it
9 would be the same as the United States' land.
10 And so it is possible that a sovereign could be
11 immune from this kind of suit, right?

12 MR. MILLER: If -- if the land were in
13 trust, the sovereign immunity of the United
14 States would bar the suit. But the reason I
15 say the United States would not be immune from
16 this kind of suit is this is a suit challenging
17 title to property owned by one sovereign within
18 the territory of another.

19 JUSTICE GORSUCH: I -- I understand.

20 MR. MILLER: But --

21 JUSTICE GORSUCH: But if this were in
22 trust and, therefore, property of the United
23 States, you'd agree sovereign immunity would
24 bar this suit?

25 MR. MILLER: Yes, the -- the Quiet

1 Title Act exception for trust or restricted
2 Indian lands would -- would bar it.

3 CHIEF JUSTICE ROBERTS: I -- as
4 Justice Kagan suggested, you know, you're --
5 you're a good lawyer, but you're not the one
6 who came up with this the first time in this
7 litigation, were you? I mean, the government
8 raised the immovable property argument in its
9 brief.

10 MR. MILLER: That's -- that's
11 absolutely right, Your Honor, they did --

12 JUSTICE KAGAN: Did that happen
13 because you had a conversation with the
14 solicitor general --

15 (Laughter.)

16 JUSTICE KAGAN: -- in which the
17 solicitor general knew which sort of arguments
18 you were going to make?

19 MR. MILLER: We had a conversation
20 with the solicitor general.

21 (Laughter.)

22 JUSTICE BREYER: Look, sending it
23 back, sending it back, I think it is a -- we
24 could try to decide it or we could say:
25 Review, not first view, all right? So one of

1 the things -- ways in my mind is this, that
2 reading the words "immunity from suit" broadly,
3 extending where not even Canada would dare to
4 go, all right, there's a lot of language in
5 cases that does say that. So I'm pretty
6 curious, whether anyone else is, but I'm pretty
7 curious, for the last 20 years, how have things
8 gone?

9 I mean, Congress hasn't acted. Tribes
10 are in business across the country. There must
11 have been controversies. What's actually
12 happened? And -- and one argument for leaving
13 things alone is we have all survived. And an
14 argument the other way is it's very anomalous,
15 could give the tribes more immunity than
16 foreign countries would have. All right.

17 So why shouldn't we send it back and
18 get all this out on the table and, you know, we
19 -- we have the views of other courts and we
20 also have a more extensive set of arguments?

21 MR. MILLER: Well, because what --
22 what has happened is that there is a conflict
23 in the lower courts. And these issues have
24 been fully ventilated in -- in the lower
25 courts.

1 So the -- the other state high court
2 decision on the same side as Washington.

3 JUSTICE SOTOMAYOR: I'm sorry, I'm
4 actually quite interested in that because I
5 went to look. There is a split on Yakima and
6 what Yakima means or doesn't mean. But I don't
7 know that the courts below have been looking at
8 this immovable property theory.

9 MR. MILLER: Well, the -- the other
10 state high court decision on the same side as
11 Washington is the North Dakota decision in Cass
12 County and Joint Water Resources District and
13 that has a several-paragraph discussion of
14 Georgia against Chattanooga. So, the -- the
15 concept is there in the -- in the decisions
16 below.

17 On the other side of the split the
18 leading case is the Second Circuit's decision
19 in Oneida against Madison County. This Court
20 granted cert in that case back in 2010 and it
21 was mooted after the tribe waived immunity --

22 JUSTICE SOTOMAYOR: So, the -- if --

23 MR. MILLER: -- but --

24 JUSTICE SOTOMAYOR: -- if we let it go
25 back, it's going to get aired fully and we'll

1 have a split --

2 MR. MILLER: Well, you --

3 JUSTICE SOTOMAYOR: -- according to
4 you. Might or might not have a split. That
5 would require us to take the case again on this
6 theory, but it still doesn't explain why we
7 shouldn't follow our normal practice and just
8 say relying on Yakima is wrong, and there might
9 be something else, but, you know, you'll take
10 care of it --

11 MR. MILLER: Well, I mean because --

12 JUSTICE SOTOMAYOR: -- in that first
13 instance.

14 MR. MILLER: -- because you already
15 have -- you already have a split in which these
16 issues have been ventilated in the lower
17 courts. You have an issue here that, you know,
18 the lower court's decision wasn't just county
19 of Yakima. You know, it was also about the
20 state's authority over land within the state.

21 And then we made that point in the
22 brief in opposition at -- at page 6.

23 We said that a state's jurisdiction to
24 control the ownership and disposition of real
25 property within its territory is a core

1 sovereign prerogative. That's exactly the same
2 idea, just less memorably phrased, as -- as
3 then Justice Scalia's observation in
4 Reclamantes about territorial sovereign's
5 primeval interest in controlling real property
6 within -- in its domain.

7 CHIEF JUSTICE ROBERTS: What -- what
8 would be -- what's your objection, the -- the
9 tribe has suggested that you wait until the
10 trust proceedings, at which time you'll have an
11 opportunity to object to the government's
12 taking the property in trust because you would
13 say part of it is ours. What -- what's wrong
14 with that?

15 MR. MILLER: Well, we would object,
16 and under the land and trust regulations, this
17 existence of this, you know, the existence of
18 this encumbrance on the title should preclude
19 taking the land into trust, but if we -- if we
20 succeed, we convince the secretary not to take
21 the land into trust, that doesn't actually get
22 us anything.

23 We still have the tribe asserting an
24 interest in land that under state law belongs
25 to us. And that is a -- that's a cloud on the

1 title. It makes the title non-marketable. And
2 that is a -- a real immediate and concrete
3 injury for which Washington law, like law of
4 pretty much every state, provides a remedy.

5 Because it -- you know, all -- all
6 this -- the discussion of sort of sovereignty
7 can be a little bit abstract, but there's a
8 real -- real practical reality underlying it
9 and that's that, you know, every government and
10 really every organized society has an interest
11 in having some mechanism for determining who
12 owns what pieces of land.

13 And the tribe's position would create
14 situations, you know, like -- like this one
15 where that's impossible. The -- the tribe's
16 position would also undermine the ability of
17 the state to acquire land that's needed for
18 public use. And -- and Justice Alito, you
19 asked a hypothetical about blocking
20 condemnation that's -- that's not hypothetical
21 at all.

22 The North Dakota case I mentioned
23 earlier was a case where they were going to
24 build a dam and they had plotted out the area
25 that was going to be flooded by the dam. And

1 then the tribe purchased one and a half acres
2 in the middle of that area. And then attempted
3 to assert its immunity to block the entire
4 project.

5 So that's -- and North Dakota went the
6 same way as Washington and rejected that
7 assertion of immunity, but that's the sort of
8 thing that one would expect to happen under the
9 rule.

10 JUSTICE ALITO: Does the record show
11 -- this parcel of land is about an acre; is
12 that correct?

13 MR. MILLER: That's correct, Your
14 Honor.

15 JUSTICE ALITO: Does the record show
16 what it is worth?

17 MR. MILLER: No, I don't -- I don't
18 believe there's anything in the record on that.

19 The -- as I said earlier, you know,
20 this argument has been presented in response
21 to, you know, the argument that Petitioner made
22 that they should be treated like other
23 sovereigns. And, you know, it's not just what
24 they said, it's what this Court has said.

25 As Justice Kagan, you mentioned

1 earlier that, you know, under Bay Mills and
2 under Santa Clara Pueblo, what tribal sovereign
3 immunity is, is the common law immunity from
4 suit traditionally enjoyed by sovereign powers.

5 So, you know, if the Court is going to
6 consider, you know, what cases fall within the
7 scope of sovereign immunity, it -- it has to do
8 that by reference to, you know, what the
9 traditional rules are for other sovereigns.
10 And --

11 JUSTICE KAGAN: Yeah, I mean, as I
12 said, I think you have a -- a pretty strong,
13 not -- you know, it looks pretty good to me
14 right now.

15 (Laughter.)

16 JUSTICE KAGAN: I -- I -- I am a
17 little bit worried about what Justice Sotomayor
18 said, which is, you know -- you know, if we
19 really looked harder, maybe there would be
20 something else that would cut against this
21 theory.

22 I'm a little bit worried that there
23 aren't amici who knew about this theory. The
24 only one who did is really the solicitor
25 general, because the solicitor general

1 generally talks to parties as the litigation
2 goes forward.

3 And I think it would be, I have to
4 say, just a bad way of dealing on our part if
5 we allowed parties to come in, even with the
6 best of faith, and said I have a new theory for
7 you that -- that really the only people who got
8 a chance to reply are the Petitioners in a
9 20-page yellow brief.

10 MR. MILLER: Well, I mean, I think the
11 -- the issue was out there. Anyone who read
12 the cases cited in the petition for writ of
13 certiorari would have been aware of, you know,
14 these concepts. They're -- they're expressed
15 in the North Dakota opinion. They were
16 expressed by Petitioners in the Madison County
17 case when -- when this Court -- from the Second
18 Circuit, when this Court granted cert, you
19 know, seven years ago.

20 So anybody who is looking at the legal
21 landscape of what the circuit conflict was
22 would have been aware of these issues. Anybody
23 who read the decision below and looked at the
24 Court's references to in rem jurisdiction and
25 asked themselves, you know, what does it mean

1 to say that a state has, you know, in rem
2 jurisdiction to exercise power over the land
3 within its sovereign domain would have been
4 aware of the issue.

5 And anyone who read this Court's
6 decision in *City of Sherrill*, which, you know,
7 doesn't address this precise question presented
8 but goes a long way toward saying that when you
9 have land that's within a state, the fact that
10 a tribe has come along and purchased it on the
11 open market does not divest the state of
12 sovereignty. It's still subject to state
13 sovereignty, not tribal sovereignty.

14 You know, all of those things that
15 were out there, you know, should have put
16 parties on notice, you know, as -- and, in
17 addition, the -- you know, the foundational
18 principle that, as I said earlier, you know,
19 the scope of sovereign immunity under this
20 Court's precedents is determined by reference
21 to the law that governs other sovereigns.

22 I mean, just last year in *Lewis*, you
23 know, the Court applied that understanding of
24 how sovereign immunity works. That was a case
25 where the tribe came in and asserted that its

1 sovereign immunity barred the suit.

2 JUSTICE BREYER: That might be fair.
3 I mean, I see in terms of fairness between the
4 parties, but we have, you know, a dozen tribes
5 and the National Congress of -- of American
6 Indians and so forth, they all have an interest
7 in this.

8 And they'd have to say squarely why
9 should tribes have more immunity than Canada,
10 Mexico, whatever, and -- and I don't know that
11 they've addressed that squarely. Now they --
12 and that's -- that's -- that's what's sort of
13 moving me, to tell you the truth.

14 MR. MILLER: I mean, they -- they --
15 several -- certainly, Petitioners in their
16 opening brief, as well as several of the
17 non-governmental amici did address that
18 question, and said that tribes should have the
19 same immunity as other sovereigns. So, you
20 know, they have addressed that.

21 JUSTICE BREYER: That's on your side.
22 But you think there are also people on their
23 side.

24 MR. MILLER: Well, no, I'm -- I'm
25 referring to the people on their side. You

1 know --

2 JUSTICE BREYER: They got those
3 squarely in these three amici -- in the three,
4 you know, light green amicus briefs which I did
5 look at, but I haven't looked it with that
6 directly in mind.

7 MR. MILLER: I don't know that they
8 all did, but we -- we -- we cited a number of
9 them in -- I think it would be early in -- in
10 Section D of -- of our brief, we -- we cite --

11 JUSTICE SOTOMAYOR: Mr. Miller, I -- I
12 -- you argue forcefully and you argue
13 intelligently, but I don't know why if it was
14 so obvious to everyone, and you didn't author
15 the brief in opposition to certiorari, but if
16 it was so obvious that this was the case, why
17 doesn't the brief mention the immovable
18 property exception?

19 MR. MILLER: Well, I --

20 JUSTICE SOTOMAYOR: It -- you know,
21 you say it's obvious, but it obviously isn't
22 obvious --

23 MR. MILLER: It doesn't mention it --

24 JUSTICE SOTOMAYOR: -- because neither
25 did the court below.

1 MR. MILLER: Yeah, it doesn't mention
2 it in terms -- I've -- I've cited to you the --
3 you know, the qualification of the question
4 presented in the -- in the brief in opposition
5 that refers to off-reservation land.

6 The passage on page 6 that refers to
7 the -- the sovereign prerogative of the state,
8 which is just a -- I mean, it is not explicit,
9 but it is another way of getting at that
10 concept.

11 I mean, if the Court has no further
12 questions, we ask that the judgment be
13 affirmed.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Hawkins, you have a minute left.

17 REBUTTAL ARGUMENT ON DAVID S. HAWKINS

18 ON BEHALF OF THE PETITIONERS

19 MR. HAWKINS: It is fundamentally
20 Congress's job, not ours, to determine whether
21 or how to limit tribal sovereign immunity.
22 That comes from Bay Mills, 2037.

23 Justice Breyer, you asked how have
24 things gone over 20 years and how are these
25 issues addressed? These issues are addressed

1 every day in contracts and in land transactions
2 by the tribe either agreeing to waive
3 voluntarily or negotiating how disputes will be
4 resolved.

5 So there is a mechanism, and that's
6 between the parties who understand their place.
7 Even in this situation, had the Lundgrens
8 offered an opportunity to negotiate in
9 recognition of the tribe's immunity from suit,
10 we would have not -- we would have engaged in
11 that same process here.

12 JUSTICE SOTOMAYOR: I'm sorry, there
13 was a negotiation, and I thought the
14 negotiation resulted in the tribe saying: No,
15 we want the land, we won't take money for it.
16 We won't exchange parcels for it. The
17 Lundgrens wanted to pay you money or exchange
18 parcels, and the tribe said no.

19 MR. HAWKINS: Justice Sotomayor --

20 JUSTICE SOTOMAYOR: So what were they
21 supposed to do next?

22 MR. HAWKINS: There was an -- there --
23 there -- what I said was if the Lundgrens
24 understood our immunity from suit, then the
25 negotiations would be different.

1 JUSTICE SOTOMAYOR: How? When you
2 said no.

3 MR. HAWKINS: Because they would not
4 have -- they would not have the opportunity to
5 seek the legal relief that they have sought
6 here. We respectfully ask that the judgment
7 below be reversed.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel. The case is submitted.

10 (Whereupon, at 11:07 a.m., the case
11 was adjourned.)

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