No. 21-1245

IN THE

Supreme Court of the United States

O'DONNELL & SONS, INC.,
Petitioner,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether petitioner has statutory or third-party standing to invoke the Federal Credit Union Act's tax exemption for federal credit unions and certain of their assets, 12 U.S.C. § 1768, where petitioner is not a federal credit union.

2. Whether New York may lawfully collect its mortgage-recording tax from a member of and borrower from a federal credit union, where the Federal Credit Union Act does not exempt federal credit union members or borrowers from state taxation and where the mortgage-recording tax is imposed on the privilege of recording a mortgage rather than on federal credit unions or their property.

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INTRODUCTION

New York has imposed a tax on the recording of mortgages for more than a century. The State does not specify who must pay the mortgage-recording tax, but most often borrowers pay it, among other closing costs, pursuant to the contract between borrower and lender. Petitioner is a construction company that is a member of a federal credit union and obtained a loan from that credit union secured by a mortgage on a property in New York. Petitioner paid the associated mortgage-recording tax, as it had agreed to do in its mortgage contract.

Petitioner then brought this lawsuit in state court arguing that it should be exempt from paying the tax. Petitioner claimed tax immunity under the Federal Credit Union Act (FCUA), 12 U.S.C. § 1768, which exempts federal credit unions and certain of their statutorily listed assets from federal, state, and local taxation. The FCUA does not exempt from taxation members of or borrowers from federal credit unions.

The trial court and intermediate appellate court below dismissed petitioner's claims, relying on the New York Court of Appeals' prior decision in *Hudson Valley Federal Credit Union v. New York State Department of Taxation and Finance*, 20 N.Y.3d 1 (2012). *Hudson Valley* held that the FCUA does not exempt federal credit unions from the mortgage-recording tax; it did not address whether credit union members or borrowers are exempt. *See id.* at 13. The New York Court of Appeals denied petitioner's motion for leave to appeal.

Certiorari should be denied. Petitioner attempts to challenge the Court of Appeals' prior conclusion in *Hudson Valley* that the FCUA does not exempt federal credit unions from the State's mortgage-recording tax.

But this petition is a poor vehicle for addressing that question because petitioner is not a federal credit union. As a member of and borrower from a federal credit union, petitioner has no cause of action under the FCUA's tax exemption—which applies solely to federal credit unions and certain of their assets. Nor do petitioner's interests fall within the statute's zone of interests, which protects only federal credit unions from taxation.

Without a cognizable legal right of its own, petitioner attempts to assert the statutory rights of tax-exempt federal credit unions. Yet petitioner lacks third-party standing to do so. Petitioner's status as a contractual counterparty of a federal credit union is not the type of close relationship that this Court has recognized to support third-party standing. And there is nothing preventing federal credit unions from seeking to vindicate their own interests in the FCUA's tax exemption—as a federal credit union did in *Hudson Valley*.

Contrary to petitioner's contentions, the decision below does not implicate any split in authority warranting this Court's intervention. There is no conflict regarding the issue squarely presented in this case, i.e., whether the FCUA exempts the members of or borrowers from federal credit unions from New York's mortgage-recording tax. Rather, it is well-established that where a federal statute confers tax immunity on a specific entity and certain of its assets, that immunity does not extend to nonexempt businesses that transact with the tax-immune entity. Moreover, the cases on which petitioner relies did not address the FCUA at all and instead involved different taxes levied directly on federal entities benefitting from different statutory exemptions. The purported split identified by peti-

tioner merely reflects the courts' interpretation of different statutes under different factual circumstances.

Finally, certiorari is also not warranted because *Hudson Valley* correctly concluded that federal credit unions are not exempt from New York's mortgage-recording tax. The mortgage-recording tax is not a tax on exempt federal credit unions but rather a tax on the privilege of recording a mortgage—an activity for which Congress did not provide any exemption. Nor is the mortgage-recording tax properly viewed as a tax on a federal credit union's "property." Under this Court's precedents, where a statute exempts "property" from taxation, the exemption does not include excise taxes on privileges of ownership, such as the mortgage-recording tax.

STATEMENT

A. Legal Background

1. Since 1906, New York has imposed a basic tax on the recording of mortgages payable when a mortgage on real property is recorded at the county recording office. N.Y. Tax Law § 253(1) (reproduced at Pet. App. 12a).[1] The statute that imposes the basic mortgage-recording tax "d[oes] not prescribe by whom such tax should be paid." *People v. Trust Co. of Am.*, 205 N.Y. 74, 76 (1912). Instead, the statute simply prohibits the county clerk from recording a mortgage unless the tax has been paid, whether by the borrower or the lender.

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[1] *See also* N.Y. Tax Law § 257 ("The taxes imposed by this article shall be payable on the recording of each mortgage of real property subject to taxes thereunder. Such taxes shall be paid to the recording officer of any county in which the real property or any part thereof is situated.").

See N.Y. Tax Law § 258(1) ("No mortgage of real property shall be recorded by any county clerk or register, unless there shall be paid the taxes imposed by and as in this article provided."). If the tax is not paid and, as here, the borrower has agreed to pay the tax, the Attorney General may commence an action against the lender, the borrower, or both. *Id.* § 266; *see Hudson Valley*, 20 N.Y.3d at 7. As a practical matter, it is the borrower rather than the lender that usually pays most loan closing costs, including the basic mortgage-recording tax. *See* Pet. 5; *accord Dime Sav. Bank of N.Y., FSB v. State*, 174 A.D.2d 173, 176 & n.* (N.Y. App. Div. 1992).

In addition to the basic mortgage-recording tax, the recording of certain mortgages also implicates an "additional tax" and a "special additional tax," which are not at issue here. N.Y. Tax Law §§ 253(1-a)-(2), 253-a, 253-c to 253-y. State law treats the special additional tax differently from the basic mortgage-recording tax, providing that this special tax must, with limited exceptions, "be paid by the mortgagee [the lender], and such tax shall not be paid or payable, directly or indirectly, by the mortgagor [the borrower]." *Id.* § 253(1-a)(a).

2. In 1934, Congress enacted the Federal Credit Union Act (FCUA) to provide for the federal chartering of credit unions. *See* Ch. 750, 48 Stat. 1216 (1934) (codified as amended at 12 U.S.C. § 1751 et seq.). A federal credit union is a cooperative association owned and managed by private members. *See* 12 U.S.C. § 1752(1). As originally enacted, the FCUA did not exempt federal credit unions or their members from state taxation. Ch. 750, § 18, 48 Stat. at 1222; H.R. Rep. No. 73-2021, at 4 (1934). Instead, the FCUA expressly authorized States to tax credit unions at the same "rate" as "domestic banking corporations." Ch. 750, § 18, 48 Stat. at 1222.

And the FCUA expressly provided that shares of a federal credit union's stock held by a member are subject to state taxation as the owner's property. *Id.*

In 1937, Congress amended the FCUA's taxation provision. Congress did not change the taxable status of federal credit union members, continuing to allow States to levy taxes on members. Rather, the amendment added a limited tax exemption solely for credit unions and certain of their credit-union assets:

> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed.

See Federal Credit Union Act Amendments, ch. 3, § 4, 51 Stat. 4, 4 (1937) (codified at 12 U.S.C. § 1768).

The exemption was designed to ensure that federal credit unions would not be subject to "disproportionate and excessive" taxation due to their unique structure. H.R. Rep. No. 75-1579, at 2 (1937). At the time of the amendments, States commonly taxed domestic banking corporations based on the proportion of the bank's resources consisting of share capital. This tax resulted in a disproportionately high tax burden on federal credit unions relative to other financial institutions because federal credit unions could not accept deposits,

and their share capital thus represented a higher proportion of their resources. *See id.* When Congress amended the FCUA to protect federal credit unions from such disproportionately high state tax burdens, it made clear that no similar protection had been provided to the members of credit unions. As Congress explained, it remained "appropriate that local taxation should be levied on the members" of federal credit unions. *Id.*

Since 1937, Congress has amended the FCUA multiple times, including amendments in 1977 that authorized federal credit unions to make residential mortgage loans. *See* Pub. L. No. 95-22, § 302, 91 Stat. 49, 49 (1977). But in expanding the lending authority of federal credit unions, Congress did not expand the tax exemption. Instead, the FCUA's taxation provision is essentially unchanged from the original provision enacted in 1937. The provision thus exempts credit unions and the statutorily enumerated categories of credit-union assets from applicable taxes, but not their members, loans, or mortgages.

3. In 2012, a federal credit union filed a state-court lawsuit alleging that it was not required to pay New York's mortgage-recording tax because the FCUA purportedly exempted federal credit unions from the tax. The New York Court of Appeals concluded that the credit union was not exempt from the mortgage-recording tax. *See Hudson Valley*, 20 N.Y.3d at 7-13. The Court explained that the FCUA's tax exemption applies only to taxes imposed directly on federal credit unions or certain of their assets. New York's mortgage-recording tax is not a tax on federal credit unions themselves or any of the statutorily enumerated types of property, the Court further explained, because the tax is a privilege tax that applies to the act of recording a

mortgage. *See id.* at 7-9, 11 n.5. The Court further concluded that the FCUA does not exempt federal credit unions' mortgages or mortgage-lending activities from taxation because the FCUA does not expressly exempt mortgages, loans, or lending activities. As the Court emphasized, "exemptions in derogation of state taxing authority" must be limited to their express terms. *Id.* at 8. The Court in *Hudson Valley* had no occasion to address whether or to what extent the FCUA exempts from taxation the members of a federal credit union or businesses that transact with a federal credit union.

B. Factual and Procedural Background

Petitioner O'Donnell & Sons, Inc. is a homebuilding company headquartered in New York. In August 2017, it obtained a construction mortgage loan from TEG, a federal credit union. According to O'Donnell, it is also a member of TEG. (Pet. App. 7a-8a; N.Y. App. Div. Appendix ("A.") 16.) To acquire the loan, O'Donnell agreed to TEG's standard mortgage commitment letter, which obligates borrowers "to pay all 'required' fees" associated with the mortgage; for O'Donnell, those fees included $3,750 for the mortgage-recording tax. (A. 21-22.)

O'Donnell then filed this lawsuit in state court against the State of New York, the New York State Department of Taxation and Finance, and the Department's commissioner, on behalf of itself and putatively on behalf of other federal credit union members who have paid the State's mortgage-recording tax. Among other things, O'Donnell sought (i) a declaration that TEG, other federal credit unions in New York, and their members are exempt from the mortgage-recording tax under the FCUA; and (ii) an order refunding the amount O'Donnell had paid for the mortgage-recording

tax. (*See* Pet. 6a-7a; A. 14-29.) No federal credit union is a party to this proceeding.

The trial court granted the State's motion to dismiss O'Donnell's complaint. The court concluded that O'Donnell had standing to challenge the tax's application to a federal credit union even though O'Donnell is not a federal credit union, reasoning that O'Donnell was TEG's equitable subrogee. The court further concluded that *Hudson Valley* foreclosed O'Donnell's argument that federal credit unions are exempt from the mortgage-recording tax under the FCUA. (Pet. App. 9a-10a.)

The intermediate appellate court unanimously affirmed. The appellate court did not reach the State's arguments that O'Donnell's status as a credit-union member, rather than a credit union, meant that O'Donnell lacked a cause of action under the FCUA, lacked standing, and had failed to join TEG (the credit union) as a necessary party. The intermediate appellate court modified the trial court's order to grant a declaratory judgment in defendants' favor, concluding that defendants were entitled to a declaration "that mortgages issued by New York State federal credit unions are not exempt from the imposition of the New York State mortgage recording tax." (Pet. App. 2a-4a.) With that modification, the court remitted to the trial court for entry of a judgment. (Pet. App. 5a.)

In October 2021, the New York Court of Appeals denied O'Donnell's motion for leave to appeal. (Pet. App. 1a.)

REASONS FOR DENYING THE PETITION

A. This Case Is a Poor Vehicle to Address the Question Presented.

Petitioner frames the issue in this case as whether the FCUA, "which broadly exempts federal credit unions from 'all taxation,'" prevents New York from applying its tax on the recording of mortgages to federal credit unions. *See* Pet. 1. But this case is an exceedingly poor vehicle to address whether the FCUA exempts *federal credit unions* from New York's mortgage-recording tax because petitioner is not a federal credit union. Rather, petitioner is a private business that is a *member* of a federal credit union and that transacted with a federal credit union to obtain a mortgage loan. As a member of and borrower from a federal credit union, petitioner is not entitled to the FCUA's tax exemption for federal credit unions. This fundamental defect in petitioner's claim creates multiple vehicle problems with this case, each of which independently warrants denial of certiorari.

1. Petitioner lacks any viable cause of action under the FCUA because the statute does not exempt members of a federal credit union or businesses that transact with a federal credit union from state taxation. The FCUA exempts from taxation "Federal credit unions . . . , their property, their franchises, capital, reserves, surpluses, and other funds, and their income." 12 U.S.C. § 1768. By its plain terms, the statute exempts federal credit unions and certain of their assets from taxation. *See id.*; *see also First Fed. Sav. & Loan Ass'n of Boston v. State Tax Comm'n*, 437 U.S. 255, 260 (1978); *United States v. Michigan*, 851 F.2d 803, 807 (6th Cir. 1988). *See generally Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (statute must

be enforced "according to its terms"). The FCUA does not provide any tax exemption to members of a federal credit union, which are individuals or entities distinct from the credit union itself. *See American Bankers Ass'n v. National Credit Union Admin.*, 934 F.3d 649, 658-59 (D.C. Cir. 2019) (describing organization of federal credit unions). Nor does the statute provide any tax exemption to businesses that transact with or borrow from federal credit unions. *See generally Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (Congress's express enumeration of exempt items reflects its intention not to exempt others).

Here, petitioner is indisputably not a federal credit union but rather a member of TEG (a federal credit union) that obtained a mortgage loan from TEG. And given that petitioner is not a credit union, it does not own any of the credit-union assets listed in the FCUA's tax-exemption provision. Petitioner thus lacks any cognizable claim to the FCUA's tax exemption. *See Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (courts do not interpret "federal statutes as providing tax exemptions unless those exemptions are clearly expressed"). Accordingly, certiorari is not warranted to review whether the FCUA's tax exemption for federal credit unions applies to O'Donnell for purposes of New York's mortgage-recording tax. Even if TEG (the federal credit union) were immune from the mortgage-recording tax, petitioner still could not rely on that immunity because it is not itself a federal credit union.

Petitioner's attempt to benefit from the FCUA's tax exemption also contravenes the principle of statutory standing, i.e., that "a statute ordinarily provides a cause of action 'only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.'" *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296,

1302 (2017); *accord Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). Because petitioner is not a federal credit union, it falls outside the class of entities the statute is designed to protect.[2] *See Lexmark*, 572 U.S. at 130 n.5; *see also Warth v. Seldin*, 422 U.S. 490, 509 (1975).

Petitioner's interest in avoiding the mortgage-recording tax is unmoored from the interests that Congress sought to protect when it enacted the FCUA's tax-exemption provision—i.e., the interests of federal credit unions. The FCUA's tax exemption sought to put federal credit unions on more equal footing with domestic banking corporations because the unique share structure of federal credit unions had been routinely subjecting them to disproportionate state and local tax burdens compared to banking corporations. See *supra* at 5-6. And the exemption was premised on the assumption that state and local taxes could continue to be assessed and collected from members of federal credit unions. *See* H.R. Rep. No. 75-1579, at 2. Construing the FCUA to bar the State from collecting its mortgage-recording tax from *both* federal credit unions and their members would give members of and borrowers from federal credit unions a competitive advantage that Congress never intended to provide and would leave the state tax totally unpaid. Far from falling within the statute's zone of interests, petitioner's asserted exemp-

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[2] Petitioner is not aided by its assertion (Pet. 5) that the mortgage-recording tax "inflates the cost of mortgage loans" and thereby purportedly imposes additional costs on federal credit unions. It is well established that immunity is not conferred on a nonexempt taxpayer simply because a tax has an ancillary economic impact on a tax-exempt entity. *See United States v. New Mexico*, 455 U.S. 720, 734 (1982); *United States v. City of Detroit*, 355 U.S. 466, 472 (1958).

tion would upset the careful balance Congress struck in giving a tax exemption only to federal credit unions.

2. Because petitioner is not exempt from taxation, it attempts to assert the tax immunity of TEG, the third-party federal credit union that is absent from this litigation. But petitioner lacks third-party standing. "[A] party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth*, 422 U.S. at 499). Even if petitioner has an injury based on its having paid the mortgage-recording tax, it cannot seek to redress that injury based solely on the rights of others without establishing third-party standing. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991). To do so, it must have a close relation to the third party whose rights it seeks to assert, and "there must exist some hindrance to the third party's ability to protect his or her own interests," *id.* at 411.

Here, there is no plausible basis to allow petitioner to assert the rights of third-party credit unions. Petitioner's business associations with TEG do not constitute the type of "close" relationship with an absent third party that is required for third-party standing. *See id.*; *Kowalski*, 543 U.S. at 130; *see also, e.g.*, *W.R. Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 109-10 (2d Cir. 2008) (advisor lacked standing to assert rights of clients); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1381 (8th Cir. 1997) (waste-generating customers lacked standing to assert rights of waste haulers to be free of regulation). And federal credit unions are not hindered from bringing litigation to protect their own interests in the FCUA's tax exemption. To the contrary, a federal credit union brought a lawsuit to challenge New York's

mortgage-recording tax in *Hudson Valley* and declined to seek this Court's review of that decision. *See* 20 N.Y.3d at 7. And federal credit unions routinely bring litigation to protect their own interests. *See, e.g.*, *Navy Fed. Credit Union v. LTD Fin. Servs., LP*, 972 F.3d 344, 350-51 (4th Cir. 2020); *California Credit Union League v. City of Anaheim*, 190 F.3d 997, 997 (9th Cir. 1999); *Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228, 1230 (1st Cir. 1996).

Petitioner does not qualify for third-party standing based on the doctrine of equitable subrogation. *See* Pet. 9, 23. The doctrine of equitable subrogation allows a person who pays the debts of another to step into the latter's shoes to pursue litigation to recover the amounts paid. *See Chemical Bank v. Meltzer*, 93 N.Y.2d 296, 304 (1999); *see also Pandora Indus., Inc. v. Paramount Commc'ns* (*In re Wingspread Corp.*), 145 B.R. 784, 789 (S.D.N.Y. 1992), *aff'd sub nom. Wingspread Co. v. Paramount Commc'ns*, 992 F.2d 319 (2d Cir. 1993). That doctrine has no application here because the mortgage-recording tax is not owed solely or even primarily by lenders.

Contrary to petitioner's suggestion (Pet. 5, 20), New York law does not assign the obligation of paying the basic mortgage-recording tax to lenders. Rather, the statute is silent as to who must pay the tax, and it may be paid by either the borrower or the lender. *See* N.Y. Tax Law §§ 253(1), 266; *Trust Co. of Am.*, 205 N.Y. at 76-77. Thus, when petitioner paid the mortgage-recording tax, it was fulfilling *its own* tax liability—not the liability of TEG or any other federal credit union.

Petitioner is incorrect in arguing (Pet. 5) that the mortgage-recording tax falls initially on federal credit unions or that the Attorney General must seek to

recover unpaid taxes from lenders in the first instance. New York's statute says no such thing. It does not specify who must pay the tax—let alone assign any order of priority as to whether the tax incidence falls first on the borrower or lender. *See Trust Co. of Am.*, 205 N.Y. at 76. And where no entity has paid the mortgage-recording tax, Tax Law § 266 authorizes the Attorney General to maintain an action against *either* the lender or the borrower where, as here, "stipulations contained in such mortgage" make it "the duty of the mortgagor to pay such tax." The statute thus allows the Attorney General to collect the mortgage-recording tax from whichever party has assumed the legal obligation to pay it. Here, that party is plainly petitioner given that it voluntarily contracted to pay the mortgage-recording tax along with other closing costs.

Petitioner also misses the mark in asserting (Pet. 5, 20) that lenders are legally responsible for paying the mortgage-recording tax because they bear many of the consequences if a mortgage is not properly recorded. There is no support for this theory of tax incidence. To the contrary, when the Legislature wants to assign the legal or economic incidence of a tax to a specific party, it says so expressly—as it did in specifically imposing the "special additional tax" on lenders and providing that this tax "shall not be paid" by the borrower. *See* Tax Law § 253(1-a). And as petitioner admits (Pet. 5), borrowers typically pay the basic mortgage-recording tax as a practical and economic matter. Petitioner's own obligation to pay the tax does not give rise to any claim of tax immunity under the FCUA. *See Board of County Comm'rs of Kay County v. Federal Hous. Fin. Agency*, 754 F.3d 1025, 1029 (D.C. Cir. 2014) (exemptions covered only those who "would ultimately bear the burden of the Transfer Tax").

3. This case is also a poor vehicle for reviewing the FCUA's application to New York's mortgage-recording tax because petitioner failed to join TEG or any other federal credit union as necessary parties. The Court should not grant certiorari where, as here, the parties whose interests are keenly at stake are not present in the litigation to assert those interests.

Petitioner was required to join TEG or other federal credit unions as parties because they are likely to be "inequitably affected by a judgment in the action." *See* N.Y. C.P.L.R. 1001(a); *see also id.* 1003, 3211(a)(10). The basic premise of petitioner's claim is that New York is unlawfully imposing its mortgage-recording tax on federal credit unions when they serve as mortgage lenders. But to resolve that claim, a court must determine whether mortgage lenders like TEG, rather than borrowers like petitioner, are actually responsible for paying the tax because solely federal credit unions may claim a tax exemption under the FCUA. Such a determination could adversely affect the rights of TEG and other federal credit unions in New York, including whether, as petitioner asserts, federal credit unions are initially responsible for the tax. *See* Pet. 5, 20.

B. There Is No Split in Authority Requiring This Court's Intervention.

1. There is no split in authority regarding the issue squarely presented in this case, i.e., whether the FCUA exempts the members of or borrowers from federal credit unions from New York's mortgage-recording tax. To the contrary, courts have consistently determined that where a federal statute confers immunity from taxation on a specific type of entity and certain of its assets, that immunity does not extend to nonexempt businesses that transact with the tax-immune entity.

For example, in *Federal National Mortgage Association v. City of Chicago*, the Seventh Circuit concluded that buyers who purchased real property from tax-exempt entities were required to pay local taxes assessed on the transfer of real property. 874 F.3d 959, 960, 966 (7th Cir. 2017). The federal statutory exemptions at issue in *City of Chicago* exempted the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Housing Finance Agency (FHFA)—two federally chartered entities that issue mortgage loans and the federal agency acting as their conservator, *see id.* at 960—from "all taxation now or hereafter imposed by any State" or local government, "except that any real property" of the federal entities was subject to state and local "taxation to the same extent as other real property is taxed," 12 U.S.C. § 1723a(c)(2) (Fannie Mae); *see also id.* § 1452(e) (Freddie Mac); *id.* § 4617(j)(2) (FHFA). Relying on the text and history of the statutory exemptions, the Seventh Circuit determined that the purchasers were subject to the property-transfer tax because the tax burden fell on nonexempt entities that Congress did not intend to shield from state or local taxation. *City of Chicago*, 874 F.3d at 966; *see also Taylor v. Genesee County*, 286 Mich. 674, 678-80 (1938) (borrower was not exempt from mortgage-recording tax it agreed to pay in connection with loan obtained from exempt federal entity).

The current case fully accords with *City of Chicago* given that petitioner is not a federal credit union—the only type of entity that Congress intended to protect under the FCUA's tax exemption. And the lack of any tax exemption for credit union members or borrowers here fits squarely with well-settled precedent from this Court and other courts establishing that the federal

government's constitutional immunity from state and local taxes "does not shield private parties" that do business with tax-immune federal entities. *See City of Detroit*, 355 U.S. at 469; *see also, e.g.*, *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 36 (1999) (federal contractor not exempt from Arizona's transaction privilege tax); *Chrysler Corp. v. Township of Sterling*, 410 F.2d 62, 72 (6th Cir. 1969) (private business that used federal property not exempt from local property tax). Just as nonfederal entities do not receive the federal government's constitutional tax immunity, members of or borrowers from credit unions do not receive the federal credit unions' statutory tax immunity under the FCUA—particularly when "exemptions from taxation are not to be implied," *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988). *See Chickasaw Nation*, 534 U.S. at 95.

The cases on which petitioner relies are not to the contrary because none of them exempted an entity based on its business relationship with a tax-exempt entity. Petitioner primarily relies on cases (*see* Pet. 11-15) where tax authorities were seeking to collect the tax at issue directly from tax-exempt entities. In those cases, the courts concluded that the federal statutes expressly exempting Fannie Mae, Freddie Mac, and FHFA (and certain of their assets or activities) from "all taxation" exempted the agencies from state or local property-transfer taxes. *See, e.g.*, *County of Oakland v. Federal Hous. Fin. Agency*, 716 F.3d 935, 936 (6th Cir. 2013); *see also Board of County Comm'rs*, 754 F.3d at 1029; *Town of Johnston v. Federal Hous. Fin. Agency*, 765 F.3d 80, 82-83 (1st Cir. 2014); *Delaware County v. Federal Hous. Fin. Agency*, 747 F.3d 215, 222-23 (3d Cir. 2014); *Montgomery County v. Federal Nat'l Mortg. Ass'n*, 740 F.3d 914, 917 (4th Cir. 2014); *DeKalb County*

v. Federal Hous. Fin. Agency, 741 F.3d 795, 801 (7th Cir. 2013); *Hennepin County v. Federal Nat'l Mortg. Ass'n*, 742 F.3d 818, 824 (8th Cir. 2014); *City of Spokane v. Federal Nat'l Mortg. Ass'n*, 775 F.3d 1113, 1115 (9th Cir. 2014); *Montgomery County Comm'n v. Federal Hous. Fin. Agency*, 776 F.3d 1247, 1256 (11th Cir. 2015).

None of these cases conflict with *City of Chicago*, *City of Detroit* and its progeny, or the circumstances presented here. Indeed, in *City of Chicago*, the Seventh Circuit reviewed many of the same cases on which petitioner relies here and correctly concluded that they were each distinguishable on the basis that they did not involve a nonexempt entity seeking to claim a counterparty's tax exemption for itself. *See* 874 F.3d at 961-63 (explaining that "[n]othing in the language of" the tax-exemption provisions applicable to Fannie Mae, Freddie Mac, or FHFA "addresses parties that transact with the exempt entities").

Petitioner has also not identified any disagreement among the States on the FCUA's application to mortgage-recording taxes. *See* Pet. 15-16. Consistent with the decisions below, Maryland has concluded that the FCUA's tax exemption does not apply to a "borrower who is giving the mortgage or deed of trust to the credit union." 75 Ops. Md. Att'y Gen. 451, 452-53 (1990). And neither Virginia nor Tennessee (Pet. 15-16) has addressed whether the FCUA's tax exemption extends to federal credit union members or applies to mortgage-recording taxes. Virginia has concluded only that *federal credit unions* are exempt from recording taxes on deeds; it is has not suggested that federal credit union members or borrowers are exempt. *See* Op. Va. Att'y Gen. No. 13-105, at 2 (2014). And Tennessee has proclaimed (without elaboration) that *federal credit unions* are exempt from recordation taxes on warranty

and trust deeds, depending on their role in the transaction. *See* Tenn. Dep't of Rev., REC-10-Credit Unions Exempt from Recordation Tax (May 7, 2021).

2. Contrary to petitioner's assertions, there is also no split in authority about whether the FCUA exempts federal credit unions or their mortgages from mortgage-recording taxes. The cases on which petitioner relies did not involve the FCUA at all, let alone that statute's application to mortgage-recording taxes. Rather, they involved different taxes levied on entities subject to different statutory exemptions than the exemption at issue here. Certiorari is not warranted to review the lower courts' case-specific decision regarding a tax exemption not addressed by other courts.

The tax exemptions for Fannie Mae, Freddie Mac, and FHFA are broader than the FCUA's exemption for federal credit unions, reflecting Congress's intent to immunize these other entities' mortgage-related activity. For example, the statutory tax exemptions for Fannie Mae and Freddie Mac expressly apply the exemption to Fannie Mae's "*mortgages* or other security holdings," 12 U.S.C. § 1723a(c)(2) (emphasis added), and to Freddie Mac's "activities," *id.* § 1452(e). *See infra* at 21-22 (distinguishing this Court's cases addressing statutory exemptions for "mortgages," "loans," and "advances"). By contrast, the FCUA does not expressly exempt federal credit unions' mortgages, loans, or mortgage-related activities.

Moreover, the cases on which petitioner relies involved particularly broad tax exemptions that immunized more assets than the ones expressly listed in the statutes as nonexhaustive examples. For instance, Freddie Mac's tax exemption provides that "[t]he Corporation, *including* its franchise, activities, capital,

reserves, surplus, and income, shall be exempt from all taxation." 12 U.S.C. § 1452(e) (emphases added). And the exemptions for Fannie Mae and FHFA each contain a similar clause. *See id.* § 1723a(c)(2) ("The corporation, *including* its franchise, capital, reserves, surplus, mortgages or other security holdings, and income, shall be exempt from all taxation . . . ." (emphasis added)); *id.* § 4617(j)(2) ("The Agency, *including* its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation . . . ." (emphasis added)). As this Court explained in construing a similar provision of the Federal Farm Loan Act, Congress's use of the term "including" makes clear that its list of tax-exempt assets was nonexhaustive and that other assets might also be exempt. *See Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941).

These cases are not in conflict with the decisions below because the FCUA's tax-immunity provision does not contain an "including" clause. Instead, its tax exemption applies to federal credit unions and a finite list of credit union assets, i.e., "their property, their franchises, capital, reserves, surpluses, and other funds, and their income." 12 U.S.C. § 1768. Congress thus intended to limit the FCUA's exemption to the assets specifically identified—which do not include mortgages or loans. *See, e.g.*, *Bloate v. United States*, 559 U.S. 196, 206-07 (2010) (absence of "including" clause reflects Congress's intent to exclude).

C. The Decision Below Is Correct and Consistent with This Court's Precedent.

For the reasons explained, this case does not squarely present the issue previously decided by the New York Court of Appeals in *Hudson Valley*, i.e., that the FCUA does not exempt federal credit unions from

paying the mortgage-recording tax. But even if that issue were squarely presented here, certiorari would not be warranted because *Hudson Valley* was correctly decided.

The FCUA's exemption from "all taxation" applies to the federal credit unions themselves and the listed assets belonging to credit unions, such as their "property," "reserves," and "franchises." 12 U.S.C. § 1768. As *Hudson Valley* correctly concluded, New York's mortgage-recording tax does not violate this provision because it is not a tax on federal credit unions themselves. Rather, it is a one-time assessment imposed on the privilege of recording a mortgage and thus constitutes a tax on an activity for which Congress did not provide any exemption. *See Hudson Valley*, 20 N.Y.3d at 8-9, 11 n.5; *Matter of S.S. Silberblatt, Inc. v. Tax Comm'n of State of N.Y.*, 5 N.Y.2d 635, 642 (1959). Moreover, New York's tax on the activity of recording a mortgage also does not apply to any of the tax-exempt assets listed in the FCUA, a list that does not include "mortgages" or "loans."

These omissions are determinative. As the Court of Appeals explained in *Hudson Valley*, Congress expressly exempts an entity's mortgage-related activities or the mortgages themselves from taxation when it intends to exempt such activities or assets. For example, in immunizing certain credit banks from tax liability, Congress expressly provided that "[t]he *mortgages* held by the Farm Credit Banks . . . shall be exempt from all Federal, State, municipal, and local taxation." 12 U.S.C. § 2023 (emphasis added); *see also id.* § 2098 (same exemption for federal land bank associations); *id.* § 1452(e) (exempting Freddie Mac's "activities" from taxation). And in cases where this Court has found certain statutory tax exemptions broad enough to encompass

mortgage-recording taxes, those provisions expressly exempted from taxation "mortgages," "loans," and "advances," respectively. *See Federal Land Bank of New Orleans v. Crosland*, 261 U.S. 374, 377-78 (1923); *Pittman v. Home Owners' Loan Corp. of Wash., D.C.*, 308 U.S. 21, 31 (1939); *Laurens Fed. Sav. & Loan Ass'n v. South Carolina Tax Comm'n*, 365 U.S. 517, 519-22 (1961). Indeed, the Court considered Congress's specification of these assets as tax exempt to be "critical," and reasoned that such a tax exemption "should be construed as covering the whole process of lending." *Pittman*, 308 U.S. at 31.

The absence of any such express tax exemption for mortgages, loans, or activities in the FCUA disposes of petitioner's arguments—particularly because "exemptions from taxation are not to be implied," *Wells Fargo Bank*, 485 U.S. at 354. *See Hudson Valley*, 20 N.Y.3d at 10 (distinguishing statutes with express exemptions for mortgages or mortgage-related activities). Indeed, providing a separate tax exemption for mortgages or mortgage-related activities in other statutory provisions would have been unnecessary if Congress believed that a tax on such an asset or activity was a tax on the entity itself.

Petitioner misplaces its reliance (Pet. 17-18) on this Court's decision in *Bismarck*, which relied on a broad "including" clause in concluding that the "structure of the section" at issue supported reading the term "all taxation" as encompassing the tax at issue. *See* 314 U.S. at 99-100. By contrast, the FCUA does not contain any "including" clause (see *supra* at 19-20), reflecting Congress's desire to limit the exemption to taxes on

federal credit unions and the specific credit union assets listed.[3] *See Hudson Valley*, 20 N.Y.3d at 9 n.2.

There is also no merit to petitioner's argument that the mortgage-recording tax is a tax "on the credit unions' intangible property" and thus falls within the FCUA's tax exemption for credit unions' "property" in § 1768. *See* Pet. 17. Under this Court's precedent in *Wells Fargo Bank*, a tax exemption for "property" has long been understood to exempt the property from "direct taxation, but certain privileges of ownership, such as the right to transfer the property, could be taxed." 485 U.S. at 355 (emphasis omitted); *cf. United States Tr. Co. of N.Y. v. Helvering*, 307 U.S. 57, 60 (1939) (discussing inheritance or estate taxes). Indeed, in several cases on which petitioner relies (Pet. 13-14), a federal circuit court concluded that real-estate transfer taxes were not taxes on the real property itself and thus did not fall within statutory provisions that allowed States and localities to continue to tax the real property of otherwise tax-exempt federal entities. *See Montgomery County Comm'n*, 776 F.3d at 1256-57; *Board of County Comm'rs*, 753 F.3d at 1029-30; *DeKalb County*, 741 F.3d at 801. The mortgage-recording tax here likewise does not unlawfully tax federal credit union's intangible "property" because, as petitioner does not contest, the tax is an excise tax levied on the act of recording a mortgage rather than a direct tax on property (*see* Pet. 19-20).

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[3] As discussed earlier (at 19-20), petitioner's federal circuit court cases also involved statutes with "including" clauses, and those cases relied on *Bismarck* to support their construction of the statutes at issue. *See, e.g.*, *Board of County Comm'rs*, 754 F.3d at 1029-30 (collecting cases).

The lack of any express exemption for federal credit unions' mortgage-lending activity accords with the history of the FCUA. When the FCUA's tax-exemption provision was enacted, federal credit unions could not issue mortgage loans at all. See *supra* at 6. And although federal credit unions are now authorized to issue mortgages, it is far from their only activity (unlike other federal housing entities like Fannie Mae, Freddie Mac, and FHFA). Moreover, as the Court of Appeals aptly observed in *Hudson Valley*, eliminating the mortgage-recording tax on federal credit unions' mortgage-related activity would give those "credit unions a competitive advantage over the banking industry" by "lur[ing] mortgage business away from banks by offering lower closing costs to credit union borrowers." *Hudson Valley*, 20 N.Y.3d at 12 n.6. Had Congress intended to impose such a fundamental shift in the mortgage industry, "it could have stated such an intention," but it did not. *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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