

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UPPER SKAGIT INDIAN TRIBE,)
 Petitioner,)
 v.) No. 17-387
SHARLINE LUNDGREN, ET VIR.,)
 Respondents.)

Pages: 1 through 61

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5 v.) No. 17-387
6 SHARLINE LUNDGREN, ET VIR.,)
7 Respondents.)
8 - - - - -
9 Washington, D.C.
10 Wednesday, March 21, 2018

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

15
16 APPEARANCES:
17 DAVID S. HAWKINS, ESQ., Sedro-Woolley, Washington;
18 on behalf of the Petitioner.
19 ANN O'CONNELL, Assistant to the Solicitor General,
20 Department of Justice, Washington, D.C.; on
21 behalf of the United States, as amicus curiae,
22 in support of the Petitioner.
23 ERIC D. MILLER, ESQ., Seattle, Washington; on
24 behalf of the Respondents.

25

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

2 (10:11 a.m.)

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

6 Mr. Hawkins.

7 ORAL ARGUMENT OF DAVID S. HAWKINS

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

12 JUSTICE GINSBURG: Because of the
13 adverse possession?

14 MR. HAWKINS: Correct.

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

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

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

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

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

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

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

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

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

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

5 MR. HAWKINS: Uh-huh.

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

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

21 MR. HAWKINS: Yes.

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

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

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

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

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

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

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

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

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

3 MR. HAWKINS: Sovereign immunity
4 applies in that situation --

5 JUSTICE BREYER: All right.

6 MR. HAWKINS: -- because the action is
7 against the -- the tribal government's
8 interests, and your holdings in Bay Mills
9 specifically provides that an action against
10 the tribe is barred. It's Congress's --

11 CHIEF JUSTICE ROBERTS: All right.
12 With respect to --

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

19 He says: I own the lot next to my
20 house. I have my swimming pool there. He's
21 quite wealthy.

22 (Laughter.)

23 JUSTICE BREYER: The tribe members
24 say: No, this is ours.

25 Now how is that dispute -- since that

1 decision that I joined, how is that dispute,
2 kind of dispute which could arise all over the
3 place, how has it been resolved? I can't
4 believe there is no such thing in some form.

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

16 In the instances that you're
17 describing, it sounds as though the tribe's
18 claims probably are going to be somewhat
19 frivolous.

20 JUSTICE BREYER: Oh, no, I don't know
21 if they're frivolous. But suppose they are.
22 Suppose they are.

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

24 JUSTICE BREYER: Why doesn't the tribe
25 -- how do you get around sovereign immunity if

1 they are frivolous?

2 MR. HAWKINS: The -- the threshold
3 issue is whether or not the action is directed
4 against the tribe. The tribe has to establish
5 a prima facie basis that it has an interest.

6 Once that interest is established, as
7 in this instance, where we have registered
8 title, the -- the -- the court there would
9 immediately lose its jurisdiction and the case
10 should be dismissed.

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

19 That would be the end of the project,
20 would it not?

21 MR. HAWKINS: That potentially would
22 be the end of the project, yes. However, there
23 would be remedies available that the U.S.
24 Government could invoke, and it's important to
25 keep in mind that what Bay Mills stands for,

1 the prop -- specifically affords Congress the
2 ability to step in and act in this situation.

3 JUSTICE GINSBURG: What about the --

4 CHIEF JUSTICE ROBERTS: You mentioned
5 Bay Mills a couple of times. What about
6 Footnote 8 in Bay Mills? There, it says we
7 have never specifically addressed "whether
8 immunity should apply in the ordinary way if a
9 tort victim, or other plaintiff who has not
10 chosen to deal with a tribe, has no alternative
11 way to obtain relief."

12 Doesn't that distinguish your reliance
13 on Bay Mills?

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

23 CHIEF JUSTICE ROBERTS: Well, how does
24 that work in the -- yes, an individual action,
25 I remember that from Lewis and Clarke, but how

1 does that work here? Are the Lundgrens
2 supposed to sue anybody from the tribe who goes
3 on to the area that they claim to have adverse
4 possession of?

5 MR. HAWKINS: If they were able to
6 frame the -- the claim properly, Lewis v.
7 Clarke may provide them relief in that
8 instance, yes.

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

16 MR. HAWKINS: I understand --

17 CHIEF JUSTICE ROBERTS: Is that a
18 valid -- a viable alternative remedy to a quiet
19 title action?

20 MR. HAWKINS: It is not. But, again,
21 I get back to the point that this Court has
22 continually affirmed as relates to the
23 significance of sovereign immunity.

24 This Court --

25 JUSTICE KAGAN: Well, Mr. Hawkins --

1 JUSTICE GINSBURG: Does it make any
2 difference that the -- that the Lundgrens had
3 no notice when they bought the property that
4 there was any tribe in the picture? I could
5 see if the Lundgrens bought the property and a
6 tribe is already there.

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

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

21 JUSTICE GINSBURG: No, I -- I mean
22 there are no proceedings in court.

23 MR. HAWKINS: But -- but -- but -- but
24 if there is no proceedings that are at issue
25 and the tribe purchases a property, the -- the

1 tribe is exercising the rights that it has to
2 defend its claim against the Lundgrens.

3 Keep in mind the Lundgrens assert that
4 they've had this property for over 40 years,
5 never paying property taxes on it, never taking
6 any action for that period of time to legally
7 establish their claims. And now, all of a
8 sudden, when the tribe comes in to title, they
9 assert that they have a right.

10 CHIEF JUSTICE ROBERTS: Well --

11 JUSTICE GORSUCH: Counsel --

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

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

24 JUSTICE KAGAN: Mr. Hawkins, I mean, I
25 guess the question is, what is sovereign

1 immunity and what does it entail? Even beyond
2 the footnote in Bay Mills that the Chief
3 Justice referenced, I think when you look at
4 language of the kind that appears in Bay Mills
5 and in other cases, what -- which says that,
6 you know, if Congress wants to change it, it's
7 up to Congress to change it, but the question
8 is, what is the "it"?

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

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

23 MR. HAWKINS: So, if you look at the
24 judicial history of the immovable property
25 issue and the -- in particular, as it pertains

1 to the cases involving foreign nations, the
2 Court took action at the guidance of the State
3 Department.

4 And the Court has consistently
5 deferred to the State Department, the political
6 branches, as to whether or not it will exercise
7 jurisdiction or it's prudent to exercise
8 jurisdiction over those foreign sovereigns.

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

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

24 JUSTICE GORSUCH: Counsel -- counsel,
25 along those lines, do you think you'd have a

1 stronger case if the land had been taken into
2 trust? And the land is purchased, as I
3 understand it, in 2013. I'm curious why it
4 hasn't been taken into trust.

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

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

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

23 JUSTICE KENNEDY: Of course, there the
24 parties consented to deal with the tribe. They
25 knew they were dealing with a tribe.

1 MR. HAWKINS: That is correct, Your
2 Honor.

3 JUSTICE KENNEDY: And they -- and they
4 could have put in the note if they wanted a
5 waiver of sovereign immunity or not. So this
6 is different.

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

9 MR. HAWKINS: Yes.

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

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

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

20 MR. HAWKINS: So --

21 JUSTICE GORSUCH: -- the tribe's land,
22 just as it might be France, now it's -- it's --
23 it's titled under the state's laws and is still
24 part of the state. Does that -- does that
25 resonate with you at all? And if that doesn't

1 make sense, tell me why not.

2 MR. HAWKINS: No, I -- I -- I think I
3 understand the question, Your Honor. And the
4 -- and the Minnesota case is a situation where
5 you have the land taken into trust and
6 Minnesota then sues the U.S., and the Court
7 finds that it's barred by sovereign immunity
8 because the land -- the land is held in trust
9 on the -- for the benefit of the tribe.

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

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

24 If you had more time, what more would
25 you argue to us? What more could you show us

1 to prove that you were right that this is not a
2 part of the common law?

3 Your suit -- you made an argument in
4 saying it's a matter of -- of practice, not
5 common law, but what else could you show us if
6 we gave you more time?

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

16 And their --

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

22 MR. HAWKINS: We would like -- we
23 would take the time to look at the application
24 as it relates to other tribes specifically, but
25 also how the state has -- the political

1 branches have been involved in that process and
2 how the U.S. has addressed it.

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

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

11 MR. HAWKINS: That is correct, Your
12 Honor.

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

17 MR. HAWKINS: That is -- that is our
18 position.

19 JUSTICE BREYER: Well, I don't know.
20 A sovereign nation, I think since about 1750,
21 there's been an exception for a sovereign
22 nation for immovable property. And, therefore,
23 if the nation of Canada comes and -- and has a
24 piece of land in North Dakota and the person
25 who lives there says, I'm sorry, this belongs

1 to me, not to Canada, and Canada says no, my
2 understanding was there has been a
3 long-standing exception to sovereign immunity.

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

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

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Ms. O'Connell.

14 ORAL ARGUMENT OF ANN O'CONNELL
15 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
16 IN SUPPORT OF THE PETITIONER

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

19 I'd like to start with Justice Kagan's
20 questions about what is the baseline here about
21 what sovereign immunity entails. The baseline
22 is sovereign immunity from suit.

23 This is the Alexander Hamilton quote
24 from the Federalist Papers: "It is inherent in
25 the nature of sovereignty not to be amenable"

1 to suit without consent.

2 The immovable property exception is an
3 exception that applies to other sovereigns, but
4 that's because an exception to that general
5 rule has been made.

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

11 JUSTICE BREYER: Well, you say it's
12 been made --

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

20 MS. O'CONNELL: Correct. It was
21 recognized by international practice as a
22 matter of what the executive branch recognized
23 when it was asserting immunity --

24 JUSTICE KENNEDY: And so why doesn't
25 that same principle allow the Court to

1 recognize that there's a limit to sovereign
2 immunity here under the very same principle?

3 MS. O'CONNELL: Well, I -- I think
4 that's because it is -- it is up to Congress --
5 this Court has consistently said it's up to
6 Congress to control and make exceptions to the
7 immunity from suit of Indian tribes. So --

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

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

21 JUSTICE BREYER: But it doesn't say in
22 the -- in the -- I mean, my law clerk has here,
23 which I guess he got out of the briefs, I don't
24 know, we have *Vattel*, *Cornelius Van Bynkershoek*
25 in 1744, as well as *Lauterpacht*, who's

1 certainly big authority. They don't talk about
2 exceptions. They just say a prince -- that's
3 Bynkershoek -- he says -- he says -- or maybe
4 it's the other one -- he says in -- in
5 sovereign -- several sovereigns have fiefs and
6 other possessions in the territory of another
7 prince. In such case -- cases, they hold them
8 in the manner of private individuals.

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

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

25 JUSTICE KAGAN: But if you look at two

1 cases, Ms. O'Connell, one is Schooner Exchange,
2 which talks about foreign states, and then the
3 other is this Georgia v. Chattanooga, which is
4 individual states in another state's
5 jurisdiction, I mean, both of those seem to be
6 indicating that there's this long-standing rule
7 that when the prince goes someplace else and
8 buys land there, he's just going to be treated
9 like anybody else.

10 MS. O'CONNELL: I --

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

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

20 MS. O'CONNELL: That, Justice Kagan, I
21 think is an exception to the general rule of
22 immunity from suit. This Court called it an
23 exception in Permanent Mission of India.
24 Congress certainly called it an exception in
25 the Foreign Sovereign Immunities Act, where it

1 lays out that the baseline rule is that
2 sovereigns are completely immune from suit
3 unless an exception applies.

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

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

24 JUSTICE KENNEDY: Well, of course, you
25 call it, again, as Justice Kagan's indicated,

1 you call it an exception. Others may call it
2 just a limit to the general rule.

3 MS. O'CONNELL: Right. But I think
4 the -- the point I --

5 JUSTICE KENNEDY: So that's just
6 playing with words.

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

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

23 MS. O'CONNELL: They're not exempt
24 from the regulatory jurisdiction of the state,
25 if it's just fee land, but the -- the immunity

1 from suit would still attach.

2 JUSTICE GORSUCH: Ms. O'Connell, I --
3 I have been hoping to hear from you about what
4 the baseline rule was versus the exceptions.
5 And I'm still hopeful we might get an answer to
6 that question.

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

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

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

1 solution. I think there would be --

2 CHIEF JUSTICE ROBERTS: Ms.
3 O'Connell, one -- there was one sentence in your
4 brief that really leapt off the page, for me
5 anyway. It's the one between pages 23 and 24
6 where you say the Respondents, the Lundgrens,
7 you're asking, well, what alternatives do they
8 have? And you say the Lundgrens could, for
9 example, log trees on the disputed strip,
10 commence building a structure, or take other
11 similar actions that would induce Petitioner to
12 file suit.

13 Is that really what you want them to
14 do? There's a dispute about this piece of
15 property and you say: Well, go pick a fight.
16 Go cut down some trees.

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

18 CHIEF JUSTICE ROBERTS: That's a
19 surprising position for -- for the government
20 to take.

21 MS. O'CONNELL: That -- that
22 alternative way of resolving the dispute is
23 laid out in this Court's decision in Block
24 versus North Dakota. In that case, the Court
25 said, even though the state's claim against the

1 United States to quiet title to land was barred
2 by the statute of limitations, that didn't mean
3 the title dispute was resolved. The state
4 could continue to assert its right to the
5 property and force the sovereign to sue you.
6 So --

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

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

17 (Laughter.)

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

25 And so the -- the Lundgrens could

1 continue to assert their -- their ownership of
2 the property and force the tribe to quiet
3 title. And I think one other thing I'd like to
4 point out there is that the -- the land into
5 trust process is another way that this dispute
6 could still be resolved in this particular
7 case. The tribe bought this land with the
8 intention of asking the United States to take
9 the land into trust for the Indian tribe. In
10 that process, the tribe has to present the --
11 the Secretary of the Interior with its deed and
12 with title insurance, and then the Secretary
13 conducts an investigation to see if there are
14 any infirmities to the title.

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

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

25 MS. O'CONNELL: If the --

1 JUSTICE GORSUCH: If the land were --

2 MS. O'CONNELL: If the Secretary took
3 the land into trust?

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

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

14 JUSTICE BREYER: So -- so what -- what
15 -- I mean, Kiowa was 20 years ago. I did
16 really think Congress would do something. It's
17 done nothing. All right.

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

25 MS. O'CONNELL: Congress does step in

1 from time to time. So there are certain
2 statutes where Congress has abrogated tribal
3 sovereign immunity with respect to specific
4 water settlement agreements or required the
5 tribe to waive its immunity in order to
6 exercise statutory jurisdiction under various
7 statutes, but, you know, the -- I think the
8 Footnote -- the Footnote 8 problem in Bay Mills
9 doesn't come up here because, unlike a tort
10 plaintiff that's just out of luck if it can't
11 sue the tribe because of immunity, title is not
12 settled here. There are other options for
13 resolving who owns the property than suing the
14 tribe.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Miller.

19 ORAL ARGUMENT ON BEHALF OF ERIC D. MILLER

20 ON BEHALF OF THE RESPONDENTS

21 MR. MILLER: Mr. Chief Justice, and
22 may it please the Court:

23 The core attribute of sovereignty is
24 the authority to adjudicate disputes over the
25 ownership of real property within the

1 sovereign's territory. That authority is not
2 displaced simply because another sovereign
3 claims an interest in the property.

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

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

16 MR. MILLER: We -- we are defending
17 the holding of the court below, set out at
18 pages 7A to 11A of the Petition Appendix under
19 the heading "In Rem Jurisdiction," and what the
20 court below said is that the courts of
21 Washington have in rem jurisdiction to resolve
22 disputes over real property within the State of
23 Washington.

24 And I think to -- to understand what
25 that means, you have to look at this court's

1 decision in Shaffer against Heitner, and that
2 explains that the difference between an in rem
3 and an in personam action, it's not about
4 pleading or who the defendant is or how you
5 write the caption, there's a substantive
6 difference and it turns on the source of the
7 court's authority --

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

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

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

24 MR. MILLER: Well, we -- we agree
25 that, you know, Yakima was a -- a statutory

1 case. Its holding is not controlling here.

2 JUSTICE GORSUCH: Okay, all right.
3 That's -- that -- I appreciate that concession.

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

8 JUSTICE GORSUCH: But -- fine. But
9 you agree that Yakima doesn't control?

10 MR. MILLER: Yes, yes.

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

19 MR. MILLER: Well, a couple reasons,
20 Your Honor.

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

1 it has two parts --

2 JUSTICE GORSUCH: No, I -- I
3 understand that. I spot you all of that. My
4 question, though, remains, you've raised a new
5 ground for defending the result below and
6 abandoned the ground that was actually
7 asserted.

8 This Court doesn't normally resolve
9 questions like that in the first instance.
10 Normally, it's a question of review, not first
11 view. Why shouldn't we exercise discretion
12 here and wait?

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

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

22 MR. MILLER: -- concepts that --

23 JUSTICE KAGAN: -- that's quite true,
24 Mr. Miller, unless -- I mean, tell me if I'm
25 wrong, but I made a little Venn diagram for

1 myself, and it turns out that immovable
2 property and in rem jurisdiction, there's a
3 large sphere of overlap, but there are
4 definitely places where the two do not overlap.

5 So, you know, you have your in rem
6 about land, that's this sphere of overlap, but
7 you can have immovable property that the action
8 is about land and have an in personam suit,
9 that -- tjat would be a typical trespass,
10 something like that.

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

19 So I think that there are real
20 differences in the scope of the immovable
21 property exception on the one hand and an in
22 rem exception on the other hand. And -- and,
23 clearly, the Washington court talked about the
24 in rem exception. Now you're coming in and you
25 have an extremely strong argument about this

1 immovable property rule, but it's not the same
2 argument that the court in Washington made.

3 It's not the same theory as Justice
4 Gorsuch pointed out. It's also just not the
5 same categorization.

6 MR. MILLER: With -- with respect,
7 Your Honor, I think it is the same
8 categorization and I -- I want to explain why.
9 So, to take the -- the second part of the Venn
10 diagram, it is true in the abstract that in rem
11 jurisdiction can be more than immovable
12 property, you know, in admiralty and bankruptcy
13 and so forth. But if you read the decision
14 below, there are 34 references to land.
15 There's nothing about boats.

16 The -- the first sentence of the
17 substantive part of the analysis begins with
18 the statement that the superior court has
19 jurisdiction in actions -- in rem jurisdiction
20 in actions involving real property. So the
21 fairest reading of the decision below is --

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

23 MR. MILLER: -- focused --

24 JUSTICE KAGAN: -- there's still a
25 question of where is the land, is the land on

1 the reservation or is the land outside the
2 reservation? If the land is on the
3 reservation, I took you to agree with the point
4 that that's the prince's land, and so the
5 prince would be immune from suit.

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

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

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

25 It just becomes a different question

1 if you ask about in rem exception, one which
2 does take you into this question of: What
3 happens if the land is on the reservation?
4 Then, if you say: Look, under the immovable
5 property rule, if one sovereign owns land in
6 another sovereign's territory, that sovereign
7 is subject to suit there.

8 That's not -- that's not a general in
9 rem question. It's a question about the
10 immovable property rule.

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

19 JUSTICE ALITO: If you're --

20 JUSTICE GINSBURG: Mr. Miller, it's
21 odd that you bring up Shaffer against Heitner
22 because the whole effort in that case was to
23 say: Yeah, there's an historical understanding
24 why we divided things into in personam and in
25 rem, but this Court said we wanted to make it

1 clear that the notion that things have any
2 rights is fanciful, anything is a claim
3 involving a person, that is, people have rights
4 in things.

5 So Shaffer said in the old style in
6 rem proceedings, you will have to meet --
7 you'll have to show the same kinds of
8 connections to the lawsuit that you would have
9 to show for in personam.

10 So the whole message, I think, of
11 Shaffer against Heitner is to break down that
12 distinction and say we recognize that
13 litigation is against contending humans or
14 entities and we should not have different
15 connections for in rem versus in personam.

16 MR. MILLER: Well, that -- we -- we
17 agree with that. But none -- nonetheless, what
18 that case teaches is that there can be
19 different sources of the Court's power. And --
20 and the Court addressed -- you know, obviously,
21 that case was about the quasi-in rem
22 jurisdiction where you're just using the
23 property as a hook to regulate some other
24 activity of -- of the defendant.

25 But the Court had an extended

1 discussion of the traditional in rem case that
2 we're talking about and said that, you know, in
3 a case where, you know, the dispute is about
4 property within the foreign state, the -- the
5 con -- minimum contacts test of International
6 Shoe is pretty much automatically going to be
7 qualified because of -- be satisfied because of
8 the state's strong interest in assuring the
9 marketability of property within its borders
10 and in providing a procedure for peaceful
11 resolution of disputes about the possession of
12 that property.

13 JUSTICE ALITO: I thought that the --
14 that Justice Ginsburg's question which started
15 off this line of questioning was essentially
16 this: Suppose there were no such thing as the
17 immovable property exception. It just doesn't
18 exist or doesn't apply in this situation.

19 Would the decision of the Washington
20 Supreme Court be correct based on the in rem
21 theory?

22 MR. MILLER: If there were -- I mean,
23 no, it would not.

24 JUSTICE ALITO: Okay.

25 MR. MILLER: But -- but I -- as I've

1 been explaining, the in rem theory, you know,
2 ultimately refers to the same underlying
3 concepts about the foreign's power. And -- and
4 we made this point in the brief.

5 JUSTICE KAGAN: But Mr. -- this is the
6 way I sort of see what's happened in this case,
7 and, again, you can tell me if I'm wrong. But
8 you took over this case and you read this
9 opinion and you said this is not a very good
10 theory.

11 (Laughter.)

12 JUSTICE KAGAN: There is a really good
13 theory here, and I'm going to make that. And
14 that's what good lawyers do. I'm not at all
15 criticizing you.

16 It's just it's a new theory and a new
17 -- it's not just even a new argument. It's
18 just a new -- it's a completely new way to win
19 this case.

20 MR. MILLER: Well -- I -- we -- we
21 took over the case and read the other side's
22 brief and Petitioner's brief says: Tribes
23 should be treated just like other sovereigns
24 and other sovereigns would be immune in this
25 kind of case. And we're saying: No, they

1 wouldn't. And --

2 JUSTICE GORSUCH: Well, but you --
3 that's not quite right, though, because we know
4 the United States would be immune from this
5 suit, right?

6 MR. MILLER: No, Your Honor, because
7 --

8 JUSTICE GORSUCH: Well, adverse
9 possession, I think we -- everyone acknowledges
10 that the United States would not be subject to
11 a suit like that. Maybe you can tell me why
12 that's wrong in response to Justice Ginsburg's
13 line of inquiry.

14 But it -- assuming it -- it could be
15 immune, here, if the land were in trust, it
16 would be the same as the United States' land.
17 And so it is possible that a sovereign could be
18 immune from this kind of suit, right?

19 MR. MILLER: If -- if the land were in
20 trust, the sovereign immunity of the United
21 States would bar the suit. But the reason I
22 say the United States would not be immune from
23 this kind of suit is this is a suit challenging
24 title to property owned by one sovereign within
25 the territory of another.

1 JUSTICE GORSUCH: I -- I understand.

2 MR. MILLER: So the analogy is --

3 JUSTICE GORSUCH: But if this were in
4 trust and, therefore, property of the United
5 States, you'd agree sovereign immunity would
6 bar this suit?

7 MR. MILLER: Yes, the -- the Quiet
8 Title Act's exception for trust or restricted
9 Indian lands would -- would bar it.

10 CHIEF JUSTICE ROBERTS: I -- as
11 Justice Kagan suggested, you know, you're --
12 you're a good lawyer, but you're not the one
13 who came up with this the first time in this
14 litigation, were you? I mean, the government
15 raised the immovable property argument in its
16 brief.

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

19 JUSTICE KAGAN: Did that happen
20 because you had a conversation with the
21 Solicitor General --

22 (Laughter.)

23 JUSTICE KAGAN: -- in which the
24 Solicitor General knew which sort of arguments
25 you were going to make?

1 MR. MILLER: We had a conversation
2 with the Solicitor General.

3 (Laughter.)

4 JUSTICE BREYER: Look, sending it back
5 -- sending it back, I think it is a -- we could
6 try to decide it or we could say: Review, not
7 first view, all right? So one of the things --
8 ways in my mind is this, that reading the words
9 "immunity from suit" broadly, extending where
10 not even Canada would dare to go, all right,
11 there's a lot of language in cases that does
12 say that. So I'm pretty curious, whether
13 anyone else is, but I'm pretty curious, for the
14 last 20 years, how have things gone?

15 I mean, Congress hasn't acted. Tribes
16 are in business across the country. There must
17 have been controversies. What's actually
18 happened? And -- and one argument for leaving
19 things alone is we've all survived. And an
20 argument the other way is it's very anomalous
21 to give the tribes more immunity than foreign
22 countries would have. All right.

23 So why shouldn't we send it back and
24 get all this out on the table and, you know, we
25 -- we have the views of other courts and we

1 also have a more extensive set of arguments?

2 MR. MILLER: Well, because what --
3 what has happened is that there is a conflict
4 in the lower courts, and these issues have been
5 fully ventilated in -- in the lower courts.

6 So the -- the other state high court
7 decision on the same side as Washington, is --

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

14 MR. MILLER: Well, the -- the other
15 state high court decision on the same side as
16 Washington is the North Dakota decision in Cass
17 County and Joint Water Resources District, and
18 that has a several-paragraph discussion of
19 Georgia against Chattanooga. So, you know, the
20 -- the concept is there in the -- in the
21 decisions below.

22 On the other side of the split, the
23 leading case is the Second Circuit's decision
24 in Oneida against Madison County. This Court
25 granted cert in that case back in 2010 and it

1 was mooted after the tribe waived immunity --

2 JUSTICE SOTOMAYOR: So --

3 MR. MILLER: -- but --

4 JUSTICE SOTOMAYOR: -- if we let it go
5 back, it's going to get aired fully and we'll
6 have a split --

7 MR. MILLER: Well, you --

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

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

17 JUSTICE SOTOMAYOR: -- in that first
18 instance.

19 MR. MILLER: -- because you already --
20 I mean, you already have a split in which these
21 issues have been ventilated in the lower
22 courts. You have an issue here that, you know,
23 the lower court's decision wasn't just County
24 of Yakima. You know, it was also about the
25 state's authority over land within the state.

1 And we made that point in the brief in
2 opposition at -- at page 6. We said that a
3 state's jurisdiction to control the ownership
4 and disposition of real property within its
5 territory is a core sovereign prerogative.
6 That's exactly the same idea, just less
7 memorably phrased, as -- as then-Judge Scalia's
8 observation in *Reclamantes* about a territorial
9 sovereign's primeval interest in controlling
10 real property within -- in its domain.

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

19 MR. MILLER: Well, we -- we -- we
20 would object, and under the land and trust
21 regulations, the existence of this -- you know,
22 the existence of this encumbrance on -- on the
23 title would -- should preclude taking the land
24 into trust, but if we -- if we succeed, we
25 convince the Secretary not to take the land

1 into trust, that doesn't actually get us
2 anything.

3 We -- we still have the tribe
4 asserting an interest in land that under state
5 law belongs to us. And that is a -- that's a
6 cloud on the title. It makes the title
7 non-marketable. And that is a -- a real
8 immediate and concrete injury for which
9 Washington law, like the law of pretty much
10 every state, provides a remedy.

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

19 And the tribe's position would create
20 situations, you know, like -- like this one
21 where that's impossible. The -- the tribe's
22 position would also undermine the ability of
23 the state to acquire land that's needed for
24 public use.

25 And -- and, Justice Alito, you asked a

1 hypothetical about blocking a condemnation
2 that's -- that's not hypothetical at all. The
3 North Dakota case I mentioned earlier was a
4 case where they were going to build a dam and
5 they had plotted out the area that was going to
6 be flooded by the dam. And the tribe purchased
7 one and a half acres in the middle of that area
8 and then attempted to assert its immunity to
9 block the entire project.

10 So that's -- and North Dakota went --
11 went the same way as Washington and rejected
12 that assertion of immunity, but that's the sort
13 of thing that one would expect to happen under
14 the rule.

15 JUSTICE ALITO: Does the record show
16 -- this parcel of land is about an acre, is
17 that correct?

18 MR. MILLER: That's correct, Your
19 Honor.

20 JUSTICE ALITO: Does the record show
21 what it's worth?

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

24 The -- as I said earlier, you know,
25 this argument has been presented in response

1 to, you know, the argument that Petitioner made
2 that they should be treated like other
3 sovereigns. And, you know, it's not just what
4 they said, it's what this Court has said.

5 As, Justice Kagan, you mentioned
6 earlier that, you know, under Bay Mills and
7 under Santa Clara Pueblo, what tribal sovereign
8 immunity is is the common law immunity from
9 suit traditionally enjoyed by sovereign powers.

10 So, you know, if the Court is going to
11 consider, you know, what cases fall within the
12 scope of sovereign immunity, it -- it has to do
13 that by reference to, you know, what the
14 traditional rules are for other sovereigns and
15 --

16 JUSTICE KAGAN: Yeah, I mean, as I
17 said, I -- I think you have a -- a pretty
18 strong, not -- you know, it looks pretty good
19 to me right now.

20 (Laughter.)

21 JUSTICE KAGAN: I -- I -- I am a
22 little bit worried about what Justice Sotomayor
23 said, which is, you know -- you know, if we
24 really looked harder, maybe there would be
25 something else that would cut against this

1 theory.

2 I'm a little bit worried that there
3 aren't amici who knew about this theory. The
4 only one who did is really the Solicitor
5 General, because the Solicitor General
6 generally talks to parties as the litigation
7 goes forward.

8 And I think it would be, I have to
9 say, just a bad way of dealing on our part if
10 we allowed parties to come in, even with the
11 best of faith, and said I have a new theory for
12 you that -- that really the only people who got
13 a chance to reply are the Petitioners in a
14 20-page yellow brief.

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

25 So anybody who is looking at the legal

1 landscape of what the circuit conflict was
2 would have been aware of these issues. Anybody
3 who read the decision below and -- and looked
4 at the Court's references to in rem
5 jurisdiction and asked themselves, you know,
6 what does it mean to say that a state has, you
7 know, in rem jurisdiction to exercise power
8 over the land within its sovereign domain would
9 have been aware of the issue.

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

20 You know, all of those things that
21 were out there, you know, should have put
22 parties on notice, you know, as -- and, in
23 addition, the -- you know, the foundational
24 principle that, as I said earlier, you know,
25 the scope of sovereign immunity under this

1 Court's precedents is determined by reference
2 to the law that governs other sovereigns.

3 I mean, just last year in Lewis, you
4 know, the Court applied that understanding of
5 how sovereign immunity works. That was a case
6 where the tribe came in and asserted that its
7 sovereign immunity barred the suit.

8 JUSTICE BREYER: That might be fair.
9 I mean, I see in terms of fairness between the
10 parties, but we have, you know, a dozen tribes
11 and the National Congress of -- of American
12 Indians and so forth, they all have an interest
13 in this.

14 And they'd have to say squarely why
15 should tribes have more immunity than Canada,
16 Mexico, whatever, and -- and I don't know that
17 they've addressed that squarely. Now they --
18 and that's -- that's -- that's what's sort of
19 moving me, to tell you the truth.

20 MR. MILLER: I mean, they -- they --
21 several -- certainly, Petitioners in their
22 opening brief, as well as several of the -- the
23 non-governmental amici did address that
24 question, and said that tribes should have the
25 same immunity as other sovereigns. So, you

1 know, they -- they have addressed that, I
2 think.

3 JUSTICE BREYER: That's on your side.
4 But do you think there -- there are also people
5 on their side?

6 MR. MILLER: Well, no, I'm -- I'm
7 referring to the people on their side. You
8 know --

9 JUSTICE BREYER: They got those
10 squarely in these three amici -- in the three,
11 you know, light green amicus briefs, which I
12 did look at, but I haven't looked at it with
13 that directly in mind.

14 MR. MILLER: I -- I don't know that
15 they all did, but we -- we -- we cited a number
16 of them in -- I think it would be early in --
17 in Section D of -- of our brief, we -- we cite
18 --

19 JUSTICE SOTOMAYOR: Mr. Miller, I -- I
20 -- you argue forcefully and you argue
21 intelligently, but I don't know why if it was
22 so obvious to everyone, and you didn't author
23 the brief in opposition to certiorari, but if
24 it was so obvious that this was the case, why
25 doesn't the brief mention the immovable

1 property exception?

2 MR. MILLER: Well, I --

3 JUSTICE SOTOMAYOR: It -- you know --

4 MR. MILLER: It -- it --

5 JUSTICE SOTOMAYOR: -- you say it's
6 obvious, but it obviously isn't obvious --

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

8 JUSTICE SOTOMAYOR: -- because neither
9 did the court below.

10 MR. MILLER: Yeah, it doesn't mention
11 it in terms -- I've -- I've cited to you the --
12 you know, the -- the qualification of the
13 question presented in -- in the brief in
14 opposition that refers to off-reservation land.

15 The passage on page 6 that refers to
16 the -- the sovereign prerogative of the state,
17 which is just a -- I mean, it is not explicit,
18 but it is another way of getting at that
19 concept.

20 I mean, if the -- if the Court has no
21 further questions, we ask that the judgment be
22 affirmed.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Hawkins, you have a minute left.

1 REBUTTAL ARGUMENT ON DAVID S. HAWKINS
2 ON BEHALF OF THE PETITIONERS
3 MR. HAWKINS: It is fundamentally
4 Congress's jobs, not ours, to determine whether
5 or how to limit tribal sovereign immunity.
6 That comes from Bay Mills, 2037.

7 Justice Breyer, you asked how have
8 things gone over 20 years and how are these
9 issues addressed? These issues are addressed
10 every day in contracts and in land transactions
11 by the tribe either agreeing to waive
12 voluntarily or negotiating how disputes will be
13 resolved.

14 So there is a mechanism, and that's
15 between the parties who understand their place.
16 Even in this situation, had the Lundgrens
17 offered an opportunity to negotiate in
18 recognition of the tribe's immunity from suit,
19 we would have not -- we would have engaged in
20 that same process here.

21 JUSTICE SOTOMAYOR: I'm sorry, there
22 was a negotiation, and I thought the
23 negotiation resulted in the tribe saying: No,
24 we want the land, we won't take money for it.
25 We won't exchange parcels for it. The

1 Lundgrens wanted to pay you money or exchange
2 parcels, and the tribe said no.

3 MR. HAWKINS: Justice Sotomayor --

4 JUSTICE SOTOMAYOR: So what were they
5 supposed to do next?

6 MR. HAWKINS: There was an -- there --
7 there -- what I said was if the Lundgrens
8 understood our immunity from suit, then the
9 negotiations would be different.

10 JUSTICE SOTOMAYOR: How? When you
11 said no.

12 MR. HAWKINS: Because they would not
13 have -- they would not have the opportunity to
14 seek the legal relief that they have sought
15 here. We respectfully ask that the judgment
16 below be reversed.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

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

21

22

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1	actually ^[5] 24:10 38:6 48:17 49:9 52:1 addition ^[1] 56:23 additional ^[1] 38:14 address ^[3] 11:15 56:12 57:23 addressed ^[7] 11:7 21:2 43:20 57:17 58:1 60:9,9 adjourned ^[1] 61:20 adjudicate ^[1] 34:24 admiralty ^[1] 40:12 adverse ^[8] 4:13 12:3 14:14,16 28:14 29:23 33:12 46:8 affect ^[1] 32:23 affecting ^[1] 4:18 affirmed ^[2] 12:22 59:22 affords ^[1] 11:1 ago ^[3] 27:11 33:15 55:24 agree ^[6] 36:21,24 37:9 41:3 43:17 47:5 agreeing ^[2] 26:14 60:11 agreements ^[1] 34:4 ahead ^[2] 3:23 17:11 aired ^[1] 50:5 Alabama ^[1] 7:15 Alexander ^[1] 22:23 ALITO ^[7] 10:11 42:19 44:13,24 52:25 53:15,20 Allotment ^[1] 36:15 allow ^[2] 16:20 23:25 allowed ^[1] 55:10 alone ^[1] 48:19 already ^[5] 13:6,15,19 50:19,20 alternative ^[4] 11:10 12:18 30:22 35:11 alternatives ^[1] 30:7 although ^[1] 38:15 amenable ^[1] 22:25 American ^[1] 57:11 amici ^[3] 55:3 57:23 58:10 amicus ^[4] 1:21 2:8 22:15 58:11 analogy ^[1] 47:2 analysis ^[4] 32:24 36:19 40:17 41:12 ANN ^[3] 1:19 2:6 22:14 anomalous ^[1] 48:20 another ^[11] 6:10,13 25:6,16 26:4 32:5,16 35:2 42:6 46:25 59:18 answer ^[5] 17:7 18:8 20:8 29:5 36:10 anticipation ^[1] 5:7 anybody ^[4] 12:2 26:9 55:25 56:2 anyway ^[1] 30:5 APPEARANCES ^[1] 1:16 appears ^[1] 15:4 Appendix ^[1] 35:18 applicable ^[1] 20:10 application ^[2] 20:12,23 applied ^[2] 18:16 57:4 applies ^[6] 8:4 19:13,14 21:5 23:3 27:3 apply ^[4] 11:8 13:17 25:20 44:18 appreciate ^[2] 36:10 37:3 appropriate ^[1] 18:16 area ^[3] 12:3 53:5,7	aren't ^[1] 55:3 argue ^[3] 19:25 58:20,20 arguing ^[1] 14:16 argument ^[25] 1:13 2:2,5,10,13 3:4,7 19:22 20:3,21 22:14 34:19 35:5 37:22,23,24 39:25 40:2 45:17 47:15 48:18,20 53:25 54:1 60:1 arguments ^[4] 36:22 37:17 47:24 49:1 arise ^[1] 9:2 around ^[1] 9:25 aside ^[1] 36:20 assert ^[6] 14:3,9 20:11 31:4 32:1 53:8 asserted ^[3] 13:19 38:7 57:6 asserting ^[4] 13:10 22:7 23:23 52:4 assertion ^[1] 53:12 Assistant ^[1] 1:19 assuming ^[1] 46:14 assuring ^[1] 44:8 attach ^[1] 29:1 attack ^[1] 3:17 attempted ^[1] 53:8 attribute ^[1] 34:23 author ^[1] 58:22 authority ^[10] 4:24 25:1 29:8 34:24 35:1 36:7,16 37:14 38:18 50:25 automatically ^[1] 44:6 available ^[1] 10:23 aware ^[3] 55:18 56:2,9 away ^[1] 19:18	best ^[2] 29:7 55:11 better ^[1] 5:12 between ^[5] 30:5 36:2 37:7 57:9 60:15 beyond ^[1] 15:1 big ^[1] 25:1 bit ^[3] 52:13 54:22 55:2 Block ^[2] 30:23 53:9 blocking ^[1] 53:1 boats ^[1] 40:15 borders ^[1] 44:9 both ^[6] 5:15 6:13 7:14 17:16 26:5 27:20 bought ^[3] 13:3,5 32:7 branch ^[1] 23:22 branches ^[6] 16:6,11 21:1 22:6 23:7 24:12 break ^[1] 43:11 BREYER ^[21] 5:19 6:3,6,22 7:5,21 8:5,13,23 9:20,24 21:13,19 23:11 24:21 33:14 48:4 57:8 58:3,9 60:7 Breyer's ^[1] 7:24 brief ^[19] 19:23 20:19 21:10 30:4 36:17,23 37:25 41:7 45:4,22,22 47:16 51:1 55:14 57:22 58:17,23, 25 59:13 briefs ^[2] 24:23 58:11 bring ^[3] 4:17 16:20 42:21 broad ^[2] 6:19 41:22 broader ^[1] 41:24 broadly ^[1] 48:9 brought ^[2] 18:15 28:12 build ^[2] 31:9 53:4 building ^[4] 6:8,11 28:19 30:10 business ^[3] 6:24 33:20 48:16 buy ^[1] 10:17 buys ^[4] 5:20 25:15 26:8,18 Bynkershoek ^[2] 24:24 25:3
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