17-387

No. _____

IN THE

Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioners,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a court's exercise of *in rem* jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is the Upper Skagit Indian Tribe, a federally recognized Indian tribe. Petitioner was the defendant and appellant below. Respondents are Sharline and Ray Lundgren, who were the plaintiffs and respondents below.

There are no parent or publicly-held corporations involved in the proceeding.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page(s)

Federal Statutes

Other Authorities

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OPINIONS AND ORDERS BELOW

The opinion of the Washington Supreme Court that is the subject of this petition is reported at *Lundgren v. Upper Skagit Indian Tribe*, 187 Wash. 2d 857, 389 P.3d 569 (2017), and reproduced at Appendix A. The order of the Washington Supreme Court denying the motion for reconsideration is unreported but reproduced at Appendix C.

The opinion of the Washington Superior Court denying the Upper Skagit Indian Tribe's motion to dismiss is unreported but reproduced at Appendix B.

BASIS FOR JURISDICTION

The opinion of the Washington Supreme Court that is the subject of this petition was entered on February 16, 2017, and amended on June 8, 2017, before denial of the Upper Skagit Indian Tribe's motion for reconsideration on June 12, 2017.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

INTRODUCTION

Despite settled law about suits against federally recognized Indian tribes, the Washington State Supreme Court concluded that an action against real property of the Upper Skagit Indian Tribe (the "Tribe") did not require an analysis of tribal sovereign immunity. In doing so, the Washington Supreme Court joined a national debate, dividing all ranks of

state and federal courts, about the proper interpretation of this Court's decision in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992).

Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). "Long before the formation of the United States, [t]ribes 'were self-governing sovereign political communities.'" *Id.* at 2040 (citation omitted). A core aspect of the tribes' sovereignty is common-law immunity from suit. *Id.* at 2030.

Unequivocal precedent of this Court, reaffirmed most recently in *Bay Mills*, recognizes that a tribe may lose sovereign immunity in only two ways: (1) if Congress abrogates sovereign immunity; or (2) if the tribe waives sovereign immunity. *Id.* at 2030–31 ("[W]e have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." (citations omitted)). Any congressional decision to abrogate immunity must be clear — "Congress must 'unequivocally' express that purpose." *Id.* at 2031–32 ("That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." (citations omitted)).

In the absence of waiver and abrogation, sovereign immunity is an absolute jurisdictional bar. *See FDIC*

v. Meyer, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015 (9th Cir. 2007) ("Sovereign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign.").

Courts below are split on the issue presented by this case: whether *in rem* actions against tribal property negate the jurisdictional bar of sovereign immunity when there has been neither waiver nor abrogation. The Second Circuit and the New Mexico Supreme Court correctly held that the answer is no: there is no *in rem* exception to tribal sovereign immunity. But in the 5-4 decision below, the Washington Supreme Court joined the North Dakota Supreme Court in reaching the opposite conclusion.

The Washington Supreme Court did not attempt to justify its holding under the doctrine of sovereign immunity, nor could it have done so because neither exception applied. It is undisputed that the Tribe did not waive immunity. *Lundgren*, 187 Wash. 2d at 881 n.4 (Stephens, J., dissenting). There is also no basis for an abrogation argument: the Washington Supreme Court did not examine the issue and, thus, did not hold that Congress had unequivocally abrogated tribal sovereign immunity from lawsuits brought *in rem*, as here, to quiet title held by tribes in disputed property. *See generally Lundgren*, 187 Wash. 2d at 857; CP at 134, 155–57.

Instead, the Washington Supreme Court held that personal jurisdiction over the Tribe was unnecessary

to the trial court's power to act because the action was brought *in rem*. *Lundgren*, 187 Wash. 2d at 866–67. On this basis, the Washington Supreme Court held that the trial court did not need to address the issue of sovereign immunity. *Id.* The Washington Supreme Court incorrectly analyzed this Court's decision in *County of Yakima* in claiming, "[t]he United States Supreme Court has recognized this principle." *Id.* (citing 502 U.S. at 255).

The decision below conflicts with not only the limited holding of *County of Yakima* but also betrays the carefully circumscribed exceptions to sovereign immunity reaffirmed in *Bay Mills*. As evidenced by the split in authority, the conflict will not be resolved until this Court issues a definitive ruling. And until such a ruling is made, there will be uncertainty about the scope of tribal sovereign immunity invoked in *in rem* proceedings throughout the country.

This split in authority presents a jurisprudential issue of great significance to all tribes as well as litigants in a wide variety of *in rem* cases that are likely to increase exponentially as tribes engage in business ventures involving real property. The divergent views of lower courts on this issue creates the certainty of inconsistent results for litigants depending on the federal circuit or state in which the tribal property happens to be located.

This case is an ideal vehicle for resolving this important federal question. There are no factual issues in dispute. And resolving the split rests

primarily on clarifying this Court's holding in *County of Yakima*.

This petition for writ of certiorari should be granted.

STATEMENT OF THE CASE

1. In 2013, the Tribe bought property in Skagit County, Washington and received a statutory warranty deed. In 2015, the adjacent property owners, Sharline and Ray Lundgren, filed a quiet title action against the Tribe, alleging they had acquired title to a strip of land along the common boundary through adverse possession before the Tribe purchased the land. *Lundgren*, 187 Wash. 2d at 861–63.

2. The Tribe entered a special appearance, noting that the Tribe "does not waive its inherent sovereign immunity." Clerk's Papers (CP) at 256. The Tribe then filed a motion to dismiss asserting sovereign immunity and, alternatively, failure to join a necessary and indispensable party under Rule 19. CP at 229–44. The trial court denied the Tribe's motion to dismiss and granted summary judgment in favor of the plaintiffs. CP at 155–60.

3. On the Tribe's petition for direct review, the Washington Supreme Court accepted review. In a 5-4 decision, the Washington Supreme Court affirmed, holding that the Tribe's sovereign immunity did not bar suit because the nature of the quiet title action enabled the trial court to exercise *in rem* jurisdiction

over the Tribe's property rather than *in personam* jurisdiction over the Tribe. *Lundgren*, 187 Wash. 2d at 864–68. The Washington Supreme court concluded, that when an action proceeds under the trial court's *in rem* jurisdiction, the trial court "[does] not need to address sovereign immunity" because "the doctrine of sovereign immunity [does] not apply." *Id.* at 867–68. The Washington Supreme Court also affirmed the trial court's holding that the Tribe was not a necessary party within the meaning of Rule 19, and, therefore, joinder of the Tribe was not compulsory. *Id.* at 868–73.

4. The four dissenting justices did not reach the issue of sovereign immunity and rested their conclusions on Rule 19 grounds. *Id.* at 874–75 (Stephens, J., dissenting). But the dissent also recognized that "recent decisions question whether a court may exercise in rem jurisdiction over cases in which a tribe asserts its sovereign immunity." *Id.* at 876 n.1. In particular, the dissent noted that, whether the majority's holding "rests on a misreading of *County of Yakima*" "will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*." *Id.*

REASONS WHY CERTIORARI IS WARRANTED

A. The decision below conflicts with the weight of authority in the split among lower courts interpreting the reach of *County of Yakima*.

The Washington Supreme Court's recognition of an *in rem* exception to tribal sovereign immunity, joined by the North Dakota Supreme Court, directly conflicts with the Second Circuit and New Mexico Supreme Court's decisions recognizing that sovereign immunity barred suit despite the *in rem* nature of the underlying proceeding. *Compare Lundgren*, 187 Wash. 2d at 865–66 (citing to *County of Yakima* for proposition that "a court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity"), *and Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W. 2d 685, 691 (N.D. 2002) (holding that *in rem* condemnation action may proceed and citing *County of Yakima* for the proposition that "[c]ourts have recognized distinctions in application of the doctrine of tribal sovereign immunity based upon the in rem or in personam nature of the proceedings"), *with Cayuga Indian Nation of New York v. Seneca Cty., N.Y.*, 890 F. Supp. 2d 240, 247–48 (W.D.N.Y. 2012) (rejecting argument that *County of Yakima* "stands for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* [foreclosure] proceedings"), *aff'd,* 761 F.3d 218, 221 (2d Cir. 2014) (declining to read an "implied abrogation" into *County of Yakima* or "draw [] novel distinctions—such as a distinction between *in rem* and *in personam* proceedings" as applied to the doctrine of tribal sovereign immunity from suit), *and Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 985 (N.M. 2016) (rejecting characterization of *County of Yakima* as authorizing "the tribe's amenability to suit in court based on a

concept of an *in rem* exception to immunity" because "in the context of tribal sovereign immunity there exists no meaningful distinction between *in rem* and *in personam* claims").

These cases diverge on an important question of federal law and cannot be distinguished on the facts. Both the New Mexico Supreme Court and dissent in the Washington Supreme Court recognized this fundamental disagreement over the proper interpretation of *County of Yakima* in light of *Bay Mills*. *See Hamaatsa*, 388 P.3d at 986 (acknowledging the contrary decisions by the North Dakota and Washington Supreme Courts but choosing "to follow the Second Circuit, and thereby refus[ing] to recognize an exception to tribal sovereign immunity for *in rem* proceedings"); *Lundgren*, 187 Wash. 2d at 876 n.1 (Stephens, J., dissenting) ("It is worth noting, however, that recent decisions question whether a court may exercise in rem jurisdiction over cases in which a tribe asserts its sovereign immunity, particularly since the Supreme Court issued its decision in *Bay Mills*, which reiterated the importance of sovereign immunity. Because I would decide this case under CR 19, I do not reexamine our precedent in light of *Bay Mills*. Nor do I address whether our decision in *Anderson* rests on a misreading of *County of Yakima*, though this question will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*.").

This split in authority over the proper interpretation of *County of Yakima* extends to all

ranks of federal and state courts and is by no means limited to the rulings of the Second Circuit and three state supreme courts. *Compare Save the Valley, LLC v. Santa Ynez Band of Chumash Indians*, No. CV1502463RGKMANX, 2015 WL 12552060, at *3 (C.D. Cal. July 2, 2015) ("Plaintiff has failed to provide any binding authority to show that Congress abrogated the Tribe's immunity to in rem actions . . . . Unlike the present action, *Yakima* concerned an action by the local government pursuant to an *express abrogation* of tribal power by an act of Congress."), *Pub. Serv. Co. of New Mexico v. Approximately 15.49 Acres of Land in McKinley Cty., New Mexico*, 167 F. Supp. 3d 1248, 1265 (D.N.M. 2016) (distinguishing *County of Yakima* on the basis that the disputed tribal land subject to the attempted condemnation was a part of an allotment rather than unrestricted land in fee as in *County of Yakima*), *Oneida Indian Nation of New York v. Madison Cty.*, 401 F. Supp. 2d 219, 229 (N.D.N.Y. 2005) ("The County cannot circumvent Tribal sovereign immunity by characterizing the suit as in rem, when it is, in actuality, a suit to take the tribe's property."), *aff'd in part, vacated in part, rev'd in part*, 665 F.3d 408 (2d Cir. 2011), *and First Bank & Tr. v. Maynahonah*, 313 P.3d 1044, 1056 (Okla. Civ. App. 2013) ("We do not agree with [the] assertion that *Yakima*, and the other precedent upon which it relies, are authority that 'plainly demonstrate that tribal sovereign immunity does not bar the exercise of *in rem* jurisdiction over tribal property, even when a tribe loses some part of that property as a result.'"), *with Miccosukee Tribe of Indians of Florida v. Dep't of Envtl. Prot. ex rel. Bd. of Trustees of Internal Imp. Tr. Fund*, 78 So. 3d 31, 34

(Fla. Dist. Ct. App. 2011) ("The eminent domain action here is not an action against the Tribe itself, but instead is an action against land held in fee by the Tribe. The Department of Environmental Protection does not need personal jurisdiction over the Tribe—it needs only in rem jurisdiction over the land.").

The Washington Supreme Court, in joining the North Dakota Supreme Court, has decided an important federal question that conflicts with the decisions of the Second Circuit and New Mexico Supreme Court. This controversy is also evident among the lower federal and state courts of other jurisdictions. This Court's intervention is necessary to clarify its holding in *County of Yakima* and resolve this split in authority.

B. The decision below is contrary to this Court's narrow holding in *County of Yakima* and the limited exceptions to tribal sovereign immunity recently reaffirmed by this Court in *Bay Mills*.

In rem jurisdiction is neither an exception to nor a means to circumvent the Tribe's right to assert sovereign immunity. The theory—that a trial court can acquire subject-matter jurisdiction in a quiet title action against the tribe because jurisdiction is based *in rem* over the tribe's property rather than *in personam* over the tribe—cannot be reconciled with *County of Yakima*.

In *County of Yakima*, the Yakima Indian Nation challenged whether the County of Yakima could

impose ad valorem taxes on "fee patented"[1] lands located within the Yakima Indian Reservation. 502 U.S. at 253. This Court carefully analyzed the plain language as well as history of the Indian General Allotment Act ("GAA") to determine whether it "contain[ed] the unmistakably clear expression of intent that is necessary to authorize state taxation of Indian lands." *Id.* at 251–252, 259.

Specifically, this Court examined the significance of the Burke Act proviso, an amendment enacted nearly two decades after the GAA, and confirmed that the proviso contained a clear and unmistakable congressional intent to authorize taxation of fee patented lands, which, necessarily, extended to *in rem* actions brought to enforce that power to tax. *Id.* at 259, 264 ("[W]e agree with the Court of Appeals that by specifically mentioning immunity from land taxation 'as one of the restrictions that would be removed upon conveyance in fee,' Congress in the Burke Act proviso 'manifest[ed] a clear intention to permit the state to tax' such Indian lands." (citation omitted)).

Nothing in *County of Yakima*, however, stands for the proposition that the *in rem* nature of the action was dispositive of the issue of sovereign immunity. Rather, only the finding of express abrogation in the

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[1] The "fee patent" refers to the "issuance of a deed, or title, to land formerly held [in trust] by the U.S. government, to individual members of an Indian tribe." Gary A. Sokolow, *Native Americans and the Law: A Dictionary* 90 (2000).

GAA, through the enactment of the Burke Act proviso, controlled and defeated immunity. That holding, however, extended only to actions concerning property transferred under the GAA. *County of Yakima* did not purport to—nor could it—erase immunity in all *in rem* actions.

This Court's discussion of *in rem* jurisdiction arose only to explain why its earlier decision in *Moe v. Confederated Salish and Kootenai Tribes*[2] was consistent with its holding that the GAA expressly authorized suits to enforce state taxation of fee patented lands. *Id.* at 265 ("[B]ecause the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned . . . ."). But this discussion does not support an interpretation that tribal sovereign immunity turns on the *in rem* nature of the underlying proceeding.

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[2] In *Moe*, this Court rejected the State of Montana's claim that the GAA expressly authorized taxation of Indians residing or conducting business on reservation land, which Montana alleged gave rise to *in personam* jurisdiction over reservation Indians to enforce that power to tax. 425 U.S. 463, 478 (1976) ("By its terms [the GAA] does not reach Indians residing or producing income from lands held in trust for the Tribe, which make up about one-half of the land area of the reservation. If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on 'fee patented' lands, then for All jurisdictional purposes civil and criminal the Flathead Reservation has been substantially diminished in size.").

The exception to sovereign immunity recognized in *County of Yakima* was based not on the *in rem* nature of the action but on the express abrogation of immunity in the GAA. After all, if *in rem* jurisdiction were alone sufficient to circumvent sovereign immunity, this Court's careful discussion of the plain language and history of the GAA in *County of Yakima* would have been unnecessary and moot.

The fundamental principle underlying this distinction is that, absent waiver, abrogation must be unequivocal. In the case of fee patented lands, abrogation was an express element of the statute creating the program. *County of Yakima* relies on this express abrogation in the GAA, which is necessarily limited to fee patented lands as the sole subject of abrogation. Here, it is undisputed that the GAA has no application: the Tribe acquired the disputed land from a private owner through a statutory warranty deed, not from the federal government through the fee patenting system authorized under the GAA.

The theory that a tribe's sovereign immunity turns on whether the judicial proceedings are *in rem* or *in personam* conflicts with *County of Yakima*. And the *in rem* exception adopted by the Washington Supreme Court also conflicts with this Court's decision in *Bay Mills*, which reaffirmed as "settled law" the only two exceptions to the avowedly "broad principle" of sovereign immunity. 134 S. Ct. at 2030–31 ("[W]e have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver).").

Further, the distinction between *in rem* and *in personam* jurisdiction is pure fiction as it relates to suits against sovereigns. *Cf. The Siren*, 74 U.S. 152, 154 (1868) ("[T]here is no distinction between suits against the government directly, and suits against its property."); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992) ("we have never applied an *in rem* exception to the sovereign-immunity bar" in the context of a state's Eleventh Amendment sovereign immunity).

The Washington Supreme Court has decided an important federal question directly in conflict with this Court's decisions in *County of Yakima* and *Bay Mills*. If allowed to stand, the decision below will have far-reaching implications for the sovereign immunity rights of the 29 federally-recognized Indian tribes in Washington State.[3] *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 n.19 (1978) (recognizing that "many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of" "[t]he cost of civil litigation"). This Court's intervention is necessary to correct the Washington Supreme Court's misapplication of binding precedent.

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[3] *See* Washington Governor's Office of Indian Affairs, Washington State Tribal Directory at 2–4 (June 20, 2017), *available at* http://www.goia.wa.gov/Tribal-Directory/TribalDirectory.pdf.

C. The question presented is an important jurisdictional issue of federal law, and this case would be a good vehicle for resolving it.

The Washington Supreme Court's decision improperly abrogates tribal sovereign immunity, conflicts with this Court's precedent, and intensifies the emerging division among state supreme courts and federal circuit courts. The decision below is an ideal vehicle for resolving the important federal question of whether the exercise of *in rem* jurisdiction overcomes the absolute defense of sovereign immunity asserted by a federally recognized Indian tribe absent waiver by the tribe or unequivocal abrogation by Congress. The relevant facts are not in dispute, and resolution of the case primarily turns on clarifying this Court's holding in *County of Yakima*.

Because this case raises recurring issues involving *in rem* actions initiated against federally recognized Indian tribes, further delay before resolving the split in authority will have significant, negative implications for tribal sovereignty as well as profound jurisdictional consequences, including an unwarranted drain on judicial resources in cases where jurisdiction should be barred. This Court should accept review to resolve the split in authority, conform the Washington Supreme Court's decision to the unambiguous precedent of this Court, and restore the broad scope of tribal sovereign immunity.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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