No. _____

In The
Supreme Court of the United States

PHOENIX LIGHT SF DAC, in its own right, in the right of Blue Heron Funding VI Ltd., BLUE HERON FUNDING VII LTD., KLEROS PREFERRED FUNDING V PLC, SILVER ELMS CDO PLC, SILVER ELMS CDO II LIMITED, C-BASS CBO XIV LTD., FKA PHOENIX LIGHT SF LTD., C-BASS CBO XVII LTD., and each of BLUE HERON FUNDING VI LTD., BLUE HERON FUNDING VII LTD., KLEROS PREFERRED FUNDING V PLC, SILVER ELMS CDO PLC, SILVER ELMS CDO II LIMITED, in their own right, KLEROS PREFERRED FUNDING V PLC, SILVER ELMS CDO PLC, BLUE HERON FUNDING VI LTD., BLUE HERON FUNDING VII LTD., C-BASS CBO XIV LTD.,

Petitioners,

vs.

U.S. BANK NATIONAL ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has held that federal courts (1) may adjudicate jurisdictional issues in any sequence they choose and (2) may, under appropriate circumstances, assume jurisdiction in order to decide non-jurisdictional threshold issues that do not involve the merits. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999); *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 435-36 (2007). Here, the Second Circuit assumed Article III jurisdiction in order to dismiss the case for lack of prudential standing.

The Questions Presented are:

1. In light of *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)'s holding that many types of prudential standing doctrines are misnomers and actually address merits issues, are the last vestiges of these doctrines properly treated as part of the merits (rather than standing) such that federal courts cannot evaluate them before addressing Article III jurisdiction?

2. In light of the "deep and important circuit split" regarding the jurisdictional nature of prudential standing, *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 938 (8th Cir. 2013); *Grocery Manufacturers Ass'n v. EPA*, 693 F.3d 169, 185 (D.C. Cir. 2012) (Kavanaugh, J., dissenting), is prudential standing jurisdictional such that federal courts can always evaluate it before addressing Article III jurisdiction?

QUESTIONS PRESENTED—Continued

3. If, despite *Lexmark*, 572 U.S. 118, prudential standing remains a non-merits issue, could the Second Circuit sidestep the question of Article III standing when the Article III issues pose no particularly complicated or novel issues?

4. Did petitioners' preexisting proprietary interest establish Article III standing and a non-champertous claim?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Phoenix Light SF DAC, Blue Heron Funding VII Ltd., Kleros Preferred Funding V PLC, Silver Elms CDO PLC, Silver Elms COD II Limited, C-Bass CBO XIV Ltd., FKA Phoenix Light SF Ltd., C-Bass CBO XVII Ltd., and Blue Heron Funding VI Ltd., plaintiffs, appellants below, and Petitioners here.
- U.S. Bank National Association, defendant, appellee below, and Respondent here.

Bank of America, N.A. was a defendant in the underlying action, but settled the case prior to the judgment. (A2796.)[1]

RULE 29.6 STATEMENT

There is no parent or publicly held company owning 10% or more of the Petitioners.

Based on Respondent's corporate disclosure statement in the Second Circuit, U.S. Bancorp, a public corporation, is the corporate parent of Respondent U.S. Bank National Association and owns 100% of U.S. Bank National Association's stock. U.S. Bancorp has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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[1] Citations to "A" refer to the Joint Appendix filed in the Second Circuit. Citations to "SPA" are to the Special Appendix that was attached at the end of the Brief and Special Appendix for Plaintiffs-Appellants-Cross-Appellees.

RELATED PROCEEDINGS

The proceedings directly on review are:

1. U.S. District Court of the Southern District of New York, Case No. 14-CV-10116 (VSB), *Phoenix Light SF Limited v. U.S. Bank National Association*. Judgement was entered on March 18, 2020. (SPA14.)

2. U.S. Court of Appeal for the Second Circuit, Case No. 20-1312-cv, *Phoenix Light SF DAC v. U.S. Bank National Association*. The Second Circuit issued its opinion and order on October 4, 2021 and denied rehearing on November 19, 2021. The mandate issued on November 29, 2021.

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OPINIONS BELOW

The Second Circuit's order, the subject of this petition, was not published in the official reports, but can be located at 2021 WL 4515256. (Appendix ("App.") 1-7.) The district court's opinion and order was not published in the official reports, but can be located at 2020 WL 1285783. (App.8-57.)

BASIS FOR JURISDICTION IN THIS COURT

The Second Circuit filed its order on October 4, 2021. (App.1.) The Second Circuit denied rehearing on November 19, 2021. (App.76-77.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The case involves jurisdictional issues under U.S. Const. art. III, § 2, which states:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a

> State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

It also involves jurisdiction pursuant to 28 U.S.C. § 1332(a), which states:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States."

Respondents contend that assignments of the right to sue were invalid under N.Y. Jud. Law § 489, which states:

"1. No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, and no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon; provided however, that bills receivable, notes receivable, bills of exchange, judgments or other things in action may be solicited, bought, or assignment thereof taken, from any executor, administrator, assignee for the benefit of creditors, trustee or receiver in bankruptcy, or any other person or persons in charge of the administration, settlement or compromise of any estate, through court actions, proceedings or otherwise. Nothing herein contained shall affect any assignment heretofore or hereafter taken by any moneyed corporation authorized to do business in the state of New York or its nominee pursuant to a subrogation agreement or a salvage operation, or by any corporation organized for religious, benevolent or charitable purposes. Any corporation or association violating the provisions of this section shall be liable to a fine of not more than five thousand dollars; any person or co-partnership, violating the provisions of this section, and any officer, trustee, director, agent or employee of any person,

co-partnership, corporation or association violating this section who, directly or indirectly, engages or assists in such violation, is guilty of a misdemeanor.

2. Except as set forth in subdivision three of this section, the provisions of subdivision one of this section shall not apply to any assignment, purchase or transfer hereafter made of one or more bonds, promissory notes, bills of exchange, book debts, or other things in action, or any claims or demands, if such assignment, purchase or transfer included bonds, promissory notes, bills of exchange and/or book debts, issued by or enforceable against the same obligor (whether or not also issued by or enforceable against any other obligors), having an aggregate purchase price of at least five hundred thousand dollars, in which event the exemption provided by this subdivision shall apply as well to all other items, including other things in action, claims and demands, included in such assignment, purchase or transfer (but only if such other items are issued by or enforceable against the same obligor, or relate to or arise in connection with such bonds, promissory notes, bills of exchange and/or book debts or the issuance thereof).

3. The rights of an indenture trustee, its agents and employees shall not be affected by the provisions of subdivision two of this section."

STATEMENT OF THE CASE

A. Factual Background.

1. Overview of residential mortgage-backed securities.

A residential mortgage-backed security (RMBS) is the product of a multi-step process that begins when a lender or multiple lenders sells mortgages to another financial institution, referred to as a Sponsor or Seller. (App.10-11; *see also Commerzbank AG v. U.S. Bank Nat'l Ass'n*, 277 F. Supp. 3d 483, 488 (S.D.N.Y. 2017) (cited to at Appellants' Opening Brief 8 n.3 for background).) The Sponsor then pools and transfers these bundled mortgages to a trust, where they are prioritized into tranches reflecting different levels of risk and reward. (App.11; *see also Commerzbank*, 277 F. Supp. 3d at 488.)

The trust then issues certificates representing those tranches to underwriters, who market and sell the certificates to investors. *Commerzbank*, 277 F. Supp. 3d at 488. Because the certificates are secured by the mortgages held in trust, their expected rate of return depends on the performance of the mortgages and on the mortgagors' ability to repay their home loans. *Id.*

2. Petitioners acquire and then re-securitize their RMBS Certificates.

The facts here stem from an additional layer to this normal RMBS process.

Petitioners are a group of investment vehicles that purchased RMBS Certificates in the manner discussed above. (App.10-11; A2689, 2732.) The trustees for the trusts that issued those certificates are (1) Respondent U.S. Bank National Association (USB) and (2) Bank of America, N.A. (BANA), which settled the case prior to the resolution of the summary judgment motions that instigated the underlying appeal. (App.10-11; A2796.)

Petitioners, however, then used those RMBS Certificates as collateral to issue notes to other investors—a process referred to as a collateralized debt obligation (CDO). (App.10-11.) As part of the issuance of those CDO notes, Petitioners each entered into an CDO indenture with an Indenture Trustee. (*Id*.)

Each CDO indenture included a limited grant of the RMBS Certificates to the Indenture Trustees. The indenture agreements were clear that the transfer was "for the benefit and security" of the parties that held Petitioners' CDO notes and that while the Indenture Trustees received "all of [Petitioners'] rights, title and interest in, to and under" the "Collateral"—the RMBS Certificates—"[s]uch Grants are made, however, to the Trustee to hold in trust, to secure the Notes." (*E.g.*, A1933-34.) At the end of the CDO's term, the RMBS Certificates revert back to the Petitioners. (*E.g.*, A2089 § 10.9(e).)[2]

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[2] Each of the indenture agreements is substantially similar in these regards. (*See* granting clauses at A648-49, 894-95, 1145-46, 1395-96, 1624-25, 2246-47; reversion clauses at A788, 1034, 1325, 1552, 1762, 2398.)

The indentures provide that Petitioners must pay principal and interest to their noteholders and would be unable to do so without ongoing proceeds from the RMBS Certificates. (A2040 § 7.1; *see also* A749, 995, 1275, 1515, 1724, 2351.) Accordingly, a "Payment Account"—funded by the proceeds received from the RMBS Certificates—was created "on behalf of the" Petitioners. (A2041 § 7.3, 2077-78 § 10.3.) Additionally, the Petitioners owed many performance obligations to their note holders regarding preservation of the collateral—the RMBS Certificates—that secured the loans.[3]

3. The Indenture Trustees' conflict of interest.

In 2014, RMBS Certificate holders nationwide initiated a wave of litigation against the trustees of their RMBS Certificates because those trustees allegedly routinely breached their obligations; for instance, by allowing the expiration of statute of limitations against Sellers. (A2942-50 ¶¶ 100-108.) USB and BANA—the RMBS trustees here—were no exception to this general trend among RMBS trustees. (*Id.*) Nor were the other RMBS trustees that held the other

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[3] Petitioners had the obligations to (1) take action to "secure the rights and remedies of the" noteholders; (2) "enforce [their] rights under or with respect to . . . the Collateral" (i.e., the RMBS Certificates); (3) "preserve and defend title to the Collateral"; (4) retain an agent to calculate payments to noteholders and related monthly reports and compliance statements. (*E.g.*, A2044-45, 2050.) Proceeds received in connection with the RMBS Certificates were therefore paid to Petitioners' agent to ensure that Petitioners' obligations were met. (A2092-93 § 11.1(a)(i)(A)-(B).)

RMBS Certificates that Petitioners had purchased, which are the subject of separate litigation.

However, the Indenture Trustees who held Petitioners' RMBS Certificates would not bring such claims against USB and the other RMBS trustees. Even if Indenture Trustees decided to file such a suit, Petitioners feared that they would not zealously prosecute the suit.

Why? Because the Indenture Trustees suffered from an irreconcilable, "manifest, disabling conflict of interest." (A511, 537, 556.) Noting that conflict of interest, Petitioner Phoenix Light—as the controlling noteholder of the other Petitioners—demanded that the Indenture Trustees "step aside" and assign to the Petitioners any right to bring the relevant claims (*id.*):

First, the Indenture Trustees were in an irreconcilable conflict of interest because the Indenture Trustees were *defendants* in suits asserting claims against them that were virtually identical to the claims Petitioners needed them to assert against Respondents. In addition to being the Indenture Trustees here, BNY Mellon, Deutsche Bank and Wells Fargo regularly serve as RMBS trustees that issue RMBS Certificates. In that latter capacity, they had "already" been named as "defendant[s] in several lawsuits asserting the very same [types of] claims" as Petitioners believed should be filed here. (A512, 538, 557.) In those cases, BNY Mellon, Deutsche Bank and Wells Fargo had already defended themselves (or would defend themselves) by taking "positions directly at odds with the

[Petitioners'] claims against the RMBS Trustees," including positions regarding the scope of an RMBS trustee-defendant's duty of care and on applicability of various statutes. (*Id.*) Having already asserted the opposite view of the law to defend themselves, Indenture Trustees could not now vigorously litigate the opposite, pro-RMBS Certificate Holder views of the law—they were in a positional conflict of interest that prevented them from championing the legal theory that would protect Petitioners' interests and the interests of Petitioners' noteholders. If the Indenture Trustees attempted to do so, a court would rightly respond that the Indenture Trustees were speaking out of both sides of their mouth. What's more, the Indenture Trustees manifestly could not be trusted to vigorously take litigation positions as plaintiffs in the present case that would undoubtedly be used against them in the myriad of other cases in which they were named as defendants.

Second, the Indenture Trustees were in the most direct conflict possible—one that would put them on both sides of a lawsuit. In addition to seeking assignment of the claims against USB and BANA, Petitioners demanded that the Indenture Trustees assign other, similar claims to them. (*Id.*) Among those were cases in which the Indenture Trustees (BNY Mellon, Wells Fargo, and Deutsch Bank) were the RMBS Trustees that would be named as defendants (*id.*)—claims that Petitioners have filed in a separate suit. Obviously, those entitles could not and would not sue themselves. They could not and would not act as both plaintiffs (in

their capacity as Indenture Trustees) and as defendants (in their capacity as RMBS Trustees). Assignment of the claims back to Petitioners was the only solution to avoid "the untenable position of" an Indenture Trustee suing itself.

Despite Petitioners' request that the Indenture Trustees assign back these claims, the Indenture Trustees did not take the requested action at that time.

B. Petitioners' Complaint And The 2015 Dismissal.

Seeing no other avenue to protect their interest in the RMBS Certificates and the interests of their noteholders who relied on those certificates as security, Petitioners brought suit against USB and BANA despite the Indenture Trustee's failure to assign their rights of suit. (A62-348.) The complaint asserted claims worth "hundreds of millions of dollars"—arising out of USB's and BANA's breaches as trustee of the RMBS Certificates, including claims for breach of fiduciary duty, breach of contract, negligence, and violations of statutes. (A337-47, 493, 2906, 2962.)

The district court had jurisdiction over Petitioners' claims pursuant to 28 U.S.C. §§ 1332(a) (diversity of citizenship) and 1367 (supplemental jurisdiction). (A77.)

USB and BANA moved to dismiss the complaint for lack of standing. (ECF 50 at 9-17.) On May 18, 2015, the district court dismissed the case with leave to

amend because Petitioners were "contractually barred" from asserting claims as to the RMBS Certificates that now "belong[ed] to the indenture trustees." (SPA79-81.)

C. Indenture Trustees Assign The Right To Sue And Petitioners File Their Second Amended Complaint.

Thereafter, the Indenture Trustees assigned to Petitioners all right the Indenture Trustees possessed regarding the claims against USB and BANA. (A597-633.) Petitioners then filed their second amended complaint, detailing the circumstances of Petitioners' acquisition of the RMBS Certificates and the written assignments of the right to sue. (A349, 359-64.)

USB and BANA again moved to dismiss for lack of standing. (ECF 85 at 8-17.) The district court denied the motion to dismiss, explaining that the formal assignment received from the Indenture Trustee "of the right to bring the legal claims at issue" had "effectively reverse[d]" the grant of those rights to the Indenture Trustees. (SPA64-65.) The court noted that USB's and BANA's champerty defense to those assignments (1) presented issues of fact and (2) would not apply when the purpose of an assignment was the collection of a legitimate claim based on Petitioners' preexisting interest in the RMBS Certificates. (SPA66-67.)

D. The Summary Judgment Order.

In 2016, USB and BANA each moved for summary judgment. The entirety of USB's brief and the overwhelming lion's share of BANA's brief addressed whether they had breached their duties as trustees. (ECF 242, 244.) Just three pages of BANA's brief—which USB joined—argued that Petitioners lacked standing. (ECF 242 at 12-14.) Before oral argument, BANA settled the case against it (A2796), leaving only USB as a defendant.

The district court issued a lengthy opinion granting summary judgment, exclusively devoted to standing. (App.8-57.) The trial court concluded that the case did not satisfy either the requirements of Article III or prudential standing. (*Id*.)

Petitioners moved to alter or amend the judgment under FRCP 59(e), identifying errors in the district court's order and that the district court's order overlooked key facts. (ECF 424 at 5-23.) The district court denied the Rule 59(e) motion. (App.58-75.)

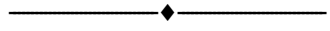
The district court entered judgment on March 18, 2020. (SPA14.)

E. The Appeal.

Petitioners timely appealed on April 16, 2020. (A2968-69.)

On October 4, 2021, the United States Court of Appeals for the Second Circuit issued a summary order

affirming the district court's order. (App.1-7.) The Second Circuit did not address the issues pertaining to Article III standing. Instead, the court stated that "we may assume Article III standing and address 'the alternative threshold question' of whether a party has prudential standing." (App.4.) The court then held that because Petitioners had granted the CDO Indenture Trustees " 'all of [their] right, title, and interest' " in the certificates, to satisfy prudential standing requirements there must have been a valid assignment from the Indenture Trustees back to the CDO but that those assignments were not valid under New York's champerty laws and that no exception to those champerty laws applied. (App.4-6.) On November 19, 2021, the Second Circuit denied Petitioners' timely petition for rehearing. (App.76-77.)



REASONS WHY CERTIORARI IS WARRANTED

A deep circuit split exists on whether prudential standing is a jurisdictional or non-jurisdictional issue. Even beyond that, this Court's decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) explicitly casts doubt on whether so-called "prudential standing" is itself a misnomer that is used to assess the *merits-based* question of whether the plaintiff "ha[s] a right to sue." *Id*. at 127.

Both issues are important here, because this Court has held that while federal courts may freely elect which jurisdictional issue to address first, courts

(1) may never bypass Article III jurisdiction to determine merits-based issues and (2) cannot prioritize non-jurisdictional issues above jurisdictional ones save for narrow circumstances when the jurisdictional issues are particularly novel or taxing.

The Second Circuit erred in sidestepping the Article III standing here:

Merits-based decision. In *Kowalski v. Tesmer*, 543 U.S. 125, 567 & n.2 (2004), this Court stated—without analysis—that courts could decide "prudential standing" issues before deciding Article III jurisdiction, applying a rule that is only applicable to non-merits threshold issues. In *Lexmark*, however, this Court subsequently recognized that so-called "prudential standing," in reality, often involves a merits-based inquiry into whether the plaintiff "has a right to sue"—making them off-limits as topics that courts may address before Article III jurisdiction.

Lexmark strongly indicated that this was true of prudential standing doctrines beyond the zone-of-interest test, but *Lexmark* explicitly left that question for "another day." In the instant case too, the issue is one of whether the Petitioners "have a right to sue"—what Respondents call "contractual standing" based on the validity, under New York's champerty law, of an assignment of the right to sue from a trustee to Petitioners. The Petitioners hold an automatic reversionary interest in property that is temporarily being held by the trustee whose conflict of interest prevents the trustee from filing the suit. The Court should now state a

broader rule that recognizes the merits-based reality of prudential standing. Because prudential standing is a merits-based inquiry, the Second Circuit was prohibited from addressing the subject while assuming Article III jurisdiction. The Court should explain this and its ramifications on the Court's decision in *Kowalski*.

Non-jurisdictional nature. Even if the last vestiges of prudential standing are allowed to remain as a non-merits issue, the Court should resolve what courts and commentators alike have decried as a "deep and important circuit split on th[e] important issue" of whether prudential standing is jurisdictional. The Court should side with the majority of Circuits in finding it to be non-jurisdictional, consistent with this Court's recent efforts to correct inapt uses of the term "jurisdictional" in favor of a significantly focused analysis that recognizes that jurisdictional requirements are those that speak to the power of a court, rather than to restrictions on the parties.

The Second Circuit is among those courts that treat prudential standing as jurisdictional. Once this Court sets aside that approach, this Court's prior directive in *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431, 435-36 (2007) and other cases require that the "proper course" here is to decide Article III jurisdiction first—an analysis that will make it clear that Petitioners have established injury in fact for Article III purposes and a non-champertous claim on which they must be allowed to proceed.

I. REVIEW IS WARRANTED, BECAUSE IN LIGHT OF *LEXMARK*, THE COURT SHOULD CLARIFY THAT PRUDENTIAL STANDING IS A MISNOMER FOR A MERITS-BASED INQUIRY THAT FEDERAL COURTS CANNOT ADDRESS BEFORE DETERMINING ARTICLE III JURISDICTION.

A. Merits Issues Can Never Precede Determinations Of Jurisdictional Issues.

"The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' " *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94-95 (1998). This Court, however, has sometimes blessed—under appropriate circumstances—the practice of courts assuming Article III jurisdiction while dismissing the action based on other jurisdictional issues or threshold non-jurisdictional issues. The unflagging rule, however, is that federal courts *never* have the power to assume Article III jurisdiction in order to reach *merits-based* issues.

But, as will be demonstrated below in section I.B., the judicial determination here—that Petitioners lack any viable claim—though couched as a matter of "prudential standing" actually is a merits-based determination that the Second Circuit improperly reached before resolving a dispute about the existence of Article III jurisdiction.

The Court has directed the sequencing of jurisdictional and non-jurisdictional issues as follows:

Sequencing multiple jurisdictional issues. While "subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues," such as the sequence of the analysis into subject-matter jurisdiction and personal jurisdiction. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85 (1999). Neither type of jurisdiction is "more 'fundamental'" than the other. *Id*. at 584. Nor is personal jurisdiction any less grounded in constitutional limits on the powers of the federal courts; personal jurisdiction is a "constitutional safeguard of due process to stop the court from proceeding to the merits of the case." *Id.* Accordingly, federal courts are free to address jurisdictional issues in any order they please. *Id.*

Deciding non-jurisdictional, <u>non-merits</u> issues before Article III jurisdiction. Federal courts also have some "leeway" in choosing to decide a non-jurisdictional threshold issue before deciding Article III jurisdiction. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431, 435-36 (2007). However, the entire premise of the rule permitting assumption of jurisdiction is that the court may only ever do so for purposes of deciding something other than the *merits*. It remains a bedrock principle that federal courts "may not hypothesize subject-matter

jurisdiction for the purpose of deciding the merits." *Ruhrgas*, 526 U.S. at 577; *see Steel Co.*, 523 U.S. at 94.

For instance, the Court has blessed a forum non conveniens dismissal without first determining jurisdiction—but only after a thorough, multi-page explanation that forum non conveniens has nothing to do with the merits. *Sinochem Int'l Co.*, 549 U.S. at 431-35. Similarly, the Court has held that before determining Article III jurisdiction, it is proper to apply a doctrine that precludes—on "public policy" grounds—any judicial inquiry of suits by spies who seek to enforce secret espionage agreements with the United States. *Tenet v. Doe*, 544 U.S. 1, 3, 6 n.4 (2005). That too does not involve a "*merits* question" about the underlying claim. *Id.* at 12 (Scalia, J., concurring) (original italics). Rather, it merely recognizes that "[p]ublic policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Id.* at 8 (majority opinion) (original italics).

The question here, however, is the vitality of *Kowalski v. Tesmer*, 543 U.S. 125, 129 & n.2 (2004) in which the Court stated—without analysis—that "we shall assume the attorneys have satisfied Article III and address the alternative threshold question of" prudential standing—there, standing to raise the rights of others. The Second Circuit relied on *Kowalski* to assume jurisdiction and decide the prudential standing issue involved here. But this Court's subsequent decision in *Lexmark*, 572 U.S. 118 calls into question whether prudential standing is really a

misnomer and instead inquires into the merits. If so, *Ruhrgas*, 526 U.S. at 577 and *Steel Co.*, 523 U.S. at 94, prohibit the Second Circuit from assuming Article III jurisdiction to resolve the merits-based so-called "prudential standing" issue.

B. In Light Of *Lexmark* And Growing Concerns By Commentators, Prudential Standing Should Be Recognized For The Merits-Based Inquiry That It Is.

At the time that the Court decided *Kowalski*, 543 U.S. at 129, it was commonplace to refer to prudential standing as distinct from the merits. But in light of this Court's decision in *Lexmark*, 572 U.S. 118 and a raft of scholarly criticism of prudential standing, it is time for the Court to reconsider that approach. Prudential standing is little more than a misnomer for an analysis of the merits, particularly where—as here and in *Lexmark*—the so-called "standing" issue turns on statutory interpretation and proximate causation issues that address whether a particular plaintiff "has a right to sue" for a particular claim. *Id.* at 127-34 & n.3.

As legal scholarship has repeatedly noted, the reality is that prudential standing "concerns litigants' lack of substantive rights on the merits, not courts' adjudicatory authority." William James Goodling, *Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing*, 88 Wash. L. Rev. 1153, 1177 (2013) (capitalization normalized). Time and again, principles that are worded as if they

relate to the courts' powers are "susceptible to the elision of jurisdictional questions with the merits of the case." Jeffrey Kahn, *Zoya's Standing Problem, Or, When Should The Constitution Follow The Flag?*, 108 Mich. L. Rev. 673, 694 (2010). One "way to perceive the confusion of merits-based versus jurisdictional inquiries is to approach the issue with reference to the classic elements of a cause of action: duty, breach, causation, damages" and to then observe that resolution of prudential standing issues almost always implicates precisely those elements—those merits issues—to determine "the validity of a cause of action" rather than whether there is some non-merits reason not to exercise jurisdiction. *Id.* at 701-02.

In 2014, this Court unanimously came to the same conclusion regarding a subset of issues that had previously been referred to as threshold issues of prudential standing. In *Lexmark*, the Court began by taking issue with the very idea of prudential standing: Prudential standing "is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." 572 U.S. at 125-26 (internal quotation marks omitted). The Court explained that it had occasionally "adverted to a 'prudential' branch of standing, a doctrine not derived from Article III and 'not exhaustively defined'" but encompassing "at least three broad principles": the prohibition against raising another person's legal rights, the rule barring generalized grievances more appropriately addressed in the representative branches, and "the requirement that a

plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id.* at 126.

But the Court then held that this zone of interests standard is not, in fact, a threshold question of standing—that it was a "misnomer" to call it that. *Id.* at 127. Instead, the analysis which asks whether the plaintiff "'*ha[s] a right to sue* under this substantive statute'" involves a *merits-based* analysis that requires the court to engage in statutory interpretation and an analysis of proximate cause. *Id.* at 127-34 (italics added); *Standing—Civil Procedure—Lexmark International, Inc. v. Static Control Components, Inc.*, 128 Harv. L. Rev. 321, 327 (2014) (recognizing that zone of interests and proximate causation analysis "goes to the *merits* of any federal statutory cause of action," original italics).

Lexmark went on to note that the "zone-of-interests test is not the only concept that we have previously classified as an aspect of 'prudential standing' but for which, upon closer inspection, we have found that label inapt." 572 U.S. at 127 n.3. It set its aim, for instance, at one of the few remaining issues that had been called "prudential standing," noting that limitations on third-party standing have sometimes been described as questions about whether the plaintiff "'ha[s] a right of action on the claim.'" *Id.* That inquiry is the same as the merits-based zone-of-interests inquiry into whether the plaintiff has a "right to sue." *Id.* at 127. Nonetheless, *Lexmark* appreciated that "[t]his case does not present any issue of third-party standing, and consideration of that doctrine's proper place in the

standing firmament can await another day." *Id.* at 127 n.3.

Lexmark's "philosophical underpinnings are incompatible with prudential standing as a whole." *Standing—Civil Procedure—Lexmark International, Inc. v. Static Control Components, Inc.*, 128 Harv. L. Rev. at 330. "A determination that a claimant asserts the right of another is in fact a determination that the claimant lacks the right asserted in the suit. Thus, it is a conclusion on the merits." Kylie C. Kim, *The Case Against Prudential Standing: Examining the Court's Use of Prudential Standing Before and After Lexmark*, 85 Tenn. L. Rev. 303, 339 (2017). It is an examination of whether the plaintiff's claim is viable; whether the plaintiff was owed a duty and whether that duty was breached.

Lexmark's underpinnings are likewise incompatible with the prudential standing issue in this case—what Respondent calls "contractual standing" and tried to pitch as Petitioners "'raising another person's [the Indenture Trustee's] legal rights" (Appellee's Br. 23, 50, 56). Just as in *Lexmark*, Respondent's theory was that Petitioners lacked the "*right to sue*" because they had contracted that right to the Indenture Trustee and because New York's champerty law invalidated the contract by which the Indenture Trustee assigned back that right to the Petitioners. Just as in *Lexmark*, that is a merits analysis concerning the *viability* of Petitioners' claims. Just as in *Lexmark*, it is based on *statutory interpretation* of the intent behind New York's champerty statute and interpretation of the existence and

scope of policy-based exceptions to that statute. And just as in *Lexmark*, it questions proximate causation of damages—whether it was Petitioners or just the Indenture Trustee who were harmed.

In fact, the judicial determination that Petitioners lack any viable claim goes far beyond a threshold determination of whether the federal courts will refuse to exercise their jurisdiction. Rather, it means that Petitioners have no claim in state court either. That can only be so because the so-called prudential standing analysis is a misnomer and actually inquires into the merits of the Petitioners' claims.

Federal courts have no power to assume Article III jurisdiction in order to reach a merits-based issue. *Ruhrgas*, 526 U.S. at 577; *Steel Co.*, 523 U.S. at 94. That includes a merits-based analysis of so-called prudential standing. But until this Court reconsiders *Kowalski*'s single-sentence blessing of that approach, lower federal courts will blindly continue to do so.

II. IN THE ALTERNATIVE, REVIEW IS NECESSARY TO RESOLVE THE WELL-RECOGNIZED "DEEP AND IMPORTANT" CONFLICT AMONG THE CIRCUITS REGARDING WHETHER PRUDENTIAL STANDING IS JURISDICTIONAL.

Even if the last vestiges of prudential standing remain as non-merits issues, the Court should put to rest what several circuits have decried as the "deep and important circuit split" on whether prudential standing

is jurisdictional in nature. *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 938 (8th Cir. 2013); *Grocery Manufacturers Ass'n v. EPA*, 693 F.3d 169, 185 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); *see also UPS Worldwide Forwarding, Inc. v. U.S. Postal Serv.*, 66 F.3d 621, 626 n.6 (3d Cir. 1995) (issue is "uncertain" and the "Supreme Court has given mixed signals"); William James Goodling, *Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing*, 88 Wash. L. Rev. at 1154.

A. Because The Second Circuit Views Prudential Standing As Jurisdictional, The Panel Could Elect Not To Decide Article III Standing.

As noted above, the rules regarding sequencing of non-merits issues differ substantially depending on whether or not those issues are jurisdictional (§ I.A., *supra*):

No jurisdictional issue is "more fundamental" than any other, so federal courts are always free to dismiss a case based on one jurisdictional issue (i.e., personal jurisdiction) before deciding another jurisdictional issue (i.e., subject matter jurisdiction). *Ruhrgas*, 526 U.S. at 584-85.

But non-jurisdictional threshold issues are different. If "a court can readily determine that it lacks jurisdiction over the cause or the defendant, the *proper course* would be to dismiss on that ground." *Sinochem Int'l*, 549 U.S. at 436 (italics added). "[T]he settled rule"

is that "courts should *not* dismiss cases on nonjurisdictional grounds where 'jurisdiction . . . "involve[s] no arduous inquiry"' and deciding it would not substantially undermine 'judicial economy.'" *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 434 (2010) (Thomas, J., concurring in judgment) (original italics). A nonjurisdictional threshold issue should only be decided before jurisdiction "*where* subject-matter or personal *jurisdiction is difficult to determine*, and [a non-jurisdictional issue such as] *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course." *Sinochem Int'l*, 549 U.S. at 436 (some italics added).

For example, in *Sinochem*, (1) "subject-matter jurisdiction presented an issue of first impression" that would require "length[y]" analysis and (2) the unique nature of the personal jurisdiction issues meant that "[d]iscovery concerning personal jurisdiction would have burdened [the parties] with expense and delay." *Id.* at 435. Under those narrow circumstances, it was proper to bypass the two disputed jurisdictional issues because the particularly burdensome resolution of jurisdiction would drain party resources and harm judicial economy all for "scant purpose" since the case could be resolved on the far simpler and less taxing analysis of forum non conveniens factors. *Id.* "In the mine run of cases," however, "jurisdiction 'will involve no arduous inquiry' and both judicial economy" and other policy considerations "'should impel the federal court to dispose of [a jurisdictional] issue first.'" *Id*. at 436.

Because the Second Circuit is among the minority of Circuits that treats prudential standing as jurisdictional, it chose to decide what it saw as the jurisdictional prudential standing issue before the jurisdictional Article III issue, without any suggestion that the Article III issues were particularly novel or taxing as required by *Sinochem*. Indeed, the Article III issue is not uniquely difficult here and the parties' briefing suggested that it was relatively straightforward.

This contrasts starkly with the Fifth Circuit's approach, which holds that prudential standing is "not jurisdictional" and acknowledges that "we must address [Article III standing] before considering questions of prudential standing." *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473-74 & n.4 (5th Cir. 2013).

As demonstrated below, the Court should now make clear that prudential standing is a non-jurisdictional issue and should be treated accordingly.

B. The Circuits Are Hopelessly Conflicted On Whether Prudential Standing Is A Jurisdictional Inquiry Akin To Subject-Matter And Personal Jurisdiction.

The opinions of at least three circuits have already cried out for this Court to resolve the "deep and important circuit split" on whether prudential standing is jurisdictional in nature. *Lucas*, 721 F.3d at 938 (8th Cir. 2013); *Grocery Manufacturers Ass'n*, 693 F.3d at

185 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); *see also UPS Worldwide Forwarding*, 66 F.3d at 626 n.6. (3d Cir. 1995).

Circuits holding that prudential standing is jurisdictional. The Second Circuit, Sixth Circuit, and D.C. Circuit hold that "prudential standing is of course, like Article III standing, a jurisdictional concept." *Steffan v. Perry*, 41 F.3d 677, 697 (D.C. Cir. 1994) *accord Sundel v. United States*, 985 F.3d 1029, 1031 n.2 (D.C. Cir. 2021); *e.g.*, *Grocery Manufacturers Ass'n*, 693 F.3d at 179 (majority opinion holding that prudential standing can always be considered before Article III standing because "there is no mandated 'sequencing of jurisdictional issues' "), 180 (Tatel, J., concurring) (agreeing "with those circuits that have held that prudential standing is non-jurisdictional," but following D.C. Circuit law which "has directly held to the contrary"), 183-85 (Kavanaugh, J., dissenting) (following circuits that have held that prudential standing is non-jurisdictional based on some indications from this Court on the subject); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994) ("Standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded"); *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) ("[A]ppellee's purported waiver of prudential standing challenge is necessarily ineffective because standing implicates federal jurisdiction"); *Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994) (treating prudential

standing requirements as non-waivable jurisdictional requirements).

Similarly, the Second Circuit's order here relied on *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank Nat'l Ass'n*, 747 F.3d 44, 48 (2d Cir. 2014), which in turn cited *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 194 n.4 (D.C. Cir. 2013), which held that "Prudential standing, like Article III standing, is a threshold, jurisdictional concept." (App.4.)

Circuits holding that prudential standing is non-jurisdictional. On the other hand, the majority of circuits have held that prudential standing is non-jurisdictional and must be treated that way. *E.g.*, *Cibolo Waste*, 718 F.3d at 473-74 & n.4 (5th Cir. 2013); *The Wilderness Soc. v. Kane Cnty.*, 632 F.3d 1162, 1168 n.1 (10th Cir. 2011); *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008) ("Prudential-standing doctrine is not jurisdictional in the sense that Article III standing is"); *Independent Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065 n.17 (9th Cir. 2008) ("Unlike the Article III standing inquiry, whether ILC maintains prudential standing is not a jurisdictional limitation on our review"); *American Iron & Steel Institute v. OSHA*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999) ("prudential standing is flexible and not jurisdictional in nature").

Circuits that have expressly avoided the issue. Still other circuits have expressly declined to weigh in, sometimes noting that the issue is "uncertain." *UPS Worldwide Forwarding*, 66 F.3d at 626 n.6;

see, *e.g.*, *Lucas*, 721 F.3d at 938 (recognizing "deep" circuit split, but declining to join either side of the debate because either way, prudential standing was satisfied in the case).

As a number of circuit judges have observed, the confusion and resulting circuit conflict results from a long history of "sloppy and profligate use of the term 'jurisdiction' by lower courts and, at times in the past, the Supreme Court itself." *Grocery Manufacturers Ass'n*, 693 F.3d at 183-84 (Kavanaugh, J., dissenting). They have noted that the "Supreme Court has given mixed signals" regarding the jurisdictional or non-jurisdictional nature of prudential standing. *UPS Worldwide Forwarding*, 66 F.3d at 626 n.6.

This Court's recent decision in *June Medical Services LLC v. Russo*, ___ U.S. ___, 140 S. Ct. 2103 (2020) adds to the ambiguity. There, the plurality opinion stated (1) that prudential standing "can be forfeited or waived" because it does not involve Article III and (2) "[i]n any event," the plaintiff did meet the prudential standing requirement. *Id*. at 2117-19 (Breyer, J., plurality opinion). The applicability of waiver suggests that prudential standing likely is not jurisdictional, but the plurality decision never uses the terminology of "jurisdiction." Moreover, this statement is only found in the *plurality* opinion. Chief Justice Roberts' concurrence in the judgment, agrees with the plurality's alternative holding "that the abortion providers in this case *have standing* to assert the constitutional rights of their patients"—without any mention of the availability of forfeiture or waiver. 140 S. Ct. at 2139 n.4

(Roberts, C.J., concurring in judgment) (italics added). In the wake of *June Medical*, the Circuits have maintained their prior disagreements about whether prudential standing is jurisdictional. *See*, *e.g.*, *Sundel*, 985 F.3d at 1031 n.2.

It is time for this Court to put that confusion to rest and to clarify that prudential standing is a non-jurisdictional threshold issue that must be treated as such.

C. The Court Should Hold That Prudential Standing Is Not A Jurisdictional Inquiry.

As then-Judge Kavanaugh's dissent in *Grocery Manufacturers Ass'n* methodically explains, prudential standing should not be treated as jurisdictional.

A requirement is jurisdictional "when it speaks to the power of a court to hear a case rather than to the rights of or restrictions on the parties." *Grocery Manufacturers Ass'n*, 693 F.3d at 184 (Kavanaugh, J., dissenting). "[T]ruly jurisdictional rules" are those that "govern 'a court's adjudicatory authority'" and are distinct from "nonjurisdictional 'claim-processing rules.'" *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) A "rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Other rules, even if important and mandatory, we have said, should not be given the jurisdictional brand." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (citations omitted).

On the other hand, "[p]rudential standing is not jurisdictional because prudential standing has not been ranked by Congress as jurisdictional and is not a limitation on a court's authority to hear a case, as opposed to a limitation on who may sue to challenge" particular conduct. *Grocery Manufacturers Ass'n*, 693 F.3d at 183 (Kavanaugh, J., dissenting). Prudential standing represents a choice to not exercise jurisdiction that the court possesses. It simply does not concern the power of a court to adjudicate a dispute. Moreover, a plurality of this Court has recognized that prudential standing issues "can be forfeited or waived," *June Medical*, 140 S. Ct. at 2117 (Breyer, J., plurality), and we are aware of no law or logic that permits waiver of a truly jurisdictional issue.

III. EVEN ASSUMING PRUDENTIAL STANDING IS A NON-MERITS ISSUE, REVIEW IS WARRANTED BECAUSE THE SECOND CIRCUIT SIDESTEPPED A QUESTION OF ARTICLE III STANDING THAT POSES NO PARTICULARLY COMPLICATED OR NOVEL ISSUES.

Just like "[i]n the mine run of cases," analysis of the Article III issues "will involve no arduous inquiry" here. *Sinochem Int'l*, 549 U.S. at 436. Under those circumstances, the "proper course" is to first address the district court's concerns about Article III jurisdiction. *Id.* Indeed, as discussed below (§ IV., *infra*) the Article III analysis provides a critical piece of information that

dovetails into the analysis of the prudential-standing question in this case, simplifying the entire process.

Here, there is nothing particularly novel about whether Petitioners met the Article III requirement of injury-in-fact. This area of law is well known to federal courts, which are required to consider the issue sua sponte in every case. Nor was there anything particularly taxing about the review of the evidence that Petitioners marshalled to demonstrate that injury: It is undisputed that Petitioners assigned their RMBS Certificates to the Indenture Trustee only to hold in trust for a limited period of time, after which ownership would revert back to the Petitioners. (A2089 § 10.9(e); 2805:5-15 (USB concession that certificates revert to Petitioners).) Any injury that USB caused to the RMBS Certificates would thus inflict an injury on Petitioners. Moreover, Petitioners received a stream of income from the RMBS Certificates that Petitioners used to pay their note holders. (A2040, 2077-78; *see also* A749, 995, 1275, 1515, 1724, 2351.) Again, any injury that USB caused to the value of the RMBS Certificates would impact that income stream and thus injure Petitioners through their inability to pay others. Petitioners sued to protect their rights because the Indenture Trustees were unable and unwilling to do so, being plagued with an irreconcilable conflict of interest. (*See* A511, 537, 556.) That is more than enough to create the type of concrete adverseness required by Article III. In any event, whether the courts accept or reject those arguments, their consideration will not involve any

particularly "arduous inquiry." *Sinochem Int'l*, 549 U.S. at 436.

That should end the debate. If "a court can readily determine that it lacks jurisdiction over the cause or the defendant, the *proper course* would be to dismiss on that ground." *Sinochem Int'l*, 549 U.S. at 436 (italics added). "[T]he settled rule" is that "courts should *not* dismiss cases on nonjurisdictional grounds where 'jurisdiction . . . "involve[s] no arduous inquiry"' and deciding it would not substantially undermine 'judicial economy.'" (*Levin*, 560 U.S. at 434 (Thomas, J., concurring)) (original italics). But it is worth noting that, if anything, the prudential standing issue is more complicated, involving a foray into champerty law and its exceptions.

As demonstrated above, the Court should hold that prudential standing is, in reality, a merits analysis that can never precede analysis of Article III jurisdiction. (§ I., *supra*.) But if prudential standing is to be treated as a non-merits issue, it is a non-jurisdictional issue (§ II., *supra*) and under the circumstances here, the "proper course" was to address the Article III issues first. *Sinochem Int'l*, 549 U.S. at 435-36.

IV. REVIEW IS WARRANTED BECAUSE PETITIONERS POSSESS ARTICLE III STANDING AND THE ASSIGNMENT WAS NOT CHAMPERTOUS.

A decision that the federal courts cannot presume jurisdiction before deciding so-called "prudential

standing" ultimately leads to a Catch-22: This Court, of course, will need to consider its own subject matter jurisdiction in the case.

As Petitioners will be able to demonstrate in greater detail in their merits briefs, Article III's injury-in-fact requirement is satisfied here. In fact, numerous cases in the securitization and re-securitization context recognize that Article III standing exists when an issuer grants its "right, title, and interest" in collateral (including RMSB Certificates) to an indenture trustee. *E.g.*, *National Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 252 n.57, 257-58 (2d Cir. 2018); *Blackrock Allocation Target Shares v. Wells Fargo Bank N.A.*, 247 F. Supp. 3d 377, 415 n.19 (S.D.N.Y. 2017); *House of Eur. Funding I, Ltd. v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 118729, at *17 (S.D.N.Y. Sept. 4, 2015); *House of Eur. Funding I, Ltd. v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 49894, at *46, *49 (S.D.N.Y. Mar. 31, 2014).

The undisputed fact that ownership of the RMBS Certificates reverts from the Indenture Trustees back to Petitioners at the end of a contractually-specified term is enough to demonstrate that Petitioners' interests are at stake in this litigation. So too does the fact that the RMBS Certificates pay an income stream to Petitioners that Petitioners then use to pay their noteholders. Any harm that USB inflicted on the value of the RMBS Certificates will be sustained by Petitioners—not by a trustee who temporarily holds the certificates.

The Indenture Trustees have not (and could not have) filed suit because of their manifest conflict of interest. (*See* A511, 537, 556.) They are named defendants in some of the claims that they assigned back to Petitioners. Similarly, the Indenture Trustees could never and would never have taken litigation positions against USB and BANA that would be used against the Indenture Trustees in similar litigation brought against the Indenture Trustees in their capacity as RMBS trustees. Petitioners are the parties that have skin in the game and the *only* ones with the unconflicted motivation to prosecute the claims. If that does not satisfy the case-or-controversy requirement, nothing does.

Moreover, that Article III analysis drives the answer to the champerty question. Champerty doctrines have ancient roots. As New York's highest court has repeatedly expressed, caution must be taken to apply those ancient rules narrowly to avoid untoward outcomes in the realm of sophisticated financial transactions and complicated investment strategies. *Trust for the Certificate Holders of Merrill Lynch Mortg. Invs., Inc. v. Love Funding Corp.*, 918 N.E.2d 889, 893-94 (N.Y. 2009) ("*Love Funding*"); *Bluebird Partners, L.P. v. First Fid. Bank, N.A.*, 731 N.E.2d 581, 585-86 (N.Y. 2000). "To say the least, a finding of champerty as a matter of law might engender uncertainties in the free market system in connection with untold numbers of sophisticated business transactions—a not insignificant potentiality in a State that harbors the financial capital of the world." *Bluebird Partners*, 731 N.E.2d at

589. Accordingly, champerty is not violated when an entity takes an assignment of a claim "if its purpose is to collect damages, by means of a lawsuit, for losses on a debt instrument *in which it holds a preexisting proprietary interest*." *Love Funding*, 918 N.E.2d at 891 (italics added). Here, the undisputed evidence and the Article III analysis itself establishes that Petitioners had such a preexisting interest in the RMBS Certificates:

- The Indenture Trustees were only *temporarily* holding the RMBS Certificates and were doing so for the benefit of the Petitioners and as collateral to support Petitioners' notes. (A1933-34.) None of the damage would be felt by the Indenture Trustee at any time.
- It is undisputed that Petitioners always maintained the *reversionary interest* in the RMBS Certificates. (A2089 § 10.9(e); 2805:5-15 (USB concession that certificates revert to Petitioners).) That is, long before the Indenture Trustees assigned back the right to sue, Petitioners always had a "preexisting proprietary interest" in the RMBS Certificates because the ownership would automatically revert back to the Petitioners on a contractually-identified date. Any damage to the RMBS Certificate's value during the period of the indenture trust would be immediately and forever felt by the Petitioners upon the automatic reversion.
- It is undisputed that a "Payment Account"—funded by the proceeds received from the

> RMBS Certificates—was created "on behalf of the" Petitioners. (A2041 § 7.3, 2077-78 § 10.3.) That is because the income from the RMBS Certificates flows to the Petitioners, who use those funds to pay the noteholders. This would never be the case if Petitioners did not have a preexisting proprietary interest in the RMBS Certificates.

When the Indenture Trustees assigned back the Petitioners' right to sue, it wasn't champerty. It wasn't about a non-interested party purchasing a claim. It was about trustees who could not prosecute claims due to their own irreconcilable conflicts of interest assigning the right to sue back to the actually interested parties, the parties who held the preexisting proprietary interest in the RMBS Certificates, and who would actually suffer damage due to the breaches sought to be addressed by the lawsuit.

The Article III analysis—which should have been performed first—itself answers the champerty question: Petitioners suffered an injury-in-fact due to their preexisting proprietary interest. In fact, Article III cases use that identical standard: "proprietary interest." *See*, *e.g.*, *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059 (D.C. Cir. 2018) ("'no difficulty in recognizing'" a state's Article III standing "'to protect proprietary interests or sovereign interests'"); *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 654 (9th Cir. 2017) (party may establish Article III standing due to "their proprietary interests as gas consumers"); *Griswold v. Coventry First LLC*, 762 F.3d 264, 268 (3d Cir. 2014)

(district found Article III standing where party "possesses a proprietary interest in the property . . . that was injured"); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) ("for Article III purposes," municipality "may sue to protect is own 'proprietary interests' " in "assets"); *Hodges v. Abraham*, 300 F.3d 432, 444 (4th Cir. 2002) (Article III standing depends on "asserted proprietary interests"); *Sioux Falls Cable Television v. South Dakota*, 838 F.2d 249, 251 (8th Cir. 1988) (Article III requirements satisfied by "significant proprietary interests in the satellite signals"). The Indenture Trustee's assignment of the right to sue back to Petitioners merely rejoined that right with the Petitioners' preexisting proprietary interest, making the assignment non-champertous.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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