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 ILLINOIS, INDIANA, NEW MEXICO, AND TEXAS IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether tribal sovereign immunity precludes a state court's assertion of *in rem* jurisdiction when the tribe has not waived its immunity and the state court has not deemed it an indispensable party.

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INTEREST OF *AMICI CURIAE*

This case presents the question whether the doctrine of tribal sovereign immunity precludes a state court from exercising *in rem* jurisdiction, specifically with respect to an action to quiet title to land claimed by both a tribe and a third party. This Court has long held as a general matter that when it comes to States' interests in property, the nature of an action—whether it is *in rem* or *in personam*—does not alter the sovereign immunity analysis, because both types of proceedings potentially determine the State's rights. The Amici States have a strong interest in maintaining that principle and submit this brief to support that narrow proposition.

States can be subject to a wide range of *in rem* suits, including quiet title actions, demands for easements, and attempts to sue them in interpleader actions and other collective proceedings to decide the rights of the State in a particular piece of property in which one or more other parties also assert ownership rights. If the mere fact that the adjudication seeks to decide such competing rights in property can force a sovereign to choose whether it must forfeit its rights or its immunity, the States will lose much of the value that such immunity affords them. Although the Amici States may have differing views on the wisdom of recognizing tribal immunity and its scope, and express no view as to the appropriate disposition of this case, they have a united interest in ensuring the continued vitality of state sovereign immunity as applied to *in rem* actions.

STATEMENT OF THE CASE

1. The Lundgrens own a piece of property adjoining property recently purchased by the Upper Skagit Indian Tribe (the "Tribe"). The Tribe bought the adjoining property in 2013 from a family that had owned the land for an extended period of time. The Lundgrens had treated 10 acres at the edge of Tribe's land as their property since 1947 and had erected a fence setting off their land. The record deed for the property bought by the Tribe, however, covered the 10-acre parcel the Lundgrens had included within their fence line. The Tribe did not learn of the fence until a survey was made at some point after the purchase. The Tribe then notified the Lundgrens that the fence did not mark the proper boundary and asserted ownership of the entire parcel described in the deed. The Lundgrens initiated a quiet title action in March 2015, seeking a state-law determination that they had acquired title to the 10 acres by adverse possession before the sale to the Tribe occurred.

2. The Tribe filed a motion to dismiss based both on its asserted tribal immunity and on the fact that it had not been named in the quiet title action even though it was a necessary and indispensable party. The trial court denied the motion to dismiss and, in a later ruling, granted summary judgment to the Lundgrens, finding that they had established ownership of the disputed land by adverse possession.

3. On appeal, the Washington Supreme Court held that tribal immunity did not apply because the quiet title action was an *in rem* proceeding and therefore did not require assertion of jurisdiction over the Tribe itself. Pet. App. 2a. It based that decision on its reading of *County of Yakima v. Confederated Tribes & Bands*

of Yakima Indian Nation, 502 U.S. 251 (1992), and two state-court decisions that purported to apply *Yakima* to quiet title actions brought against tribal entities. Pet. App. 8a–11a (citing *Anderson & Middleton Lumber Co. v. Quinalt Indian Nation*, 929 P.2d 379 (Wash. 1996); *Smale v. Noretep*, 208 P.3d 1180 (Wash. App. 2009)).

The court also held that the Tribe was not an indispensable party under Superior Court Rule 19, the state-law rule equivalent to Federal Rule of Civil Procedure 19. Pet. App. 11a–18a. In the course of resolving that issue, the court stated that because the Tribe resisted being brought into state court, and had not waived its immunity from suit in tribal court, it was using immunity not as a "shield" but as a "sword" to preclude the Lundgrens from finding any forum in which they could assert a right to property "they rightfully own." Pet. App. 11a, 18a.

4. Four justices dissented. They accepted the majority's conclusion that tribal immunity did not bar an *in rem* action to quiet title in the tribe's absence, Pet. App. 21a (Stephens, J., dissenting), although they noted that other courts disagreed and had held that tribal immunity bars state-court *in rem* actions, *see Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977 (N.M. 2016), and *Cayuga Indian National v. Seneca County*, 761 F.3d 218 (2d Cir. 2014). In the dissent's view, though, tribal immunity remained relevant to the Rule 19 analysis. Under a proper analysis of that rule, the dissent argued, the Tribe's absence due to its immunity required dismissal of the action. Pet. App. 22a–24a. The dissent noted that a judgment entered in the Tribe's absence would cloud its record title even if it might not be bound by that judgment. And the dissent could not "imagine a remedy that would lessen

the prejudice that results from quieting title to disputed property in the absence of the record title holder." Pet. App. 34a. The dissent acknowledged that there appeared to be no other judicial forum to resolve the quiet title issues, but noted that inability to join an indispensable party for any reason—including based on that party's sovereign immunity—often has that consequence. Pet. App. 35a–36a.

5. The Tribe filed a petition for a writ of certiorari challenging the Washington Supreme Court's conclusion that the state court had authority to conduct an *in rem* proceeding to quiet title, notwithstanding the tribe's absence and its assertion of immunity. This Court granted the petition.

SUMMARY OF ARGUMENT

A sovereign has the inherent right to protect itself from being sued without its consent. While Congress has some authority to abrogate sovereign immunity with respect to the States—and greater power to do so with respect to tribes, *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998)—such immunity presumptively applies in any judicial proceeding that could adversely affect or determine rights asserted by the sovereign. In particular, when States seek to protect their interests in property, they may assert immunity whether the rights at issue are asserted in an *in personam* action that could result in the sovereign's liability or in an *in rem* action to determine the rights of parties in a particular piece of property.

Thus, this Court has long recognized that "[a]ll proceedings, like all rights, are really against persons," *Shaffer v. Heitner*, 433 U.S. 186, 207 n.22 (1977), and that "[t]he fiction that an assertion of jurisdiction over

property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification," *id*. at 212. Any attempt to treat an *in rem* action dealing with property claimed by a sovereign as something other than a suit *against* that sovereign is thus an impermissible attempt to perpetuate that fiction.

This Court has explicitly so found as to States in quiet title actions in federal court, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and in interpleader cases, *Cory v. White*, 457 U.S. 85 (1982). And this Court has used the same analysis and announced the same rule in cases affecting interests of the United States, including quiet title actions, *United States v. Brosnan*, 363 U.S. 237 (1960), and probate cases, *United States v. Shaw*, 309 U.S. 495 (1940). Regardless of the ultimate disposition of this case, the Amici States urge this Court to reaffirm its view that the *in rem* nature of an action concerning property held by a sovereign does not suffice to overcome that sovereign's ability to assert its immunity from suit.

ARGUMENT

I. Sovereign immunity applies to *in rem* actions, including actions to determine ownership of property held by a State.

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*," *The Federalist* No. 81, at 548 (Alexander Hamilton) (B. Cooke ed., 1961) (emphasis in original). As this Court has noted, "[i]mmunity from private suits has long been considered 'central to sovereign dignity.'" *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

The States retained their immunity from suit by private entities when they entered the Union and may also waive it as they choose. The federal government may abrogate that immunity, but only to the extent authorized by the plan of the Constitutional Convention. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321–323 (1934) ("There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.") (internal quotation omitted). Absent such abrogation, their immunity remains intact. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

Because sovereign immunity applies to actions brought against a sovereign, there was initially some doubt as to whether an *in rem* action—one brought to decide ownership of a piece of property—should be viewed as one being brought against the *parties* who disputed that issue, or only against the *property* itself. For a time, the argument was made that the ownership dispute could be decided on an abstract basis without the need to invoke jurisdiction over the parties involved in that dispute, at least where the parties sought a judgment that would bind all the world. As we show below, however, this analysis has long since been rejected by this Court.

A. *In rem* actions are proceedings against those who claim an interest in the subject property.

As long ago as *Pennoyer v. Neff*, 95 U.S. 714 (1878), the Court declared that "in a larger and more general sense" *in rem* actions are "*actions between parties*

where the direct object is to reach and dispose of property owned by them, *or of some interest therein*." *Id*. at 734 (emphases added). That is true even though, "in a strict sense," an *in rem* action is "taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants." *Id*. And *Pennoyer* held that because the competing property owners' interests are affected by *in rem* proceedings, due process required that the disputed property's owner be made aware of the action—including by seizure of the property, which the law assumed to be in the possession of its owner or an agent—before the merits could be addressed. *Id*. at 726–28.

The Court revisited this issue in *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 312 (1950), where it sought to resolve confusion over whether personal service was required in *in rem* proceedings. The Court held that known beneficiaries of a trust are entitled to *personal* notice, not mere publication notice, of an *in rem* proceeding to determine whether a trustee had satisfied his duties to them and could be discharged from further liability. *Id*. at 318. Their personal interests in the assets at issue were sufficient to require that they be given due process before their rights were affected, no matter how the proceeding was classified. *Id*. at 312.

This line of cases culminated in *Shaffer*, which held that state courts' jurisdiction over *in rem* actions is subject to the same due process standard as *in personam* actions, namely, the minimum contacts test established in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). In reaching that conclusion, the Court explained that "[t]he overwhelming majority of commentators have also rejected *Pennoyer's* premise

that a proceeding 'against' property is not a proceeding against the owners of that property." *Shaffer*, 433 U.S. at 205. Rather, "an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court." *Id*. at 206. The Court explained that "[a]ll proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected.'" *Id*. at 206 n.22 (quoting *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (Holmes, C.J.), *appeal dismissed*, 179 U.S. 405 (1900)).

Taken together, *Pennoyer*, *Mullane*, and *Shaffer* demonstrate that the invocation of *in rem* jurisdiction over real or personal property does not excuse a court from considering the real substance of a lawsuit. That reasoning dictates that the use of the *in rem* label here cannot be the end of the analysis in addressing whether the Washington state courts had the power they exercised to affect the Tribe's interests in real property.

B. This Court has long held that sovereign immunity applies to *in rem* actions seeking to adjudicate ownership of an asset in which the States or the United States claim an interest.

Because an *in rem* action determines the rights of parties, a sovereign's right to immunity from suit over its interests in property applies just as much to *in rem* actions as to *in personam* actions. If sovereign immunity would bar a court from deciding the rights of the sovereign in a dispute between it and a single party, it also bars a court from deciding those rights in an action with multiple parties, or in an *in rem* action that

seeks a judgment binding the whole world. Indeed, this Court has so stated on numerous occasions in cases brought against States and the United States.

This Court announced the general rule in *Missouri v. Fiske*, 290 U.S. 18 (1933), that the fact "that a suit in a federal court is *in rem*, or *quasi in rem,* furnishes no ground for the issue of process against a nonconsenting state." *Id*. at 28. Although a State may choose to appear before the Court, the court "has no authority to . . . compel [the State] to subject itself to the court's judgment, whatever the nature of the suit." *Id*.

And in the case most analogous to this one, *Coeur d'Alene Tribe*, all nine Justices—and the parties—agreed that an *in rem* quiet title action could not be brought against a State in federal court:

> It is common ground between the parties, at this stage of the litigation, that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent. The Eleventh Amendment would bar it. *Tindal* [*v. Wesley*, 167 U.S. 204, 223 (1897)].

521 U.S. at 281-82; *see also id*. at 289 (O'Connor, J., concurring) ("The Tribe could not maintain a quiet title action in federal court without the State's consent, and for good reason: A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest."); *id.* at 307 (Souter, J., dissenting) ("settling the matter of title by compelling the State itself to appear in a federal-question suit is barred by Eleventh Amendment doctrine"). The only question in the case was whether the tribe's suit, which sought to exclude the State from exercising any regulatory control over submerged lands beneath Lake Coeur d'Alene and associated waterways, was the

functional equivalent of such a quiet title action. The majority found that it was, and accordingly held the action barred by the State's immunity. *Id*. at 287.

This Court has also held that States enjoy immunity from interpleader actions, another type of *in rem* proceeding. In *Cory v. White*, the Court held that the estate of Howard Hughes could not bring an interpleader action in federal district court to decide which of two competing States could lay claim to being Hughes's domicile at the time of his death and could therefore impose estate taxes on him. 457 U.S. at 91. Indeed, the Court held that the suit was barred even though it named the relevant state officials rather than the States themselves. *Id.* at 90–91. It then affirmed that the position first expressed in *Worcester County Trust Co. v. Riley*, 302 U.S. 282 (1937)—that an interpleader action to determine ownership of a disputed asset is barred by the State's sovereign immunity—remained good law. *Id*. at 91.[1]

This Court has also confirmed that quiet title actions may not be brought against the United States without its consent, *United States v. Brosnan*, 363 U.S. 237, 243 (1960) (explaining it is "well established that the United States was an indispensable party to any suit affecting property in which it had an interest, and that such a suit was therefore a suit against the United States which could not be maintained without its consent"), and has limited the relief that can be awarded against the United States when it files a claim in an *in rem* probate proceeding, *United States v. Shaw*, 309 U.S. 495 (1940).

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[1] The Court also reiterated that suit was barred by the States' immunity even if it sought only injunctive relief and not monetary damages. *Id*. at 90.

Moreover, in quiet title actions against a State or the United States, the sovereign does not bear the burden of proving its interest in the lands in order to assert its immunity from suit. As the Tenth Circuit observed, "[t]he very purpose of the [sovereign immunity] doctrine is to prevent a judicial examination of the merits of the government's position." *Iowa Tribe of Kansas and Nebraska v. Salazar,* 607 F.3d 1225, 1232 (10th Cir. 2010). When the United States acts to take land into trust for tribes, for instance, the Secretary of Interior "need only make a colorable claim that the land is held in trust on behalf of an Indian tribe." *Id*. at 1231. *See also Alaska v. Babbitt*, 75 F.3d 449, 451–52 (9th Cir. 1996) (quiet title action may not go forward in the face of a colorable claim of a federal property interest); *Alaska v. Babbitt*, 38 F.3d 1068, 1073 (9th Cir. 1994) (same).

This Court's case law thus establishes that the States and the United States control their amenability to actions concerning their title to property. The mere fact that an action is *in personam* or *in rem* does not affect this ability to assert immunity from suit.[2]

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[2] Although the Court has interpreted state sovereign immunity more narrowly for *in rem* actions in admiralty, *see California v. Deep Sea Research*, 523 U.S. 491 (1998) (Eleventh Amendment does not bar federal jurisdiction over *in rem* admiralty action in which State does not have direct possession of *res*), and bankruptcy, *see Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), those decisions reflect unique features of maritime and bankruptcy law. *See*, *e.g.*, *Deep Sea Research*, 523 U.S. at 506 (reaffirming general rule that "the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests"); *Katz*, 546 U.S. at 377–78 (concluding that States agreed in plan of convention to abrogation of sovereign immunity against proceedings necessary to effectuate *in rem* bankruptcy jurisdiction). There may likewise be reasons rooted in

County of Yakima is not to the contrary. There, the Court considered whether the County of Yakima could impose an ad valorem property tax or excise tax on the sale of fee-patented land located within the Yakima Tribe reservation. The tribe argued that federal law barred the imposition of the taxes on those parcels, relying on *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), which held that a State could not impose its cigarette taxing regime generally across an entire reservation without regard to the ownership of the land. The Court rejected this argument, stating that "because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned and it is not impracticable either." *County of Yakima*, 502 U.S. at 265. The Court explained that the "parcel-by-parcel determinations that the State's tax assessor is required to make on the reservation do not differ significantly from those he must make off the reservation, to take account of immunities or exemptions enjoyed, for example, by federally owned, state-owned, and church-owned lands." *Ibid*.

The Court's reference to *in rem* jurisdiction in *County of Yakima* was simply a shorthand way of saying that the challenged tax related to a tangible, fixed piece of land and was a cost directly tied to that land—in other words, it was a reference to the State's substantive regulatory jurisdiction. Nothing in *County of Yakima* deals with sovereign immunity from suit, let alone supports the conclusion that the scope of such

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unique features of Indian law to reject the claim of immunity here. As with the admiralty and bankruptcy cases, however, any such conclusion should not undermine the general principle that sovereign immunity is available as a defense to actions affecting a State's property interests, regardless of whether the lawsuit is styled *in rem*.

immunity from suit is restricted when a lawsuit is *in rem* as opposed to *in personam*.

CONCLUSION

There may be unique features of tribal immunity that call for a narrow application of that doctrine here. The Amici States take no position on that question, or on the proper disposition of this case. The Amici States do, however, forcefully urge this Court to adhere to its settled view that characterizing a proceeding as *in rem* cannot suffice to eliminate a sovereign's ability to assert its inherent immunity from actions affecting its property interests without its consent.

Respectfully submitted,

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