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]

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

We granted certiorari to decide whether "a court's exercise of *in rem* jurisdiction overcome[s] the jurisdictional bar of tribal sovereign immunity." Pet. for Cert. i; 583 U. S. ___ (2017). State and federal courts are divided on that question, but the Court does not give them an answer. Instead, it holds only that *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251 (1992), "resolved nothing about the law of [tribal] sovereign immunity." *Ante,* at 5. Unfortunately, neither does the decision today—except to say that courts cannot rely on *County of Yakima.* As a result, the disagreement that led us to take this case will persist.

The Court easily could have resolved that disagreement by addressing respondents' alternative ground for affirmance. Sharline and Ray Lundgren—whose family has maintained the land in question for more than 70 years—ask us to affirm based on the "immovable property" exception to sovereign immunity. That exception is settled, longstanding, and obviously applies to tribal immunity—as it does to every other type of sovereign immunity that has ever been recognized. Although the Lundgrens did not raise this argument below, we have the discretion to reach it. I would have done so. The immovable-property

exception was extensively briefed and argued, and its application here is straightforward. Addressing the exception now would have ensured that property owners like the Lundgrens can protect their rights and that States like Washington can protect their sovereignty. Because the Court unnecessarily chooses to leave them in limbo, I respectfully dissent.

I

As the Court points out, the parties did not raise the immovable-property exception below or in their certiorari-stage briefs. See *ante,* at 6. But this Court will resolve arguments raised for the first time in the merits briefs when they are a "'"predicate to an intelligent resolution" of the question presented'" and thus "'fairly included' within the question presented." *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 75, n. 13 (1996) (quoting *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996); this Court's Rule 14.1). The Court agrees that the immovable-property exception is necessary to an intelligent resolution of the question presented, which is why it remands that issue to the Washington Supreme Court. See *ante,* at 6–7. But our normal practice is to address the issue ourselves, unless there are "good reasons to decline to exercise our discretion." *Jones* v. *United States*, 527 U. S. 373, 397, n. 12 (1999) (plurality opinion).

There are no good reasons here. The Court's only proffered reason is that the applicability of the immovable-property exception is a "grave question" that "will affect all tribes, not just the one before us." *Ante,* at 6.[1] The

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[1]The Court does not question the adequacy of the briefing or identify factual questions that need further development. Nor could it. The immovable-property exception received extensive attention in the parties' briefs, see Brief for Respondents 9–26; Reply Brief 13–24, and the Government's *amicus* brief, see Brief for United States 25–33. Most

exception's applicability might be "grave," but it is also clear. And most questions decided by this Court will affect more than the parties "before us"; that is one of the primary reasons why we grant certiorari. See this Court's Rule 10(c) (explaining that certiorari review is usually reserved for cases involving "an important question of federal law" that has divided the state or federal courts). Moreover, the Court's decision to forgo answering the question presented is no less "grave." It forces the Lundgrens to squander additional years and resources litigating their right to litigate. And it casts uncertainty over the sovereign rights of States to maintain jurisdiction over their respective territories.

Contrary to the Court's suggestion, *ante,* at 6–7, I have no doubt that our state-court colleagues will faithfully interpret and apply the law on remand. But I also have no doubt that this Court "ha[s] an 'obligation . . . to decide the merits of the question presented'" in the cases that come before us. *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. ___, ___ (2016) (THOMAS, J., dissenting) (slip op., at 1). The Court should have discharged that obligation here.

II

I would have resolved this case based on the immovable-property exception to sovereign immunity. That exception is well established. And it plainly extends to tribal immunity, as it does to every other form of sovereign immunity.

A

The immovable-property exception has been hornbook

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of the oral argument likewise focused on the immovable-property exception. See Tr. of Oral Arg. 14–16, 19–29, 34–51, 54–59. And when asked at oral argument what else it could say about the exception if it had more time, the Tribe had no response. See *id.*, at 19–21.

law almost as long as there have been hornbooks. For centuries, there has been "uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property." Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y. B. Int'l Law 220, 244 (1951).[2] This immovable-property exception predates both the founding and the Tribe's treaty with the United States. Cornelius van Bynkershoek, a renowned 18th-century jurist,[3] stated that it was "established" that "property which a prince has purchased for himself in the dominions of another . . . shall be treated just like the property of private individuals." De Foro Legatorum Liber Singularis 22 (G. Laing transl. 2d ed. 1946). His conclusion echoed

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[2] There is some disagreement about the outer bounds of this exception—for example, whether it applies to tort claims related to the property or to diplomatic embassies. See, *e.g.,* Letter from J. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General P. Perlman (May 19, 1952), 26 Dept. of State Bull. 984, 984–985 (Tate Letter); see also C. Bynkershoek, De Foro Legatorum Liber Singularis 22–23 (G. Laing transl. 2d ed. 1946) (explaining there is "no unanimity" regarding attaching a foreign prince's debts to immovable property). But there is no dispute that it covers suits concerning ownership of a piece of real property used for nondiplomatic reasons. See Tate Letter 984; Brief for United States as *Amicus Curiae* 27–28. In other words, there is no dispute that it applies to *in rem* suits like this one.

[3] Considered "a jurist of great reputation" by Chief Justice Marshall, *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 144 (1812), "Bynkershoek's influence in the eighteenth century [w]as enormous," Adler, The President's Recognition Power, in The Constitution and the Conduct of American Foreign Policy 133, 153, n. 19 (G. Adler & L. George eds. 1996) (internal quotation marks omitted). Madison, for example, consulted Bynkershoek's works (on the recommendation of Jefferson) while preparing to draft the Constitution. See Letter from Thomas Jefferson to James Madison (Feb. 20, 1784), in 4 The Works of Thomas Jefferson 239, 248 (P. Ford ed. 1904); Letter from James Madison to Thomas Jefferson (Mar. 16, 1784), in 2 The Writings of James Madison 34, 43 (G. Hunt ed. 1901).

the 16th-century legal scholar Oswald Hilliger. See *ibid.* About a decade after Bynkershoek, Emer de Vattel explained that, when "sovereigns have fiefs and other possessions in the territory of another prince; in such cases they hold them after the manner of private individuals." 3 The Law of Nations §83, p. 139 (C. Fenwick transl. 1916); see also E. de Vattel, The Law of Nations §115, p. 493 (J. Chitty ed. 1872) ("All landed estates, all immovable property, by whomsoever possessed, are subject to the jurisdiction of the country").[4]

The immovable-property exception is a corollary of the ancient principle of *lex rei sitae*. Sometimes called *lex situs* or *lex loci rei sitae*, the principle provides that "land is governed by the law of the place where it is situated." F. Wharton, Conflict of Laws §273, p. 607 (G. Parmele ed., 3d ed. 1905). It reflects the fact that a sovereign "cannot suffer its own laws . . . to be changed" by another sovereign. H. Wheaton, Elements of International Law §81, p. 114 (1866). As then-Judge Scalia explained, it is "self-evident" that "[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes* v. *United Mexican States*, 735 F. 2d 1517, 1521 (CADC 1984). And because "land is so indissolubly connected with the territory of a State," a State "cannot permit" a foreign sovereign to displace its jurisdiction by purchasing land and then claiming "immunity." Competence of Courts in Regard to Foreign States, 26 Am. J. Int'l L. Supp. 451, 578 (1932) (Competence of Courts). An assertion of immunity by a foreign sovereign over real property is an attack on the sovereignty of "the State of

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[4] De Vattel's work was "a leading treatise" of its era. *Jesner* v. *Arab Bank, PLC*, *ante*, at 9, n. 3 (GORSUCH, J., concurring in part and concurring in judgment).

the situs." *Ibid.*

The principle of *lex rei sitae* was so well established by the 19th century that Chancellor James Kent deemed it "too clear for discussion." 2 Commentaries on American Law 429, n. a (4th ed. 1840). The medieval jurist Bartolus of Sassoferatto had recognized the principle 500 years earlier in his commentary on conflicts of law under the Justinian Code. See Bartolus, Conflict of Laws 29 (J. Beale transl. 1914).[5] Bartolus explained that, "when there is a question of any right growing out of a thing itself, the custom or statute of the place where the thing is should be observed." *Ibid.* Later authorities writing on conflicts of law consistently agreed that *lex rei sitae* determined the governing law in real-property disputes.[6] And this Court likewise held, nearly 200 years ago, that "the nature of

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[5] In the foreword to his translation of Bartolus, Joseph Henry Beale described him as "the most imposing figure among the lawyers of the middle ages," whose work was "the first and standard statement of the doctrines of the Conflict of Laws." Bartolus, Conflict of Laws, at 9.

[6] See, *e.g.,* F. von Savigny, Conflict of Laws 130 (W. Guthrie transl. 1869) ("This principle [of *lex rei sitae*] has been generally accepted from a very early time"); G. Bowyer, Commentaries on Universal Public Law 160 (1854) ("[W]here the matter in controversy is the right and title to land or other immovable property, the judgment pronounced in the *forum rei sitae* is held conclusive in other countries"); H. Wheaton, Elements of International Law §81, p. 114 (G. Wilson ed. 1936) ("[T]he law of a place where real property is situated governs exclusively as to the tenure, title, and the descent of such property"); J. Story, Commentaries on the Conflict of Laws §424, p. 708 (rev. 3d ed. 1846) ("The title . . . to real property can be acquired, passed, and lost only according to the *Lex rei sitae*"); J. Westlake, Private International Law *56 ("The right to possession of land can only be tried in the courts of the *situs*"); L. Bar, International Law 241–242 (G. Gillespie transl. 1883) (noting that, in "the simpler case of immoveables," "[t]he *lex rei sitae* is the rule"); F. Wharton, 1 Conflict of Laws §273, p. 607 (G. Parmele ed., 3d ed. 1905) ("Jurists of all schools, and courts of all nations, are agreed in holding that land is governed by the law of the place where it is situated").

sovereignty" requires that "[e]very government" have "the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries." *Green* v. *Biddle*, 8 Wheat. 1, 12 (1823) (Story, J.).

The acceptance of the immovable-property exception has not wavered over time. In the 20th century, as nations increasingly owned foreign property, it remained "well settled in International law that foreign state immunity need not be extended in cases dealing with rights to interests in real property." Weber, The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning, and Effect, 3 Yale J. Int'l L. 1, 33 (1976). Countries around the world continued to recognize the exception in their statutory and decisional law. See Competence of Courts 572–590 (noting support for the exception in statutes from Austria, Germany, Hungary, and Italy, as well as decisions from the United States, Austria, Chile, Czechoslovakia, Egypt, France, Germany, and Romania). "All modern authors are, in fact, agreed that in all disputes *in rem* regarding immovable property, the judicial authorities of the State possess as full a jurisdiction over foreign States as they do over foreign individuals." C. Hyde, 2 International Law 848, n. 33 (2d ed. 1945) (internal quotation marks omitted).

The Restatement of Foreign Relations Law reflects this unbroken consensus. Every iteration of the Restatement has deemed a suit concerning the ownership of real property to be "outside the scope of the principle of [sovereign] immunity of a foreign state." Restatement of Foreign Relations Law of the United States (Proposed Official Draft) §71, Comment *c,* p. 228 (1962); see also Restatement (Second) of Foreign Relations Law of the United States §68(b) (1965) (similar); Restatement (Third) of Foreign Relations Law of the United States §455(1)(c) (1987) (denying that immunity exists for "claims . . . to immovable property in the state of the forum"); Restate-

ment (Fourth) of Foreign Relations Law of the United States §456(2) (Tent. Draft No. 2, Mar. 22, 2016) (recognizing "jurisdiction over a foreign state in any case in which rights in immovable property situated in the United States are in issue"). Sovereign immunity, the First Restatement explains, does not bar "an action to obtain possession of or establish an ownership interest in immovable property located in the territory of the state exercising jurisdiction." §71(b), at 226.

Given the centuries of uniform agreement on the immovable-property exception, it is no surprise that all three branches of the United States Government have recognized it. Writing for a unanimous Court and drawing on Bynkershoek and De Vattel, Chief Justice Marshall noted that "the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual." *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 144–145 (1812). Thus, "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction . . . and assuming the character of a private individual." *Id.,* at 145.[7] The Court echoed this reasoning over a century later, holding that state sovereign immunity does not extend to "[l]and acquired by one State in another State." *Georgia* v. *Chattanooga*, 264 U. S. 472, 480 (1924). In 1952, the State Department acknowledged that "[t]here is agreement[,] supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property." Tate Letter 984.[8] Two decades

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[7] The Skagit Tribe entered into its treaty with the United States four decades later. See Treaty of Point Elliott, Apr. 11, 1859, 12 Stat. 927. The treaty does not mention sovereignty or otherwise alter the rule laid out in *Schooner Exchange*.

[8] This declaration has long been "the official policy of our Government." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S.

later, Congress endorsed the immovable-property exception by including it in the Foreign Sovereign Immunities Act of 1976. See 28 U. S. C. §1605(a)(4) ("A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are in issue"). This statutory exception was "meant to codify the *pre-existing* real property exception to sovereign immunity recognized by international practice." *Permanent Mission of India to United Nations* v. *City of New York*, 551 U. S. 193, 200 (2007) (emphasis added; internal quotation marks omitted).

The Court does not question any of the foregoing authorities. Nor did the parties provide any reason to do so. The Government, when asked to identify its "best authority for the proposition that the baseline rule of common law was total immunity, including *in rem* actions," pointed to just two sources. See Tr. of Oral Arg. 29; Brief for United States as *Amicus Curiae* 10, 26. The first was Hamilton's statement that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (emphasis deleted). Yet "property ownership is not an inherently sovereign function," *Permanent Mission*, *supra*, at 199, and Hamilton's general statement does not suggest that immunity is automatically available or is not subject to longstanding exceptions. The Government also cited *Schooner Exchange*. But as explained above, that

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682, 698 (1976). The State Department has reaffirmed it on several occasions. See, *e.g.,* Dept. of State, J. Sweeney, Policy Research Study: The International Law of Sovereign Immunity 24 (1963) ("The immunity from jurisdiction of a foreign state does not extend to actions for the determination of an interest in immovable—or real—property in the territory. This limitation on the immunity of the state is of long standing").

decision expressly acknowledges the immovable-property exception. The Government's unconvincing arguments cannot overcome more than six centuries of consensus on the validity of the immovable-property exception.

B

Because the immovable-property exception clearly applies to both state and foreign sovereign immunity, the only question is whether it also applies to tribal immunity. It does.

Just last Term, this Court refused to "exten[d]" tribal immunity "beyond what common-law sovereign immunity principles would recognize." *Lewis* v. *Clarke*, 581 U. S. ___, ___–___ (2017) (slip op., at 7–8). Tribes are "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831), that "no longer posses[s] the full attributes of sovereignty," *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978) (internal quotation marks omitted). Given the "limited character" of their sovereignty, *ibid.*, Indian tribes possess only "the common-law immunity from suit traditionally enjoyed by sovereign powers," *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 58 (1978). That is why this Court recently declined an invitation to make tribal immunity "broader than the protection offered by state or federal sovereign immunity." *Lewis*, 581 U. S., at ___ (slip op., at 8). Accordingly, because States and foreign countries are subject to the immovable-property exception, Indian tribes are too. "There is no reason to depart from these general rules in the context of tribal sovereign immunity." *Id.,* at ___ (slip op., at 7).

In declining to reach the immovable-property exception, the Court highlights two counterarguments that the Tribe and the United States have raised for why the exception should not extend to tribal immunity. Neither argument has any merit.

First, the Court notes that "immunity doctrines lifted

from other contexts do not always neatly apply to Indian tribes." *Ante,* at 5 (citing *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751, 756 (1998)). But the Court's authority for that proposition merely states that tribal immunity "is not coextensive with that of *the States*." *Id.*, at 756 (emphasis added). Even assuming that is so, it does not mean that the Tribe's immunity can be more expansive than any recognized form of sovereign immunity, including the immunity of the United States and foreign countries. See *Lewis*, *supra*, at ___–___ (slip op., at 7–8). And the Tribe admits that this Court has previously limited tribal immunity to conform with analogous "limitations . . . in suits against the United States." Reply Brief 22. No one argues that the United States could claim sovereign immunity if it wrongfully asserted ownership of private property in a foreign country—the equivalent of what the Tribe did here. The United States plainly would be subject to suit in that country's courts. See Competence of Courts 572–590.

Second, the Court cites two decisions for the proposition that "since the founding . . . the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country." *Ante,* at 6 (citing *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983); *Ex parte Peru*, 318 U. S. 578, 588 (1943)). But those cases did not involve tribal immunity. They were admiralty suits in which foreign sovereigns sought to recover ships they allegedly owned. See *Verlinden*, *supra*, at 486 (citing cases involving ships allegedly owned by Italy, Peru, and Mexico); *Ex parte Peru*, *supra*, at 579 (mandamus action by Peru regarding its steamship). Those decisions were an extension of the common-law principle, recognized in *Schooner Exchange*, that sovereign immunity applies to vessels owned by a foreign sovereign. See *Berizzi Brothers Co.* v. *S. S. Pesaro*, 271 U. S. 562, 571–576 (1926). These

cases encourage deference to the political branches on sensitive questions of foreign affairs. But they do not suggest that courts can ignore longstanding limits on sovereign immunity, such as the immovable-property exception. And they do not suggest that courts can abdicate their judicial duty to decide the scope of tribal immunity—a duty this Court exercised just last Term. See *Lewis*, *supra*, at ___–___ (slip op., at 5–8).[9]

In fact, those present at "the founding," *ante,* at 6, would be shocked to learn that an Indian tribe could acquire property in a State and then claim immunity from that State's jurisdiction.[10] Tribal immunity is "a judicial doctrine" that is not mandated by the Constitution. *Kiowa*, 523 U. S., at 759. It "developed almost by accident," was reiterated "with little analysis," and does not reflect the realities of modern-day Indian tribes. See *id.,* at 756–758. The doctrine has become quite "exorbitant," *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___ (2014) (GINSBURG, J., dissenting) (slip op., at 1), and it has been implausibly "exten[ded] . . . to bar suits arising out of an

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[9]These decisions about ships, even on their own terms, undercut the Tribe's claim to immunity here. The decisions acknowledge a "distinction between possession and title" that is "supported by the overwhelming weight of authority" and denies immunity to a foreign sovereign that has "title . . . without possession." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 37–38 (1945); see, *e.g.*, *Long* v. *The Tampico*, 16 F. 491, 493–501 (SDNY 1883). That distinction would defeat the Tribe's claim to immunity because the Lundgrens have possession of the land. See 187 Wash. 2d 857, 861–864, 389 P. 3d 569, 571–572 (2017).

[10]Their shock would not be assuaged by the Government's proposed remedy. The Government suggests that the Lundgrens should force a showdown with the Tribe by chopping down trees or building some structure on the land. See Brief for United States as *Amicus Curiae* 23–24. If the judge-made doctrine of tribal immunity has come to a place where it forces individuals to take the law into their own hands to keep their own land, then it will have crossed the threshold from mistaken to absurd.

Indian tribe's commercial activities conducted outside its territory," *id.,* at ___ (THOMAS, J., dissenting) (slip op., at 1).

Extending it even further here would contradict the bedrock principle that each State is "entitled to the sovereignty and jurisdiction over all the territory within her limits." *Lessee of Pollard* v. *Hagan*, 3 How. 212, 228 (1845); accord, *Texas* v. *White*, 7 Wall. 700, 725 (1869); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 9 (1888) (collecting cases). Since 1812, this Court has "entertain[ed] no doubt" that "the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate[d]." *United States* v. *Crosby*, 7 Cranch 115, 116 (1812) (Story, J.). Justice Bushrod Washington declared it "an unquestionable principle of general law, that the title to, and the disposition of real property, must be exclusively subject to the laws of the country where it is situated." *Kerr* v. *Devisees of Moon*, 9 Wheat. 565, 570 (1824). This Court has been similarly emphatic ever since. See, *e.g., Munday* v. *Wisconsin Trust Co.*, 252 U. S. 499, 503 (1920) ("long ago declared"); *Arndt* v. *Griggs*, 134 U. S. 316, 321 (1890) ("held repeatedly"); *United States* v. *Fox*, 94 U. S. 315, 320 (1877) ("undoubted"); *McCormick* v. *Sullivant*, 10 Wheat. 192, 202 (1825) ("an acknowledged principle of law"). Allowing the judge-made doctrine of tribal immunity to intrude on such a fundamental aspect of state sovereignty contradicts the Constitution's design, which "'leaves to the several States a residuary and inviolable sovereignty.'" *New York* v. *United States*, 505 U. S. 144, 188 (1992) (quoting The Federalist No. 39, at 256).

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The Court's failure to address the immovable-property exception in this case is difficult to justify. It leaves our colleagues in the state and federal courts with little more

guidance than they had before. It needlessly delays relief for the Lundgrens, who must continue to litigate the threshold question whether they can litigate their indisputable right to their land. And it does not address a clearly erroneous tribal-immunity claim: one that asserts a sweeping and absolute immunity that no other sovereign has ever enjoyed—not a State, not a foreign nation, and not even the United States.

I respectfully dissent.