No. 17-387

IN THE

Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN, ET VIR,

Respondents.

On Writ of Certiorari to the Washington Supreme Court

BRIEF OF *AMICI CURIAE* THE FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, PUYALLUP TRIBE OF INDIANS, AND SKOKOMISH INDIAN TRIBE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are federally recognized Indian tribes that historically suffered devastating losses of land as a result of treaty cessions and the allotment policy. Each is now seeking to restore its land base so that it is sufficient to sustain the tribe's culture and society and meet its governmental responsibilities. This often requires that *Amici* purchase lands in fee, on- and off-reservation.

For example, *Amicus* Fond du Lac Band of Lake Superior Chippewa Indians ("the Band") owns land in Minneapolis, Minnesota on which it provides pharmaceutical health care services to tribal members living in the Minneapolis area. Like the Band, many other Indian tribes have members who live in urban areas. Indeed, many Indians were relocated from their Reservations in the 1950s as part of the federal relocation programs that moved Indian people to large urban areas for jobs and training. *See Cohen's Handbook on Federal Indian Law* § 1.06, at 87-89 (Nell Jessup Newton ed., 2012). The Band also owns fee land in the City of Duluth. There, it operates the Center for American Indian Resources, an ambulatory care facility providing a broad range of health care services to tribal members and other Indians who are part of Duluth's large Indian community. *See* Lisa Kaczke, *Fond du Lac Band Dedicates New $14 Million Center in Duluth,* Duluth News Trib. (Dec. 10, 2016)

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for *Amici* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief, as reflected by the letters of consent filed with the Clerk.

http://www.duluthnewstribune.com/news/4177211-fond-du-lac-band-dedicates-new-14-million-center-duluth. The Band also acquired fourteen acres of land along the shores of Lake Superior, in Douglas County, Wisconsin, through the General Services Administration ("GSA") excess land process. *See* 25 U.S.C. § 5324(f)(3), which it now holds in fee. These lands, called Wisconsin and Left Hand Point, are the site of a principal Fond du Lac village that was occupied by the Band for several hundred years. This land was granted to Fond du Lac Chief Osaugie under the Treaty of LaPointe, 10 Stat. 1109 (Sept. 30, 1854), and his remains and those of many other Fond du Lac Band members are buried on this land. In the early 1900s, several private companies claimed the land and the Band's people were forcibly removed from it. *See Lemieux v. Agate Land Co.*, 214 N.W. 454, 458-59 (Wis. 1927). The federal government later condemned the site and used it as a Coast Guard facility for a number of years until it was declared excess, and the Band was able to reacquire it from the GSA.

Amicus Puyallup Tribe, located in Washington State, has acquired land off-reservation in fee to protect critical fisheries and fish-rearing habitat that is necessary to sustain the Tribe's fishing rights under the Treaty of Medicine Creek, art. 3, 10 Stat. 1132 (Dec. 26, 1854), as well as for camping, youth activities, and community events. These lands range in distance from adjacent to the Reservation boundaries to, in some cases, thirty to forty miles from the Reservation.

Amicus Skokomish Tribe, also located in Washington State, acquired approximately 500 acres of off-reservation land in fee as a part of a Federal Energy Regulatory Commission-approved settlement with a hydroelectric company. *See* Order on Remand, *City*

of Tacoma, 132 FERC ¶ 61,037 (2010). This land is utilized for forestry activities, a campground, and as an important site for ceremonial activities. It is now in trust, but the process to put the land into trust took years.

The Skokomish Tribe was also gifted a 160-acre parcel of fee land located off Reservation, along the Skokomish River, for conservation purposes. This land is critically important to the restoration of habitat for endangered species, which include chinook and steelhead salmon. All of this land is unquestionably within the Skokomish Tribe's aboriginal territory. *United States v. Washington*, 384 F. Supp. 312, 377 (W.D. Wash. 1974) (Finding No. 137); *United States v. Washington*, 626 F. Supp. 1405, 1489 (W.D. Wash. 1985) (Finding No. 353), *aff'd sub nom. United States v. Skokomish Indian Tribe*, 764 F.2d 670 (9th Cir. 1985). Furthermore, due to persistent flooding, only 50% of the original Skokomish Reservation is habitable and buildable. Thus, the Tribe now has no other choice but to acquire other land off-reservation in order to meet the current and future needs of its community. All these land acquisitions will be in fee with the goal of having the United States eventually take them in trust. The reacquisition of these lands in fee and trust status advances not only tribal self-determination goals but also protects the Tribe's cultural connection to its ancestral homelands.

Amici Tribes share an interest in ensuring that their lawful possession of lands as governments cannot be challenged by opponents intending to undermine the Tribes' rights and ongoing efforts to restore a land base as needed to "assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

STATEMENT OF THE CASE

The Washington Supreme Court entered a judgment affirming the state trial court's decision that the Upper Skagit Indian Tribe could not assert tribal sovereign immunity against a state court action, brought by private parties, to quiet title to lands held in fee by the Tribe. The court reasoned that under this Court's decision in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992), a tribe is not immune from *in rem* actions brought against its fee lands and that Washington state precedent supported this conclusion.

To make that determination, the court relied on this Court's ruling in *County of Yakima* that the Burke Amendment to the General Allotment Act allows a county to impose *ad valorem* taxes on tribally-owned fee lands on the reservation. *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569, 573 (Wash. 2017). The Washington Supreme Court found that *County of Yakima* "reached that conclusion by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the Yakama Nation. In other words, the Court [sic] had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners." *Id.* (also citing *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996) (en banc)). This was the entirety of the Washington Supreme Court's analysis of the *County of Yakima* decision.

The court also relied on state court precedent. The Washington Supreme Court had previously opined that tribal sovereign immunity was not implicated by a quiet title action against tribally-owned land because such an action "is 'a much less

intrusive assertion of state jurisdiction over reservation fee patented land' than taxing and foreclosing fee lands . . ." *Id.* (quoting *Anderson*, 929 P.2d at 385). And an intermediate state appellate court had found that state court jurisdiction over a quiet title action "does not offend the Tribe's sovereignty" as under Washington state law, a quiet title action is a proceeding *in rem* against the tribe's property, not against the tribe itself. *Id.* at 573-74 (quoting *Smale v. Noretep*, 208 P.3d 1180, 1180 (Wash. Ct. App. 2009)).

SUMMARY OF ARGUMENT

The Washington Supreme Court's ruling ignores the fundamental principles of tribal sovereign immunity articulated by this Court, which are decisive here. Tribal sovereign immunity is an aspect of tribal inherent sovereignty that can only be abrogated by Congress. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)). That immunity applies both on and off the reservation, *id.* at 2031 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998)), and to commercial and noncommercial activities alike, *id.* Its scope and application in any particular circumstance is generally determined by analogy to the immunity of other sovereigns, such as the state and federal governments. *See U.S. Fid. & Guar.*, 309 U.S. at 512; *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017).

The Washington Supreme Court, instead of following these rules, carved out a novel exception to tribal sovereign immunity in *in rem* proceedings, relying on *County of Yakima*, a case that did not deal with tribal sovereign immunity. *County of Yakima* described the extent of state authority to tax fee land on the reservation under the General Allotment Act, but did

not attempt to describe the extent of state authority to vindicate those rights, much less address State authority to adjudicate private disputes with tribes over the ownership of fee land. Nor does *County of Yakima* permit a state court to exercise jurisdiction over a tribe that possesses immunity from suit simply because the action is deemed *in rem* under state law.

The proper rule is that sovereign immunity applies to *in rem* actions under the basic principle that sovereign immunity bars a lawsuit that seeks to divest a government of its property, no matter what its ostensible form. *Idaho v. Coeur d'Alene Tribe of Idaho* (*Idaho I*), 521 U.S. 261, 268-69 (1997); *see The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868) ("there is no distinction between suits against the government directly, and suits against its property"). Even if the suit is not against the government directly, it is barred by sovereign immunity if it is "in substance and effect . . . one against the [government] without its consent." *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962). This rule, which has been applied in other legal contexts, *see, e.g.*, *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 505 (1998), applies equally here.

ARGUMENT

I. UNDER SETTLED FEDERAL LAW, SOVEREIGN IMMUNITY IS A CORE ASPECT OF TRIBAL SOVEREIGNTY THAT IS NOT SUBJECT TO DIMINUTION BY THE STATES.

A. The Doctrine Of Tribal Immunity Is Settled Federal Law, And Federal Law Determines Its Scope And Extent.

We begin with the first principles of tribal sovereign immunity. "Indian tribes are domestic dependent

nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal quotation marks and citations omitted). Their sovereignty includes "the 'common-law immunity from suit traditionally enjoyed by sovereign powers,'" *id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)), which is "a necessary corollary to Indian sovereignty and self-governance," *id.* (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)). "[T]he qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands." *Id.* (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)); *accord id.* at 2040 (Sotomayor, J., concurring) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)). Tribal immunity applies to both commercial and noncommercial activities, on tribal lands on and off the reservation, *id.* at 2031 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998)), and to suits brought in state court by private parties and the States themselves, including actions brought to enforce state laws, *id.* (citing *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 167-68 (1977), and *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509-10 (1991)). As the Court explained in *Bay Mills*, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them" and "[t]hat is because . . . tribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" *Id.* (quoting *Kiowa*, 523 U.S. at 756). Applying these principles, the Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a [tribal]

waiver)." *Id.* at 2030-31 (first alteration in original) (quoting *Kiowa,* 523 U.S. at 756).

The bounds of tribal sovereign immunity set forth in this Court's decisions generally match those of federal and state immunity. The Court held long ago that the same "public policy . . . exempt[s] the dependent as well as the dominant sovereignties from suit without consent," *U.S. Fid. & Guar.,* 309 U.S. at 512, and therefore "the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *Id.* at 514. And the Court's ruling that tribal immunity applies to tribal operations that may be designated commercial or for profit, *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 755), parallels the rule that state immunity extends to governmental activity that "involves conduct that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of market participants." *Id.* at 2041 (Sotomayor, J., concurring) (internal quotation marks omitted) (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 684 (1999)).[2] Similarly, the distinction between the applicability of substantive law to a tribe and the tribe's immunity from a suit brought to enforce that law, *see Bay Mills*, 134 S. Ct. at 2031, also applies to States, *Alden*, 527 U.S. at 730-32 (Congress

[2] As this Court has made plain, although state sovereign immunity is provided for in the Eleventh Amendment, the principles of state sovereign immunity are derived from the fundamental nature of sovereignty that, in the case of the States, predates the Constitution. *Alden v. Maine*, 527 U.S. 706, 728-29 (1999).

lacks authority to abrogate a State's immunity from suit in its own courts, but the State remains obligated to comply with federal law); *Bd. of Trustees v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (Congress did not validly abrogate state sovereign immunity from an action for money damages brought by a private party under Title I of the Americans with Disabilities Act, but the States are still subject to the standards set forth therein). And most recently, in *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017), the Court found "no reason to depart from . . . general rules" of sovereign immunity to determine whether tribal immunity protected tribal employees from tort lawsuits arising from actions taken in the scope of their employment off-reservation. Applying those rules, the Court held that the Connecticut Supreme Court had erred in "extend[ing] sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees." *Id.* at 1291-92 (citing *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985)).

Symmetry also exists with respect to the inability of States and Tribes to sue one another. Tribal immunity applies to suits brought by states against tribes, *Bay Mills*, 134 S. Ct. at 2031, and State immunity applies to actions brought by tribes against States, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781-82 (1991). In *Blatchford*, the Tribe argued that the States had waived their immunity from suits brought by tribes when they adopted the federal Constitution. The Court held otherwise, ruling that while the States surrendered their immunity from suits by sister States when they submitted to the constitutional scheme, the "mutuality of . . . concession" that occurred between the States at the constitutional convention did not include Indian tribes, and therefore the States did not surrender their immunity for the benefit of the

tribes, nor did the tribes surrender their immunity to the States. *Id.* at 782 (cited in *Bay Mills*, 134 S. Ct. at 2031; *Kiowa*, 523 U.S. at 756; *Idaho v. Coeur d'Alene Tribe of Idaho* (*Idaho I*), 521 U.S. 261, 268-69 (1997)).

As these decisions show, the bounds of tribal immunity are determined by application of the common law principles set forth in this Court's decisions on sovereign immunity, particularly those that define federal and state immunity. As we show next, the Washington Supreme Court ignored virtually all of that precedent, and in so doing, erred.

B. The Washington Supreme Court Erred By Ignoring This Court's Sovereign Immunity Decisions, And Relying Instead On A Decision In Which Immunity Was Not At Issue.

Instead of applying the principles of sovereign immunity set forth in this Court's decisions to determine the applicability of tribal immunity to the quiet title action brought by the Lundgrens against the Upper Skagit Indian Tribe, the Washington Supreme Court relied almost exclusively on *County of Yakima*, in which neither sovereign immunity, nor the settled principles just recited, were even mentioned.

In *County of Yakima*, the Court held that a county could impose an *ad valorem* tax on lands owned in fee by an Indian tribe, 502 U.S. 251, 266-68 (1992), but not an excise tax on the sale of those lands, *id.* at 268-70. The Court reasoned that Congress had authorized the application of *ad valorem* taxes to tribally-owned fee lands in § 6 of the General Allotment Act, as amended by the Burke Act of 1906, including its

proviso,[3] 25 U.S.C. § 349, and by making the lands alienable and encumberable under § 5 of the General Allotment Act, 25 U.S.C. § 348.[4] *Cnty. of Yakima*, 502 U.S. at 264, 267-68.[5] In so holding, the Court rejected

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[3] Section 6, as amended by the Burke Act of 1906, including its proviso, provides in pertinent part as follows:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . . *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . . .

Id.

[4] Section 5 of the General Allotment Act provides in pertinent part as follows:

> [A]t the expiration of said [trust] period the United States will convey [the allotted lands] by patent to said Indian . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void . . . .

Id.

[5] The Court held that the county's "ad valorem tax constitutes 'taxation of . . . land' within the meaning of the General Allotment Act and is therefore prima facie valid," and then went on to reject the Court of Appeals' ruling that the tax could be invalidated if the Tribe established on remand that under *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S.

the argument made by the Tribe and the United States that *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), "repudiate[d] the continuing jurisdictional force of the General Allotment Act." *Cnty. of Yakima*, 502 U.S. at 261. The Court instead determined that *Moe* had held that § 6 of the General Allotment Act, as amended by the Burke Act (without considering the proviso), did not authorize a State to exercise *in personam* jurisdiction to impose excise taxes on Indians on fee lands on the Reservation (other than on the original Indian allottee). 502 U.S. at 261-62. *Moe*'s holding was based on Congress's modern-day rejection of checkerboard regulatory schemes on Indian reservations, which – if applicable – would have resulted in an "almost surreal" outcome under which the State could tax tribal members *in personam* anywhere in the Reservation, if they owned fee land. *Id.* at 262-63 (quoting *Moe*, 425 U.S. at 478-79). In contrast, the *County of Yakima* Court explained, its decision on *ad valorem* taxes was not "*Moe*-condemned" because "the jurisdiction is *in rem* rather than *in personam*" and did not result in a checkboard pattern of jurisdiction on the Reservation. *Id.* at 264-65. In sum, *Moe*, which foreclosed uneven *in personam* taxation on the Reservation, did not preclude the imposition of taxes directly on fee lands on the Reservation.

Although *County of Yakima* says not one word about tribal sovereign immunity, the Washington Supreme Court interpreted it to mean that "[a] court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign

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408 (1989), it had a "protectible interest" against the imposition of the tax. *Cnty. of Yakima*, 502 U.S. at 266-68 (alteration in original).

immunity." *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569, 573 (Wash. 2017). In the court's view, *County of Yakima* determined that the county could impose an *ad valorem* tax on on-reservation fee land under the General Allotment Act "by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the Yakama Nation. In other words, the Court [sic] had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners." *Id.*[6]

That is a non sequitur. *County of Yakima* addressed only a county's right to tax tribally-owned fee land, not whether Congress had abrogated tribal sovereign immunity to enable the county to enforce that tax, which would require that Congress "'unequivocally' express that purpose." *Bay Mills*, 134 S. Ct. at 2031 (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001)). "There is difference between the right to demand compliance with state laws and the means available to enforce them." *Id.* (quoting *Kiowa*, 523 U.S. at 755; *accord Citizen Band Potawatomi*, 498 U.S. at 513-14; *Santa Clara Pueblo*, 436 U.S. at 57-59 (Indian Civil Rights Act imposed substantive civil rights obligations on tribes but did not abrogate their

[6] The same interpretation has been adopted in a small number of state decisions and fails there for the same reasons described here. *Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 691-93 (N.D. 2002) (citing *Cnty. of Yakima*, 502 U.S. at 264-66 and *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 385-87 (Wash. 1996) (en banc) (also relying on *Cnty. of Yakima*)); *Miccosukee Tribe of Indians of Fla. v. Dep't of Envtl. Prot. ex rel. Bd. of Trustees*, 78 So.3d 31, 33-34 (Fla. Ct. App. 2011) (relying on *Cass Cnty. Joint Water Resource Dist.* and *Cnty. of Yakima*).

sovereign immunity from suits to enforce those rights in federal court). In *Citizen Band Potawatomi*, the Court applied that principle to state taxation of Indian tribes, holding that although "tribal sellers are obliged to collect and remit state taxes on sales to nonmembers at Indian smoke-shops on reservation lands," 498 U.S. at 513; *see Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 159-60 (1980), the State could not sue a Tribe to enforce that right, because the Tribe was protected by sovereign immunity, 498 U.S. at 509-11, 513-14. Addressing off-reservation gaming in *Bay Mills,* the Court reached the same conclusion, holding that a State has the legal right to regulate a tribe's off-reservation actions, but lacks the ability to sue the tribe directly to enforce that right. 134 S. Ct. 2034-35. These holdings reject the Washington Supreme Court's interpretation of *County of Yakima* because they distinguish between the appealability of state law and its enforceability against an immune sovereign.

Furthermore, a state court's bare assertion of *in rem* jurisdiction cannot abrogate tribal sovereign immunity because only explicit congressional authorization can do so. *Bay Mills*, 134 S. Ct. at 2031; *see Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 985 (N.M. 2016) ("Because tribal sovereign immunity divests a court of subject matter jurisdiction it does not matter whether [a plaintiff's] claim is asserted *in rem* or *in personam.*") (citing *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007)). *In rem* jurisdiction is based on the court's power over property within its territory, rather than the court's authority over a defendant's person, as in *in personam* jurisdiction. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796 n.3 (1983); *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977). But establishing *in rem*

jurisdiction in a case does not abrogate tribal sovereign immunity. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 38 (1992) (rejecting the "argument that a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity"). Because "an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court," *Mennonite Bd. of Missions*, 462 U.S. at 796 n.3 (quoting *Shaffer*, 433 U.S. at 206), a court can exercise *in rem* jurisdiction over a sovereign property owner only if its immunity has been abrogated or waived. Finally none of the controlling principles of tribal sovereign immunity stand for the proposition that tribal sovereign immunity does not apply in *in rem* proceedings. *See Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 761 F.3d 218, 221 (2d Cir. 2014) (citing *Bay Mills*, 134 S. Ct. at 2031) (declining to draw "novel distinctions" in tribal sovereign immunity doctrine based on *in rem* and *in personam* jurisdiction).

In addition, the Washington Supreme Court's decision rests on the faulty premise that *County of Yakima*'s determination that the imposition of a county *ad valorem* tax is an exercise of jurisdiction *in rem*, 502 U.S. at 264-65, also applies to a quiet title action that a state court determines to be *in rem*, *Lundgren*, 389 P.3d at 865 (citing *Phillips v. Tompson*, 131 P. 461 (Wash. 1913)). It does not. In the first place, *County of Yakima* said nothing about the status of quiet title actions. Second, in *Nevada v. United States*, 463 U.S. 110 (1983), decided before *County of Yakima,* this Court stated expressly that "quiet title actions are *in personam* actions." *Id.* at 143-44. Furthermore, if a state law ruling on whether an action is *in rem* were determinative of the applicability of the federal law doctrine of tribal sovereign immunity, it would give States carte blanche to diminish tribal sovereign

immunity without any congressional authorization. That result is contrary to federal law. *See Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756). It would also shatter the national uniformity of a federal legal doctrine. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-47 (1989) (rejecting the application of state-law definitions to the federal Indian Child Welfare Act in part because Congress did not intend such a "lack of nationwide uniformity" in a statute applicable to all Indian tribes). In *Shaffer v. Heitner*, this Court held that "Fourteenth Amendment rights cannot depend on the classification of an action *in rem* or *in personam* since that is 'a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.'" 433 U.S. at 206 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950)). For the same reason, the application of tribal sovereign immunity cannot depend on a state court's classification of an action as *in rem* or *in personam*.

Finally, *County of Yakima* itself contains language leaving open the extent of the State's procedural and substantive rights to collect taxes on the Reservation. The Court, even while recognizing the State's authority to impose taxes on fee lands on the Reservation, acknowledged that legal immunities may prevent the State from doing so. Rejecting an analogy between its ruling and the "*Moe*-condemned 'checkerboard,'" the Court in *County of Yakima* stated that its ruling would actually reduce regulatory fracturing by allowing the county tax assessor to do on the Reservation what he or she did anywhere else in the county: Make "parcel-by-parcel determinations" of the status of potentially taxable lands on the Reservation, "to take account of immunities or exemptions enjoyed, for example, by

federally owned, state-owned, and church-owned lands." 502 U.S. at 265. *County of Yakima* thus recognized that immunities or exemptions may still apply to lands owned by sovereigns, thereby foreclosing the conclusion that state authority to tax tribally-owned fee land necessarily implies that the tribe can be sued over ownership of that land. Rather, the case recognizes that the power to tax does not include the power to override immunities held by the landowner. The lower court's reliance on *County of Yakima* to define the scope of tribal immunity is therefore wrong. And so are other state court cases that come to the same conclusion. *See Cass Cnty. Joint Water Res. Dist.*, 643 N.W.2d at 691-93; *Anderson*, 929 P.2d at 385-87; *Miccosukee Tribe of Indians*, 78 So.3d at 33-34.

As we show next, tribal sovereign immunity applies to *in rem* proceedings, just as it does to federal and state-owned property.

II. TRIBAL SOVEREIGN IMMUNITY APPLIES TO *IN REM* ACTIONS.

A. As This Court Held In *Idaho I,* State Sovereign Immunity Bars An Action That Seeks To Divest A State of Its Rights To Property, And That Ruling Also Applies Conversely To This Case.

Sovereign immunity bars actions against a sovereign and its property. The longstanding rule is that "there is no distinction between suits against the government directly, and suits against its property." *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868).

That rule applies to actions brought by a tribe against a State, as demonstrated by *Idaho v. Coeur d'Alene Tribe of Idaho* (*Idaho I*), 521 U.S. 261 (1997). In that case, the Coeur d'Alene Tribe filed an action

against the State of Idaho, state agencies, and state officials, asserting that Idaho had no valid claim of title to the submerged lands under navigable waters within the exterior boundaries of the Coeur d'Alene Reservation, and seeking prospective relief to block the State from continuing to claim title. *Id.* at 264-65. The Court readily concluded that sovereign immunity barred the Tribe from pursuing the action against the State, relying on its holding in *Blatchford* that "[s]ince the plan of the Convention did not surrender Indian tribes' immunity for the benefit of the States, . . . the States likewise did not surrender their immunity for the benefit of the tribes." *Idaho I*, 521 U.S. at 268 (citing *Blatchford*, 501 U.S. at 779-82). Nor could the Tribe avoid the State's immunity by suing state officials in their individual capacities under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), because the case was "the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281. Although the Court recognized that the Tribe had its own claim to the lands, and that on the merits the lands were "just as necessary, perhaps even more so, to its own dignity and ancient right" as they were to the State, *id.* at 287, the dispositive inquiry was the relationship between the lands and state sovereign immunity, *id.* Given that, if the Tribe were to prevail, "Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," *Young* could

not properly provide an exception to state sovereign immunity in that case. *Id.*[7]

Idaho I compels the same result for the Tribe here that it did for the State there. Under settled law, Indian tribes are immune from suits brought in state court by private parties. *Bay Mills*, 134 S. Ct. at 2031. And here, as in *Idaho I*, an alternative theory is relied on to circumvent that immunity and divest the sovereign of its interests in the property at issue. Furthermore, the instant action is not the "functional equivalent" of a quiet title action, as it was held to be just such an action by the court below, *Lundgren,* 389 P.3d at 572-73, and the decision below purports to divest the Tribe of any interest in the property, *id.* at 574-75 (concluding that the Tribe has no interest in the property). To divest a tribe of its interests in fee lands is to interfere directly with the tribe's sovereign interests in its governmental operations, its patrimony, and its "dignity and ancient right[s]" as a sovereign. That is so because tribes purchase fee lands for many purposes, including providing services to members both on- and off-reservation, engaging in economic enterprises that provide revenue for governmental operations, protecting cultural and archaeological resources, and

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[7] In a follow-up case brought by the United States against Idaho, *Idaho v. United States (Idaho II)*, 533 U.S. 262 (2001), the Court found on the merits that, under an exception to the equal footing doctrine, the submerged land had been reserved by the United States in trust for the Tribe, *id.* at 274-81. That finding was based on the Tribe's historical reliance on the waters for subsistence, transportation, recreation, and cultural activities, *id.* at 265 (citing *United States v. Idaho*, 95 F. Supp. 2d 1094, 1095-96, 1099-1100 (D. Idaho 1998), *aff'd*, 210 F.3d 1067 (9th Cir. 2000)), and their historical demands that the United States include those lands and waters in the Reservation for the Tribe's use, *id.* at 265-66, 275-76.

regaining aboriginal lands lost to cession and settlement. *See* Interest of *Amici*, *supra*. Accordingly, the principles that blocked a lawsuit that sought to circumvent state sovereign immunity in *Idaho I*, also protect tribes from a lawsuit that seeks to circumvent tribal sovereign immunity, based on a "novel distinction" without support in the law. *See Cayuga Indian Nation*, 761 F.3d at 221 (citing *Bay Mills*, 134 S. Ct. at 2031).

Furthermore, because this case deals with tribal immunity from suit in state courts, rather than a State's authority over another State's lands, the decision in *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), has no application here, and the state courts that relied on it to conclude that tribal immunity does not apply to *in rem* proceedings erred (cited in *Cass Cnty. Joint Water Res. Dist.*, 643 N.W.2d at 693-94 (quoted in *Miccosukee Tribe of Indians*, 78 So.3d at 33-34)). In *City of Chattanooga*, the Court found that the City of Chattanooga, Tennessee, could condemn land in the City that was owned by the State of Georgia and used by a Georgia state-owned railroad company. 264 U.S. at 479-80. As this Court later made clear in *Nevada v. Hall*, 440 U.S. 410 (1979), States are not immune from suit in another State's courts, *id.* at 425,[8] which results

[8] Although *Hall* was a tort case involving the conduct of a state employee, rulings since have clarified that it applies in any case where the exercise of a State's adjudicatory authority over another State would "pose[] no substantial threat to our constitutional system of cooperative federalism." 440 U.S. at 424 n.24. *See, e.g.*, *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 497-98 (2003) (allowing suit in Nevada state court against California tax collecting agency for torts arising from agency's audit of former California resident living in Nevada); *Montana v. Gilham*, 133 F.3d 1133, 1138 (9th Cir. 1998) (*Hall* only limited by whether state court jurisdiction would not interfere with another state's

from the mutual consent to sue given by the States at the constitutional convention, *see Blatchford*, 501 U.S. at 779-82. So even if *City of Chattanooga* could be said to have had implications for one State's sovereign immunity in another State's courts at an earlier time, its ruling on that score has been superseded by *Hall*. In addition, distinctly different principles apply to Indian tribes, which as a matter of federal law are immune from suits brought in state court, including those arising from commercial activities on off-reservation lands, *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 758). And the Tribes did not surrender their immunity to the States in the plan of the Convention. *Blatchford*, 401 U.S. at 779-82. *City of Chattanooga* thus has no application to the federal law of tribal sovereign immunity.[9]

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sovereign responsibilities); *Faulkner v. Univ. of Tenn.*, 627 So.2d 362, 365-66 (Ala. 1992) (allowing contract and tort claims in Alabama court against Tennessee public university for conduct arising in Tennessee); *Struebin v. State*, 322 N.W.2d 84, 86 (Iowa 1982) (*Hall* limited by whether a State's "sovereign prerogatives and responsibilities" would be threatened, not by its facts; allowing suit in Iowa state court against Illinois for Illinois's alleged negligence in maintaining a road in Iowa pursuant to inter-state contract); *Ehrlich-Bober & Co. v. Univ. of Houston*, 404 N.E.2d 726, 729 & n.2 (N.Y. 1980) (permitting contract claims in New York court against Texas public university for conduct arising in New York).

[9] As *City of Chattanooga* dealt with the State's power of eminent domain, it is inapplicable here for that reason as well. Here, private parties seek to sue a sovereign tribe to adjudicate title to land. This case does not implicate the special sovereign interests underlying the exercise of eminent domain, which justified Tennessee's authority over Georgia's land. 264 U.S. at 480 (describing eminent domain as "essential to the life of the state" and "extend[ing] to all property within the jurisdiction of the state"). The same is true of the other state cases that rely on

B. Decisions Of This Court Establishing That Federal And State Sovereign Immunity Apply To *In Rem* Proceedings, Direct The Same Result With Respect To Tribal Sovereign Immunity.

Applying tribal sovereign immunity to bar *in rem* actions brought in state court is also supported by a long line of decisions holding that sovereign immunity both protects the government from suit and protects "its possession from disturbance by virtue of judicial process." *The Davis*, 77 U.S. (10 Wall.) 15, 21 (1869). *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 505 (1998) (citing *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 709-10 (1982) (White, J., concurring in judgment in part and dissenting in part)). If the effect of a lawsuit would be to deprive the government of its property, even if the suit is not against the government directly, it is barred by sovereign immunity because it is "in substance and effect one against the [government] without its consent." *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962).

This Court's consideration of claims to government property show that dispossession of the government's property is an affront to sovereign authority that, when sought by suit, is barred by sovereign immunity. *Id.*; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949). In *Larson*, the Court

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City of Chattanooga to assert state jurisdiction over *in rem* actions against tribes. In both cases, a State sought to condemn land owned by a tribe for a public purpose. *Cass Cnty. Joint Water Res. Dist.*, 643 N.W.2d at 688; *Miccosukee Tribe of Indians*, 78 So.3d at 32. So, even if *Cass County Joint Water Resources District* and *Miccosukee Tribe* correctly relied on *City of Chattanooga* – and they did not – none of these decisions are within the ambit of this case.

resolved then-existing conflicts in the sovereign immunity case law by explaining why sovereign immunity protects government officials from suit over the disposition of the sovereign's property. *Malone*, 369 U.S. at 646 (citing *Larson*, 337 U.S. at 701). The *Larson* Court dismissed a suit against a federal officer in his individual capacity, in which the plaintiff sought to establish his ownership, under a government contract, of coal in the government's possession and to enjoin the officer to deliver the coal to him. 337 U.S. at 684. The Court dismissed the suit because the relief sought was "against the sovereign" since it sought to determine the plaintiff's rights in the coal vis-à-vis the government, *id.* at 689 n.9, and require the government to deliver that coal to the plaintiff, *id.* at 689. The Court held that such a suit cannot be maintained unless the government officer is acting outside his or her lawful, delegated authority or the plaintiff's constitutional rights have been violated.[10] *Id.* at 689-90. Even if either of those two exceptions apply, sovereign immunity may bar the suit if it "will require . . . the disposition of unquestionably sovereign property." *Id.* at 691 n.11 (citing *North Carolina v. Temple*, 134 U.S. 22, 26 (1890) (dismissing suit against state official for the disbursement of state funds)).

In *Malone,* the Court applied this rule to dismiss a suit in which the plaintiff sought to eject federal

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[10] This qualification explains the apparently contradictory conclusion in *United States v. Lee*, 106 U.S. 196, 210, 215-16, 219 (1882), that officers of the United States could be sued to recover property in the United States' possession. For, as *Larson* explains, the United States had obtained the land held there by an unconstitutional taking, and so *Lee* falls into the exception for suits to vindicate constitutional rights. 337 U.S. at 696-97 (citing *Lee*, 106 U.S. at 219).

officials from land the government had acquired by deed, based on the theory that the plaintiff was the lawful owner of the land. *Malone*, 369 U.S. at 643-44 & n.2, 648. The plaintiffs argued that the United States had purchased the property from third party sellers who did not actually hold legal title to the land at the time of purchase. *Id.* at 644 n.2. Because the plaintiffs did not allege any violations of the constitution or that the defendant officer had no statutory authority to occupy the land, their suit was dismissed. *Id.* at 648.

Larson and *Malone* show that the critical question in determining the applicability of a sovereign's immunity to an action is whether the sovereign is the real party in interest. That inquiry turns on whether the relief sought is effectively against the sovereign, because it seeks an adjudication of ownership of the government's money or property. *See Larson*, 337 U.S. at 688-89; *Malone*, 369 U.S. at 647-48; *Temple*, 134 U.S. at 26. This basic principle was reaffirmed in *Idaho I*, 521 U.S. at 269-70, 282-87, and this Court's decisions, as well as lower federal court decisions, show that it has broad application to *in rem* cases.

This Court recently applied the rule that a suit to adjudicate ownership of a sovereign's property is generally barred by sovereign immunity to admiralty proceedings in *Deep Sea*, 523 U.S. at 505-06. *Deep Sea* was an *in rem* case in which a salvor brought an action asserting ownership of a shipwreck in California's territorial waters. *Id.* at 495-96. California intervened and asserted ownership of the shipwreck under the Abandoned Shipwrecks Act, 43 U.S.C. §§ 2101-2106, which gives a State title to abandoned shipwrecks on, or embedded in, its submerged lands. 523 U.S. at 496. California moved to dismiss the salvor's

action on the basis of state sovereign immunity, arguing that it possessed title to the wreck under federal and state law and therefore the salvor's *in rem* action was actually against the State. *Id.* at 496-97. The Court ruled that the case should not be dismissed. It recognized the ancient rule that proceedings *in rem* against property held by a sovereign are forbidden "in cases where, in order to sustain the proceeding, the possession of the [sovereign] must be invaded under process of the court . . . ." *Id.* at 507 (quoting *The Davis*, 77 U.S. (10 Wall.) at 20). Under this rule as applied in the admiralty *in rem* context, courts lack jurisdiction over a proceeding against a sovereign's property when the sovereign can show "actual possession" of the *res*. *Id.* (citing *The Siren*, 74 U.S. (7 Wall.) at 159 (describing "exemption of the [federal] government from a direct proceeding *in rem* against the vessel whilst in its custody")); *The Pesaro*, 255 U.S. 216, 219 (1921) (applying same rule to foreign-owned vessel)). California failed to qualify for immunity because it had merely asserted a colorable claim to the shipwreck and had not established possession of the wreck as a matter of admiralty law. *Id.* at 498, 507.[11]

The lower courts have consistently interpreted *Deep Sea*, and the cases on which it relies, to bar *in rem* admiralty proceedings to adjudicate ownership of shipwrecks or other property in the sovereign's possession. For instance, in *Fairport International Exploration, Inc. v. Shipwrecked Vessel, Captain Lawrence*, 177 F.3d 491, 497-98 (6th Cir. 1999), the

[11] As discussed in Petitioner's brief at 28 n.2, this manner of establishing possession in admiralty law does not apply in the real property context where a sovereign has established possession by obtaining title to the property, *see Malone*, 369 U.S. at 644, as the Petitioner did here by warranty deed, Pet.'s Br. at 5.

Sixth Circuit held that the State could not assert sovereign immunity in a case to adjudicate ownership of a shipwreck, because the shipwreck remained embedded in the lake bed during the proceedings and the State did no more than assert a colorable legal claim to it. And in *Aqua Log, Inc. v. Georgia*, 594 F.3d 1330, 1335-37 (11th Cir. 2010), the Eleventh Circuit held that the State could not raise sovereign immunity against an *in rem* proceeding to determine ownership of submerged logs on lands under navigable waters because, although it patrolled the waters over the logs, located them with sonar, and purported to extend state law over the terms of their ownership, it never established physical possession of the logs. *See*, *e.g.*, *Ne. Research, LLC v. One Shipwrecked Vessel*, 729 F.3d 197, 207 n.14 (2d Cir. 2013); *Great Lakes Exploration Grp., LLC v. Unidentified Wrecked & (For Salvage-Right Purposes), Abandoned Sailing Vessel*, 522 F.3d 682, 688 (6th Cir. 2008). The corollary to these holdings is that a sovereign has immunity from *in rem* admiralty proceedings against property that it possesses under admiralty law.

The rule that sovereign immunity applies to *in rem* proceedings has also been applied outside of the admiralty context. In *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 446-47, 454 (2004), this Court held that States are not immune from proceedings in bankruptcy to discharge a student loan debt, owed by a private party to the State, *id.* at 446-47. In so holding, the Court analogized bankruptcy *in rem* proceedings to admiralty *in rem* proceedings, *id.*, and held that state sovereign immunity was not implicated because the proceeding was an *in rem* action where the Government was not in possession of property. *Id.* at 454-55. *See In re Ellett*, 254 F.3d 1135, 1141 (9th Cir.

2001) (comparing *Deep Sea*'s principles of admiralty *in rem* to bankruptcy *in rem*).

Additionally, Congress has recognized that the federal government's sovereign immunity must be waived in order for it to be bound by general stream adjudications of water rights, *see* 43 U.S.C. § 666 (waiving United States' immunity from general stream adjudications in state courts), which is necessary because water adjudications are "in the nature of" *in rem* proceedings, *Nevada*, 463 U.S. at 144; *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013-14 (9th Cir. 1999); *see Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976) ("actions seeking the allocation of water essentially involve the disposition of property").

These decisions establish that federal and state sovereigns are immune from *in rem* suits that seek possession of the sovereign's property, as much as if the suit was brought against the sovereign directly. And the common law principles on which they are based apply to tribal immunity as well, and bar the Respondents' suit.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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