No. 21-477

In the
Supreme Court of the United States

JASON SELF AND THOMAS W. LINDQUIST,
Petitioners,

v.

CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California

BRIEF OF AMICUS CURIAE SENECA COUNTY, NEW YORK IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Seneca County, New York ("Seneca County" or the "County") is a political subdivision of the State of New York. Over the past three decades, the Cayuga Indian Nation of New York (the "Cayuga Nation" or the "Cayugas"), a federally recognized Indian Nation, has purchased dozens of non-contiguous parcels of land in Seneca County through open-market transactions. Despite the Cayugas' efforts to assert tribal sovereign immunity to escape local regulation of these parcels, this Court previously held that such parcels are not immune from local taxation and regulation. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *see also Cayuga Nation v. Vill. of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005) (applying *Sherrill* to preclude the Cayuga Nation from avoiding zoning laws with respect to its recently purchased properties). This Court was concerned that tribes would unilaterally create an unworkable checkerboard of state and tribal jurisdiction by their piecemeal acquisition of fee simple properties on the open market. *Sherrill*, 544 U.S. at 200.

However, defying logic, the lower courts have–since *Sherrill*—repeatedly held that tribal sovereign immunity from suit nonetheless still operates to bar local municipalities from enforcing local taxation and regulation of the Cayuga Nation's non-trust lands.

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[1] This *amicus* brief is presented pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States, as this brief is presented on behalf of a county and is submitted by its authorized law officer. Consent to file this brief was timely requested and obtained from Petitioners and Respondent.

These decisions stem from the lower courts' reading of *Sherrill* as providing municipalities with taxation and regulatory rights over these lands without a means to enforce these rights. *See, e.g., Oneida Indian Nation v. Madison Cty.*, 605 F.3d 149 (2d Cir. 2010) ("Madison Cty."); *Cayuga Indian Nation of New York v. Seneca Cty.*, 978 F.3d 829 (2d Cir. 2020) ("*Seneca Cty.*") (agreeing that—despite *Sherrill*—the Cayuga Nation is immune from any effort by the County to collect massive unpaid property taxes). The Cayuga Nation—and other tribes, relying on this precedent—have successfully argued that this same reasoning extends to avoid any form of compulsory regulatory action related to their use of the land. *See*, *e.g. Cayuga Nation v. Tanner*, 6 F.4th 361, 380 n.14 (2d Cir. 2021) (opining that the Cayugas enjoy tribal immunity from any suit to enforce a local land use ordinance).

As a result, the jurisdictional patchwork that this Court was concerned with in *Sherrill* operates today across multiple counties and municipalities in New York but instead of a patchwork of taxed and untaxed parcels, counties, towns and cities have within their borders a checkerboard of regulated and unregulated land. The lack of enforcement authority with respect to properly imposed local regulation of lands due to this jurisdictional checkerboard has had real world consequences in Seneca County. *See*, *infra*, Argument, Sec. E.

Recognizing the immovable-property exception as applicable to tribal sovereign immunity provides an opportunity to reunite law and logic in disputes

concerning the enforcement of local laws regulating and restricting the use of non-trust lands owned by the Cayuga Nation, or any other tribe, as intended by *Sherrill*. This exception has historically been understood to "cover[] a broad range of suits, including those arising out of the foreign state's obligations stemming from its ownership of property," not just the question of title to property. *City of N.Y. v. Perm. Mission of India to the UN*, 446 F.3d 365, 373-74 (2d Cir. 2006), *aff'd* 551 U.S. 193 (2007) (applying exception in suit concerning validity of real property tax liens). It could therefore potentially be applied to render a number of disputes concerning Cayuga Nation lands justiciable.

The County, therefore, has a strong interest in the question presented of "[w]hether the immovable-property exception applies to tribal sovereign immunity". The answer to this question will have a direct bearing on whether Seneca County, and all other municipalities where Indian tribes have purchased (or will someday purchase) fee simple land, can enforce local laws concerning real property taxes, zoning, environmental protection, condemnation, and other land-use regulations applicable by reason of *Sherrill*.

SUMMARY OF THE ARGUMENT

In *Sherrill*, this Court confirmed a city's right to assess and collect real property taxes on property owned by an Indian nation in fee simple. The *Sherrill* Court also suggested that fee-titled property owned by tribes are also subject to state and local zoning, environmental and regulatory laws. In the 16 years

that have followed, lower court decisions have interpreted *Sherrill* in a manner that is nonsensical, determining that while a state or political subdivision can assess taxes, it cannot sue to enforce collection of those taxes due to tribal sovereign immunity from suit. *Seneca Cty*. Arguably, this same "logic" applies to enforcement of state and local zoning, environmental and regulatory laws, making compliance by Indian nations voluntary at best. *Tanner*, 6 F.4th at 380, n. 14.

As is further explained below, this Court should grant certiorari because real property owned in fee simple by a tribe is not only subject to state and local taxation and regulation, but municipalities also have the ability to sue to enforce these laws since tribal sovereign immunity to suit is subject to the immoveable-property exception-an exception that has been recognized for centuries under common law. Tribal sovereign immunity is "a judicial doctrine" and this Court has "taken the lead in drawing" its "bounds." *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 759 (1998). Accordingly, this Court should clarify once and for all that tribal sovereign immunity is not greater than the immunity enjoyed by the U.S. government, states and foreign sovereigns. Such a clarification by this Court will give full effect to *Sherrill* by resolving all lower court interpretations that have found an inherent conflict between the rights of state and local municipal to tax and regulate fee-owned tribal property and their ability to enforce these rights.

ARGUMENT

I. This Court Should Grant Certiorari to Clarify that Tribal Sovereign Immunity to Suit is Subject to the Immoveable-Property Exception Thereby Giving Effect to *Sherrill*.

A. *Sherrill* Upheld a Municipality's Authority to Tax and Regulate Fee-Titled Lands Owned by an Indian Tribe.

In *Sherrill*, this Court affirmed the City of Sherrill's right to assess and collect property taxes on fee lands purchased by the Oneida Indian Nation. That decision did not draw a distinction between the right to tax the land and the right to collect the taxes through litigation, and indeed no such distinction should be drawn.

Sherrill arose from an eviction proceeding, following the City of Sherrill having obtained title to the parcels through tax foreclosure proceedings. *See Oneida Indian Nation v. City of Sherrill*, 145 F. Supp. 2d 226, 232-33 (N.D.N.Y. 2001). The Oneida Indian Nation purchased fee title to the parcels through open market transactions in 1997 and 1998. *Sherrill*, 544 U.S. at 202. Invoking tribal sovereign immunity, the Oneida Indian Nation sought a declaration that its lands were not subject to taxation, and declarations that the City "may not . . . *attempt to collect* property taxes based upon lands owned and possessed by the Nation within Sherrill . . . that Sherrill's *purported conveyances of the properties for delinquency of taxes are null and void*, and that Sherrill may not evict the Nation from its lands . . ." *Id.* at 237 (emphasis added); Joint App'x,

City of Sherrill v. Oneida Indian Nation, 2004 U.S. S. Ct. Briefs LEXIS 493, at *JA27 (Aug. 12, 2004) (Complaint filed by the Oneida Nation on Feb. 2, 2000 in N.D.N.Y. Case No. 00-cv-223). The Oneida Indian Nation also sought an injunction prohibiting the City from taxing its properties, and "prohibiting it from interfering with *the Nation's ownership and possession* of its lands and from any effort to evict the Nation from such lands . . ." *Oneida Indian Nation*, 145 F. Supp. 2d at 237 (emphasis added).

Reversing the Second Circuit, this Court rejected the Oneida Indian Nation's argument that the City did not have taxing and regulatory authority over the parcels on the basis that the "acquisition of fee title to discrete parcels of historic reservation land [had] revived the Oneidas' ancient sovereignty piecemeal over each parcel." *See Sherrill*, 544 U.S. at 202, 214. Rather, the Court found that the Oneida Indian Nation's tribal patchwork of land owned in fee simple was deemed subject to the full jurisdiction and regulating authority of state and local governments. *Id.* at 202-203.

In so doing, the *Sherrill* Court specifically referenced zoning and other regulations when it warned that if the Oneidas could "unilaterally reassert sovereign control and remove . . . parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *Sherrill*, 544 U.S. at 202-03.

B. Certiorari is Warranted to Resolve the Conflict Identified by The Second Circuit Following *Sherrill*.

Perhaps the *Sherrill* Court was convinced that it had solved the problem of Indian tribes creating an unworkable checkerboard jurisdictional patchwork through piecemeal acquisitions of land, but the Second Circuit's strained interpretation of *Sherrill* has resulted in this very thing.

In *Madison Cty.*, this Court granted certiorari to decide "whether tribal sovereign immunity . . . bars taxing authorities from foreclosing to collect lawfully imposed property taxes." The central issue was whether *Sherrill* merely affirmed the right to tax or also determined that the taxing authorities could enforce this right despite a tribe's claim of sovereign immunity to suit. The Second Circuit held that, pursuant to *Sherrill*, lands owned in fee by a tribe were subject to local taxation and regulation, but that the tribe's sovereign immunity to suit precluded any enforcement action by the County. The Court noted that its interpretation of *Sherrill* "defies common sense" but believed it was constrained to so rule. *Madison Cty.*, 605 F.3d at 163 (Cabranes, J., concurring). Judge Cabranes went on to encourage this Court to reunite "law and logic . . . in this area of the law." *Id.* at 164. Unfortunately, this Court was denied the opportunity to do so when the Oneidas withdrew the defense of sovereign immunity resulting in this Court vacating and remanding for consideration of other issues. *Madison Cty. v. Oneida Indian Nation of N.Y.*, 562 U.S. 42 (2011).

Ten years later, in *Seneca Cty.*, the Second Circuit doubled down on its interpretation of *Sherrill*, this time enjoining Seneca County from prosecuting tax foreclosure proceedings against lands owned by the Cayugas in fee simple due to tribal sovereign immunity to suit. *Seneca Cty.*, 978 F.3d at 840. Determining that the County was without a remedy to enforce its right to tax the lands, it rejected the very argument that could reunite "law and logic"—the immoveable property exception. *Id.* Earlier this year, in *Tanner*, 6 F.4th at 380 n.14, the Second Circuit arguably extended its holding in *Seneca Cty.* to preclude a village from enforcing a local land-use ordinance against the Cayugas land by stating:

> Though we need not resolve the Nation's sovereign immunity claim . . . we note that all parties now agree that the portion of the judgment below providing that "[t]he Nation enjoys tribal sovereign immunity from any suit by defendants to enforce the [1958] Ordinance," . . . is correct under our decision in *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 978 F.3d 829 (2d Cir. 2020).

Id.

Although *Madison Cty.* was vacated, by its decisions in *Seneca Cty.* and arguably *Tanner*, the Second Circuit has established precedent that permits an Indian nation to buy fee titled land anywhere and ignore the tax and regulatory obligations this Court confirmed in *Sherrill.* And in the *Seneca Cty.* case, it expressly rejected the strongest argument that could resolve the inherent conflict that the Second Circuit read into

Sherrill—i.e. that the taxing and regulatory rights confirmed by *Sherrill* may also be enforced by a municipality because the disputes at issue concerned rights in immoveable property. For this very reason, this Court should grant a writ of certiorari here.

C. In *Upper Skagit*, this Court Acknowledged the Grave Question of the Application of the Immovable-Property Exception to Tribal Sovereign Immunity.

Upper Skagit is an adverse possession case brought by individuals (the Lundgrens) against the Upper Skagit Indian Tribe to establish the property line between the adjacent parcles they owned. *Upper Skagit v. Lundgren*,138 S. Ct. 1649, 1651-52 (2018). 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 *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian nation*, 502 U.S. 251 (1992) as holding that sovereign immunity does not apply to in rem lawsuits. *Id*. at 1652. 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 immoveable property exception was not

raised until the merits briefing, 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 their 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). Consequently, this grave question remains unanswered.

D. Determining Whether the Immoveable-Property Exception Applies to theDefense of Tribal Sovereign Immunity to Suit Will Resolve the Jurisdictional Problems Resulting from the Second Circuit's Strained Interpretation of *Sherrill*.

The immoveable-property exception, codified in FSIA and found in the common law, includes state and local regulation among the property rights that may be adjudicated as an exception to sovereign immunity. Property ownership has frequently been described as ownership of a bundle of rights made up of individual "sticks" or "strands" representing individual rights. *See e.g. Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (Jun. 23, 2021); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J. dissenting) (explaining that property regulation may impact individual rights within the overall bundle without constituting a regulatory taking). The Court of Appeals for the Second Circuit, in a decision affirmed by this Court, explained the applicability of the immovable-property exception to local regulations, stating that:

> Ownership of property connotes a bundle of related rights and obligations defined by local property law. A foreign state cannot assume the benefits of ownership—including the right to exclude others from the property with the

> assistance of the local government and, significantly, the right to sue those who violate its rights—while simultaneously disclaiming the obligations associated with them.

City of New York, 446 F.3d at 373-74. Those "obligations" include complying with local laws and zoning codes. *Id*. at 374 ("when owning property here, a foreign state must follow the same rules as everyone else"). The Second Circuit concluded that the immovable-property exception:

> should be construed to include any case where what is at issue is: (1) the foreign country's rights to or interest in immovable property situated in the United States; (2) the foreign country's use or possession of such immovable property; or (3) the foreign country's obligations arising directly out of such rights to or use of the property

Id.

Zoning and land use regulations are a legitimate exercise of a government's police power. *Murr*, 137 S. Ct. at 1947 (citing *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Indian tribes acquiring land in the market do so subject to existing state and local regulations and the reasonable extension of those regulations that do not amount to a regulatory taking. *Id*. at 1945. *Sherrill* warned of the risk that by mere acquisition of property Indian tribes could grow the bundle of rights by rendering state regulation moot. The result would be a patchwork, within a residential neighborhood or downtown business district, of properties governed by

zoning and land use regulations and those free from any regulation.

Because "property ownership is not an inherently sovereign function", *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) ("*Permanent Mission*"), unless and until a parcel acquired by an Indian tribe is taken into trust, a tribe should not be allowed to exercise sovereignty over it in a manner that violates regulation by the state and its subdivisions. *See Sherrill*, 544 U.S. at 220-21 (recognizing the land into trust process under 25 U.S.C. § 465 as the proper mechanism "to regain sovereign control over" tribal ancestral lands); *Cayuga Indian Nation v. Vill. of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) (concluding, in light of *Sherrill*, that repurchased ancestral lands are subject to state and local zoning laws and regulations).

Certiorari should be granted here to clarify that tribal immunity to suit is subject to the immoveable property exception, thereby giving teeth to this Court's *Sherrill* decision and ensuring that tribes cannot simply disregard state and local tax, zoning, environmental and other regulatory laws that govern, and have governed for centuries, the lands they purchased on the open market.

E. Requiring Municipalities to Enforce Regulations by Force Without the Protection of Judicial Order Creates a Troubling Precedent.

The alternative to application of the immovable-property exception is the removal of

legitimate legal disputes from this nation's court systems and an invitation to aggrieved parties to engage in self-help. Chief Justice Roberts, concurring in the remand decision in *Upper Skagit*, expressed a legitimate concern that litigants would become belligerents whose lack of recourse in courts would require them to "steer into the conflict." *Upper Skagit*, 138 S. Ct. at 1655. For the Lundgrens, who claimed adverse possession of forested land based on the location of their border fence, that could have meant "firing up their chainsaws" and removing trees on the disputed parcel. *Id*. at 1656. For municipalities seeking to protect neighborhood residents from the dangers of an Indian nation ignoring local regulations—for example, storing dangerous chemicals or fuels on a property, constructing behemoth buildings that block out the sun, opening adult-themed business next door to schools, or abandoning derelict property creating attractive nuisances— the recourse in the absence of an immovable-property exception may be forced entry on to a property to take actions that would provoke Indian tribes into waiving their immunity-from-suit by rushing to court. Without the ability to enforce their regulations under the immoveable property exception, municipalities will be left with two bad choices, permitting potentially dangerous situations to persist, or taking police action without the benefit of a court order. And this is a conflict that is already taking place.

Last year the Cayugas simply ignored Seneca County's regulatory authority when dealing with its property holdings in the County by demolishing buildings on its lands in the middle of the night without applying for, or obtaining, a demolition permit

from the County.[2] To make matters worse, they have refused to clean up the demolished buildings creating a dangerous nuisance.[3] Yet, under current Second Circuit precedent, the County has no legal recourse.

Furthermore, the threat of government intrusion on land without a court order could be met with violence. Zoning enforcement officials, building inspectors or environmental conservation officers may be at risk if forced enter property to enforce regulations and codes without the benefit of a court order. These officials, and the municipalities, might also open themselves up to civil liability if a court disagrees after-the-fact that the landowner has violated an ordinance.

Chief Justice Roberts was "skeptical that the law requires [parties dealing with land owned by Indian tribes] . . . to pick a fight in order to vindicate their interests." *Upper Skagit*, 138 S. Ct. at 1655. He warned that "[t]he consequences of the Court's decision today seem intolerable, unless there is another means of resolving property disputes," concluding that the immovable-property exception was that other means. *Id*., *see also Michigan v. Bay Mills Indian Cmty*., 1572

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[2] Thompson, C. (2020, February 25). *Indian Nation Destroys Own Buildings Over Leadership Dispute* ABC News. https://abcnews.go.com/US/wireStory/indian-nation-destroys-buildings-leadership-dispute-69213147

[3] Durso, J. (2021, June 17). *Officials Debate Destroyed Cayuga Nation Buildings Ithaca Times.* https://www.ithaca.com/news/regional_news/officials-debate-destroyed-cayuga-nation-buildings/article_b7e14bc8-ceb9-11eb-984f-4f0756928ede.html

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").

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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