

**In the Supreme Court of the United States**

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O'DONNELL & SONS, INC., on behalf of itself and all persons similarly situated,  
*Petitioner,*

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THE STATE OF NEW YORK,  
AND AMANDA HILLER in her official capacity as Acting Tax Commissioner of the New  
York State Department of Taxation and Finance,  
*Respondents.*

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**APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF  
CERTIORARI FROM JANUARY 10, 2022 TO FEBRUARY 9, 2022**

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To the Honorable Justice Sotomayor:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30, petitioner O'Donnell & Sons, Inc.<sup>1</sup> respectfully requests that the time to file a petition for a writ of certiorari in this case be extended for 30 days to and including February 9, 2022. The New York Court of Appeals denied review in this case on October 12, 2021. *See* App. 1a-2a. Absent an extension of time, the petition would be due on January 10, 2022. Petitioner is filing this application more than ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1257 to review this case.

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<sup>1</sup> Pursuant to this Court's Rule 29.6, petitioner states that it has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

## BACKGROUND

This case presents an important question about the scope of 12 U.S.C. § 1768, a provision of the Federal Credit Union Act that generally exempts federal credit unions from taxation “by any State, Territorial, or local taxing authority.” Petitioner O’Donnell & Sons, Inc., on behalf of a putative class of mortgage borrowers, alleges that the State of New York violates this provision by charging a tax on the recordation of mortgages issued by federal credit unions. *See* New York Tax Law § 235(1) (imposing “[a] tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt of obligation which is . . . secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state”). Petitioner alleges that the State charges the tax to lenders, including federal credit unions, which pass that cost on to borrowers.

In this case, petitioner was required to pay a mortgage tax in the amount of \$3,750 on a construction mortgage loan. Petitioner brought a putative class action in the Supreme Court of the State of New York alleging that collection of the tax was unlawful under federal law, and seeking refunds on behalf of itself and all other federal credit union borrowers who paid the tax.<sup>2</sup> In the complaint, petitioner acknowledged that a prior decision of New York’s Court of Appeals, *Hudson Valley*

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<sup>2</sup> The complaint originally named Nonie Manion, who was then the Acting Tax Commissioner. Per the Commission’s website, the current Acting Tax Commissioner is respondent Amanda Hiller, who began serving in that role on April 23, 2021. Ms. Hiller’s name has been substituted into the caption pursuant to this Court’s Rule 35.3.

*Federal Credit Union v. New York State Department of Taxation & Finance*, 980 N.E.2d 473 (N.Y. 2012), held that the Federal Credit Union Act does not prohibit the collection of this tax—but petitioner asserted that federal courts of appeals had subsequently rejected the reasoning of *Hudson* (including by reversing the federal district court decision upon which *Hudson* relied), necessitating a different outcome now.

Every level of the state judicial system refused to deviate from or reconsider *Hudson*. The trial court held it was “bound by the decision of the Court of Appeals in *Hudson*, notwithstanding conflicting post-*Hudson* decisions by the lower federal courts.” App. 9a. It determined that only the State’s highest court, or “the United States Supreme Court’s interpretations of federal statutes” could overrule *Hudson*. *Ibid*.

The Appellate Division affirmed, likewise holding that “[t]his precise question was decided in” *Hudson*, and recognizing that intermediate appellate courts were likewise “bound by [*Hudson*] . . . despite conflicting federal intermediate court decisions which post-date it.” App. 4a.

Petitioner timely sought review in the Court of Appeals, the only court in New York State capable of reconsidering or overruling *Hudson*. The Court of Appeals denied review on October 12, 2021, App. 1a, in a one-sentence order saying “Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements,” *id.* at 2a.

This application followed.

## REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a petition for a writ of certiorari should be extended for 30 days, to February 9, for several reasons.

First, petitioner only recently retained undersigned counsel for the filing of a petition for a writ of certiorari before this Court. Additional time is necessary for counsel to review the record in the case as well as the decisions of other State and federal courts to prepare a clear and concise petition for the Court's review.

Second, no prejudice would result from the extension. Whether the extension is granted or not, the petition will be considered this Term—and, if granted, the case will be argued and decided next Term. In the interim, the status quo *ante* remains intact.

Third, the press of other matters will make submission of the petition difficult absent an extension. Petitioner's counsel is currently responsible for numerous pending matters in this Court and others. These include:

- A petition for a writ of certiorari to be filed this week;
- A reply brief in support of the petition for a writ of certiorari in No. 21-462, *Johnson v. Bethany Hospice and Palliative Care LLC*, which is scheduled to be distributed on December 29, 2021;
- An opening brief in the Ninth Circuit, No. 21-35905, *UPPI LLC v. Cardinal Health, Inc.*, due December 29, 2021;
- A response to a motion to dismiss in the Southern District of New York, No. 19-cv-11876-AKH, *Brown v. National Bank of Pakistan* currently due on December 29, 2021 (request for extension to January 28 is pending, but has not been acted upon);
- Oral argument before the Ninth Circuit in No. 21-15420, *United States of America ex rel. Silbersher v. Allergan, Inc.*, on January 10, 2022;

- Oral argument in the District of Utah in No. 20-cv-00732, *United States ex rel. Khoury v. Intermountain Healthcare, Inc.*, on January 11, 2022.

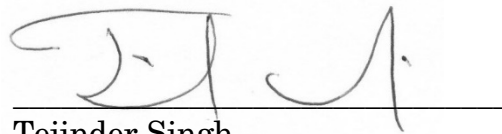
On top of these other commitments, counsel also has pre-planned travel during the holiday season, and will be serving as an instructor at the Harvard Law School Supreme Court Litigation Clinic for most of the month of January—which requires a substantial teaching commitment in addition to case work.

Finally, the petition is likely to be granted. This case presents an important question that affects thousands of homeowners and other taxpayers. Moreover, as the decisions below indicate, there is an acknowledged conflict between the decision of the New York Court of Appeals in *Hudson* (reinforced by the decision below), on the one hand, and multiple federal courts, on the other.

### CONCLUSION

For the foregoing reasons, the time to file a petition for a writ of certiorari should be extended for 30 days to and including February 9, 2022.

Respectfully submitted,



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Dated: December 21, 2021

## **APPENDIX**

Order of the Court of Appeals denying leave to appeal dated October 12, 2021 .....	1a
Decision & Order of the Appellate Division dated March 9, 2021.....	3a
Decision & Order of the Supreme Court dated December 6, 2018 .....	5a

**State of New York**  
**Court of Appeals**

**Decisions**

October 12, 2021

**CASES**

3                      No. 81 SSM 16  
JPMorgan Chase Bank National Association,  
    Appellant,  
    v.  
Barbara J. Kelleher,  
    Respondent,  
et al.,  
    Defendants.

On review of submissions pursuant to section 500.11 of the Rules, order affirmed, with costs. Under these circumstances, Supreme Court did not abuse its discretion in denying plaintiff an extension of time to serve defendant Barbara J. Kelleher in the interest of justice pursuant to CPLR 306-b.  
Chief Judge DiFiore and Judges Rivera, Fahey, Garcia, Wilson, Singas and Cannataro concur.

                        No. 53  
The People &c.,  
    Respondent,  
    v.  
Dave Lewis,  
    Appellant.

Order affirmed.  
Opinion by Judge Garcia.  
Chief Judge DiFiore and Judges Rivera, Fahey, Wilson, Singas and Cannataro concur, Judge Wilson in a concurring opinion.

2                      No. 55  
Richard J. Sassi II,  
    Appellant,  
    v.  
Mobile Life Support Services, Inc.,  
    Respondent.

Order reversed, with costs, and defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) denied.  
Opinion by Chief Judge DiFiore.  
Judges Rivera, Fahey, Garcia, Wilson, Singas and Cannataro concur, Judge Garcia in a concurring opinion.

3                      No. 58  
The People &c.,  
    Respondent,  
    v.  
Bradford L. Shanks,  
    Appellant.

Order reversed and a new trial ordered.  
Opinion by Judge Fahey.  
Chief Judge DiFiore and Judges Rivera, Garcia, Wilson, Singas and Cannataro concur.

1                    Mo. No. 2021-552  
 Joseph Mendler, &c.,  
                     Appellant,  
                     v.  
 Jane-Horatio LLC, et al.,  
                     Respondents,  
 et al.,  
                     Defendant.

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

2                    Mo. No. 2021-533  
 O'Donnell & Sons, Inc., &c.,  
                     Appellant,  
                     v.  
 New York State Department of Taxation and  
 Finance, et al.,  
                     Respondents.

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

3                    Mo. No. 2021-579  
 In the Matter of the Claim of Marie R. Rho,  
                     Appellant,  
                     v.  
 Beth Israel Medical et al.,  
                     Respondents.  
 Workers' Compensation Board,  
                     Respondent.

Motion for leave to appeal denied.

1                    Mo. No. 2021-557  
 Alroy Richards,  
                     Appellant,  
                     v.  
 Security Resources,  
                     Respondent,  
 et al.,  
                     Defendant.

Motion for reargument of motion for leave to appeal denied.  
 Judges Singas and Cannataro took no part.



3a  
**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

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T/htr

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Argued - March 9, 2021

REINALDO E. RIVERA, J.P.  
ROBERT J. MILLER  
VALERIE BRATHWAITE NELSON  
LINDA CHRISTOPHER, JJ.

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2019-00150

DECISION & ORDER

O'Donnell & Sons, Inc., etc., appellant, v New York  
State Department of Taxation and Finance, et al.,  
respondents.

(Index No. 52772/17)

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Paul Quartararo, Esq., PLLC (Law Offices of John F. Harnes, PLLC, New York, NY,  
of counsel), for appellant.

Letitia James, Attorney General, New York, NY (Steven C. Wu and Caroline A.  
Olsen of counsel), for respondents.

In a purported class action, inter alia, to recover certain New York State mortgage recording tax payments and for a judgment declaring that New York State federal credit unions and their members are exempt from the imposition of the New York State mortgage recording tax, the plaintiff appeals from an order of the Supreme Court, Dutchess County (James D. Pagones, J.), dated December 6, 2018. The order granted the defendants' motion pursuant to CPLR 3211(a) to dismiss the complaint, and denied, as academic, the plaintiff's cross motion for summary judgment declaring that mortgages issued by New York State federal credit unions are exempt from the imposition of the New York State mortgage recording tax.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss the cause of action for a judgment declaring that mortgages issued by New York State federal credit unions are exempt from the imposition of the New York State mortgage recording tax, and adding thereto a provision deeming that branch of the defendants' motion to be for a declaratory judgment in the defendants' favor, and thereupon granting that branch of the defendants' motion; as so modified, the order is affirmed, with costs to the defendants, and the matter is remitted to the Supreme Court, Dutchess County, for the entry of a judgment, inter alia, declaring that mortgages issued by New York State federal credit unions are not exempt from the imposition of the New York

April 28, 2021

Page 1.

O'DONNELL & SONS, INC. v NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE

State mortgage recording tax.

The plaintiff commenced this purported class action seeking, inter alia, a declaration that mortgages issued by New York State federal credit unions are exempt from the imposition of the New York State mortgage recording tax. The defendants moved, among other things, pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action. The plaintiff cross-moved for summary judgment declaring that mortgages issued by New York State federal credit unions are exempt from the imposition of the New York State mortgage recording tax. The Supreme Court granted the defendants' motion and denied, as academic, the plaintiff's cross motion.

“[U]pon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment where no questions of fact are presented [by the controversy]. Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action should be treated as one seeking a declaration in [the] defendant's favor and treated accordingly” (*Neuman v City of New York*, 186 AD3d 1523, 1525 [citations and internal quotation marks omitted]). Applying these principles here, as a matter of law, the defendants were entitled to a declaration in their favor that mortgages issued by New York State federal credit unions are not exempt from the imposition of the New York State mortgage recording tax.

This precise question was decided in *Hudson Val. Fed. Credit Union v New York State Dept. of Taxation & Fin.* (20 NY3d 1, 13), where the Court of Appeals held that, based on principles of statutory interpretation and the legislative history of the Federal Credit Union Act, mortgages issued by New York State federal credit unions are not exempt from the imposition of the New York State mortgage recording tax. This Court is bound by the Court of Appeals' decision in *Hudson Val. Fed. Credit Union*, despite conflicting federal intermediate court decisions which post-date it (see *People v Jackson*, 46 AD3d 1110).

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Dutchess County, for the entry of a judgment, inter alia, declaring that mortgages issued by New York State federal credit unions are not exempt from the imposition of the New York State mortgage recording tax (see *Lanza v Wagner*, 11 NY2d 317, 334).

RIVERA, J.P., MILLER, BRATHWAITE NELSON and CHRISTOPHER, JJ., concur.

ENTER:



Aprilanne Agostino  
Clerk of the Court

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X  
O'DONNELL & SONS, INC., on behalf  
of itself and all persons similarly  
situated,

Plaintiff,

**DECISION AND ORDER**

Index No. 52772/2017

-against-

NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, THE STATE OF NEW YORK, and  
NONIE MANION in her official capacity as  
Acting Tax Commissioner of the New York  
State Department of Taxation and Finance,

Defendants.

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**HON. JAMES D. PAGONES, A.J.S.C.**

Defendants move for an order, pursuant to CPLR 3211, dismissing plaintiff's complaint. Plaintiff moves for an order, pursuant to CPLR 3211(c), awarding partial summary judgment to the plaintiff against the defendants as follows: (1) declaring the imposition of the mortgage recording tax, as set forth in New York Tax §253 *et seq.* on TEG Federal Credit Union (hereinafter "TEG") and its mortgages to be unlawful; (2) declaring that TEG and its members, and other New York State federal credit unions and their members, are exempt pursuant to the Federal Credit Union Act (hereinafter "FCU") from the imposition of the mortgage tax in mortgages given to them to secure loans; and, (3) declaring the payment of the mortgage tax is not payment of a

required fee. Plaintiff next moves for an order, pursuant to CPLR §§901 and 902, certifying this action as a class action on behalf of a class consisting of all those who obtained mortgage loans during the period beginning October 1, 2015 from TEG specifically, and/or from any federal credit union in New York State created pursuant to the Federal Credit Union Act, and who paid, on behalf of that federal credit union, the Mortgage Recording Tax, as set forth in Tax Law §§253 et seq., requiring disclosure of, *inter alia*, the names and addresses of potential class members. Defendants also cross-move for an order, pursuant to CPLR §2201, staying plaintiff's current motion for class certification on the grounds that two fully submitted motions could dispose of the matter making class certification academic.

The following papers were read:

Notice of Motion-Affirmation-Exhibits A-B	1-4
Notice of Motion-Affirmation-Exhibits 1-2	5-8
Memorandum of Law	9
Appendix	10
Affirmation in Opposition	11
Appendix	12
Notice of Motion-Affirmation-Exhibits A-B	13-16
Memorandum of Law	17
Notice of Cross-Motion-Affirmation	18-19
Memorandum of Law in Opposition	20
Memorandum of Law In Support	21

By way of background, plaintiff is a New York corporation with its principal address located in Dutchess County at 218 Van Wyck Road, Fishkill, New York 12524. Plaintiff is a member/shareholder and lendee of TEG Federal Credit Union. Plaintiff obtained a construction mortgage loan from TEG, on August 25, 2017, that was secured by a mortgage to the credit

union on real property located at 45 Jeffrey Drive, Town of LaGrange, Dutchess County, State of New York.

Plaintiff maintains that the FCU Act precludes and forbids the defendants from imposing the mortgage tax on TEG and other federal credit unions and mortgages that they issue in connection with mortgages they issue in connection with mortgage loans that they make and have made to their members. Plaintiff maintain that the imposition of the mortgage tax is unlawful and in contravention of the Federal Credit Union Act, U.S. Supreme Court precedent and the Supremacy Clause of the United States Constitution.

Defendants move for dismissal alleging that plaintiff lacks standing to proceed with this action and that it fails to state a cause of action.

On a defendants' motion to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendants to establish, *prima facie*, the plaintiff's lack of standing as a matter of law (see *MLB Sub I, LLC v. Bains*, 148 AD3d 881 [2<sup>nd</sup> Dept 2017]). To defeat a defendants' motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing (*id.*).

Defendants state, without citing to any controlling statutory authority, caselaw or documentary evidence, that plaintiff lacks standing in this proceeding as TEG or other similarly situated credit unions are the proper party. Here, the

defendants failed to meet their initial burden of establishing, *prima facie*, the plaintiff's lack of standing as a matter of law (see CPLR 3211[a][3]; *MLB Sub I, LLC v. Bains*, 148 AD3d 881 [2<sup>nd</sup> Dept 2017]). Notwithstanding defendants' failure to establish *prima facie* evidence of plaintiff's lack of standing and assuming that defendants were correct that plaintiff merely reimbursed TEG for the mortgage recording tax, pursuant to contract, plaintiff would still have standing as an equitable subrogee (see generally *Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev. Corp.*, 64 AD3d 85 [2<sup>nd</sup> Dept 2009]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (see *Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Nonnon v. City of New York*, 9 NY3d 825 [2007]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus (see *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11 [2005]).

The defendants indicate that dismissal is warranted based upon the New York State Court of Appeals case entitled *Hudson Valley Federal Credit Union v. New York State Department of*

*Taxation and Finance, et al.*, 20 NY3d 1 [2012])). The Court in *Hudson* held that federal credit union mortgages are not exempt from the State's mortgage recording tax. The defendants maintain and this Court concurs that *Hudson* has not been overturned or superseded in New York State.

Notwithstanding this clear mandate by New York's highest Court, plaintiff maintains that as there exists a split in federal authority at the time of the decision of the Court of Appeals in *Hudson* which has now been resolved by lower federal courts in contradiction to said decision, this Court is bound to apply the uniform contrary precedent of the lower federal courts (see *Flanagan v. Prudential-Bache Sec.*, 67 NY2d 500 [1986]; *Heymach v. Cardiac Pacemakers*, 183 Misc2d 584 [Sup Ct, Suffolk County 1999]; *LaManna v. Carrigan*, 196 Misc2d 98 [Civ Ct, Richmond County 2003])).

Although this court is bound by the United States Supreme Court's interpretations of federal statutes and the federal constitution, it is not necessarily bound by the decisions of intermediate and lower federal courts (*Seltzer v. New York State Democratic Committee*, 293 AD2d 172 [2<sup>nd</sup> Dept 2002])). However, this Court is bound by the decision of the Court of Appeals in *Hudson*, notwithstanding conflicting post-*Hudson* decisions by the lower federal courts not within this jurisdiction (see *People v. Jackson*, 46 AD3d 1110 [3<sup>rd</sup> Dept 2007] leave to appeal denied by 10 NY3d 766). If there is a conflict between the lower federal

courts and the New York State Court of Appeals, this Court is bound by the rulings of our highest court (*id.*).

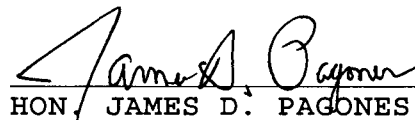
Accordingly, based upon the precedent of the Court of Appeals in *Hudson*, the defendants' motion to dismiss, pursuant to CPLR 3211(a)(7), is granted and plaintiff's complaint is dismissed.

The dismissal of the plaintiff's complaint renders all remaining motions academic and they are denied as such.

This constitutes the decision and order of this Court. This decision and order has been filed electronically.

Dated: December 6, 2018  
Poughkeepsie, New York

ENTER

  
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