No. 20-1210

IN THE
Supreme Court of the United States

SENECA COUNTY, NEW YORK,
Petitioner,
v.

CAYUGA INDIAN NATION OF NEW YORK,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does tribal sovereign immunity from suit bar Seneca County from attempting to collect a disputed money debt by foreclosing on properties the Cayuga Nation owns in fee within its federal reservation in upstate New York?

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INTRODUCTION

This case stems from a disputed debt. Seneca County claims the Cayuga Nation owes money for unpaid taxes on properties the Nation owns within its reservation. The Nation disagrees—because state law exempts its properties from tax. Sovereign immunity would obviously bar a collection suit against the Nation. So the County tried to circumvent that immunity by foreclosing on the Nation's properties. The Second Circuit rebuffed the County's efforts and declined the invitation to "carv[e] out exceptions" from the Nation's immunity. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). Instead, it adhered to separation-of-powers principles by "defer[ring] to Congress." *Id.*

The Second Circuit's conclusion was correct, implicates no division of authority, and does not warrant review. The County's arguments for certiorari are long on rhetoric and short on substance.

First, the County urges a new exception from tribal sovereign immunity based on *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). The County argues that because *Sherrill* authorizes it to *tax* the Nation's properties, it must be able to *collect* taxes via foreclosure—and that any other rule would make *Sherrill* a "sport." Pet. 1. This Court, however, has repeatedly rejected that argument. In *Potawatomi*, *Kiowa*, and *Bay Mills*, this Court considered whether Indian nations could assert immunity from suit for conduct that states "have authority to tax or regulate." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998). The states asked this Court to say no and argued that, otherwise, they would have "a right

without any remedy." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991). But every time, this Court rejected that argument. "There is a difference," this Court explained, "between the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755. The decision below duly applied this settled law. Pet. App. 24.

Further review is not warranted. There is no split. Instead, the County relies entirely on the grant in *Madison County v. Oneida Indian Nation of New York*, 562 U.S. 960 (2010) (mem.). But the County ignores that this Court later *decided* the issue spurring that grant. There, Judge Cabranes agreed that *Kiowa* and *Potawatomi* controlled—but he deemed their rule "anomalous" and penned a concurrence inviting this Court to "reconsider" them. *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 605 F.3d 149, 164 (2d Cir. 2010). This Court proved unable to take up that invitation in *Madison County*. But it did so in *Bay Mills*, which considered whether to "revisit *Kiowa*" but "declined." 572 U.S. at 797, 803. With this Court having resolved that issue, plus two others the *Madison County* petitioners pressed, there is no warrant for certiorari here. The *amicus* lineup underscores the point: Where five *amici* urged review in *Madison County*, Seneca County stands alone.

The County fares no better with its arguments based on the immovable-property exception. In *Upper Skagit*, this Court reserved the question whether the common-law "immovable property exception" limits tribal sovereign immunity. *Upper Skagit Indian Tribe v.*

Lundgren, 138 S. Ct. 1649, 1654 (2018). Below, the Second Circuit assumed the answer to that question *in the County's favor*. Pet. App. 3, 12. It resolved the case on the narrow ground that the County had not shown that money-seeking foreclosures fall within that exception. The County's claim that the decision below "implicates the … issue this Court was unable to resolve in *Upper Skagit*," Pet. 3, is thus false. Likewise, its claim that lower courts are divided "three ways," Pet. 18, is just rhetoric designed to conceal that the decision below implicates no split.

The Second Circuit's narrow decision is also correct. The County trumpets that the immovable-property exception has been "hornbook law" "'almost as long as there have been hornbooks.'" Pet. 26 (quoting *Upper Skagit*, 138 S. Ct. at 1657 (Thomas, J., dissenting)). But in 600 years, it cannot cite one case or hornbook applying the exception to foreclosures. And for good reason. The immovable-property exception posits that states have a "primeval interest in resolving all disputes over use or right to use of real property." *Upper Skagit*, 138 S. Ct. at 1658 (Thomas, J., dissenting). Foreclosures, however, "are—fundamentally—about money, not property." Pet. App. 16. They seize property as a stand-in for a money debt. Indeed, the *Restatement (Second) of Foreign Relations Law* expressly *says* the exception does not apply to foreclosures. Because the County failed to carry its burden, the Second Circuit properly adhered to the "baseline position" of immunity. *Bay Mills*, 572 U.S. at 790.

This case is also a poor vehicle. To begin, it does not present the Question Presented, which asks about

immunity from "lawfully imposed" taxes. Pet. ii. The Nation maintains that state law renders the taxes here unlawful, and neither lower court made a ruling on the issue (which the County did not seek). Indeed, this case is an even worse vehicle because it concerns *reservation* land (after the district court rejected the County's request to disestablish the Nation's reservation). *Upper Skagit*'s separate opinions contemplated applying the immovable-property exception because that case "involv[ed] … non-reservation land." 138 S. Ct. at 1655-56 (Roberts, C.J., concurring). The idiosyncratic status of the lands here—within the Nation's reservation but subject to *Sherrill*—renders this case unsuitable for considering general immunity questions.

The County's last gasp is to warn of "grave" consequences. Pet. 33. But this is just rhetoric. The decision below does not address immunity from suits to enforce "zoning, environmental, and other regulatory laws." Pet. 34. Its only real consequence—that the County cannot employ its preferred means of collecting a disputed debt—is just the consequence that always follows from *Potawatomi*, *Kiowa*, and *Bay Mills*. Indeed, the decision below simply reaffirms what the Second Circuit's law has provided for decades. So it is especially telling that the County cannot identify any genuine support for its parade of horribles.

The reality is that Indian nations do not invoke immunity to flout genuine tax obligations. The cost is too high, given the pressures state and local governments can bring to bear. That is why the County's Question Presented has only ever arisen as to the Cayuga and Oneida, which have compelling

arguments that New York law exempts their properties from taxation. And after *Madison County*, the Oneida reached a global settlement. So the live dispute concerns just the Cayuga, a nation of about 400 adults whose scattered parcels account for a mere 0.4% of Seneca County. Further review of the Second Circuit's split-less resolution of that dispute is not warranted.

The Court should deny the Petition.

STATEMENT OF THE CASE

A. The Cayuga Nation's Properties And Seneca County's Foreclosures.

The Nation is a federally recognized Indian nation. Pet. App. 4. In 1794, the United States recognized its 64,015-acre reservation—within what today are Seneca and Cayuga counties—and pledged that the "reservation[] shall remain theirs." Treaty of Canandaigua of 1794, art. II, 7 Stat. 44, 45. Congress never disestablished that reservation, nor authorized the sale of its lands. *See Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 260 F. Supp. 3d 290, 307-15 (W.D.N.Y. 2017). In 1795 and 1807, however, New York unlawfully purported to purchase those lands. *Id.* at 293-94, 309. Recently, the Nation repurchased some of its lands on the open market. Pet. App. 2.

The parties dispute whether the Nation's properties are taxable under New York law. New York exempts from tax "real property" in "any Indian reservation owned by [an] Indian nation." N.Y. Real Prop. Tax Law § 454; *accord* N.Y. Indian Law § 6. The New York Court of Appeals has held that the Nation's reservation is a "qualified reservation" under New York law. *Cayuga*

Indian Nation of N.Y. v. Gould, 930 N.E.2d 233, 247 (N.Y. 2010) (quoting N.Y. Tax Law § 470(16)(a)). Seneca County nonetheless purported to tax the Nation's properties. When the Nation stood on its New York–law rights and refused to pay, the County in 2010 initiated foreclosures on five Nation-owned properties (later merged into four). Pet. App. 4-5 & n.1.

The Nation sued in federal district court. Pet. App. 5. It averred that New York law exempted its properties from taxation, and that the foreclosures were barred by the Nation's immunity from suit and the Non-Intercourse Act, 25 U.S.C. § 177. Pet. App. 5-6.

B. The Preliminary Injunction And The Second Circuit's Affirmance.

In August 2012, the district court issued a preliminary injunction based on immunity from suit. Pet. App. 43. It explained that "Supreme Court precedent clearly … holds" that "[e]ven assuming that Seneca County has the right to impose property taxes …, it does not have the right to collect th[em]" via foreclosure. Pet. App. 47.

The relevant precedent was *Potawatomi* and *Kiowa*. *Potawatomi* held that Oklahoma could impose substantive duties on an Indian nation—namely, "requir[ing it] to collect all state taxes applicable to sales to non-Indians"—but that "immunity … from suit" barred lawsuits to enforce those duties. 498 U.S. at 512-14. It rejected Oklahoma's complaint that this holding gave the state "a right without any remedy." *Id.* at 514. *Kiowa* held that an Indian nation's sovereign immunity barred a breach-of-contract suit concerning an off-

reservation commercial contract. 523 U.S. at 753. It explained that states "may have authority to tax or regulate tribal activities … within the State" but that "[t]o say substantive state laws apply to off-reservation conduct … is not to say that a tribe no longer enjoys immunity from suit." *Id.* at 755. That is because "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Id.* The district court noted that the Second Circuit's *Madison County* decision applying *Potawatomi* and *Kiowa* had been vacated and so was "technically without effect." Pet. App. 57. But it nonetheless followed *Madison County's* straightforward application of *Potawatomi* and *Kiowa* and granted a preliminary injunction. *Id.*

The Second Circuit affirmed. It did not rely on *Madison County*. Instead, it considered the issue *de novo* and applied this Court's intervening decision in *Bay Mills*. In particular, the Second Circuit found no "need … to discern the implied message communicated by the vacatur" of *Madison County*—because *Bay Mills* had reaffirmed "the continuing vitality of" *Kiowa* and deemed it "'improper suddenly to start carving out exceptions' to [tribal sovereign] immunity." Pet. App. 40 (quoting 134 S. Ct. at 2030). The Second Circuit thus declined the County's invitation to "read [an] implied abrogation of tribal sovereign immunity into … *Sherrill*." Pet. App. 41. Accepting that invitation, it explained, would be "clearly at adds" with *Bay Mills*' holding "that we must 'defer to Congress about whether to abrogate tribal [sovereign] immunity.'" Pet. App. 41 (quoting 134 S. Ct. at 2031). The Second Circuit also

declined to draw "a distinction between *in rem* and *in personam* proceedings," rejecting the County's argument based on *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). Pet. App. 41.

This Court rejected the County's motion to file an out-of-time cert petition. *See* No. 14M57.

C. The District Court's Final Judgment.

On remand, the County sought a declaration that the Nation's "reservation has been disestablished." W.D.N.Y. Dkt. 37 at 7. The district court rejected that claim. W.D.N.Y. Dkt. 44. It recognized that, as this Court reaffirmed in *Nebraska v. Parker*, "[o]nly Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear." *Id.* at 29 (quoting 577 U.S. 481, 487-88 (2016)). And the district court held that Congress had not enacted any statute or treaty disestablishing the Nation's reservation. *Id.* at 29-40. The County did not appeal that decision.

On the merits, the court granted judgment to the Nation and permanently enjoined the foreclosures "based upon tribal sovereign immunity from suit" "for essentially the same reasons" as its preliminary-injunction decision. Pet. App. 36. Because that holding sustained the Nation's requested relief, the court did "not reach" the Nation's claims based on New York law or the Non-Intercourse Act and "dismissed [them] without prejudice." Pet. App. 36-37.

D. The Second Circuit's Affirmance.

On *de novo* review, the Second Circuit again affirmed. Pet. App. 11; *see* Pet. App. 8-9 (rejecting the Nation's argument that the preliminary-injunction decision "control[led]"). It explained that "federally recognized tribes possess 'the common-law immunity from suit traditionally enjoyed by sovereign powers,'" and that "[c]ourts must avoid 'carving out exceptions' to that immunity.'" Pet. App. 11 (quoting *Bay Mills*, 572 U.S. at 788, 789-90). Instead, the "power to restrict ... a tribe's immunity … lies … with Congress." *Id.* (citing *Bay Mills*, 572 U.S. at 788). The Second Circuit rejected both the exceptions the County urged.

1. The decision below again rejected the argument that *Sherrill* "strip[s] tribes of their immunity from suit." Pet. App. 22. It recognized that *Sherrill* addressed only "immunity from taxation—*e.g.*, … the power to *impose* real property taxes" and did not "speak to … immunity from suit—*e.g.*, whether a state … may use the courts … to *collect*." Pet. App. 23. These immunities, the Second Circuit explained, are "separate and independent," with "distinctive" rationales and scopes. *Id.* Tax immunity applies only to fully sovereign lands. Pet. App. 24 (citing *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998)). But "a tribe's immunity from suit is independent of its lands." *Id.* (citing *Kiowa*, 523 U.S. at 754).

The Second Circuit emphasized that the County's invitation to read into *Sherrill* an implied abrogation of immunity from suit would contradict *Kiowa*'s holding that there is "'a difference between the right to demand compliance with state laws' (which *Sherrill* addressed)

and 'the means available to enforce [those laws]' (which *Sherrill* did not consider)." *Id.* (quoting *Kiowa*, 523 U.S. at 755). It would also violate *Bay Mills*' holding that courts should not "carv[e] out exceptions" to tribal sovereign immunity and instead should "defer[] to Congress." Pet. App. 25 (quoting *Bay Mills*, 572 U.S. at 790).

2. The Second Circuit also rejected the County's reliance on the "[i]mmovable[p]roperty" exception to "state and foreign sovereign immunity." Pet. App. 11. The court explained that it "need not rule on" whether a similar exception limits tribal sovereign immunity—because the County's foreclosures "fall outside … the common law … exception." Pet. App. 12.

The immovable-property exception, the Second Circuit explained, posits that states have a "primeval interest in resolving disputes over use or right to use of real property" in their territory. Pet. App. 13 (quoting *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.)). The court observed that quiet-title actions like *Upper Skagit* fall within that rationale because they seek "to resolve competing claims to" property. Pet. App. 15. By contrast, foreclosures "fall outside th[at] ambit." Pet. App. 16. They do not resolve "competing claims" about "existing rights." Pet. App. 17. They use foreclosure "as a *remedy* … to satisfy [an alleged] tax debt," which the Nation could pay from any assets. Pet. App. 17. Such "enforcement actions are—fundamentally—about money, not property." Pet. App. 16.

The Second Circuit found "additional support … in the Restatement (Second) of Foreign Relations Law of

the United States," which "[c]ourts have regularly consulted" to determine "the scope of the common law exception." Pet. App. 17. The *Restatement* explains that "no case has been found in which the property of a foreign government has been subject to foreclosure of a tax lien or a tax sale." *Id.* (quoting *Restatement (Second) of Foreign Relations Law* § 65 cmt. d (1965)). The *Restatement* also explains the reason for that "void": Although "particular types of property of foreign governments may be carried on the tax rolls and be made the subjects of levy and assessment," sovereign immunity "prevent[s] the actual enforcement against the property of a foreign state of a tax claim of the territorial state." Pet. App. 17-18 (quoting *Restatement (Second) of Foreign Relations Law* § 65 cmt. d). While the County tried to dismiss that discussion as relating only to "movable property," the *Restatement* "does not expressly acknowledge any such limit[]." Pet. App. 18. And the County's request to "infer" such a limit was especially meritless because it could "identif[y] no case … in which a [U.S.] court has applied the … exception … to permit" foreclosures. *Id.*

The Second Circuit emphasized that the County's "failure" was "hardly surprising" because "[u]ntil the middle of the 20th century, the United States afforded foreign sovereigns 'absolute immunity' from the execution of judgments against their properties." Pet. App. 19 (quoting *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1233 (2d Cir. 1995)). Foreclosure is a form of execution, and "[n]othing … suggests that th[e] common law … recognized an exception for immovable property." Pet. App. 20. Hence, when the Foreign

Sovereign Immunities Act ("FSIA") created a *statutory* immovable-property exception, Congress expressly "'intended to modify" the common law's rule of "absolute immunity." Pet. App. 21 (quoting H.R. Rep. No. 94-1487, 27 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6626). The Second Circuit thus concluded that the common-law immovable-property exception "does not cover" the County's foreclosures and thus it "need not … decide" whether the common-law exception limits tribal sovereign immunity. Pet. App. 22.

The Second Circuit declined to credit the County's "dark predictions" that Indian nations would "buy [up] property" and leave the County "remediless." Pet. App. 25. This Court "rejected a similar line of argument" in *Potawatomi*. *Id.* And the remedies *Potawatomi* identified—such as entering cooperative agreements or "seek[ing] … legislation from Congress"—are "available to [the] County." *Id.* The Second Circuit thus "adhere[d] to the settled principle that 'it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.'" Pet. App. 26 (quoting *Bay Mills*, 572 U.S. at 800).

REASONS FOR DENYING THE PETITION

The decision below properly applied settled law to decline to abrogate the Nation's sovereign immunity by judicial fiat. It began, as this Court has directed, with the "baseline position" that Indian nations enjoy "immunity from suit" absent tribal waiver or congressional action. *Bay Mills*, 572 U.S. at 785, 790-91. Then, the Second Circuit rejected the argument that *Sherrill* judicially abrogated the Nation's immunity. Instead, it applied the bedrock distinction—recognized

in *Potawatomi* and *Kiowa* and reaffirmed in *Bay Mills*—between "the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755. Finally, the Second Circuit assumed in the County's favor the question *Upper Skagit* left open. But the County could not show that the common-law immovable-property exception reached foreclosures. So the exception could not help it.

The Second Circuit's decision is correct and does not warrant certiorari. Neither of the County's arguments implicates a split. Nor does the County identify any persuasive reason to grant absent a split. Indeed, because of the narrow grounds on which the Second Circuit ruled, and the idiosyncratic status of the Nation's lands, this case would be a poor vehicle for resolving broad questions. The Court should deny the Petition.

I. The Court Should Not Grant To Address The County's *Sherrill* Argument.

Three different panels have considered the County's argument that *Sherrill* impliedly "strip[ped]" Indian nations' "immunity from suit in tax foreclosure[s]." Pet. App. 22. Each has recognized, unanimously, that this Court's cases bar that argument. The chorus sings with one voice for a simple reason: *Sherrill* was not about immunity from suit. And the issue it did address, concerning "power to *impose*" taxes, differs fundamentally from immunity from suit, which follows "separate" principles. Pet. App. 23.

The County's contrary argument—that the power to tax implies the power to invade sovereign immunity to collect—contradicts *Potawatomi*, *Kiowa*, and *Bay Mills*.

Each decision holds that Indian nations retain their sovereign immunity even as to conduct that states have authority to regulate. And each decision reached that result based on the same rule the Second Circuit applied below—namely, that there is a difference between "the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755. The Second Circuit's split-less and correct application of that rule warrants no further review.

A. The County's Arguments Based On *Sherrill* Implicate No Split And Do Not Warrant Certiorari.

The County does not claim any division of authority on its *Sherrill*-based arguments. That is no surprise. *Sherrill* applied "equitable" doctrines like "laches" to the distinctive history of Indian nations in upstate New York. 544 U.S. at 216-17. Those doctrines are fact-specific. Indeed, although the Oneida's tax disputes once encompassed more than 17,000 acres, the Oneida and New York in 2013 reached a global settlement. That settlement resolved existing tax disputes, established detailed rules governing future taxation, and provided for payments from the Oneida to New York.[1] There is also no disagreement, or prospective disagreement, between the Second Circuit and state courts: While the New York Court of Appeals has not addressed the

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[1] *New York v. Jewell*, No. 6:08-CV-0644, 2014 WL 841764, at *1 (N.D.N.Y. Mar. 4, 2014); *see Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 564 & n.8 (2d Cir. 2016); Settlement Agreement by Oneida Nation, New York, Madison County, and Oneida County §§ III, V.E (May 2013) ("Oneida Settlement"), https://on.ny.gov/3mRLOco.

question presented here, it has rejected other overbroad readings of *Sherrill*. *E.g.*, *Gould*, 930 N.E.2d at 248.

Nor does this Court's 2010 grant in *Madison County* provide a reason to review this split-less issue. This Court subsequently resolved the issue that triggered that grant. In *Madison County*, Judge Cabranes penned (as a concurrence) a veritable cert petition. 605 F.3d at 164. He recognized that this Court had "twice held" in *Kiowa* and *Potawatomi* that "although states may have a right to demand compliance with state laws by Indian tribes, they lack the legal means to enforce that right." *Id.* Judge Cabranes recognized that *Kiowa* and *Potawatomi* stated "the law" and that he was "bound" to follow their "unambiguous guidance." *Id.* But he deemed their rule "anomalous" and "call[ed] out for [this] Court to reconsider *Kiowa* and *Potawatomi*." *Id.*; *see Madison Cnty.* Pet. 2, 2010 WL 2771738.

In *Bay Mills*, the Court accepted that invitation. It considered exactly the argument that Judge Cabranes pressed—which is exactly the argument the County presses here. The Bay Mills Indian Community allegedly opened a casino outside of its "Indian lands," and everybody agreed that Michigan could prohibit "illegal gaming" outside "Indian country." 572 U.S. at 793. So, Michigan said, it must have the power to *enforce* its laws against illegal gaming—and if *Kiowa* and *Potawatomi* stood as a barrier, the Court should "revisit … and reverse … *Kiowa*." *Id.* at 791. This Court considered that argument at length but ultimately "decline[d] to revisit [its] prior decision[]." *Id.* at 785, 797-803. And in doing so, it reaffirmed precisely the distinction Judge Cabranes found "counterintuitive,"

which is the same one the County claims renders *Sherrill* "a sport"—namely, the difference "between the right to demand compliance with state laws and the means available to enforce them." *Id.* at 789-90. Hence, events have well and truly left behind Judge Cabranes' invitation to grant in *Madison County*.

The same is true of two more arguments the *Madison County* petitioners advanced, each of which this Court has *also* subsequently resolved.

First, the petitioners argued that the Second Circuit's decision conflicted with *County of Yakima*, which they claimed established an "in rem" exception from tribal sovereign immunity. *Madison Cnty.* Pet. 11, 2010 WL 2771738. That is the precise issue *Upper Skagit* addressed. This Court noted that "[l]ower courts disagree about" whether "*County of Yakima* … means Indian tribes lack sovereign immunity in *in rem* lawsuits," citing the Second Circuit's preliminary-injunction decision below, which cited *Madison County*. 138 S. Ct. at 1651 & n.*. *Upper Skagit* agreed with the Second Circuit that "*Yakima* did not address … tribal sovereign immunity." *Id.* at 1652.

Second, the petitioners asked this Court to declare the Oneida's reservation disestablished based on a theory of "de facto disestablishment." This theory posited that the Oneida's reservation had disappeared because its lands had been "governed and taxed for generations by state and local governments." *Madison Cnty.* Pet. 22, 2010 WL 2771738; *see Madison Cnty.* Pet'r Br. 32, 45-60, 2010 WL 4973153. Of course, this issue provides no help to the County here—because the district court rejected the County's disestablishment

argument and the County did not appeal. But regardless, this Court addressed the same argument in *Parker* and *McGirt*, which rejected "de facto … diminishment." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020). Even though Nebraska and Oklahoma had exercised unquestioned jurisdiction over Indian reservations for 100 years while "Indian[s] landowners los[t] their titles" and the very idea of a reservation became "farfetched," this Court declined to find disestablishment. *Id.* at 2474.

With this Court having resolved every issue of potentially broad significance that *Madison County* could have addressed, all that remains is the narrow question of whether *Sherrill* (which arose out of upstate New York's distinctive history) abrogates tribal sovereign immunity (which is only a live issue as to the 400-member Cayuga Nation). The Second Circuit's split-less and correct resolution of that narrow question merits no further review.

B. The Decision Below Correctly Rejected The County's *Sherrill* Arguments.

On that narrow issue, the County's attempts to gin up a "conflict" with *Sherrill*, Pet. 21, utterly fail.

1. Again and again, the County claims the decision below turns *Sherrill* into "a sport." Pet. 1, 14, 24. It "cannot be," the County proclaims, that it may impose taxes on Nation properties but cannot "collect[]" via foreclosure. Pet. 14. If those arguments sound familiar, they should: They are a near word-for-word rerun of arguments this Court has rejected.

Potawatomi heard and rejected Oklahoma's "complain[t]" that, if the Court adhered to "sovereign immunity … from suit," it would effectively have "a right without any remedy." 498 U.S. at 514. The same complaints recurred in *Kiowa*—and in response, this Court emphasized that "[t]o say substantive state laws apply … is not to say that a tribe no longer enjoys immunity from suit." 523 U.S. at 755. And in *Bay Mills*, this Court reaffirmed *Kiowa* and reiterated that immunity from suit requires states to pursue "other remedies[] … even if … less 'efficient.'" 572 U.S. at 789. In each case, this Court rejected the arguments the County makes here by applying the bedrock principle that "'[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Id.* (quoting *Kiowa*, 523 U.S. at 755). The Second Circuit did not err by rejecting those arguments again.

Indeed, there is no truth to the County's suggestion that the decision below renders *Sherrill* meaningless or deprives it of any remedy. Because of *Sherrill*, courts have held that the Nation must comply with certain "local zoning laws and regulations." *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005). Because of *Sherrill*, the Nation could not pursue its land claim seeking compensation for the unlawful theft of its lands. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 268 (2d Cir. 2005). And because of *Sherrill*, the very properties at issue here will carry tax liens, which will be "effective as against subsequent purchasers" unless the Nation

prevails on its state-law arguments. *United States v. Alabama*, 313 U.S. 274, 282 (1941).

All that, moreover, is before getting to the remedies *Potawatomi* found sufficient—including tribal/state compacts (like the Oneida/New York settlement) and "seek[ing] appropriate legislation from Congress," 498 U.S. at 514—as well as other levers available in inter-sovereign disputes. *Infra* 34 (describing how the County's opposition contributed to denial of the Nation's trust application). This Court has repeatedly held that sovereign immunity applies even when it "bars … the most efficient remedy." *Potawatomi*, 498 U.S. at 514. So the County's preference to proceed directly against the Nation is neither here nor there.[2]

2. The County's suggestion that *Sherrill* "squarely rejected" immunity from suit, Pet. 21, is squarely wrong. *Sherrill* only addressed whether the Oneida could invoke a "unification theory" to "remove … parcels" on its reacquired reservation lands "from the local tax rolls." 544 U.S. at 220. *Sherrill* did not once mention tribal immunity from suit or cite this Court's cases about such immunity. The Oneida's brief also did not mention

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[2] This case does not implicate footnote 8 of *Bay Mills*, which reserved whether the Court might find a "'special justification' for abandoning precedent" where a "tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative … relief for off-reservation commercial conduct." 572 U.S. at 799 n.8. The County has many remedies. And this case does not involve "off-reservation" conduct. *Id.* Nor does the County—a sovereign entity, with many nonjudicial tools available—resemble a private tort victim. Indeed, given that the County exists only because New York illegally seized the Nation's lands, it cannot compare itself to a "plaintiff who has not chosen to deal with a tribe." *Id.*

immunity from suit or this Court's relevant cases. The Oneida argued only that a "federally protected possessory right" in their lands barred "taking Oneida land … through tax foreclosures." *Sherrill* Resp. Br. 16, 2004 WL 2246333. The Oneida grounded that argument in "tax immunity," not immunity from suit. *Id.*

The County unsuccessfully tries to manufacture an immunity-from-suit holding out of an exchange between *Sherrill*'s majority and Justice Stevens' lone dissent. Pet. 24. *Sherrill* grounded its holding in the equitable nature of the relief the Oneida sought, evoking "laches, acquiescence, and impossibility." 544 U.S. at 221. Justice Stevens argued that this approach made little sense because the "narrow legal issue" the Oneida pressed—"tax immunity"—could "just as easily … be raised … as a defense against a state collection proceeding," *i.e.*, an action at "law." *Id.* at 225-26 (Stevens, J., dissenting). The majority, in turn, rejected that argument and responded that the Oneida could not assert tax immunity defensively because "[t]he equitable cast of the relief sought remains the same." *Id.* at 214 n.7. Both Justice Stevens' dissent, and the majority's response, thus addressed whether the Oneida could raise "tax immunity" to avoid tax enforcement suits. Neither addressed immunity from suit.

3. Unable to show that this Court *actually* addressed immunity from suit, the County claims it must have *impliedly* done so because *Sherrill* arose out of "eviction proceedings," which the lower courts enjoined. Pet. 23. This argument has a simple answer: This Court does not read its cases as addressing every argument a litigant might have, but did not, make. "[Q]uestions that 'merely

lurk in the record are not resolved, and no resolution of them may be inferred.'" *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979).

For two reasons, the County's attempt to rewrite *Sherrill* is especially ill-founded. First, the County would reimagine *Sherrill* as having done exactly what *Bay Mills* held this Court should *not* do: Invoke "equitable considerations," *Sherrill*, 544 U.S. at 214 n.8, to "carv[e] out exceptions" to tribal sovereign immunity, *Bay Mills*, 572 U.S. at 790. *Bay Mills* explained that the proper approach is to "defer to Congress." *Id.* The Second Circuit correctly rejected a reading that would bring *Sherrill* into conflict with separation-of-powers principles.

Second, the County's rewriting makes little sense because, as the Second Circuit explained, tax immunity and immunity from suit are separate doctrines with separate scopes. Pet. App. 23. Tax immunity applies only on lands where Indian nations exercise plenary sovereignty. *See Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998). Hence, the Oneida in *Sherrill* had a plausible tax-immunity claim only because the lands were within the Oneida's "ancient reservation," over which they claimed full sovereignty. 544 U.S. at 213. Elsewhere, the Oneida would have had no such claim. *Id.* But "a tribe's immunity from suit is" generally "independent of its lands," Pet. App. 24, applying both on- and "off-reservation." *Bay Mills*, 572

U.S. at 798.[3] Why would *Sherrill* have impliedly addressed an issue that would arise equally off-reservation? The County does not say.

Trying to make lemons into lemonade, the County complains that the decision below is *worse* because it would allow Indian nations to "resist … taxes" even off-reservation. Pet. 25. But any off-reservation immunity stems not from the decision below but from this Court's cases holding that Indian nations have immunity as to "off-reservation commercial conduct." 572 U.S. at 799. If that immunity covers anything, it covers attempts to collect money debts. The County's broad attack on immunity from suit confirms that its arguments have nothing to do with *Sherrill*.

II. The Court Should Not Grant To Address The County's Immovable-Property Argument.

The County fares worse with its arguments based on the immovable-property exception. The Second Circuit assumed *arguendo* that the common-law exception limits tribal sovereign immunity. Pet. App. 3, 12. It then resolved the case on narrow grounds, holding that the County had not shown that money-seeking foreclosures fall within that exception. In the annals of American law, not a *single* other case has addressed whether an "immovable-property exception" allows tax foreclosures against Indian nations' real property. Certainly, no case has disagreed. The County's arguments—that the

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[3] The immovable-property exception, if applicable to tribal sovereign immunity, may be different given the exception's relationship to land status. *Infra* 32-33. The general rule, however, applies with full force to the County's *Sherrill*-based arguments.

decision below "implicates the … issue this Court was unable to resolve in *Upper Skagit*" and a "three way[]" division of authority, Pet. 3, 19—are smoke and mirrors.

A. The County's Immovable-Property Arguments Implicate No Split And Do Not Warrant Certiorari.

1. The decision below does not implicate the issue *Upper Skagit* "was unable to resolve." Pet. 3. *Upper Skagit* left open whether the common-law immovable property exception limits tribal sovereign immunity. 138 S. Ct. at 1654. The decision below, as just explained, assumed the answer to that question in the County's favor. It then held that "even if the County is correct," the County had not shown that foreclosures fall within the exception. Pet. App. 12. Hence, the Second Circuit found that it "need not reckon with" and "need not rule on" the *Upper Skagit* issue. Pet. App. 3, 12.

Nor does the Second Circuit's conclusion on the immovable-property exception's *scope* implicate any unresolved disagreement in *Upper Skagit*. *Upper Skagit* arose out of a quiet-title action seeking to settle a disputed boundary. 138 S. Ct. at 1652. The Court reserved decision both on whether the common-law immovable property exception limits tribal sovereign immunity and on the "scope" of any such exception. *Id.* at 1654. The Chief Justice regarded it as "settled" that quiet-title actions fall within the common-law exception and viewed the "only question" as "whether … Indian tribes [have] a broader immunity from actions involving off-reservation land." *Id.* at 1655. Justice Thomas regarded the immovable-property exception as "clearly applic[able]" to the dispute before the Court and "plainly

extend[ing] to tribal immunity." *Id.* at 1657, 1661. None of those opinions decided whether the exception applies to enforcement actions, like foreclosures, that seize property to remedy an alleged money debt. The County's claim that the decision below "contradicts the stated views" of the Chief Justice and Justice Thomas, Pet. 4, is thus wrong.

2. The County's claim of a split among lower courts, Pet. 18-20, is meritless. The County asserts a "three way[]" division on the immovable-property exception, with the decision below "charting a third course" between *Cass County* and *Hamaatsa*. Pet. 18, 20. But this is just another way of saying that this case implicates no split at all. No other decision has even considered whether tribal sovereign immunity bars tax foreclosures. And the decision below's narrow holding would not prevent the Second Circuit from agreeing with either *Cass County* or *Hamaatsa* if it someday considers the issues presented in those cases.

Cass County addressed an eminent-domain proceeding. Pet. App. 15. It held that Indian nations lack "sovereign immunity in the context of … condemnation action[s]." *Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 693 (N.D. 2002). Partly, it relied on *County of Yakima* (adopting the position that *Upper Skagit* ultimately rejected). *Id.* at 691-93. Partly, it relied on the distinctive nature of eminent-domain actions. *Id.* at 693-95. It reasoned that the eminent-domain power is "essential to the life of the state" because it vindicates the sovereign's need to acquire particular property for "public use"—citing the holding in *Georgia v. City of*

Chattanooga, 264 U.S. 472, 479-82 (1924), that states lack immunity from condemnation actions by other states.

Nothing in *Cass County*'s result conflicts with the decision below. Citing *Chattanooga*, the Second Circuit agreed that the common-law immovable-property exception "plainly … allows[] … eminent-domain proceedings." Pet. App. 15. It simply distinguished money-seeking foreclosures as, unlike eminent domain, "a *remedy*" for a general money debt. Pet. App. 17. If the Second Circuit someday hears an eminent-domain case, it will still need to address whether "the common law version of the immovable-property exception" marks the limits of tribal sovereign immunity. Pet. App. 12. But nothing in the decision below will prevent the Second Circuit from agreeing with *Cass County*'s result.

Even more strained is the County's assertion of a conflict between the decision below and *Hamaatsa*. Pet. 19-21. *Hamaatsa* also did not address tax foreclosures. It held that tribal sovereign immunity barred an action seeking a "declar[ation]" of rights in a road. *Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 979 (N.M. 2016). Indeed, because *Hamaatsa* and the decision below both found that tribal sovereign immunity applied, those cases could not possibly conflict.

The County tries to torture a split by asserting that *Hamaatsa*, supposedly unlike the decision below, "rejected any immovable-property limitation on tribal sovereign immunity" and "refus[ed] to apply [that] exception … at all." Pet. 19, 21. But this argument mischaracterizes both the decision below and *Hamaatsa*. The Second Circuit did not hold that it *would* apply the immovable-property exception to tribal

sovereign immunity. Again, it assumed *arguendo* that the exception applied and held that tax foreclosures fall outside its scope. Pet. App. 3, 12. If the Second Circuit someday resolves whether the immovable-property exception applies to tribal sovereign immunity, this Court can weigh a petition from that hypothetical decision.

Meanwhile, *Hamaatsa* did not "refus[e] to apply the immovable-property exception." Pet. 21. The plaintiff raised several "[p]roposed [e]xceptions" to sovereign immunity—but not the immovable-property exception. 388 P.3d at 984. Instead, the plaintiff relied on *County of Yakima*'s supposed "*in rem*" exception, and *Hamaasta* rejected that argument. *Id.* at 979-80. The County misleadingly quotes *Hamaasta*'s statement that it would "follow the Second Circuit['s]" 2014 preliminary-injunction decision in this case and that it disagreed with *Cass County*. Pet. 20 (quoting 388 P.3d at 986). That quotation, however, concerned the dispute over *County of Yakima*. 388 P.3d at 986. Indeed, *Upper Skagit* correctly cited those three cases as disagreeing over *County of Yakima*. 138 S. Ct. at 1651 n.* *Upper Skagit* also correctly observed "the courts below and the certiorari-stage briefs … said precisely nothing" on the "immovable property exception"—including the same three cases, all of which were discussed in the *Upper Skagit* certiorari briefs. 138 S. Ct. at 1654; *see also Upper Skagit* Pet. 7-8, 2017 WL 4082023; *Upper Skagit* BIO 5-7, 2017 WL 4676672. If the New Mexico Supreme Court considers the immovable-property excerption after *Upper Skagit*, it will presumably treat the issue as

"presenting an as-yet unresolved question," like the Second Circuit did below. Pet. App. 9.

B. The Decision Below Correctly Rejected The County's Immovable-Property Arguments.

The Second Circuit also correctly resolved the narrow question before it. Simply put: The "baseline position" is immunity from suit, *Bay Mills*, 572 U.S. at 785, 790-91, and the County did not carry its burden to show that the immovable-property exception covers money-seeking foreclosures. The County has never identified a *single case* applying the exception to foreclosures seeking to collect money debts. Pet. App. 18. More than that, history, principle, and precedent all contradict the County's position. Pet. App. 16-22. The decision below thus left for another day the question, reserved in *Upper Skagit*, of whether the common-law exception limits tribal immunity. Pet. App. 3, 12. The County fails to show error in the Second Circuit's narrow decision.

1. The County spends most of its verbiage arguing that the immovable-property exception *in general* has been "hornbook law" "'almost as long as there have been hornbooks.'" Pet. 26 (quoting *Upper Skagit*, 138 S. Ct. at 1657 (Thomas, J., dissenting)). But despite 600 years of history, the County cannot cite a single case or hornbook applying the common-law exception to permit money-seeking foreclosures. So instead, the County proclaims that the exception "self-evidently" extends to foreclosures, Pet. 30, and that the Second Circuit's contrary conclusion "has no basis in logic or law," Pet. 31, 33. Rhetoric, however, is no substitute for substance.

2. In fact, the common-law sources show that the immovable-property exception *did not* extend to tax foreclosures. As the Second Circuit explained, "[c]ourts have regularly consulted" the *Restatement (Second) of Foreign Relations Law* to "ascertain[] the scope of the common law exception." Pet. App. 17-18. Section 65 comment d addresses, specifically, the "[i]mmunity of foreign state[s] from jurisdiction to enforce tax laws." *Restatement (Second) of Foreign Relations Law* § 65 cmt. d (1965). And it reports that "*no case* has been found in which the property of a foreign government has been subject to foreclosure of a tax lien or a tax sale." *Id.* (emphasis added). That void exists, the *Restatement* explains, because sovereign immunity "prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state." *Id.* So while foreign-government property "may be carried on the tax rolls and be made the subject[] of levy," territorial sovereigns have an "inability … to enforce … tax claims against the property of a foreign state." *Id.*; *see* Pet. App. 17-18. The *Restatement* thus follows exactly the line separating this case from *Sherrill*: While the County may (per *Sherrill*) assess taxes against the Nation's properties, it may not "enforce its tax claims" via foreclosure.

The Second Circuit correctly rejected the County's "attempts to downplay" the *Restatement* as addressing only "movable property." Pet. App. 18; *see* Pet. 32. As the Second Circuit observed, the "Restatement does not expressly acknowledge any such limitation." Pet. App. 18. Plus, if that limit existed, the County should be able to cite cases applying the exception to permit

foreclosures on immovable property. But it "identifie[d] no case before or since the Restatement" doing so. *Id.* Indeed, the New York Court of Appeals—writing shortly after the *Restatement*—read Section 65 comment d to show that New York had an "inability to enforce a tax claim" against immovable property. *Republic of Argentina v. City of New York*, 250 N.E.2d 698, 702-03 (N.Y. 1969).

3. The common law reached that result because, as the Second Circuit correctly concluded, money-seeking foreclosures fall outside the immovable-property exception's rationale. That exception posits 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." *Upper Skagit*, 138 S. Ct. at 1658 (Thomas, J., dissenting) (quoting *Reclamantes*, 735 F.2d at 1521). Hence, in a quiet-title action like *Upper Skagit*, the territorial sovereign claims the right to draw the boundary between two parcels. Tax foreclosures, by contrast, "are—fundamentally—about money, not property." Pet. App. 16. The County contends that the Nation owes a debt—which the Nation could satisfy from any assets—and seeks to seize property to satisfy that debt. The desire to obtain money, however, falls outside the immovable-property exception's rationale and within the heartland of what sovereign immunity has always protected against. *E.g.*, *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011) (immunity bars suits whose "object … is to reach funds in the … treasury").

The County does not genuinely answer this point. It argues that some cases and treatises characterize the

exception broadly enough to encompass any action concerning immovable property and seeking its transfer from one owner to another. Pet. 29, 31. None of those sources, however, address tax foreclosures. And courts do not read common-law sources as if they were statute books, or seize on broad language written in the 18th century to resolve issues the authors did not consider. The County concedes that the exception does not reach *every* action arising out of real-property ownership. Pet. 29. If a foreign sovereign incurs a money debt because of a slip-and-fall, for example, the exception does not apply—even if the plaintiff enforces the debt only by foreclosing on the property in question. Pet. App. 15-16; *see* Pet. 29. The County's claim that tax foreclosures are "self-evidently" different—because they concern "tax obligations to the very property at issue," Pet. 30—is pure *ipse dixit*. Slip-and-fall judgments and tax debts share the same key feature: They are money debts the debtor could satisfy from any assets.

4. The decision below also grounded its conclusion in the history of immunity from *execution*, which the County—tellingly—simply ignores. Pet. App. 19. As the Second Circuit explained, "[u]ntil the middle of the 20th century, the United States afforded foreign sovereigns 'absolute immunity' from the execution of judgments against their properties." *Id.* (quoting *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1233 (2d Cir. 1995)). Hence, even if a court imposed a judgment on a foreign state, its property "remain[ed] shielded from … execution." Pet. App. 20 (citing *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 476-77 (7th Cir. 2016)). And "[n]othing in th[is] longstanding case

law … suggests … an exception for immovable property." *Id.* In the FSIA, Congress changed the traditional rule by generally allowing courts to execute on judgments they have jurisdiction to enter. *Id.*; *see* 28 U.S.C. § 1610. But this change, Congress understood, "intended to modify" the "traditional view" of "absolute immunity from execution." H.R. Rep. No. 94-1487, 27 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6626.

That same point disposes of the County's claim that the Second Circuit's conclusion is "incompatible with" *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193 (2007). That case, the County notes, held that actions to establish tax liens' validity fall within the FSIA's immovable-property exception because they "place[] rights in immovable property … in issue." *Id.* at 202. So, the County says, it "follows *a fortiori*" that foreclosure suits also satisfy the common-law immovable-property exception. Pet. 32. But the FSIA's history shows why this conclusion does not follow: Congress understood the FSIA's execution provisions *to modify* the common law. Pet. App. 20. The County again just ignores this point, which invalidates the syllogism it attempts.

III. This Case Is A Poor Vehicle.

This case is also a poor vehicle. First, it does not present the County's Question Presented, which asks whether Indian nations have immunity from "lawfully imposed" property taxes. Pet. ii. The Nation maintains that the taxes here are unlawful, and neither lower court made a ruling on the issue (which the County did not seek). *Supra* 5-6. Hence, the County premises its entire Petition on an unresolved threshold question.

Second, the County's immovable-property arguments implicate *another* unresolved threshold question—namely, whether the common-law exception marks the boundaries of tribal sovereign immunity. In *Upper Skagit*, the "Tribe and the federal government disagree[d]" with that proposition, noting that "immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes." 138 S. Ct. at 1654. The Nation made that same argument below. Nation 2d Cir. Br. 44-47.[4] But the Second Circuit did not address that issue, instead assuming *arguendo* that the common-law exception applied. Pet. App. 3, 12. In *Upper Skagit*, this Court declined to address the immovable-property exception because "the courts below … said precisely nothing on th[at] subject." 138 S. Ct. at 1654. It would be strange for this Court to grant certiorari when the lower courts again left the key threshold issue unresolved.

Third, this case is a poor vehicle because it concerns reservation lands. *Upper Skagit* involved non-reservation land, 138 S. Ct. at 1652, which was important to both the Chief Justice and Justice Thomas. *See, e.g.*, 138 S. Ct. at 1655 (Roberts, C.J., concurring) (emphasizing that case "involv[ed] non-trust, non-reservation land"); *id.* at 1662 (Thomas, J., dissenting) (tribe acted "outside its territory"). Here, however, the district court rejected the County's invitation to disestablish the Nation's reservation—and because the County did not appeal, that decision is binding here. *Supra* 8. On reservation lands, a core concern animating

[4] The Nation would also make this argument if this Court grants review.

the immovable-property exception—that the foreign sovereign is acting "outside its territory" in derogation of the territorial sovereign's "exclusive right[s]," 138 S. Ct. at 1659, 1662 (Thomas, J., dissenting)—does not neatly apply. The County suggests that the Nation's reservation is different because of *Sherrill*. Pet. 30. But that only underscores the vehicle problems. This Court grants certiorari to resolve questions of broad importance. There is nothing broadly important about whether and how the immovable-property exception applies to the Nation's idiosyncratic lands.

IV. The County's Parade Of Horribles Is Imaginary.

Unable to identify any split or error, the County prophesies "grave" consequences. Pet. 33. But this is just more rhetoric. The decision below's only consequence is the one *Potawatomi* and *Kiowa* have yielded for decades: The County may not sue the Nation to collect a disputed debt. That issue arises here in the narrow, idiosyncratic context of tax foreclosures on fee-owned lands on a reservation subject to *Sherrill* in the context of a good-faith dispute between sovereigns over the propriety of the tax. And as to the narrow issue this case presents, the County's dark prophesies melt away in the face of what has *actually happened*. The County's first argument, based on *Sherrill*, has only ever arisen in cases concerning the Oneida and Cayuga—and the Oneida dispute has ended via a comprehensive settlement. The County's second argument, concerning whether an immovable-property exception permits tax forecloses, has *never* arisen until this case.

Nor can it be said that the decision below creates a *new* problem that is poised to yield serious but as-yet-unmanifested problems. For decades, local jurisdictions in the Second Circuit have been unable to foreclose on properties like those here. For years, too, Indian nations elsewhere could have invoked this law in their own jurisdictions. Yet tellingly, the only support the County offers for its fear-mongering is the prediction in a 2010 *Madison County* amicus brief that Indian nations were poised to buy "the Empire State Building, refuse to pay … taxes, and invoke sovereign immunity … as [a] … defense." Pet. 34. In the 11 years since, however, Indian nations have not taken over Manhattan real estate. Indeed, the County cites not one example since *Madison County* of an Indian nation exploiting sovereign immunity to become a tax scofflaw.

That is for good reason. First, tax scofflawery is bad business. When tax disputes fester, Indian nations may be unable to sell properties (due to tax liens) or ask the Department of the Interior to take them into trust (which requires "eliminat[ing] any … liens," 25 C.FR. § 151.13(b)). Meanwhile, making the best use of property often requires cooperation from local jurisdictions—and when relations deteriorate, local jurisdictions can inflict pain. Here, for example, Interior recently denied the Nation's application to take into trust a different set of properties based in part on the County's opposition to the application. By contrast, when the Oneida were able to bargain for New York's non-opposition to its trust application, *see* Oneida Settlement § VI.A.1, that accommodation was valuable.

Second, Indian nations understand that their immunity is "subject to plenary control by Congress," *Bay Mills*, 572 U.S. at 788, which makes it even riskier to invoke immunity to evade legal obligations. Here, the Nation is standing on its rights because it maintains that the County's taxes are unlawful under *New York law*—a position with deep support, *supra* 5-6. But make no mistake, the Nation has suffered for asserting its rights in opposition to the County. History teaches that Indian nations do not lightly incur these costs.

Apparently recognizing that its parade of horribles leaves something to be desired, the County avers that the decision below will allow Indian nations to claim immunity "from zoning, environmental, and other regulatory laws." Pet. 34. The Second Circuit, however, expressly limited its rejection of the County's immovable-property arguments to money-seeking foreclosures. Pet. App. 22. Other types of actions, seeking to enforce different obligations, present different questions. Indeed, *Bay Mills* noted that an *Ex Parte Young*-style action seeking an injunction "against tribal officials or employees (rather than the Tribe itself)" may be available in certain circumstances. 572 U.S. at 796; *accord Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Utah*, 790 F.3d 1000, 1010 (10th Cir. 2015) (Gorsuch, J.). And the Second Circuit has applied *Bay Mills* to hold that "federal courts may entertain suits against tribal officers in their official capacities seeking prospective, injunctive relief prohibiting off-reservation conduct that violates state and substantive federal law." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 117 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 856 (2020). The County's

suggestion that local jurisdictions are "without recourse," Pet. 34, is invented.

CONCLUSION

The Court should deny the petition.

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Respectfully submitted,

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