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

## REPLY BRIEF


BRIAN LAUDADIO
MARY P. MOORE
LOUIS P. DILORENZO
BOND, SCHOENECK & KING PLLC
350 Linden Oaks
Third Floor
Rochester, NY 14625

PAUL D. CLEMENT
*Counsel of Record*
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

*Counsel for Petitioner*


May 18, 2021

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Treatises**



**Other Authorities**

## REPLY BRIEF

In the decision below, the Second Circuit held that tribes may assert sovereign immunity to bar municipalities from collecting the same property taxes from which *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), held they have no immunity. The last time the Second Circuit reached that bewildering conclusion, this Court promptly granted certiorari, only to vacate the Second Circuit's decision after the Oneidas mooted the issue rather than defend that position before this Court. *See Madison Cty. v. Oneida Indian Nation of N.Y.*, 562 U.S. 42 (2011) (per curiam). The Cayugas' efforts to resist certiorari here should fare no better than the Oneidas' did there. Their effort to evade the tax obligations *Sherrill* authorized for a decade longer should not be rewarded. Indeed, if anything, the case for certiorari has strengthened in the interim, as the Second Circuit has now also rejected the application of the immovable-property exception as a ready path to avoid converting *Sherrill* into a sport, thereby also implicating the issue this Court left unresolved in *Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649 (2018).

The Cayugas deny the cert-worthiness of the question presented, but only by recycling objections that failed to sway the Court in *Sherrill* or *Madison County* (and adding the implausible claim that this Court answered that question in a case that did not so much as mention *Sherrill*). The Cayugas insist that the decision below is correct, but only by invoking decisions that had nothing to do with *Sherrill*, *in rem* proceedings, or immovable property. And the Cayugas

assert purported "vehicle" problems, but ultimately concede that none poses any real obstacle to review. They thus offer no sound reason for this Court to decline to address two issues it has previously granted certiorari to consider and give effect to its decision in *Sherrill*.

## I. The Court Should Grant Certiorari To Resolve The Question It Left Unanswered In *Madison County*.

In *Madison County*, this Court granted certiorari to decide "whether tribal sovereign immunity … bars taxing authorities from foreclosing to collect lawfully imposed property taxes"—*i.e.*, to decide whether *Sherrill* would have any practical effect. 562 U.S. at 42. But due to the Oneidas' post-grant-of-certiorari waiver of immunity, the Court vacated the Second Circuit's decision, leaving that question unresolved. *See id.* This case presents the exact same issue; indeed, the decision below expressly reinstated the reasoning of the Second Circuit's decision in *Madison County*, effectively unvacating what this Court vacated. And the issue remains every bit as cert-worthy today as it was in *Madison County*.

The Cayugas protest that it implicates no "division of authority." BIO.14. But as they acknowledge, *Sherrill* itself involved a splitless issue arising out of the same "distinctive history of Indian nations in upstate New York," BIO.14, and that did not stop this Court from granting certiorari and seemingly protecting the tax rolls in upstate New

York.[1] And when the Second Circuit "eviscerate[d]" that decision in *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149, 159 (2d Cir. 2010), the Oneidas lodged the same no-circuit-split objection to no avail. *See* Br. in Opp. at 1, 9, 25-27, *Madison Cty.*, No. 10-72 (U.S. filed Sept. 10, 2010). That is presumably because the issue is undeniably important (as the *Sherrill* grant attests) and a conflict with—or evisceration of—this Court's precedents is an independent basis for satisfying Rule 10 (as the *Madison County* grant attests).

Implicitly recognizing as much, the Cayugas devote most of their discussion to trying to reconcile the Second Circuit's decision with *Sherrill*. Their efforts are unavailing. While the Cayugas claim that they consider the properties at issue "reservation land," that is part of the problem, as they also concede that they are all "fee-owned lands" "subject to *Sherrill*." BIO.4, 33. They thus do not dispute that they are claiming immunity from the collection of the very taxes from which *Sherrill* held they lack immunity. The Cayugas insist that *Sherrill* concerned only whether localities could *impose* such taxes, not whether they could *collect* them. But even apart from the absurdity of suggesting that this Court went out of its way to authorize the imposition of uncollectable taxes, *Sherrill* itself concerned actions to enforce taxes

[1] The Cayugas note that their properties "account for a mere 0.4% of Seneca County." BIO.5. But that simply underscores the practical and historical difficulties with their claims to reservation-status and the parallels with *Sherrill*. *See* 544 U.S. at 211 ("American Indians represent less than 1% of the city of Sherrill's population and less than 0.5% of Oneida County's population.").

through evictions and foreclosures. Pet.22-23. And while the Oneidas initiated the federal-court action to enjoin those state-court enforcement actions, the Court explicitly rejected the proposition that the tribe could "assert tax immunity defensively in the eviction proceeding." *Sherrill*, 544 U.S. at 214 n.7.

The Cayugas protest that the Court was concerned with "tax immunity," not "immunity from suit." BIO.20. But nothing in *Sherrill* was so limited. *Sherrill* dealt with the distinct problems occasioned by tribal efforts to "rekindl[e] embers of sovereignty" in ways that would have been highly unfair to both the city and to "landowners neighboring the tribal patches." 544 U.S. at 214, 220. As the Court explained, belatedly recognizing such an immunity not only would "remove these parcels from the local tax rolls," but would enable the tribe "to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *Id.* at 220. It was that practical effect and the superior alternative of a statutory mechanism more sensitive to "complex interjurisdictional concerns," *id.* at 220-21 (discussing provision now codified at 25 U.S.C. §5108), that drove this Court's decision, which is precisely why converting it into a purely theoretical precedent that allows local jurisdictions to impose uncollectable taxes and promulgate unenforceable regulations "defies common sense," *Madison Cty.*, 605 F.3d at 163 (Cabranes, J. concurring). In reality, all of the doctrines *Sherrill* invoked to reject a "piecemeal shift in governance," including "laches, acquiescence, … impossibility," and the alternative of the §5108 trust process, are equally fatal to the immunity the Cayugas assert here. 544 U.S. at 221.

Unable to explain why this Court should not grant certiorari to answer the question it left unanswered in *Madison County*, respondents make the bold claim that this Court already answered it in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014). Like many a bold claim, that assertion is unsustainable. If *Bay Mills* actually intended to render *Sherrill* without practical effect and to answer the question on which certiorari was granted in *Madison County,* one might think the Court's opinion or one of the four separate opinions, including two by Justices who joined *Sherrill* and one by the author of *Sherrill* herself, would have at least cited *Sherrill*. None did. The idea that the author of *Sherrill* would dissent separately in *Bay Mills* but not so much as lament the demise of her opinion in *Sherrill* beggars belief. The reason for this uniform silence is obvious: A case about tribal immunity from *in personam* suits in general says nothing about the specific dynamic and inequities addressed in *Sherrill*, let alone about *in rem* proceedings or the immovable-property exception to sovereign immunity. In short, the Cayugas' claim that this Court has already answered the question presented in their favor is wishful thinking. The need to restore common sense, reunite law and logic, and prevent *Sherrill* from being converted into a sport remains alive and well.

## II. The Second Circuit's Immovable-Property Ruling Reinforces The Need For Review.

The decision here is even more obviously wrong, and more obviously cert-worthy, than its predecessor because the Second Circuit rejected a ready alternative path for permitting the County's

foreclosure actions and giving *Sherrill* practical effect: the immovable-property exception to sovereign immunity. Whether and to what extent the immovable-property exception limits tribal immunity in the *in rem* context is a question this Court has previously considered without resolving, and it is one on which "State and federal courts are divided." *Upper Skagit*, 138 S.Ct. at 1656 (Thomas, J., dissenting). This case gives the Court an opportunity to resolve it.

The Cayugas' effort to dispute that lower-court division is unsustainable. Contrary to their claim, *Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township*, 643 N.W.2d 685 (N.D. 2002), was not just a case about "condemnation action[s]." BIO.24. *Cass County* invoked *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), to conclude that a "State may exercise territorial jurisdiction over the land [within its jurisdiction], *including* an in rem condemnation action, and the Tribe's sovereign immunity is not implicated." 643 N.W.2d at 694 (emphasis added). The Cayugas acknowledge that *Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977 (N.M. 2016), "disagreed with *Cass County*," BIO.26, but claim that disagreement implicated only *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). Wrong again: *Hamaatsa* refused to recognize *any* "exceptions to tribal sovereign immunity for *in rem* actions" and expressly rejected a part of *Cass County* that discussed *Chattanooga*, not *Yakima*. 388 P.3d at 986 (citing ¶20 of *Cass County*).

The Cayugas claim that "[t]he decision below does not implicate the issue *Upper Skagit* 'was unable to

resolve'" because the Second Circuit assumed that the immovable-property exception applies to tribes before finding it inapplicable here. BIO.23. But they agree that *Upper Skagit* "reserved decision both on whether the common-law immovable property exception limits tribal sovereign immunity and on the 'scope' of any such exception." BIO.23. And there is no question that the Second Circuit resolved the latter issue—indeed, it gave the immovable-property exception so narrow a scope as to render its assumption that it limits tribunal immunity beside the point.

Once again, then, the Cayugas are left trying to defend the Second Circuit's decision on the merits. But their efforts provide no reason not to resolve the split and fall flat. They first try to draw support from comment d to §65 of the Restatement (Second) of Foreign Relations Law (1965). But there is an insurmountable problem with relying on §65 or its comments: Section 65 governs *movable*, not *immovable*, property. Like the Second Circuit, the Cayugas inexplicably claim that §65 "does not expressly acknowledge any such limitation." BIO.28. But in its very first sentence, §65 explains that "a state is immune from the exercise by another state of jurisdiction to enforce rules of law" "[e]xcept as stated in §§68 and 69." Second Restatement §65(1). And §68, in turn, explains that "[t]he immunity of a foreign state under the rule stated in §65 does not extend to … an action to obtain possession of or establish a property interest in *immovable* property located in the territory of the State exercising jurisdiction." *Id.* §68(b) (emphasis added). Taken together, §§65 and 68 leave no doubt that the immovable-property exception is alive and well after the Second Restatement.

The Cayugas contend that if §68 means what it says, then Seneca County "should be able to cite cases" involving immovable-property-related enforcement actions. BIO.29; *see* BIO.27. It can. *See, e.g.*, Charles Fairman, *Some Disputed Applications of the Principle of State Immunity*, 22 Am J. Int'l L. 566, 567 & n.6 (1928) (citing cases); Note, *Execution of Judgments Against the Property of Foreign States*, 44 Harv. L. Rev. 963, 965 & n.16 (1931) (same). The lack of more recent cases presumably stems from the long-settled international "agreement" that "sovereign immunity should not be claimed … in actions with respect to real property." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976). Indeed, it is telling that the only purportedly favorable case the Cayugas identify concerned consular property, which international law has long specially protected. BIO.29 (citing *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (1969)); *see Alfred Dunhill*, 425 U.S. at 711; *cf.* 28 U.S.C. §1610(a)(4)(B).

The Cayugas next parrot the Second Circuit's claim that foreclosures "are—fundamentally—about money, not property." BIO.29. In fact, the Second Circuit did the parroting first, copying that line verbatim from the Cayugas' brief below, which offered not a shred of authority to support it. CA2.Resp.Br.32. That is unsurprising: If a sovereign's imposition of a property-tax lien on real property is fundamentally about property, *see Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 200-01 (2007), then *a fortiori* so is an action to foreclose on the same lien and "acquire title" to the same property, Pet.App.17, as the latter is an even clearer example of an "action to obtain possession of or establish a

property interest in immovable property," *Permanent Mission*, 551 U.S. at 200.

Finally, the Cayugas allude to a purported "history of immunity from *execution*" in the United States. BIO.30. But the authorities they invoke all involved *movable* property. BIO.30-31. To state the obvious, rules governing *movable* property say precious little about the scope of a doctrine concerned only with *immovable* property. The Cayugas thus utterly fail to reconcile the Second Circuit's decision with an exception that "has been hornbook law almost as long as there have been hornbooks." *Upper Skagit*, 138 S.Ct. at 1657 (Thomas, J., dissenting).

## III. This Case Is An Ideal Vehicle To Address The Important Question Presented.

This Court in *Sherrill* thought it critical to eliminate the tensions created by tribal efforts to rekindle the embers of sovereignty in ways that upset two centuries of settled expectations. And as every member of this Court recognized in *Upper Skagit*, the issues presented by tribal efforts to acquire lands on the open market and turn around and assert sovereign immunities are of "grave" importance. 138 S.Ct. at 1654; *see also id.* at 1655 (Roberts, C.J., concurring); *id.* at 1657 (Thomas, J., dissenting). The Cayugas belittle those observations as "rhetoric" and try to dismiss this as a "narrow" controversy affecting only the parties. BIO.33. But the dispute here is no narrower than in *Sherrill*. Indeed, if *Sherrill* means only what the Cayugas and Second Circuit claim, then the stakes here are much higher. Moreover, when this Court "[d]etermin[es] the limits on the sovereign

immunity held by Indian tribes …, the answer will affect all tribes." *Upper Skagit*, 138 S.Ct. at 1654.

Because the decision below does not turn on reuniting aboriginal and fee title, its implications are truly breathtaking. The Cayugas do not deny that, under the Second Circuit's rule, tribes could purchase real property on the open market anywhere in the United States and evade tax obligations with impunity. Jurisdictions would have the cold comfort of being able to impose such taxes with no practical ability to collect them. The Cayugas blithely assert that there is little cause for concern because "tax scofflawery is bad business." BIO.34. But the Cayugas have been actively engaged in that "bad business" for well over a decade, despite *Sherrill*, with the express blessing of the Second Circuit. The tribe insists that it is "standing on its rights because it maintains that the County's taxes are unlawful under *New York law*." BIO.35. But the Cayugas have prevented any court from testing that dubious claim by successfully asserting an immunity that is incompatible with both *Sherrill* and the immovable-property exception.[2]

The Cayugas' insistence that municipalities still retain "meaning[ful]" "remed[ies]" under the Second

---

[2] Despite the Cayugas' contrary suggestion (at 31), the assertion of a merits defense that was never tested because of an asserted immunity is no obstacle to this Court reviewing the immunity claim. *See Madison Cty.*, 605 F.3d at 155, 160. At any rate, the Cayugas' principal support for that dubious defense is a case in which they "acknowledge[d]" their "obligation to pay real property taxes" on materially identical property. *Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233, 249 n.11 (N.Y. 2010).

Circuit's rule, BIO.18-19, is belied by their own examples. They claim that, "[b]ecause of *Sherrill*," courts have held that they must abide by "certain 'local zoning laws and regulations'" and cannot evict people from *Sherrill* land. BIO.18. But each of those cited cases was initiated *by* the tribe, not *against* it. Under the intervening decision below, those laws and regulations are now all practically unenforceable if the Cayugas refuse to follow them. The Cayugas claim that, "[b]ecause of *Sherrill,"* the properties "will carry tax liens … 'against subsequent purchasers.'" BIO.18. But they nowhere suggest any intention of relinquishing their recently purchased land, and the decision below gives them artificial incentives to buy more and sell less, taking progressively more land off the tax rolls, with all the attendant risks of disharmony this Court tried to eliminate in *Sherrill*.

The Cayugas try to liken this case to *Upper Skagit* because the Second Circuit "assum[ed]" that the immovable-property exception limits tribal sovereign immunity before concluding that this action does not fall within it. BIO.32. But that is a far cry from the situation in *Upper Skagit*, where the lower courts had "said precisely nothing" about the immovable-property exception—because no one even raised it until the merits briefing before this Court. 138 S.Ct. at 1654. Here, by contrast, the County has invoked the exception at every turn, and both courts below squarely rejected its application.

Finally, the Cayugas claim this is a poor vehicle because the properties here are on "reservation lands." BIO.32-33. That is highly debatable, but also irrelevant, as they concede that the properties are

"fee-owned lands" "subject to *Sherrill*." BIO.4, 33. The Second Circuit thus resolved this case on the undisputed premise that the Cayugas do not enjoy the kind of "sovereign dominion" over them that matters under *Sherrill* or the immovable-property exception. *Sherrill*, 544 U.S. at 213-14. That makes this an ideal vehicle to resolve once and for all whether tribes may really flout with impunity the very same property taxes from which *Sherrill* held they lack immunity.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

BRIAN LAUDADIO
MARY P. MOORE
LOUIS P. DILORENZO
BOND, SCHOENECK & KING PLLC
350 Linden Oaks
Third Floor
Rochester, NY 14625

PAUL D. CLEMENT
*Counsel of Record*
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

*Counsel for Petitioner*

May 18, 2021