No. _____

In the
Supreme Court of the United States

SENECA COUNTY, NEW YORK,
Petitioner,

v.

CAYUGA INDIAN NATION OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has twice granted certiorari to decide whether tribal sovereign immunity bars lawsuits concerning rights to property that a tribe acquires on the open market. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649 (2018); *Madison Cty. v. Oneida Indian Nation of N.Y.*, 562 U.S. 960 (2010) (mem.). Both times, however, subsequent developments prevented the Court from definitively answering the question. This case presents an opportunity to definitively answer that important and recurring question. In the decision below, the Second Circuit doubled down on the holding that this Court granted certiorari to review in *Madison County,* and again robbed this Court's decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), of practical effect by holding that if an Indian tribe purchases land on the open market and refuses to pay property taxes, there is nothing a local jurisdiction can do about it. That decision cannot be reconciled with *Sherrill*, and it effectively grants tribes a super immunity by rejecting the "uniform authority in support of the view that" the "immovable property" exception would preclude any sovereign's efforts to invoke sovereign immunity in these circumstances. *Upper Skagit*, 138 S.Ct. at 1657 (Thomas, J., dissenting).

The question presented is:

Whether tribal sovereign immunity bars local tax authorities from collecting lawfully imposed property taxes by foreclosing on real property that a tribe has acquired on the open market.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Court of Appeals for the Second Circuit, the United States District Court for the Western District of New York, and the County Court of the County of Seneca, New York:

- *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, No. 19-32 (2d Cir.), judgment entered Oct. 27, 2020;
- *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, No. 11-cv-06004 (W.D.N.Y.), judgment entered Dec. 11, 2018;
- *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, No. 12-3723 (2d Cir.), judgment entered July 31, 2014.
- *In the matter of Foreclosure of Tax Liens By Proceeding In Rem Pursuant to Article Eleven of the Real Property Tax Law by the County of Seneca*, State of New York, County Court, County of Seneca, Index No. 42044 (petition filed Oct. 6, 2010)

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

This case presents recurring questions that this Court has twice granted certiorari to address but has not yet been able to answer definitively. The Court should grant certiorari and finally provide long-awaited clarity on whether this Court meant what it said in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), or whether tribal sovereign immunity allows a tribe to permanently evade tax liability for property acquired on the open market. Under the decision below, a tribe can purchase land on the open market anywhere in the country, refuse to pay property taxes, and then claim immunity from foreclosure proceedings to collect the unpaid taxes. The same "logic" would appear to permit tribes to block any form of compulsory regulatory action vis-à-vis the land, allowing tribes to effectively remove parcels from the tax rolls and create a jurisdictional patchwork simply by acquiring parcels that had been subject to local jurisdiction for centuries. If those results sound like ones this Court would reject as intolerable and inequitable, that is because the Court did just that in *Sherrill*. But the decision below, like earlier Second Circuit decisions before it, converts *Sherrill* into a sport by granting the tribes the same immunity as a practical matter that this Court rejected in *Sherrill*.

In *Sherrill*, the Court held that when a tribe acquires land in fee on the open market that was once part of its historical reservation, the acquisition does not revive its tribal sovereignty over that land or make it immune from taxation. The alternative was utterly impractical: Broad swaths of land throughout New

York would drop off the tax rolls and fall outside of local regulatory jurisdiction after two centuries of local control, creating a regulatory patchwork that would seriously burden state and local governments. The Court concluded that the mechanism for the Oneidas to try to reestablish sovereign authority over reacquired lands within its historical reservation was through the trust process Congress created under 25 U.S.C. §5108, which precludes unilateral re-assertions of sovereignty and ensures the consideration of the competing interests of other parties.

Just a few years later, however, the Second Circuit rendered *Sherrill* largely academic and reintroduced all those impractical and inequitable consequences by declaring the Oneidas' property taxable in theory but immune from all efforts to actually collect the property taxes in practice. *Oneida Indian Nation v. Madison Cty.*, 605 F.3d 149 (2d Cir. 2010) ("*Madison Cty.*"). The Second Circuit recognized that its decision "eviscerated" *Sherrill* and implored this Court to grant review. This Court obliged, but before it could correct the Second Circuit's error, the Tribe mooted the issue by purporting to waive its sovereign immunity.

This case involves a different tribe but raises the same issue. Over the past 25 years, the Cayuga Indian Nation of New York has purchased dozens of parcels of land in Seneca County through open-market transactions. Like the Oneidas before them, the Cayugas have refused to pay property taxes on that land notwithstanding *Sherrill*, arguing that they are immune from any effort to collect the taxes (while continuing to accept all the same benefits and services

from the County as other taxpayers). Like the Oneidas before them, the Cayugas sued the County to enjoin it from foreclosing on the property that is subject to these massive uncollected tax obligations. And just as in the Oneida litigation, the Second Circuit embraced the wholly impractical distinction between assessing taxes (permitted by *Sherrill*) and collecting them (immune under Second Circuit law), Indeed, the court reached that impractical conclusion by invoking the very same *Madison County* decision this Court vacated after the Oneidas threw in the towel.

That alone makes this case certworthy for all the reasons this Court granted certiorari in *Madison County*. But the case for certiorari is more compelling still, because the Second Circuit here rejected the one argument that might have ameliorated the stark conflict between *Madison County* and *Sherrill*—namely, that even if the Cayugas retained sovereign immunity despite *Sherrill*, efforts to collect unpaid property taxes via foreclosure would fall within the immovable-property exception to sovereign immunity. That argument not only preserves *Sherrill*'s practical effect, but also implicates the broader issue this Court was unable to resolve in *Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649 (2018). The Court confronted the immovable-property exception in *Upper Skagit* but ultimately declined to determine its bounds because the issue had not been considered below, and thus left unresolved an issue that had divided (and continues to divide) the lower courts.

Here, the Second Circuit squarely considered the immovable-property exception and held that it does not prevent the Oneidas from asserting sovereign

immunity, exacerbating the division among the lower courts that led this Court to grant certiorari in *Upper Skagit*. What is more, the Second Circuit's ruling contradicts the stated views of the only two Justices to address the issue in *Upper Skagit* and produces precisely the result that the Chief Justice indicated would "need to be addressed in a future case." *Id*. at 1656 (Roberts, C.J., concurring). Thus, the Second Circuit's decision addresses two related issues that have merited this Court's attention and resolves them in ways that produce a practical immunity from taxation that "defies common sense." 605 F.3d at 164 (Cabranes, J., concurring).

The stakes here go well beyond the taxing authority of one county. The decision below presents a threat to the tax base and regulatory authority of jurisdictions nationwide, even areas far removed from any current or historic reservation. No one benefits from having these issues unresolved, as the decision below promises unnecessary friction between tribes and non-tribal governments. The rules governing the necessary interactions between tribes and surrounding jurisdictions on lands where the tribes are sovereign are well established. The possibility of tribes re-asserting full sovereignty over lands purchased on the open market and removing property from the tax rolls and local regulatory control after centuries of non-tribal jurisdiction, by contrast, is profoundly unsettling. This Court recognized as much in *Sherrill*, but the decision below deprives that decision of practical effect. Thus, both respect for this Court's decisions and the need to avoid unnecessary friction counsel strongly in favor of plenary review.

OPINIONS BELOW

The Second Circuit's opinions are reported at 978 F.3d 829 and 761 F.3d 218 and reproduced at App.1-26 and App.38-42. The district court's opinions are reported at 354 F.Supp.3d 281 and 890 F.Supp.2d 240 and reproduced at App.27-37 and App.43-61.

JURISDICTION

The Second Circuit entered its judgment on October 27, 2020. On March 19, 2020, this Court extended the deadline to file any certiorari petition due after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. *Sherrill* and *Madison County*

1. In *Sherrill*, this Court held that when a tribe acquires land in fee on the open market that was once part of its reservation, the tribe does not thereby revive its tribal sovereignty over that land. *Sherrill* involved a dispute over land that was "within the boundaries of the reservation originally occupied by the Oneidas," but had been privately held by non-Indians since 1807. 544 U.S. at 211. Although the land had been in non-Indian hands for nearly two centuries, the Oneidas argued that their re-acquisition of it unified fee and aboriginal title and allowed them to assert sovereign dominion. On that basis, the Oneidas asserted that the land was exempt from state property taxes and refused to pay the taxes when assessed. *Id.* at 211-12.

Sherrill was not sanguine about the prospect of having property unilaterally removed from its tax rolls. It first sent the Oneidas notices of tax

delinquency and, when they did not respond, purchased the properties at a tax sale. *See Oneida Indian Nation of N.Y. v. City of Sherrill*, 145 F.Supp.2d 226, 232-33 (N.D.N.Y. 2001). After the period to redeem the properties elapsed, Sherrill recorded deeds for the properties and initiated state-court eviction proceedings. *Id.* The Oneidas responded by suing Sherrill in federal court, seeking an "injunction prohibiting Sherrill … from interfering with the Nation's ownership and possession of its lands and from any effort to evict the Nation from such lands." *Id.* at 237. They also removed the state-court action to federal court, where it was consolidated with the federal lawsuit. *Id.* at 231-32.

In the now-consolidated action, the district court enjoined Sherrill "from taking any act to impose property taxes upon, or to collect property taxes with respect to the properties." *Id.* at 268. The Second Circuit affirmed, holding that "Sherrill can neither tax the land nor evict the Oneidas." *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 167 (2d Cir. 2003).

This Court granted certiorari and reversed nearly unanimously, concluding that the Oneidas could not assert sovereign dominion over the parcels because of their "long delay in seeking equitable relief against New York or its local units," which "render[s] inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Sherrill*, 544 U.S. at 221. And because the district court enjoined the eviction proceedings on the faulty premise that the Oneidas had sovereign dominion over the parcels, this

Court reversed the Second Circuit's judgment affirming the injunction. *Id.*

In his lone dissent, Justice Stevens suggested that the Court's reliance on equitable principles meant that the Oneidas could still assert immunity as a defense in the eviction proceeding, even though they could not obtain the equitable relief of an injunction. *Id.* at 225-26 (Stevens, J., dissenting). The majority expressly rejected that curious and impractical argument, which would have robbed the Court's decision of its practical force: "We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively." *Id.* at 214 n.7.

2. Undeterred, the Oneidas continued to refuse to pay delinquent property taxes on hundreds of properties that, like the properties in *Sherrill*, had been purchased on the open market after two centuries of private ownership and state and local taxation. When Madison County and Oneida County proceeded to foreclose on Oneida-owned properties, the Oneidas sought to enjoin those proceedings, claiming that although *Sherrill* affirmed the counties' authority to *assess* taxes, it did not address the counties' authority to *collect* those taxes via foreclosure.

The district court granted an injunction, and the Second Circuit affirmed, holding that "the foreclosure actions are barred by the [Oneida Nation's] immunity from suit." *Madison Cty.,* 605 F.3d at 159. The Second Circuit agreed with the Oneidas that "*Sherrill* dealt with the right to demand compliance with state laws," not "the means available to enforce those laws." *Id.* Accordingly, while acknowledging that the counties

could validly impose property taxes, the court held that the Oneidas could assert tribal immunity as a defense to foreclosure after refusing to pay those taxes. *Id.* at 159-60. The Second Circuit believed that its result was dictated by *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), which recognized tribal immunity from certain *in personam* suits. The majority nonetheless recognized that its holding "eviscerates" *Sherrill*, "making [the] essential right of government [to tax properties] meaningless." *Madison Cty.*, 605 F.3d at 159.

Judge Cabranes, joined by Judge Hall, wrote a concurring opinion characterizing the panel's decision (which they joined) as illogical: "The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed." *Id.* at 163. While they viewed that holding as compelled by precedent, they readily admitted that "[t]his rule of decision defies common sense," *id.*, and implored this Court to grant review and reunite "law and logic." *Id.* at 164.

This Court granted the counties' petition for certiorari, which asked "whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes." *Madison Cty. v. Oneida Indian Nation of N.Y.*, 562 U.S. 42, 42

(2011). While the case was pending, however, the Oneida Nation waived its purported immunity. *Id.* This Court vacated and remanded "in light of this new factual development," *id.*, and the case was resolved on other grounds, App.6 n.5.

B. Factual Background and Preliminary Injunction Proceedings

Over the past 25 years, the Cayugas have purchased dozens of parcels in Seneca County through open-market transactions. App.2. As in *Sherrill*, the Cayugas maintain that this land was once part of their reservation, but it is undisputed that the land was in private hands for roughly 200 years before those open-market purchases. App.6 n.4. Like the Oneida Nation before them, and despite this Court's decision in *Sherrill*, the Cayugas have steadfastly refused to pay property taxes on these parcels. App.4. The unpaid tax bills accumulated and resulted in tax liens on the parcels, and in 2010, Seneca County commenced proceedings to foreclose on four of the parcels in state court. App.5. The Cayugas responded by filing suit in federal court, seeking to enjoin the state-court foreclosure proceedings on grounds of sovereign immunity (among others). App.5. In response, the County argued both that *Sherrill* had already rejected that argument and, in all events, that under *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), tribal sovereign immunity does not apply to lawsuits involving rights in real property outside a tribe's sovereign domain.

The district court preliminarily enjoined the foreclosure proceedings, deeming itself bound to "follow the Second Circuit's ruling in [*Madison*

County], which, although technically without effect after being vacated, clearly rejects" Seneca County's reading of *Sherrill*. App.57. The court also rejected the County's argument that tribal sovereign immunity is inapplicable to proceedings involving rights to real property, opining that *Yakima* "did not involve tribal sovereign immunity from suit." App.59. The Second Circuit affirmed. App.38-42. Relying on its vacated decision in *Madison County*, the court "decline[d] to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings—that Seneca County has urged." App.41.

C. *Upper Skagit*

While summary judgment proceedings were ongoing, this Court granted certiorari in *Upper Skagit*. The dispute in *Upper Skagit* concerned the property line between a parcel purchased by the Upper Skagit Indian Tribe on the open market and an adjacent parcel owned by the Lundgrens. 138 S.Ct. at 1651-52. The Lundgrens filed a quiet-title action asserting adverse possession over the disputed property, and the Tribe claimed that sovereign immunity barred the quiet-title action. *Id.* The Washington Supreme Court rejected the Tribe's claim of immunity, reading this Court's decision in *Yakima* as holding that sovereign immunity does not apply to *in rem* lawsuits. *Id.* at 1652. Because lower courts were split on that question, this Court granted certiorari to decide whether "a court's exercise of *in rem* jurisdiction overcome[s] the jurisdictional bar of tribal sovereign immunity." *Id.* at 1656 (Thomas, J., dissenting).

In this Court, the Lundgrens conceded that the Washington Supreme Court's reliance on *Yakima* was

mistaken. *Id.* at 1653. But they urged this Court to resolve the case on the basis that "sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign." *Id.* Because the Lundgrens disclaimed reliance on *Yakima* relatively late in the proceedings, this Court vacated and remanded for the courts below "to address these arguments in the first instance." *Id.* at 1654.

Chief Justice Roberts, joined by Justice Kennedy, wrote a concurring opinion noting that it would be "intolerable" if the Lundgrens had no legal recourse and identifying the immovable-property rule as the likely solution. *Id.* at 1655 (citing *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812)). While the Chief Justice did not object to allowing the lower courts to address that issue in the first instance, he noted that if the immovable-property 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." *Id.* at 1656.

Justice Thomas, joined by Justice Alito, dissented, lamenting that "the disagreement that led us to take this case will persist." *Id.* at 1656. In his view, the Court should have rejected the "clearly erroneous tribal-immunity claim," which "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." *Id.* at 1663. In a lengthy and detailed historical analysis, he demonstrated that "[t]he immovable-property exception has been hornbook law almost as long as there have been

hornbooks" and that it applies to tribes in addition to states and foreign countries. *Id.* at 1657-63.

After this Court's decision, the Upper Skagit Indian Tribe elected to quitclaim deed the property to the Lundgrens, thereby mooting further proceedings. *See* Motion to Dismiss 1, *Upper Skagit Indian Tribe v. Lundgren*, No. 91622-5 (Wa. Superior Ct. filed Dec. 3, 2018).

D. Proceedings Below

After the Second Circuit affirmed the preliminary injunction, the parties filed cross-motions for summary judgment. Seneca County again argued that *Sherrill* foreclosed the Cayugas' sovereign immunity argument and that, even apart from *Sherrill*, the immovable-property doctrine foreclosed the Cayugas' claim to sovereign immunity. The district court adopted its prior reasoning in full, ruling that the foreclosure action is barred by tribal sovereign immunity and permanently enjoining the County from foreclosing on the properties. App.27-37.

The Second Circuit affirmed. Addressing the immovable-property issue first, the court assumed that tribal sovereign immunity is coextensive with state and foreign sovereign immunity with respect to immovable property. App.11-12. But it found the immovable-property exception inapplicable here, opining that foreclosure actions, even for failure to pay taxes on the parcel at issue, fall outside the exception's scope. App.12-14. The court did not rest that view on anything unique to the parcels in dispute, such as the Cayugas' claim that they were part of its historic reservation. Instead, in its view, foreclosure actions—*i.e.*, lawsuits seeking to foreclose on tax liens on the

parcels and transfer title to them to the County or a successful bidder at auction—do not qualify as "actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction." App.15 (quoting Restatement (Second) of Foreign Relations Law §68 cmt.d (1965)). While the court acknowledged that the foreclosure actions would transfer both possession and title, it insisted that "these tax enforcement actions are—fundamentally—about money, not property." App.16.

The Second Circuit then addressed the County's argument that *Sherrill* foreclosed an assertion of sovereign immunity from suits to collect taxes on real property purchased on the open market. Adhering to its reasoning in *Madison County*, the court held that "*Sherrill* pertains to … whether a state or local authority has the power to *impose* real property taxes on tribal lands," not to "whether a state may use the courts against a tribe to *collect* taxes levied against tribal lands." App.23. The Court dismissed any concern about the practical effects of its decision, asserting that the County could "enter into an agreement with the tribe" or "seek appropriate legislation from Congress." App.25.

REASONS FOR GRANTING THE PETITION

This case presents a perfect opportunity to answer a question on which this Court has already granted certiorari—namely, whether tribal sovereign immunity precludes any meaningful opportunity for localities to collect the property taxes that this Court in *Sherrill* held they could impose on property that tribes purchased on the open market. Unless this

Court's decision in *Sherrill* was a sport, the same tribal immunity that was insufficient to prevent the removal of parcels from the tax rolls cannot be sufficient to preclude collection of taxes on those same parcels (or prevent foreclosure on those same parcels for failure to pay those same taxes). Nonetheless, the Second Circuit held just that in *Madison County*, prompting this Court to grant certiorari, only to vacate the Second Circuit's decision when the Tribe waived any immunity it possessed. The decision below not only reinstated the reasoning of the Second Circuit's vacated *Madison County* decision, but also rejected the application of the immovable-property exception to sovereign immunity, which this Court considered in *Upper Skagit*. This case is thus the rare one that implicates two related questions on which this Court has already granted certiorari but been unable to decide.

The decision below conflicts with both this Court's decision in *Sherrill* and centuries of hornbook law on sovereign immunity. In *Sherrill*, this Court reversed a decision that enjoined a local taxing authority from foreclosing on property a tribe had purchased on the open market, even though the parcels were within the historic boundaries of the tribe's reservation, citing the vast inequity of removing from local tax rolls property that had been under local jurisdiction for centuries. That holding should have resolved this case. The Second Circuit's contrary decision not only strips *Sherrill* of all practical significance but also produces the very impractical and inequitable results that *Sherrill* refused to countenance. And even apart from *Sherrill* and its equitable principles, the decision below conflicts with centuries of hornbook law, as

sovereign immunity has never extended to actions relating to rights to immovable property in another sovereign's jurisdiction. That long-settled principle plainly extends to a foreclosure action based on a failure to pay property taxes on the very parcel at issue.

The importance of this case is undeniable, as evidenced by this Court's two prior grants of certiorari. Indeed, all nine Justices agreed in *Upper Skagit* that the issues at stake are "grave," affecting all tribes across the country and every community in which those tribes might decide to purchase land. Nothing in the decision below purports to limit its analysis to land within the historic boundaries of a reservation. Instead, if the decision below stands, then tribes can go to any community in the country, purchase land on the open market, and flout local taxes (and other land regulations) with impunity. That is precisely the result this Court sought to prevent with its decision in *Sherrill*, precisely the result the Second Circuit in *Madison County* said was "so anomalous that it calls out for the Supreme Court to … [reunite] law and logic," and precisely the result the Chief Justice in *Upper Skagit* noted "would … need to be addressed in a future case" if it came to pass. The decision below invites all those inequities and reduces *Sherrill* to an abstraction. The need for this Court's review is clear.

I. This Court Has Twice Granted Certiorari To Resolve The Issues Presented, And Certiorari Is Equally Warranted Here.

1. In *Madison County*, this Court granted certiorari to decide the same question presented here: "[W]hether tribal sovereign immunity … bars taxing

authorities from foreclosing to collect lawfully imposed property taxes." That grant of certiorari followed a plea for review from two Second Circuit judges who felt bound by precedent to hold that tribal sovereign immunity bars foreclosure actions, but recognized the conflict with *Sherrill* and that the resulting "rule of decision"—that localities are free to impose property taxes on tribes that they cannot collect—"defies common sense." *Madison Cty.*, 605 F.3d at 163 (Cabranes, J., concurring). The concurring judges implored this Court to grant certiorari, explaining that the result was "so anomalous that it calls out for the Supreme Court" to reunite "law and logic … in this area of the law." *Id.* at 164. Indeed, even the majority opinion recognized that its holding "eviscerates *Sherrill*" and renders "meaningless" a taxation power this Court considered necessary to avoid inequitable results. *Id.* at 159.

In light of the Second Circuit's deep reservations about its own opinion, the clear incompatibility with *Sherrill*, and the disruptive consequences of removing broad swaths of property from state and local tax rolls, this Court granted the counties' petition for certiorari. But before the Court could correct the Second Circuit's error, the Oneidas waived any claim to sovereign immunity, leading this Court to vacate and remand for consideration of other issues. *Madison Cty.*, 562 U.S. at 42. The case was ultimately resolved on other grounds, App.6 n.5, leaving unanswered the vitally important question on which the Court granted certiorari.

While the *Madison County* decision was vacated, the Second Circuit has since doubled down on its

reasoning and essentially treated it as having definitely resolved the issue despite this Court's vacatur. Thus, all the reasons that supported this Court's plenary review in *Madison County* fully support certiorari here. Over the past 25 years, the Cayugas have purchased dozens of parcels of land in Seneca County through open-market transactions and have refused to pay property taxes on that land. Like the Oneida Nation before them, the Cayugas sued the County to enjoin it from foreclosing on the property on which the Cayugas refused to pay taxes. And just as in *Madison County*, the Second Circuit accepted their dubious distinction between imposing taxes (permitted by *Sherrill*) and enforcing them (precluded by the Second Circuit). Indeed, the decision below adopts *Madison County*'s flawed reasoning in full, embracing the same "anomalous" result that "eviscerates" *Sherrill* and renders its holding "meaningless." *Madison Cty.*, 605 F.3d at 159, 164; *see infra* Part II.A. Just as it did in *Madison County*, that intolerable result "calls out for" review. 605 F.3d at 164 (Cabranes, J., concurring).

2. This case actually presents an even stronger case for certiorari than *Madison County* because the court went on to reject an alternative basis for giving *Sherrill* practical effect that implicates a limitation on sovereign immunity this Court considered in *Upper Skagit*. There, this Court granted certiorari to address the scope of tribal immunity from actions involving rights to immovable property that a tribe acquired in fee on the open market. The question in *Upper Skagit*, which arose from a quiet-title action, was whether "a court's exercise of *in rem* jurisdiction overcome[s] the jurisdictional bar of tribal sovereign immunity." 138

S.Ct. at 1656 (Thomas, J., dissenting). This Court granted certiorari because "[s]tate and federal courts are divided on that question." *Id.* One case this Court cited in describing the split was the Second Circuit's earlier preliminary-injunction decision in this case, which this Court noted was consistent with a decision from the New Mexico Supreme Court but in conflict with a decision from the North Dakota Supreme Court (as well as with the Washington Supreme Court decision under review). *Id.* at 1651 n.*.[1]

Briefing and argument in this Court focused largely on whether sovereigns were historically immune from actions involving immovable property located in another sovereign's territory. *See id.* at 1653-54. But because the Washington Supreme Court had not addressed that question, this Court vacated and remanded instead of addressing it in the first instance. *Id.* at 1654-55. As a result, as Justice Thomas noted in dissent, "the disagreement that led us to take this case will persist." *Id.* at 1656. The Tribe in *Upper Skagit* ultimately relinquished its claim to the disputed property, depriving this Court of an opportunity to revisit the question it reserved and provide lower courts with much-needed clarity.

As things currently stand, the North Dakota Supreme Court, the New Mexico Supreme Court, and the Second Circuit are divided three ways over

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[1] *Compare Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569, 573-74 (Wa. 2017); *Cass Cty. Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 691-93 (N.D. 2002), *with Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 986 (N.M. 2016); *Cayuga Indian Nation of N.Y. v. Seneca County*, 761 F.3d 218, 221 (2d Cir. 2014) (App.38-42).

whether and how the immovable-property exception applies to lawsuits involving property in which a tribe holds fee title. At one end of the spectrum, the North Dakota Supreme Court held that the exception covers all disputes over real property that a tribe owns outside its sovereign dominion. The issue in *Cass County* was whether the state could condemn a small parcel of land in which a tribe held fee title. *See* 643 N.W.2d at 687-88. Invoking this Court's precedent applying the immovable-property exception to states, the court held that "the Tribe's sovereign immunity is not implicated" when states or other political subdivisions exercise territorial jurisdiction over non-trust, non-sovereign land in which a tribe holds fee ownership, including (but not limited to) in "an in rem condemnation action." *Id.* at 693-94 (citing *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924)); *see Upper Skagit*, 138 S.Ct. at 1655 (Roberts, C.J., concurring) (identifying *Chattanooga* as a decision applying the immovable-property doctrine); *id.* at 1660 (Thomas, J., dissenting) (same); App.12 n.6 (same).[2]

At the other end, the New Mexico Supreme Court in *Hamaatsa* rejected any immovable-property limitation on tribal sovereign immunity. In *Hamaatsa*, a private plaintiff sued the Pueblo, seeking a declaration that it could use a road on land the Tribe held in fee but was not "held in trust by the federal government as part of the … reservation." 388 P.3d at 979. The court held that the Tribe was immune from the lawsuit, reasoning that tribes are "immune from

[2] The North Dakota Supreme Court also relied on *Yakima*, *see* 643 N.W.2d at 691-92, but unlike the Washington Supreme Court in *Upper Skagit*, it did not do so exclusively.

suit[] absent a waiver of [their] immunity or congressional authorization of the suit—regardless of the nature of the claim giving rise to the dispute." *Id.* at 982. In reaching that conclusion, the court expressly rejected the North Dakota Supreme Court's reasoning in *Cass County* and any "carve[] out" from sovereign immunity "for *in rem* actions." *Id.* at 986. Instead, the court explained that it would "choose to follow the Second Circuit"—*viz.*, the preliminary-injunction decision in the proceedings below here. *Id.*

The decision below exacerbates the pre-existing split by charting a third course. The Second Circuit acknowledged that the common law has long recognized an exception to sovereign immunity for actions to determine rights in immovable property. App.12-13. But the court held that exception inapplicable because, in its view, it does not apply to suits seeking to recover delinquent taxes on real property via foreclosure. Although the court acknowledged that the foreclosure action sought to enforce tax liens for property taxes assessed on the very parcels subject to foreclosure and that a successful action would result in transfer of title, *see* App.16-17, it determined that foreclosure actions "fall outside" the immovable-property exception because the "transfer of title" "would simply serve as a *remedy*" for rights in immovable property, but would not itself "*determine* rights in immovable property," App.16-17.

That reasoning is incompatible with the North Dakota Supreme Court's view that tribal sovereign immunity "is not implicated" by actions involving rights in real property that a tribe owns outside its sovereign domain, *Cass Cty.*, 643 N.W.2d at 693-64,

and is likewise incompatible with the New Mexico Supreme Court's refusal to apply the immovable-property exception to tribal immunity at all, *see Hamaatsa*, 388 P.3d at 982-83, 986. Accordingly, certiorari is warranted to resolve the still-extant split of authority that this Court granted certiorari in *Upper Skagit* to resolve.

II. The Decision Below Conflicts With This Court's Decisions And Hornbook Law.

A. The Decision Below Conflicts With This Court's Decision in *Sherrill*.

The decision below is not just certworthy; it is wrong and irreconcilable with this Court's decision in *Sherrill*. In *Sherrill*, this Court held nearly unanimously that tribal sovereign immunity does not bar a local taxing authority from pursuing eviction proceedings concerning parcels purchased by a tribe on the open market. The Oneidas argued that because the lands were located within the historic boundaries of their reservation, by purchasing the lands on the open market, they had "unified fee and aboriginal title" and now exercised "sovereign dominion over the parcels," such that they were immune from local efforts to impose property taxes or seize the lands via eviction provisions. *Sherrill*, 544 U.S. at 213. This Court squarely rejected that argument and held that whatever interest the Oneidas possessed in the newly re-acquired lands, it was insufficient to support an immunity from efforts to tax the lands pursuant to state and local powers that had been exercised vis-à-vis the land for two centuries. As the Court explained, Congress has created a process for reacquiring sovereign control over former reservation property,

and that process carefully weighs local governance and other equitable considerations. *See* 25 U.S.C. §5108. Allowing tribes to unilaterally "reassert sovereign control and remove these parcels from the local tax rolls" after "two centuries of New York's exercise of regulatory jurisdiction" not only would render that process a nullity, but would be profoundly "disruptive" and "inequitable." 544 U.S. at 215-17, 220-21.

That holding should have resolved this case. The land at issue here—real property purchased by the Cayuga Nation through open market transactions and owned in fee—is identically situated to the land in *Sherrill*. *See, e.g.*, *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 268 (2d Cir. 2005). Indeed, while the Cayugas have vaguely asserted that they maintain "some" regulatory jurisdiction over the parcels, they do not claim that their parcels are distinguishable from the parcels in *Sherrill* or that the rule of *Sherrill* does not apply to them.

The Second Circuit nevertheless held that the Cayugas are immune from foreclosure proceedings. The Second Circuit attempted to reconcile that holding with *Sherrill* by claiming that "*Sherrill* pertains to … whether a state or local authority has the power to *impose* real property taxes on tribal lands," not "whether a state may use the courts against a tribe to *collect* taxes levied against tribal lands." App.23. In other words, it read *Sherrill* as holding only that the city could impose taxes on the Oneidas but leaving open whether the city could do anything to collect those taxes.

That reading is mystifying. *Sherrill* plainly addressed both the city's power to assess taxes and its power to collect them via eviction proceedings. Indeed, if anything, *Sherrill* was *primarily* about the latter. *Sherrill* came to this Court as a consolidated action consisting of (1) a removed state-court eviction proceeding and (2) a federal equity proceeding seeking to enjoin that eviction action. Unsurprisingly in light of that posture, the relief the Oneidas sought in district court was expressly about eviction—namely, to "prohibit[] Sherrill … from any effort to evict the Nation." *Oneida Indian Nation*, 145 F.Supp.2d at 237. The relief the Oneidas obtained was likewise eviction-focused: The district court enjoined Sherrill "from taking any act to impose property taxes upon, *or to collect property taxes with respect to the properties*," *id.* (emphasis added), and the Second Circuit affirmed, holding that "Sherrill can neither tax the land *nor evict the Oneidas*," *Oneida Indian Nation*, 337 F.3d at 167 (emphasis added). Accordingly, as the case came to this Court, *Sherrill* was not some academic dispute about the power to impose taxes in the abstract. The stakes were clear and concrete: Sherrill asserted the right to evict the Oneidas for their refusal to pay taxes, and the Oneida asserted tribal sovereign immunity to continue to possess their lands without paying taxes.

The City of Sherrill won, and the Second Circuit decision and district court injunction were reversed. And the Oneidas' unsuccessful argument was not limited to the state and local authority to assess taxes, but plainly extended to eviction and foreclosure proceedings. They contended that, by uniting fee and aboriginal title, they had created a "federally protected possessory right," which "bars New York

and its political subdivisions from taking Oneida land from the Oneidas today through tax foreclosures and evictions." Br. for Respondents 16, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 2004 WL 2246333 (U.S. filed Sept. 30, 2004). In rejecting that argument, the Court's holding was likewise not limited to the assessment of taxes in the abstract, but equally extended to foreclosures and evictions. Indeed, when Justice Stevens suggested in his lone dissent that the majority's opinion only barred the Oneidas from affirmatively invoking the equitable jurisdiction of the federal courts, and might not preclude them from asserting immunity defensively in the removed-from-state-court eviction proceeding, 544 U.S. at 225-26, the majority would have none of it. In response, the Court squarely held that the Tribe was equally barred from asserting immunity defensively in the conjoined eviction proceeding: "The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively." *Id.* at 214 n.7. *Sherrill* thus holds, in direct conflict with the decision below, that tribal sovereign immunity is no defense in eviction and foreclosure proceedings involving like those at issue here.

2. The decision below not only contradicts the square holding of *Sherrill*, but turns that decision into nothing more than a sport. Given that the Court's decision was driven by the inequitable and impractical consequences of the Oneidas' argument, reimagining it as a decision about tax assessment (and not tax collection) makes no sense. What bothered the City of

Sherrill and this Court was not whether Sherrill could send the Tribe a tax assessment along with the other property owners in the city. What bothered the City of Sherrill and this Court was whether the Tribe could unilaterally remove the parcels from the tax rolls and create a "checkerboard of alternating state and tribal jurisdiction in New York State" that "would seriously burden the administration of state and local governments and would adversely affect landowners neighboring the tribal patches." *Id.* at 219-20 (alteration omitted). Those concerns are all about tax collection, not tax assessment. And the decision below unleashes the very same inequitable consequences by effectively removing from the tax rolls property that has been taxable for two centuries and allowing Indian tribes to unilaterally create a patchwork of unregulated enclaves throughout the entire country.

In fact, the decision below is even more problematic because its "logic" is not even limited to parcels within a historic reservation. What drives the Second Circuit's misguided immunity analysis is not that the Cayugas have reunited fee and aboriginal title, but the bare fact that the Cayugas are a tribe with tribal immunity. That cannot remotely be squared with *Sherrill*. Indeed, if the decision below is correct, then *Sherrill* was not just academic but nonsensical. The premise of the opinion is that even the reunification of fee and aboriginal title is not sufficient to overcome the equitable problems with an immunity from state and local taxation. The premise of the decision below is that reunification of fee and aboriginal title is not even necessary, as any tribe that obtains any land in fee can resist all state and local efforts to collect property taxes. If the latter

proposition is true, then this Court's decision in *Sherrill* was entirely beside the point.

The better reading, of course, is that this Court knew exactly what it was doing in *Sherrill*—namely, holding that tribal sovereign immunity is no bar to foreclosure and eviction proceedings involving property that a tribe acquires outside its sovereign dominion. This Court should grant certiorari to restore that result and confirm that *Sherrill*'s holding cannot be evaded by granting tribes a functionally identical immunity that creates identically intolerable inequities.

B. The Decision Below Erred In Holding the Immovable-Property Exception Inapplicable Here.

1. In addition to failing to faithfully apply *Sherrill*, the decision below erred in finding the immovable-property exception to sovereign immunity inapplicable here. For "almost as long as there have been hornbooks," it has been hornbook law that "'there is no immunity from jurisdiction with respect to actions relating to immovable property.'" *Upper Skagit*, 138 S.Ct. at 1657 (Thomas, J., dissenting) (quoting H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l Law 220, 244 (1951)).[3] This principle reflects the fact that "[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to

[3] Neither the majority nor the concurring opinions in *Upper Skagit* disputed Justice Thomas's description of the immovable-property doctrine and its historical pedigree. *See, e.g.*, *Upper Skagit*, 138 S. Ct. at 1655-56 (Roberts, C.J., concurring).

use of real property within its own domain." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.). Accordingly, when disputes over rights in real property arise, sovereign immunity does not bar the territorial sovereign from resolving those disputes. *See id.*

That international-law principle traces back to the very roots of international law. In his 18th century treatise, Cornelius van Bynkershoek noted his agreement with 16th-century scholar Oswald Hilliger that "property which a prince has purchased for himself in the dominions of another … shall be treated just like the property of private individuals and shall be subject in equal degree to burdens and taxes." Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis* 22 (G. Laing transl. 2d ed. 1946). Writing shortly after Bynkershoek, Vattel, "the founding era's foremost expert on the law of nations," *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S.Ct. 1485, 1493 (2019), similarly 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." 2 Emer de Vattel, *The Law of Nations* §83, p. 139 (C. Fenwick transl. 1916). That principle remains equally entrenched today: "All modern authors are … 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." 2 C. Hyde, International Law 848, n. 33 (2d ed. 1945).

Unsurprisingly in light of this history, this Court has repeatedly endorsed the principle that sovereign immunity does not preclude lawsuits relating to rights in immovable property within another sovereign's jurisdiction. In *Schooner Exchange*, for example, Chief Justice Marshall explained that "the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual." 11 U.S. at 145-46. Accordingly, "[a] prince, by acquiring private property in a foreign country," subjects "that property to the territorial jurisdiction." *Id.* With respect to that property, "he may be considered as so far laying down the prince, and assuming the character of a private individual." *Id.* at 145. This Court later reiterated the point in affirming Chattanooga's right to seize by eminent domain land owned in fee by Georgia, explaining that state sovereign immunity does not extend to "[l]and acquired by one State in another State." *City of Chattanooga*, 264 U.S. at 480. With respect to its real property in Tennessee, "[Georgia] occupies the same position there as does a private corporation … and … cannot claim sovereign privilege or immunity." *Id.* at 481.

Consistent with its status as a precept of *international* law, this principle is not limited to actions that any one domestic sovereign treats as *in rem* versus *in personam*. For example, this Court held in *Permanent Mission of India to the UN v. City of New York*, 551 U.S. 193 (2007), that foreign sovereigns were not immune from "a lawsuit to declare the validity of tax liens on property" in New York City. *Id.* at 195. Interpreting the Foreign Sovereign Immunities Act of 1976 (FSIA) but doing so with

reference to the broader immovable-property principles that "the FSIA was … meant to codify," *id.* at 200, this Court held that lawsuits against foreign governments in which "rights in immovable property situated in the United States are in issue" fall outside the scope of foreign sovereign immunity, *id.* at 197. And because the city's lawsuit to establish "the validity of a tax lien on property is a suit to establish an interest in such property," the lawsuit was not barred by sovereign immunity. *Id.* at 199-200.[4]

To be sure, while it is not limited to any one sovereign's conception of *in rem* jurisdiction, the immovable-property exception does not apply to every lawsuit that relates in some remote way to real property. For example, it does not apply to claims that are merely "incidental to property ownership, such as actions involving an injury suffered in a fall on the property." *Id.* at 200 (quoting Restatement (Second) of Foreign Relations Law §68); *see* App.13. But it applies with full force to all "actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction." App.15 (quoting Restatement (Second) of Foreign Relations Law §68 cmt.d).

2. The immovable-property exception provides an alternative ground for reversing the decision below.

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[4] Because *Permanent Mission* involved diplomatic residences, New York conceded that it could not enforce the tax liens even if the Court deemed them valid. 551 U.S. at 195-96 n.1; *see also* 28 U.S.C. §1610(a)(4)(B); Restatement (Third) of Foreign Relations Law §455, cmt.b (1987)). That limitation on enforcement has no application here.

Under *Sherrill*, the land here is indisputably outside the Cayuga Nation's sovereign domain. These actions, moreover, are simply designed to hold the Cayugas to account for their tax obligations to the very property at issue. Thus, they are self-evidently actions "for the determination of possession of, or an interest in, immovable or real property." *Id.* Indeed, even the Second Circuit acknowledged that "if Seneca County prevailed in the Foreclosure Actions, it would acquire title to the Properties." App.17. That is exactly how the County would enforce the tax obligations of any other taxpayer in the County. Accordingly, with respect to the foreclosure actions, the Cayuga "occup[y] the same position" as would any private party, and therefore "cannot claim sovereign privilege or immunity." *City of Chattanooga*, 264 U.S. at 481.

The Second Circuit concluded otherwise not because it disputed the historical pedigree of the immovable-property exception, or because it believed that the exception does not apply to tribal sovereign immunity. Instead, the Second Circuit opined that foreclosure actions are not "actions for the determination of possession of, or an interest in, immovable or real property" because they "are—fundamentally—about money, not property." App.15-16. In the Second Circuit's view, because the purpose of the foreclosure actions is to satisfy "the Cayugas' financial debt for accrued, unpaid property taxes," they are not "actions to determine rights in immovable property" but rather "actions to pursue a remedy that is available to Seneca County by virtue of its rights in immovable property." App.16-17.

That analysis has no basis in logic or law. This is not an effort to satisfy some unrelated debt by taking action against the property. This is an action by the territorial sovereign to enforce property taxes assessed against the very property at issue. As such, this action is all about the immovable property at issue. The immovable-property exception applies broadly to all disputes in which rights to immovable property are in issue. *See, e.g.*, 1 Emer de Vattel, *The Law of Nations* §115, p. 493 (J. Chitty transl. 1853) ("*All* contests and lawsuits concerning [immovable] property are to be carried before the tribunals of the country; and those same tribunals may decree its seizure in order to satisfy *any* legal claim." (emphasis added)). Here, the foreclosure actions plainly implicate rights in immovable property; indeed, it is hard to imagine a lawsuit that is more fundamentally "for the determination of possession of, or an interest in, immovable or real property" than a lawsuit that aims to oust one party from possession and vest title in the other based on a failure to pay taxes on the parcel.[5]

The Second Circuit's contrary conclusion is plainly incompatible with *Permanent Mission*. There, as here, the underlying dispute was about property taxes: The governments of India and Mongolia were

[5] The Second Circuit's conclusion that a foreclosure action does not "fundamentally" concern "property," App.16, also conflicts with the "local action rule," which gives local courts "exclusive" authority "to settle questions" that "directly implicate interests in the property or rights to possession." *Reclamantes*, 735 F.2d at 1521-22. New York courts have held that a foreclosure action is a local action. *See* N.Y. CPLR §507; *Scotto v. Kodsi*, 958 N.Y.S.2d 740, 742 (N.Y. App. Div. 2013).

delinquent on several years of property taxes, leading to the imposition of tax liens and New York City's declaratory actions to confirm the validity of those liens. This Court nevertheless had no difficulty concluding that the immovable-property exception applied, holding that "a suit to establish the validity of a tax lien places rights in immovable property … in issue." 551 U.S. at 202. The application of the immovable-property exception here follows *a fortiori*: If a suit to merely impose a tax lien places possession of and rights to immovable property in issue, so too must a suit to take title and possession of that property by foreclosing on the lien.

The Second Circuit perceived support for its interpretation in the Second Restatement, but that too was misguided. Looking to the Restatement's "General Rule" of sovereign immunity, the court cited a comment that sovereign immunity "prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state." Restatement (Second) of Foreign Relations Law §65, cmt.d. But whatever application that general rule may have to *movable* property, section 65 makes clear that its general rule applies "except as stated in §68," which specifically addresses *immovable* property. *Id.* §65(1). And Section 68 makes clear that sovereign immunity does not apply to foreclosure proceedings concerning immovable property: "The immunity from jurisdiction of a foreign state does not extend to actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction." *Id.* §68 cmt.d.

In short, the Second Circuit's conclusion that the immovable-property exception is inapplicable to foreclosure proceedings is inconsistent with historical doctrine, incompatible with this Court's cases, and wholly without grounding in logic or law. For this reason too, certiorari is warranted.

III. The Question Presented Is Exceptionally Important.

The importance of this case is undeniable. As all nine Justices agreed in *Upper Skagit*, "[d]etermining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes." 138 S.Ct. at 1654; *see also id.* at 1655 (Roberts, C.J., concurring); *id.* at 1657 (Thomas, J., dissenting). That question is no less grave for non-tribal parties throughout the country, including states and local jurisdictions like Seneca County, which have been denied the promise of *Sherrill* for well over a decade, despite this Court's decision to grant certiorari 11 years ago to review Second Circuit doctrines that by the judges' own admission produce results that defy logic.

No one's interests are served by further delay and uncertainty. There are nearly 600 federally recognized tribes in the United States. *See* U.S. Dep't of Interior, Bureau of Indian Affairs, *Frequently Asked Questions*, https://on.doi.gov/3iNnlCU (last visited Feb. 17, 2021). Every one of those tribes has to co-exist with state governments, and virtually all need to reach accommodations with nearby local jurisdictions. The rules for the interactions between tribes and state, local, and federal authorities on current reservations and trust land are reasonably well

established. But as this Court recognized in *Sherrill*, the potential for friction among jurisdictions becomes untenable if tribes can unilaterally re-establish full sovereignty simply by making open-market purchases of parcels that have been on the local tax rolls for centuries. And the potential for friction engendered by the decision below is not even limited to historic reservations. Because the "[t]he Second Circuit's holding does not depend on the tribal history or legal status of the land but follows solely from the fact of tribal fee ownership today," any tribe "could buy real property anywhere in the United States, *e.g.*, the Empire State Building, refuse to pay real property taxes, and invoke sovereign immunity from suit as an absolute defense to the resulting foreclosure action." Br. for the States of New York et al. as *Amici Curiae* in Support of Petitioners 16, *Madison Cty. v. Oneida Indian Nation*, No. 10-72 (U.S. filed Dec. 10, 2010).

Nor is the threat limited to the tax rolls. If the Second Circuit's understanding of the immovable-property exception were correct—and if states and local subdivisions really were without recourse in cases like this one—then tribes could obtain practical immunity not just from taxes but from zoning, environmental, and other regulatory laws—simply by purchasing land in fee. Indeed, as the Chief Justice noted in *Upper Skagit*, if the immovable-property doctrine "does not extend to tribal assertions of rights in non-trust, non-reservation property," then "the applicability of sovereign immunity in such circumstances would … need to be addressed in a future case," for "[t]he correct answer cannot be that the tribe always wins no matter what." 138 S.Ct. at 1655-56; *cf. Michigan v. Bay Mills Indian Cmty.*, 1572

U.S. 782, 799 n.8 (2014) (noting that an exception to immunity may be warranted if a "plaintiff who has not chosen to deal with a tribe has no alternative way to obtain relief for off-reservation commercial conduct").

Fortunately, both *Sherrill* and the immovable-property exception preclude such inequitable results. By minimizing both doctrines, the decision below creates a rule that "defies common sense." *Madison Cty.*, 605 F.3d at 163-64 (Cabranes, J., concurring). This Court should grant review and reunite "law and logic," *id.* at 164, in the Second Circuit and nationwide.

CONCLUSION

The Court should grant the petition.

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