SUPREME COURT OF THE UNITED STATES

No. 17–387

UPPER SKAGIT INDIAN TRIBE, PETITIONER *v.* SHARLINE LUNDGREN, ET VIR

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[May 21, 2018]

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court in full.

But that opinion poses an unanswered question: What precisely is someone in the Lundgrens' position supposed to do? There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe. The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right.

The Tribe suggests that the proper mode of redress is for the Lundgrens—who purchased their property long before the Tribe came into the picture—to negotiate with the Tribe. Although the parties got off on the wrong foot here, the Tribe insists that negotiations would run more smoothly if the Lundgrens "understood [its] immunity from suit." Tr. of Oral Arg. 60. In other words, once the Court makes clear that the Lundgrens ultimately have no recourse, the parties can begin working toward a sensible settlement. That, in my mind at least, is not a meaningful remedy.

The Solicitor General proposes a different out-of-court

solution. Taking up this Court's passing comment that a disappointed litigant may continue to assert his title, see *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 291–292 (1983), the Solicitor General more pointedly suggests that the Lundgrens should steer into the conflict: Go onto the disputed property and chop down some trees, build a shed, or otherwise attempt to "induce [the Tribe] to file a quiet-title action." Brief for United States as *Amicus Curiae* 23–24. Such brazen tactics may well have the desired effect of causing the Tribe to waive its sovereign immunity. But I am skeptical that the law requires private individuals—who, again, had no prior dealings with the Tribe—to pick a fight in order to vindicate their interests.

The consequences of the Court's decision today thus seem intolerable, unless there is another means of resolving property disputes of this sort. Such a possibility was discussed in the Solicitor General's brief, the Lundgrens' brief, and the Tribe's reply brief, and extensively explored at oral argument—the exception to sovereign immunity for actions to determine rights in immovable property. After all, "property ownership is not an inherently sovereign function." *Permanent Mission of India to United Nations* v. *City of New York*, 551 U. S. 193, 199 (2007). Since the 18th century, it has been a settled principle of international law that a foreign state holding real property outside its territory is treated just like a private individual. *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 145 (1812). The same rule applies as a limitation on the sovereign immunity of States claiming an interest in land located within other States. See *Georgia* v. *Chattanooga*, 264 U. S. 472, 480–482 (1924). The only question, as the Solicitor General concedes, Brief for United States as *Amicus Curiae* 25, is whether different principles afford Indian tribes a broader immunity from actions involving off-reservation land.

I do not object to the Court's determination to forgo consideration of the immovable-property rule at this time. But if it turns out that the rule does not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would, in my view, need to be addressed in a future case. See *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___, n. 8 (2014) (slip op., at 16, n. 8) (reserving the question whether sovereign immunity would apply if a "plaintiff who has not chosen to deal with a tribe[ ] has no alternative way to obtain relief for off-reservation commercial conduct"). At the very least, I hope the Lundgrens would carefully examine the full range of legal options for resolving this title dispute with their neighbors, before crossing onto the disputed land and firing up their chainsaws.