No. 17-387

In the Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,
Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,
Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF AMICUS CURIAE SENECA COUNTY, NEW YORK IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

Seneca County, New York ("Seneca County") is a political subdivision of the State of New York. Seneca County has a strong interest in the question presented in this case because it regularly deals with regulation and taxation of real property within its jurisdiction that is owned in fee simple by the Cayuga Indian Nation of New York (the "Cayuga Nation"), another federally recognized Indian Nation. In particular, the issue of whether tribal sovereign immunity bars an *in rem* foreclosure proceeding for nonpayment of real property taxes against Cayuga Nation-owned lands is a dispute that is currently before the United States District Court for the Western District of New York on cross-motions for summary judgment. *See Cayuga Indian Nation of New York v. Seneca County*, Civil Action No. 11-cv-6004-CJS (W.D.N.Y.). The Upper Skagit Indian Tribe's argument before this Court relies upon the Second Circuit's affirmance of the preliminary injunction that was previously granted in *Cayuga Indian Nation of New York v. Seneca County*. *See* Br. for Pet. at 20, 23-24 (citing *Cayuga Indian Nation of New York v. Seneca County*, 716 F.3d 218, 221 (2d Cir. 2014)).

In its cross-motion for summary judgment currently pending before the District Court, Seneca County has argued that the doctrine of tribal sovereign immunity does not bar an *in rem* tax foreclosure proceeding

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[1] This *amicus* brief is presented pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States, as this brief is presented on behalf of a county and is submitted by its authorized law officer.

against Cayuga Nation-owned properties owned in fee simple and over which the Cayuga Nation does not have sovereign control. The Cayuga Nation maintains that the *in rem* foreclosure proceeding is indeed barred due to tribal sovereign immunity. Thus, this Court's answer to the question presented here—*i.e.* whether tribal sovereign immunity deprives a state court of jurisdiction to hear an *in rem* proceeding concerning real property owned by an Indian Nation in fee simple—could potentially determine the outcome of the pending dispute in *Cayuga Indian Nation of New York v. Seneca County*.

SUMMARY OF THE ARGUMENT

I. This Court's decisions in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) ("*Yakima*"), and *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) ("*Sherrill*"), demonstrate that tribal sovereign immunity does not extend to *in rem* proceedings involving real property owned in fee simple by an Indian Nation. The principles underlying sovereign immunity generally (whether of the U.S. government, one of the several States, a foreign sovereign, or an Indian Nation) do not justify extension of tribal sovereign immunity to *in rem* proceedings involving unrestricted fee titled lands, located outside of an Indian tribe's sovereign control.

A. *Yakima* dealt with more than tribal immunity from taxation. This Court held that the power to assess and to collect real property taxes imposed on unrestricted fee lands (through *in rem* foreclosure proceedings) does not implicate tribal sovereignty or its

corollary—immunity from suit. *Yakima*, 502 U.S. at 263-64.

B. In *Sherrill*, which arose from an *in rem* eviction proceeding, this Court rejected the Oneida Indian Nation's asserted sovereign immunity from taxation and from enforcement thereof with respect to lands over which the Nation's "embers of sovereignty [had] long ago [grown] cold." *Sherrill*, 544 U.S. at 214. This Court affirmed the City of Sherrill's authority to both foreclose on the tribe's land for nonpayment of taxes and to evict the Oneida Indian Nation based upon such foreclosure, reversing the Second Circuit's decision, which had expressly held that the Oneida Indian Nation was entitled to sovereign immunity from the eviction proceeding.

C. While sovereign immunity bars disputes concerning real property claimed by a sovereign from being heard within the sovereign's own courts, disputes concerning real property owned by a sovereign outside of its jurisdiction may be heard in the courts of the second sovereign. States are not immune from suit with respect to property owned in a different State because such a suit "could hardly interfere with [the State's] capacity to fulfill its own sovereign responsibilities." *See Nevada v. Hall*, 440 U.S. 410, 424 n. 24 (1979); *see also Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924) (Georgia could not "claim privilege or immunity" with respect to a condemnation proceeding involving land it owned within Tennessee). Furthermore, as a matter of international practice, a foreign state is not immune from suit within the United States as to "any case . . . in which . . . rights in immovable property . . . are in issue." *See Perm.*

Mission of India to the UN v. City of N.Y., 551 U.S. 193, 199 (2007).

D. The extension of tribal sovereign immunity to *in personam* suits against Indian tribes related to off reservation commercial activity is based upon notions of "promot[ing] economic development and tribal self-sufficiency." *See*, *e.g.*, *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 757 (1998). The goal of tribal self-sufficiency does not provide a basis to extend tribal sovereign immunity to *in rem* proceedings to determine rights in freely alienable fee titled lands.

II. To the extent this Court is inclined to overturn the Washington Supreme Court's decision, it should decline to make a sweeping determination that tribal sovereign immunity bars all *in rem* proceedings directed to any property owned in fee title by an Indian Nation. Such a holding would eviscerate this Court's holding in *Sherrill*. Moreover, it would be contrary to this Court's continued concern that taxing authorities—which have no adequate alternatives to tax foreclosure and have no control over Indian Nations purchasing properties within the State's jurisdiction—are left without a remedy.

ARGUMENT

I. The Bounds Of Tribal Sovereign Immunity From Suit Do Not Extend To *In Rem* Proceedings Involving Freely Alienable, Non-Sovereign Lands Owned In Fee Title By An Indian Tribe.

Tribal sovereign immunity bars suits *against* Indian tribes unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754; *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (Indian tribes are "domestic dependent nations" and thus "are subject to plenary control by Congress"). As noted by Petitioner, tribal immunity from suit is a common law doctrine that developed as "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)); *see also* Br. of Pet. at 14. This Court has been reluctant to dispense with or limit the doctrine given "Congress' desire to promote the 'goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Okla. Tax Comm'n v. Citizen Band of Potowatomi Tribe of Okla.*, 498 U.S. 505, 510 (1991) (quoting *Cali. v. Cabazon Band of Mission Indians*, 470 U.S. 202, 216 (1987)).

But tribal sovereign immunity is "a judicial doctrine" and this Court has "taken the lead in

drawing" its "bounds."[2] *Kiowa*, 523 U.S. at 759. In other words, courts define the reach of the doctrine, and defer to Congress to define any exceptions thereto. It is clear that tribal sovereign immunity bars suits *against* Indian tribes themselves. But this Court's decisions in *Yakima* and *Sherrill* also make clear that the bounds of tribal sovereign immunity do not reach *in rem* proceedings involving real property owned in fee simple by an Indian Nation, like any other private landowner. The principles underlying sovereign immunity generally (whether the sovereign is the U.S. government, one of the several States, a foreign sovereign, or an Indian Nation) do not justify extension of tribal sovereign immunity to *in rem* proceedings involving unrestricted fee titled lands, located outside of an Indian tribe's sovereign control.

A. *Yakima* Upheld The Assertion Of *In Rem* Jurisdiction Over Freely Alienable, Fee-Titled Lands.

In *Yakima*, this Court upheld efforts by the County of Yakima in Washington State to foreclose on real

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[2] That tribal sovereign immunity is a judicial doctrine—the bounds of which are drawn by the courts—is further demonstrated by lower court decisions extending tribal sovereign immunity to tribal entities deemed to be an "arm of the tribe." *See*, *e.g.*, *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010) (allowing tribal entities to share in an Indian tribe's immunity from suit depending on: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities").

property held in fee title by an Indian tribe for delinquent property taxes. *See Yakima*, 502 U.S. at 264-65. The land at issue was located in the Yakima Indian Reservation, which was established by treaty in 1855. Eighty percent of the reservation land was held in trust by the United States for the tribe's benefit, and the remaining twenty percent was owned in fee title, including by the Yakima Indian Nation itself. *Id.* at 254-56. This fee-titled land had been freed from restrictions on alienation through the Indian General Allotment Act of 1887 ("IGA"), in an effort "to extinguish tribal sovereignty." *Id.*

Yakima County had imposed an *ad valorem* tax on the tribe's fee-titled properties located within its reservation "without incident for some time." *Id.* at 256. But when the tribe stopped paying these taxes, the County brought *in rem* proceedings to foreclose properties owned by the tribe in fee title, among others. *Id.* The tribe argued that federal law prohibited the imposition of taxes on lands owned by the tribe because they were reservation lands. *Id.* This Court held that while states are typically without power to tax reservation lands, a 1906 amendment to the IGA (*i.e.* the Burke Act proviso) unequivocally subjected Indian allottees thereunder to state tax laws. *Id.* at 258. As a result, the County could lawfully tax the fee-titled reservation lands.

Importantly, the Court went on to also hold that the County could assert jurisdiction over the fee-titled lands in *Yakima* because "the jurisdiction [was] *in rem*

rather than *in personam*."[3] *Id.* at 265. It reasoned that "[w]hile the *in personam* jurisdiction over reservation Indians at issue in *Moe* [*v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976),] would have been significantly disruptive of tribal self-government, the mere power to assess *and collect* a tax on certain real estate is not." *Id.* at 265; *see also City of N.Y. v. Perm. Mission of India to the UN*, 446 F.3d 365, 374 (2d Cir. 2006) (citing *Schooner Exchange v. M'Faddon*, 11 U.S. 116, 125 (1812)) (noting the longstanding principle that "property ownership is not an inherently sovereign function"). Because the land had been "rendered . . . alienable and encumberable" under to the IGA, the land was also "render[ed] . . . subject to assessment *and forced sale for taxes*." *Yakima*, 502 U.S. at 263-64. So in *Yakima*, this Court held that the power to assess *and to collect* (through *in rem* foreclosure proceedings) real property taxes imposed on unrestricted fee lands does not implicate tribal sovereignty or its corollary—immunity from suit.

Petitioner argues that *Yakima* only dealt with "tribal immunity from taxation." *See* Br. of Pet. at 17. But if that was true, the Court could have ended its analysis of the *ad valorem* tax issue with the Burke Act proviso. *Yakima* arose from an *in rem* foreclosure proceeding and the Supreme Court's express holding

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[3] This Court held, pursuant to Washington State foreclosure law, that the real property taxes "create[d] a burden on the property alone," and that the "[l]iability for the *ad valorem* taxes flows exclusively from ownership of realty on the annual date of assessment." *Yakima*, 502 U.S. at 266 (Wash. Rev. Code § 84.60.020).

that the County could *collect* the taxes through a *forced sale* demonstrates that the Court had remedies, not only rights, in mind when it decided *Yakima*.

B. *Sherrill* Upheld The Assertion Of *In Rem* Jurisdiction Over Fee-Titled Lands Where The Indian Nation's "Embers Of Sovereignty . . . Long Ago Grew Cold."

In *Sherrill*, this Court affirmed the City of Sherrill's right to assess *and to collect*, including through *in rem* proceedings, *ad valorem* property taxes on fee lands recently purchased by the Oneida Indian Nation. That decision did not draw a distinction between the right to tax the land and the right to enforce those taxes through *in rem* foreclosure and eviction proceedings, and indeed no such valid distinction may be drawn.

Sherrill arose from an eviction proceeding, following the City of Sherrill having obtained title to the parcels through tax foreclosure proceedings.[4] *See Oneida*

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[4] *In rem* and *in personam* jurisdiction are described in *Shaffer v. Heitner*, 433 U.S. 186 (1977):

> If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of [the plaintiff]. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

Id. at 199. Under New York law, a tax foreclosure proceeding is *in rem*. *See* N.Y. Real Property Tax Law ("RPTL") § 1120. No personal judgment may be entered under an *in rem* tax foreclosure

Indian Nation v. City of Sherrill, 145 F. Supp. 2d 226, 232-33 (N.D.N.Y. 2001). The Oneida Indian Nation had purchased fee title to the parcels through open market transactions in 1997 and 1998. *Sherrill*, 544 U.S. at 202. The parcels were located within the Oneida Indian Nation's historical reservation area, which was last possessed by the Oneidas as a tribal entity in 1805. *Id.*

Invoking tribal sovereign immunity, the Oneida Indian Nation sought a declaration that its lands were not subject to taxation, and declarations that the City "may not . . . *attempt to collect* property taxes based upon lands owned and possessed by the Nation within Sherrill . . . that Sherrill's *purported conveyances of the properties for delinquency of taxes are null and void*, and that Sherrill *may not evict* the Nation from its lands . . ." *Id.* at 237 (emphasis added); Joint App'x, *City of Sherrill v. Oneida Indian Nation*, 2004 U.S. S. Ct. Briefs LEXIS 493, at *JA27 (Aug. 12, 2004) (Complaint filed by the Oneida Indian Nation on Feb. 2, 2000 in N.D.N.Y. Case No. 00-cv-223). The Oneida Indian Nation sought an injunction prohibiting the City from taxing its properties, and "prohibiting it from interfering with *the Nation's ownership and possession* of its lands and from any effort *to evict* the

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proceeding. *See Buffalo v. Cargill, Inc.*, 44 N.Y.2d 7, 15 (N.Y. 1978) (citing N.Y. RPTL § 1124). Similarly, a summary eviction proceeding to recover possession of real property is *in rem* and "purely possessory." N.Y. Real Property Actions and Proceedings Law § 713(5); *Allyn v. Markowitz*, 373 N.Y.S.2d 293, 294 (N.Y. Cnty. Ct. 1975); *see also* 12-129 Warren's Weed N.Y. Real Property, § 129.157 (2017) (same); Rasch's Landlord and Tenant § 29:7 (5th ed. 2017) ("A summary proceeding is a legal process of purely possessory character, and relates to real property only.").

Nation from such lands . . ." *Oneida Indian Nation*, 145 F. Supp. 2d at 237 (emphasis added).

The basis for the relief sought was the assertion that the Nation's sovereign immunity prevented not only the imposition of tax, but also the collection of tax through *in rem* foreclosure and eviction proceedings. *See Sherrill* Joint App'x, 2004 U.S. S. Ct. Briefs LEXIS 493, at *JA25 (alleging that the City's effort to foreclose on and evict the Nation from its properties "violate[s] the Nation's sovereign immunity, which derives from . . . federal common law"); *Oneida Indian Nation*, 145 F. Supp. 2d at 237-38; *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 144 (2d Cir. 2003). The Oneida Nation specifically asserted tribal sovereign immunity as an affirmative defense to the eviction action. *Oneida Indian Nation*, 145 F. Supp. 2d at 237-38; *Oneida Indian Nation*, 337 F.3d at 144. And the district court expressly held that the Nation was entitled to sovereign immunity from the *in rem* eviction petition. *Oneida Indian Nation*, 145 F. Supp. 2d at 260 (dismissing eviction petition because "the Nation [was] entitled to sovereign immunity *from suit*") (emphasis added).

Thus, the Oneida Indian Nation expressly put at issue sovereign immunity from enforcement mechanisms—including *in rem* foreclosure and subsequent eviction—not only sovereign immunity from taxation. The Oneida Indian Nation continued to press these arguments to this Court, to which it argued that the City's efforts to tax its real property "*and to enforce the tax by evicting the Oneidas from the land*" were impermissible. Br. of Resp. at 1, *City of Sherrill v. Oneida Indian Nation,* U.S. Case No. 03-855

(emphasis added); *see also id.* at 12 (arguing that its properties could not "be removed from Oneida possession through a state law property tax foreclosure").

The Court rejected the Oneida Indian Nation's argument that the City did not have regulatory authority over the parcels on the basis that the "acquisition of fee title to discrete parcels of historic reservation land [had] revived the Oneidas' ancient sovereignty piecemeal over each parcel." *See Sherrill*, 544 U.S. at 202, 214. The Court stated as follows:

> Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.

Id. at 202-203. It held that "'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214. Thus, the Oneida Indian Nation's tribal patchwork of land owned in fee simple was deemed subject to the full jurisdiction and taxing authority of State and local governments.

This Court's decision rejected every aspect of the Oneida Nation's asserted sovereign immunity from

taxation and from enforcement thereof, affirming the City of Sherrill's authority to both foreclose on the tribe's land for nonpayment of taxes and to evict the Oneida Indian Nation based upon such foreclosure. It reversed the Second Circuit's decision, which had expressly affirmed that the Oneida Indian Nation was entitled to sovereign immunity from the eviction proceeding—immunity from suit, not merely "tax immunity." This Court expressly stated that tribal immunity would not bar the *in rem* eviction proceeding:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by *Sherrill*. We disagree.

Sherrill, 544 U.S. at 214 n. 7. As a result, *Sherrill* necessarily reached, and rejected, the Oneida Indian Nation's claim that its sovereign immunity barred the underlying *in rem* eviction proceeding, and that the conveyances resulting from *in rem* foreclosure proceeding were therefore null and void.

C. The Principles Underlying Sovereign Immunity Do Not Justify The Extension of Tribal Sovereign Immunity To *In Rem* Proceedings Involving Land Owned By An Indian Tribe Outside of Its Sovereign Jurisdiction.

Although the Upper Skagit Indian Tribe asserts that the parcel at issue here is located within its "ancestral lands," the Tribe sold its lands in Washington State to the United States by treaty in 1855, the Tribe acquired fee title to the parcel in 2013 by statutory warranty deed, and the parcel is not held

in trust by the United States or located within a reservation. *See* Br. of Pet. at 5-6 (noting that the Tribe intends to apply to the federal government to take the parcel into trust, on the basis that it is contiguous with 500 acres of trust land previously secured). There is no basis to conclude that the parcel is not freely alienable or that the Tribe exercises sovereign control over it.[5]

As such, the parcel is akin to those at issue in *Sherrill—i.e.* the Upper Skagit Indian Tribe recently purchased the parcel through an open market transaction within its purported ancestral lands that were last possessed by the Tribe in 1855. So unless and until the parcel is taken into trust, the Tribe may not exercise sovereignty over it and it is subject to regulation by the State of Washington. *See Sherrill*, 544 U.S. at 220-21 (recognizing the land into trust process under 25 U.S.C. § 465 as the proper mechanism "to regain sovereign control over" tribal ancestral lands); *Cayuga Indian Nation v. Vill. of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) (concluding, in light of *Sherrill*, that repurchased ancestral lands are subject to state and local zoning laws and regulations).

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[5] *Amici* National Congress of American Indians, *et al.*, suggest that the *in rem* proceeding is barred by tribal sovereign immunity because the lands at issue are inalienable "tribal lands." *See* Br. of *Amici Curiae* at 36. But the Upper Skagit Indian Tribe has not argued that the parcel at issue here is subject to restrictions on alienation under 25 U.S.C. § 177, and indeed such an argument could not withstand *Sherrill* given that the fee parcel was recently acquired on the open market. *See* Br. of *Amici Curiae* at 3; *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 269, 275-80 (2d Cir. 2005) (applying *Sherrill* to bar claim under the 25 U.S.C. § 177).

The law regarding sovereign immunity demonstrates that the application of immunity to disputes concerning land owned by a sovereign—whether the sovereign is the U.S. government, one of the several States, or a foreign government—depends on where the land is situated. While sovereign immunity bars disputes concerning real property claimed by a sovereign from being heard within the sovereign's *own courts*, disputes concerning real property owned by a sovereign outside of its jurisdiction may be heard in the courts of the second sovereign.

1. Federal and State Sovereign Immunity Applies Within The Sovereign's Own Jurisdiction.

Petitioner and its supporting *amici* argue in conclusory fashion that tribal sovereign immunity is coextensive with the sovereign immunity accorded to disputes over real property owned by the U.S. government or any of the several States *within their own courts*, even where the dispute involves real property located outside of the tribe's sovereign jurisdiction. But there is significant difference between the absolute immunity that a sovereign enjoys within its own jurisdiction and the immunity that a sovereign might enjoy in another sovereign's jurisdiction. Indeed, the "doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *See Nevada v. Hall*, 440 U.S. 410, 414 (1979) (describing "the source and scope of the traditional doctrine of sovereign immunity").

On the one hand, "the immunity of a truly independent sovereign from suit *in its own courts* has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity." *Id.* at 414 (emphasis added); *Alden v. Maine*, 527 U.S. 706, 715 (1999) ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent *in its own courts*.") (emphasis added). That is why the United States is immune from suit with respect to disputes concerning real property claimed by it within its own jurisdiction, as referenced in several cases cited by Petitioner and supporting *amici*. *See*, *e.g.*, *Belknap v. Schild*, 161 U.S. 10, 16 (1896) ("'It is a familiar doctrine of the common law, that the sovereign cannot be sued *in his own courts* without his consent . . . This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States.'") (quoting *The Siren*, 74 U.S. 152 (1869)) (emphasis added).

On the other hand, whether or not a State enjoys immunity within the courts of another State is "a matter of comity"—*i.e.* "the voluntary decision of the second [sovereign] to respect the dignity of the first [sovereign]"—not a legal requirement. *Nevada*, 440 U.S. at 416; *see also id.* 418-19 (noting that "the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified"). States are not immune from suit in the courts of a different State as a matter of law because such a suit "could hardly interfere with [the State's] capacity to fulfill its own sovereign responsibilities." *Nevada*, 440 U.S. at 424 n. 24.

As such, in *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), this Court held that the State of Georgia "cannot claim privilege or immunity" with respect to a condemnation proceeding involving land it owned within Tennessee. *Id.* at 480. The land Georgia had acquired within Tennessee "was held subject to the laws of the latter and to all the incidents of private ownership," and the "sovereignty of Georgia was not [thereby] extended into Tennessee."[6] *Id.* at 481; *see also State v. Hudson*, 231 Minn. 127, 130 (1950) (same); *People ex rel. Hoagland v. Streeper*, 145 N.E.2d 625, 629 (1957) (same).

The Supreme Court of North Dakota relied on *Chattanooga* in *Cass County Joint Water Resource District v. 1.43 Acres of Land*, 643 N.W.2d 685 (2002), to affirm a state court's exercise of jurisdiction over an *in rem* condemnation action involving "private land" that had been "purchased in fee by an Indian tribe," and which, like here, did not constitute reservation or trust lands. *Id.* at 693. The Court held that, "[u]nder these circumstances, the State may exercise territorial jurisdiction over the land, including an *in rem* condemnation action, and the Tribe's sovereign immunity is not implicated." *Id.* By extension of these principles, the Upper Skagit Indian Tribe cannot assert

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[6] *Chattanooga* did not turn on a general "consent" granted by the States to be sued by a sister State, as is urged by *Amici* Seneca Nation of Indians, *et al.* *See* Br. of *Amici Curiae* at 25 n 8. On the contrary, *Chattanooga* held that the "power of the city to condemn does not depend upon the consent or suability of the owners." 264 U.S. at 482-83 (noting further that Georgia's acceptance of the permission given it to acquire railroad land in Tennessee is inconsistent with an assertion of its own sovereign privileges in respect of that land).

its tribal sovereign immunity to bar an *in rem* proceeding regarding unrestricted fee title land over which it does not have sovereign control.

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997), which is relied upon by Petitioner and highlighted by its supporting *amici*, is inapposite because that case involved a claim by the Coeur d'Alene Tribe to Lake Coeur d'Alene, and various navigable rivers and streams that form part of its water system, located within the State of Idaho. The Court held that the case implicated Idaho's sovereign immunity because it involved a claim to "Idaho's sovereign interest in its lands and waters." *Id.* at 287. The Court held that the case was "unusual" in that it was essentially a "quiet title action which implicates special sovereignty interests" given that it sought to "divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect." *Id.* at 281 (noting further that "navigable waters have historically been considered 'sovereign lands,'" and that state ownership of navigable waters is "an essential attribute of sovereignty").

In contrast, the Upper Skagit Indian Tribe does not have a sovereign interest or obligation with respect to the parcel at issue here, which is owned like any other private land within the State of Washington.

2. Foreign Sovereign Immunity Does Not Extend To *In Rem* Actions To Establish Rights In Immovable Property.

It is noteworthy that Petitioner fails entirely to mention, and its supporting *amici* only barely mention, that immunity does not apply to disputes concerning "rights in" real property owned by a foreign sovereign within the United States. Under foreign sovereign immunities law, a foreign state *is not immune* from "the jurisdiction of courts of the United States . . . in any case. . .in which. . .*rights in* immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4) (emphasis added). Foreign sovereign immunities law is codified in the Foreign Sovereign Immunities Act ("FSIA") of 1976. *See* 28 U.S.C. § 1604, 1605, 1607. That statute is a "codification of international [common] law at the time of the FSIA's enactment." *Perm. Mission of India to the UN v. City of N.Y.*, 551 U.S. 193, 199 (2007).

In particular, FSIA "'codif[ied]. . .the *pre-existing* real property exception to sovereign immunity recognized by international practice.'" *Id.* at 200 (quoting *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (J. Scalia)). "This principle—when owning property here, a foreign state must follow the same rules as everyone else—long predated the restrictive theory of sovereign immunity and the FSIA." *City of N.Y. v. Perm. Mission of India to the UN*, 446 F.3d 365, 374 (2d Cir. 2006) (citing *Schooner Exchange v. M'Faddon*, 11 U.S. 116, 125 (1812)). For example, a foreign sovereign may not raise sovereign immunity as a defense in a state *in rem* condemnation action. *Id.* at 372 (citing *Restatement*

(Second) of Foreign Relations Law of the United States § 68(b), cmt. d). This exception comports with the longstanding principle that "property ownership is not an inherently sovereign function." *Perm. Mission*, 551 U.S. at 199 (citing *Schooner*, 11 U.S. at 116).

Although referred to as an immovable property "exception" to foreign sovereign immunity, that a foreign state is not immune from suit with respect to rights in immovable property is really a *limitation* on the reach of foreign sovereign immunity. *See Perm. Mission*, 551 U.S. at 199 ("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) (1965)); *see also Restatement (Third) of Foreign Relations Law of the United States* § 455(1) (1987)) ("Under international law, a state is not immune from the jurisdiction of the courts of another state with respect to claims . . . (c) to immovable property in the state of the forum."); *id.*, cmt. b ("Title to land and to buildings on land traditionally is subject to adjudication by the courts of the state where the land is situated.").

Thus, in *Permanent Mission of India to the UN*, this Court held that the Permanent Mission of India to the United States was not immune from suit by the City of New York to declare the validity of tax liens against real property held by the sovereign for the purpose of housing its employees. 551 U.S. at 195. Like

Respondent's quiet title action, an action to establish validity of a tax lien "directly implicate[d] rights in property" and thus immunity did not apply. *Id.* at 201.

These principals of foreign sovereign immunities law, which predate codification in the FSIA, support the conclusion that tribal sovereign immunity does not extend to bar an *in rem* quiet title proceeding to determine rights in a real property parcel located within the jurisdiction of the State of Washington. To allow an Indian Nation to assert immunity with respect to an *in rem* proceeding concerning unrestricted fee titled lands located within a State's sovereign jurisdiction would give it "super-sovereign authority to interfere with another jurisdiction's sovereign right[s] . . . within that jurisdiction's limits." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995).

D. The Extension Of Tribal Sovereign Immunity To Off Reservation Commercial Activities Does Not Provide A Basis To Extend Immunity To *In Rem* Proceedings To Determine Rights In Freely Alienable, Fee Titled Land.

Tribal sovereign immunity has been extended to *in personam* suits against Indian tribes related to off reservation commercial activities. *See Kiowa*, 523 U.S. at 758, 760 ("[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation"); *Bay Mills*, 134 S. Ct. at 2028-29 (applying sovereign immunity to bar a suit to enjoin gaming "off a reservation or other Indian lands"). These cases are distinguishable from, and do not support extending, tribal sovereign

immunity to bar an *in rem* proceeding concerning off reservation or other Indian lands.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, (1987), this Court precluded the State of California from exercising its jurisdiction to enforce state gambling laws on tribal bingo enterprises. *Id.* at 216. It held that allowing this state regulation would impermissibly burden "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)).

Similarly, in *Kiowa*, while noting that "[t]here are reasons to doubt the wisdom of perpetuating the [tribal sovereign immunity] doctrine," this Court noted that the doctrine had been retained "on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency." *Kiowa*, 523 U.S. at 757 (citing *Potawatomi*, 498 U.S. at 510); *see also* Bay Mills, 134 S. Ct. at 2041 (basing the "continued recognition of tribal sovereign immunity, including for off-reservation commercial conduct" upon the notion that "[i]f Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal").

So, the application of tribal sovereign immunity to *in personam* suits against Indian tribes for off reservation commercial activities is an extension of the doctrine's purpose to encourage tribal self-sufficiency and economic development. Thus *Kiowa* and *Bay Mills*

do not, however, provide a basis to extend tribal sovereign immunity to *in rem* proceedings to determine rights in freely alienable fee titled lands.

II. Even If This Court Declines To Affirm the Washington Supreme Court's Decision, The Quiet Title Proceeding At Issue Here Is Potentially Distinguishable From An *In Rem* Tax Foreclosure Proceeding.

To the extent this Court is inclined to overturn the Washington Supreme Court's decision, it should decline to make a sweeping determination that tribal sovereign immunity bars all *in rem* proceedings directed to property owned by an Indian Nation. Such a holding would eviscerate this Court's holding in *Sherrill*, which rejected the Oneida Indian Nation's claim that its sovereign immunity barred the underlying *in rem* eviction proceeding, or that the *in rem* foreclosure proceeding was null and void. *See Sherrill*, 544 U.S. at 214.

Notably, while allowing an *in rem* foreclosure proceeding against freely alienable lands owned by an Indian Nation does not inherently implicate its sovereignty, barring such a proceeding would seriously burden the ability of the state and local municipalities to govern. *See id.* at 202 (noting that "a checkerboard of state and tribal jurisdiction—created unilaterally at [the tribe's] behest—would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches) (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994)).

Additionally, extending the bounds of tribal sovereign immunity to bar an *in rem* tax foreclosure proceeding would be contrary to this Court's continued concern that taxing authorities—which have no control over Indian Nations purchasing fee title to properties on the open market within the State's jurisdiction—not be left without a remedy. In *Potawatomi*, the Court noted that while "sovereign immunity bar[red] the State from pursuing the most efficient remedy," it still had "adequate alternatives" to remedy the alleged wrong, including seeking damages from individual tribe members, collecting the sales tax from cigarette wholesalers, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores. *Potawatomi*, 498 U.S. at 514. In *Bay Mills*, it was similarly significant to the Court's decision not to revisit *Kiowa* that Michigan had many "alternative remedies" to pursue the illegal gambling at issue and thus "ha[d] no need to sue the Tribe to right the wrong it allege[d]." *Bay Mills*, 134 S. Ct. at 2036 n. 8.

But this Court questioned whether it would extend tribal sovereign immunity to off reservation claims where the plaintiff has no alternative remedies for the alleged wrong:

> We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, *or other plaintiff who has not chosen to deal with a tribe*, has no alternative way to obtain relief for off-reservation commercial conduct. The

> argument that such cases would present a 'special justification' for abandoning precedent is not before us.

Bay Mills, 134 S. Ct. at 2036 n. 8 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

In *Bay Mills*, "Michigan could bring a suit against tribal officials or employees for gambling without a license or could potentially prosecute anyone who maintains or frequents an unlawful gambling establishment." *Bay Mills*, 134 S. Ct. at 2035. In contrast, a foreclosure proceeding is the only means to recover unpaid real property taxes.[7] *See Oneida Tribe of Indians v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (noting that "no other means of recovery for unpaid property taxes exists"); *Oneida Indian Nation*, 145 F. Supp. 2d at 263 (concluding that it was "clear that the [Oneida Nation] representatives cannot be held personally liable for the unpaid property taxes"). Thus, to the extent this Court overturns the Washington Supreme Court decision, its determination should be limited to the facts presented here—an *in rem* quiet title proceeding brought by private parties to protect private rights.

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[7] Respondents are in the best position to respond to the argument that they had adequate alternatives to the *in rem* quiet title action.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in the Brief for Respondents, the judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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