No. 21-___

IN THE

Supreme Court of the United States

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.

On Petition for a Writ of Certiorari
to the Supreme Court of New York,
Appellate Division, Second Department

PETITION FOR A WRIT OF CERTIORARI

John F. Harnes
LAW OFFICES OF JOHN F. HARNES PLLC
445 Hamilton Avenue
Suite 1102
White Plains, NY 10601
(917) 810-8460

Paul Quartararo
PAUL QUARTARARO, ESQ., PLLC
3278 Franklin Avenue
Suite 5
PO Box 65
Millbrook, NY 12545
(845) 605-1355

Tejinder Singh
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the Federal Credit Union Act—which exempts federal credit unions "from all taxation" other than taxes on credit unions' real property and tangible personal property, 12 U.S.C. § 1768—prohibits the imposition of a state tax on the recording of federal credit union mortgages.

PARTIES TO THE PROCEEDING

The parties to this proceeding are listed in the caption.

RULE 29.6 STATEMENT

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.

RELATED PROCEEDINGS

O'Donnell & Sons, Inc. v. N.Y. State Dep't of Tax'n & Fin., Mo. No. 2021-533 (N.Y. Oct. 12, 2021)

O'Donnell & Sons, Inc. v. N.Y. State Dep't of Tax'n & Fin., No. 2019-00150 (N.Y. App. Div. Apr. 28, 2021)

O'Donnell & Sons, Inc. v. N.Y. State Dep't of Tax'n & Fin., Index No. 52772/2017 (N.Y. Sup. Ct. Dec. 6, 2018)

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
RULE 29.6 STATEMENT ii
RELATED PROCEEDINGS ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 1
I. Introduction 1
II. Legal Background 2
III. Factual Background and Procedural History 8
REASONS FOR GRANTING THE WRIT 10
I. The Decision Below and the Prior *Hudson Valley* Decision Conflict with Federal Appellate Decisions and Interpretations in Other States 10
II. The New York Court of Appeals' Decisions Conflict With This Court's Decisions 16
III. The Question Presented Is Important 21
IV. This Case Is an Ideal Vehicle to Address the Question 23
CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Bd. of Cnty. Comm'rs of Kay Cnty. v. Fed. Hous. Fin. Agency,
754 F.3d 1025 (D.C. Cir. 2014) 14, 19

Bostock v. Clayton County,
140 S. Ct. 1731 (2020) 16, 21

Cal. Credit Union League v. City of Anaheim,
190 F.3d 997 (9th Cir. 1999) 11

Cal. Credit Union League v. City of Anaheim,
95 F.3d 30 (9th Cir. 1996) 11

City of Spokane v. Fed. Nat'l Mortg. Ass'n,
775 F.3d 1113 (9th Cir. 2014) 13

County of Oakland v. Fed. Hous. Fin. Agency,
716 F.3d 935 (6th Cir. 2013) ..... *passim*

DeKalb County v. Fed. Hous. Fin. Agency,
741 F.3d 795 (7th Cir. 2013) 14, 19

Delaware County v. Fed. Hous. Fin. Agency,
747 F.3d 215 (3d Cir. 2014) 14, 19

Fed. Land Bank of New Orleans v. Crosland,
261 U.S. 374 (1923) 6, 18, 20

Fed. Land Bank of St. Paul v. Bismarck Lumber Co.,
314 U.S. 95 (1941) ..... *passim*

First Agric. Nat'l Bank of Berkshire Cnty. v. State Tax Comm'n,
392 U.S. 339 (1968) 19

Food Mktg. Inst. v. Argus Leader Media,
139 S. Ct. 2356 (2019) 16

Hein v. Freedom from Religion Found., Inc.,
551 U.S. 587 (2007) 23

Hennepin County v. Fed. Nat'l Mortg. Ass'n,
742 F.3d 818 (8th Cir. 2014) 14

Hudson Valley Fed. Credit Union v. N.Y. State Dep't of Tax'n & Fin.,
980 N.E.2d 473 (N.Y. 2012) ..... *passim*

Laurens Fed. Sav. & Loan Ass'n v. S.C. Tax Comm'n,
365 U.S. 517 (1961) 18

Lockhart v. United States,
546 U.S. 142 (2005) 21

Montgomery Cnty. Comm'n v. Fed. Hous. Fin. Agency,
776 F.3d 1247 (11th Cir. 2015) 13, 19

Montgomery County v. Fed. Nat'l Mortg. Ass'n,
740 F.3d 914 (4th Cir. 2014) 14

Pittman v. Home Owners' Loan Corp.,
308 U.S. 21 (1939) 6, 18

Town of Johnston v. Fed. Hous. Fin. Agency,
765 F.3d 80 (1st Cir. 2014) 13

Union Bank v. Wolas,
502 U.S. 151 (1991) 21

United States v. Maine,
524 F. Supp. 1056 (D. Me. 1981) 11

United States v. Michigan,
851 F.2d 803 (6th Cir. 1988) 10, 11, 12, 13

United States v. Wells Fargo Bank,
485 U.S. 351 (1988) 18, 19

Constitutional Provisions

U.S. Const. art. III 23

U.S. Const. art. VI, cl. 2 ..... 10, 11

Statutes

Federal Credit Union Act,
12 U.S.C. § 1751 *et seq*. ..... *passim*
12 U.S.C. § 1768 ..... *passim*
Pub. L. No. 105-219, 112 Stat. 913 (1998) 2
Tax Injunction Act, 28 U.S.C. § 1341 10
12 U.S.C. § 1452(e) 12
12 U.S.C. § 1723a(c)(2) 12
12 U.S.C. § 4617(j)(2) 12, 14, 15
28 U.S.C. § 1257 1
Ala. Code § 40-22-2 22
Fla. Stat. § 201.02 22
Ga. Code Ann. § 48-6-61 22
Md. Code Ann., Tax-Prop. § 12-102 22
Minn. Stat. § 287.035 22
N.Y. Real. Prop. Law § 291 3
N.Y. Tax Law § 253.1 4
N.Y. Tax Law § 253.1-a 4
N.Y. Tax Law § 253-a *et seq*. 4
N.Y. Tax Law § 257 4
N.Y. Tax Law § 258.1 4
N.Y. Tax Law § 266 5
Okla. Stat. tit. 68, § 1904 22
Okla. Stat. tit. 68, § 1907 22
Tenn. Code Ann. § 67-4-409 22
Va. Code Ann. § 58.1-801 15
Va. Code Ann. § 58.1-802 15
Va. Code Ann. § 58.1-803 ..... 15, 22

Va. Code Ann. § 58.1-804 ..... 15, 22

Other Authorities

75 Op. Md. Att'y Gen. 451 (1990) 16

2014 Op. Va. Att'y Gen. No. 13-105 15

Black's Law Dictionary (11th ed. 2019) 3

Nat'l Credit Union Admin., Industry at a Glance (2021), https://tinyurl.com/3en4kuas 22

N.Y. Dep't of Tax'n & Fin., Federal Credit Union Mortgages, Technical Memorandum TSB-M-12(1)(R) (2012), https://tinyurl.com/mr5cp3vj 8

Tenn. Dep't of Rev., REC-10-Credit Unions Exempt from Recordation Tax (May 7, 2021), https://tinyurl.com/2p8rmmf8 16

OPINIONS BELOW

The order of the New York Court of Appeals denying petitioner's motion for leave to appeal is reported at 175 N.E.3d 1254. Pet. App. 1a. The decision and order of the Appellate Division of the Supreme Court of New York is reported at 193 A.D.3d 1063. Pet. App. 2a-5a. The decision of the Supreme Court in Dutchess County is unpublished. *Id*. at 6a-11a.

JURISDICTION

The New York Court of Appeals denied petitioner's motion for leave to appeal on October 12, 2021. Pet. App. 1a. Petitioner timely sought two extensions to file this petition, which were granted on December 23, 2021 and February 1, 2022, extending the time to file this petition to March 11, 2022. *See* No. 21A274. This Court has jurisdiction under 28 U.S.C. § 1257.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the appendix at 12a-16a.

STATEMENT OF THE CASE

I. Introduction

The issue in this case is whether the Federal Credit Union Act (FCUA), 12 U.S.C. § 1751 *et seq*., which broadly exempts federal credit unions from "all taxation" except for certain taxes on real and tangible personal property, prevents States and localities from taxing the recording of mortgages granted to federal credit unions. New York's courts hold that the answer is "no," and allow the State to levy such taxes. That result conflicts with multiple federal appellate decisions, with this Court's precedents, with practice in

several other States that apply similar taxes, and with the considered position of the United States government.

New York courts have adhered to their incorrect view since the State's highest court adopted it in 2012—even though subsequent federal appellate precedent has highlighted how wrong the State's rule is. In this case, petitioner brought that conflicting appellate precedent to the state courts' attention and urged them to reconsider their prior decision. The lower courts acknowledged the conflict but determined that they were bound by the prior decision of the State's highest court—which in turn refused to revisit that decision. The conflict is entrenched, and only this Court can restore uniformity to the law.

II. Legal Background

1. As Congress has recognized, credit unions are different from "many other participants in the financial services market" because they "are member-owned, democratically operated, not-for-profit organizations generally managed by volunteer boards of directors and because they have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means." Pub. L. No. 105-219, § 2(4), 112 Stat. 913, 914 (1998). Consistent with this special character, Congress has exempted credit unions from almost all taxes. Thus, the FCUA provides that:

> 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.

12 U.S.C. § 1768.

2. When people use the word "mortgage" in conversation, they often are referring to a loan used to finance the purchase of real estate. That is a little bit imprecise because the word "mortgage" is being used as loose shorthand for the phrase "mortgage loan." The "mortgage" part of that phrase refers to the security interest in the property that the borrower (mortgagor) grants to the lender (mortgagee), as collateral for the loan. *See* Mortgage, *Black's Law Dictionary* (11th ed. 2019). That security interest gives the lender the right to take the property if the borrower defaults on the loan, and priority over other creditors vis-à-vis that asset.

In New York, as in many other States, a lender perfects its security interest in a mortgaged property by recording the mortgage in a county register. A lender is compelled to record the mortgage if it wishes to be able to assert its security interest later. *See, e.g.*, N.Y. Real. Prop. Law § 291 (providing that conveyances that are not recorded are void as against subsequent purchasers).

New York levies a tax on the recording of mortgages (the "Mortgage Recording Tax," or "MRT"). This includes a basic

> tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six.

N.Y. Tax Law § 253.1. It also includes special additional taxes of twenty-five cents per one hundred dollars that apply to properties containing fewer than six units (each with its own cooking facility) and to most lenders, but not if the lender is a natural person, a state credit union, a not-for-profit under Section 501(a) of the Internal Revenue Code. *See id*. § 253.1-a. The statute also authorizes localities within the State to impose additional taxes upon the recordation of mortgages. *See id.* § 253-a *et seq*.

The MRT must be paid "on the recording of each mortgage of real property subject to taxes thereunder." N.Y. Tax Law § 257. If the tax is not paid, then the mortgage may not be recorded, received in evidence, assigned to a third party, or extended. *See id*. § 258.1. Moreover,

> [n]o judgment or final order in any action or proceeding shall be made for the foreclosure or the enforcement of any mortgage which is subject to any tax imposed by this article or of any debt or obligation secured by any such mortgage, unless the taxes imposed by this article shall have been paid.

Ibid.

The right way to think about the MRT is as a tax on mortgage lenders, which the lenders sometimes pass on to borrowers. If the MRT is not paid, the attorney general may bring "an action against the mortgagee" to collect it. N.Y. Tax Law § 266. The attorney general may bring such an action "against the mortgagor" only if "stipulations contained in such mortgage" make it the mortgagor's responsibility to pay the MRT. *Ibid.* Thus, as a legal matter, the incidence of the MRT falls first on lenders, unless the parties to a mortgage transaction agree otherwise. As a matter of economic reality, too, the MRT falls first on mortgage lenders because the benefit of recording the mortgage inures to lenders. Lenders are the ones who must ensure that the MRT is paid so that they can record their mortgages and perfect their security interests in the property. As a practical matter, lenders often require borrowers to pay the MRT as a closing cost. But no matter who pays for the tax, the fact that it is imposed inflates the cost of mortgage loans issued by federal credit unions—and thus imposes costs on them and their activities.

3. In *Hudson Valley Federal Credit Union v. New York State Department of Taxation & Finance*, 980 N.E.2d 473 (N.Y. 2012), a federal credit union in New York challenged the application of the MRT to its mortgages, and the New York Court of Appeals held that the MRT is not covered by the FCUA's broad prohibition against "all taxation" on credit unions. The Court of Appeals resolved to construe the federal tax exemption "strictly," and held that because some federal tax exemptions specifically mention taxes on mortgages, but the FCUA does not, the FCUA should not be read to exempt credit unions from paying such

taxes. *See id.* at 475. The court also rejected the credit union's argument that a tax on mortgages was effectively a tax on the credit union itself, or on the credit union's property. *See id*. at 476-77. Instead, the court held that under state law precedent holding that the MRT was merely a tax on the privilege of recording the mortgage, it would "decline to follow" federal decisions holding "that a state tax imposed on the recording of an entity's instrument is the same as a tax on the entity itself." *Id*. at 477 n.5.

The *Hudson Valley* decision was controversial at the time. It provoked a dissenting opinion arguing that the FCUA "mean[s] what it plainly says: a federal credit union is exempt from all taxation except that upon real and tangible personal property." 980 N.E.2d at 479 (Read, J., dissenting). "Because the MRT is not a tax on real or tangible personal property—the only two carve-outs from the FCUA's exemption of federal credit unions from 'all taxation'—New York may not impose the MRT on" credit unions. *Ibid*. In support, the dissent cited this Court's decisions in *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941); *Federal Land Bank of New Orleans v. Crosland*, 261 U.S. 374 (1923); and *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939), which held that similar mortgage tax exemptions applied in similar circumstances.

The credit union in *Hudson Valley* was also supported by a robust group of knowledgeable amici. These included the United States of America, the Federal Housing Finance Agency, the National Association of Federal Credit Unions, the Credit Union National Association, and the Credit Union Association of New York. *See Hudson Valley*, 980 N.E.2d at 473

(listing parties, amici, and counsel). All of these amici argued that imposing the MRT on credit union mortgages violated the FCUA.

The brief of the United States explains that the government "has an interest in the proper interpretation of the FCUA and in preserving the tax exemptions afforded federal credit unions by Congress." U.S. Amicus Br., *Hudson Valley*, 980 N.E.2d 473 (No. 2012-0154), 2011 WL 10757842, at *1. The government argued that refusing to exempt credit unions from paying the MRT would "fail[] to give effect to the plain terms of the FCUA, which affords federal credit unions broad immunity from all state taxation with the narrow exception of real property taxes and tangible personal property taxes," and also "conflicts with decisions of other courts interpreting the FCUA to exempt federal credit unions from all taxes not expressly authorized under the statute." *Id*. at *1-2. The government also noted that this "Court has characterized mortgage recording taxes similar to the MRT as a tax on the mortgage," and so "the MRT can be construed as an exempted tax on intangible personal property." *Id*. at *2. The government further contended that the "MRT is also a tax on a federal credit union itself when applied to mortgages issued by the federal credit union, and thus is exempted on this additional ground." *Ibid*.

The credit union in *Hudson Valley* did not seek certiorari, and so the Court of Appeals' decision stood unreviewed by this Court. As interpreted by New York's taxing authorities, "the recording of mortgages given to federal credit unions is subject to all mortgage recording taxes imposed by and pursuant to Article 11 of the Tax Law, including the basic tax, additional tax,

special additional tax, city taxes, and all county taxes." N.Y. Dep't of Tax'n & Fin., Federal Credit Union Mortgages, Technical Memorandum TSB-M-12(1)(R) (2012), https://tinyurl.com/mr5cp3vj. The only exception is that the special additional tax of twenty-five cents per one hundred dollars does not apply to "mortgages given to federal credit unions on real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, each having its own separate cooking facilities." *Ibid*. But the main component of the MRT (fifty cents for each one hundred dollars of mortgage) applies in full.

III. Factual Background and Procedural History

1. Petitioner is a family-owned home builder and a member of TEG Federal Credit Union. Petitioner obtained a construction loan secured by a mortgage on a property in New York. Pet. App. 7a-8a. Consistent with standard practice, TEG passed on this cost by requiring petitioner to pay the MRT, and petitioner paid $3750. *See* Compl. ¶¶ 24-25.

Petitioner then brought a putative class action seeking a refund of MRT collected on mortgages issued by federal credit unions during the period beginning October 1, 2015. Pet. App. 7a. Petitioner's complaint alleges that collection of the MRT on such mortgages violates the FCUA's broad tax exemption. After filing the complaint, petitioner also moved for partial summary judgment on the legal question. *Id*. at 6a.

Respondents moved to dismiss the case on the pleadings, arguing that *Hudson Valley* forecloses relief. Petitioner recognized that *Hudson Valley* forecloses its argument, but argued that subsequent

federal precedent undermined *Hudson Valley*, and urged the state courts to reconsider that decision.

2. The state courts did not reconsider *Hudson Valley*. Instead, the trial court explained that it was "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," and therefore granted respondents' motion to dismiss. Pet. App. 10a. The trial court rejected, however, respondents' argument that TEG, and not petitioner, was the proper party to bring the suit, recognizing that petitioner had at least the status of an equitable subrogee of TEG, and therefore had standing to sue. *Id*. at 9a.

The intermediate appellate court affirmed in relevant part. Thus, the court construed respondents' motion as a motion for declaratory judgment in their favor, as opposed to a motion to dismiss—a course of action the court deemed appropriate because there were no relevant issues of fact. Pet. App. 3a-4a. As the court explained, it too was "bound by the Court of Appeals' decision in *Hudson Val. Fed. Credit Union*, despite conflicting federal intermediate court decisions which post-date it." *Id.* at 4a.

Petitioner sought discretionary review in the New York Court of Appeals, the only tribunal in New York competent to revisit *Hudson Valley*. The Court of Appeals denied review without providing reasoning. Pet. App. 1a.

3. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Decision Below and the Prior *Hudson Valley* Decision Conflict with Federal Appellate Decisions and Interpretations in Other States

Certiorari should be granted to resolve a conflict between the New York Court of Appeals and federal appellate decisions interpreting the FCUA and similar federal tax exemptions vis-à-vis similar taxes.

1. Federal cases interpreting the FCUA's tax exemption are rare. That is likely because it is difficult for federal courts to obtain subject matter jurisdiction over such cases: the cases typically will not involve diverse parties, will typically not arise under a federal cause of action, or will be barred by the Tax Injunction Act, 28 U.S.C. § 1341, which generally prohibits district courts from enjoining, suspending, or restraining the assessment, levy, or collection of any tax under State law. When such cases have arisen, however, they have construed the exemption broadly, consistent with petitioner's position.

For example, in *United States v. Michigan*, 851 F.2d 803, 805 (6th Cir. 1988), the court explained that "Congress has expressly prohibited state taxation of federal credit unions, except for *ad valorem* taxation of real and personal property." "This statutory exemption suggests that Congress believes that federal credit unions play such an important role in preserving the health of the national economy that they, like the federal government, must be free from state and local taxes which serve more narrow, parochial interests." *Id.* at 807. The court thus held that under both the Supremacy Clause of the U.S. Constitution and

the statute, the credit union was exempt from paying sales taxes on its purchases. *See id*. at 804; *see also id*. at 810 (Nelson, J., concurring) (deciding the question solely on statutory grounds); *ibid.* (Wellford, J., concurring in part and dissenting in part) (also reaching the same conclusion on statutory grounds).

Similarly, in *California Credit Union League v. City of Anaheim*, 95 F.3d 30, 30 (9th Cir. 1996), the Ninth Circuit held that localities cannot charge transient occupancy taxes (*i.e.*, hotel taxes) to credit union employees on official business. The court thus held that taxes incurred while employees on business were staying at Disneyland "violated Section 1768." *Id*. at 32. The decision was vacated for lack of subject matter jurisdiction under the Tax Injunction Act, and on remand the United States joined the case as a co-plaintiff to cure the standing problem. *See Cal. Credit Union League v. City of Anaheim*, 190 F.3d 997, 997-98 (9th Cir. 1999).

Although not a circuit case, the decision in *United States v. Maine*, 524 F. Supp. 1056 (D. Me. 1981), is also instructive. There, the United States brought an action against the State of Maine challenging its imposition of so-called "sliding scale fees" on consumer credit loans. *See id*. at 1057. The fees were charged on loans, with amounts varying based on the amount of the original unpaid balance of the loan. *Ibid*. The government argued, and the court agreed, "that imposition of these fees would violate both Section 1768 of the Federal Credit Union Act, and the Supremacy Clause of the United States Constitution." *Id*. at 1058 (citations and abbreviations omitted).

2. A unanimous chorus of federal circuits holds that other tax exempt entities, which are protected

from taxation by statutes indistinguishable from the FCUA, are exempt from paying recordation taxes.

In *County of Oakland v. Federal Housing Finance Agency*, 716 F.3d 935 (6th Cir. 2013), the Sixth Circuit applied the reasoning of *Michigan*, *supra*, to a tax very similar to the MRT. There, the question was whether the Federal Housing Finance Agency (FHFA), acting as a conservator for Fannie Mae and Freddie Mac, was exempt from a tax that Michigan required "when a deed or other instrument of conveyance is recorded during the transfer of real property." *Id*. at 937. Like the FCUA's tax exemption, the relevant exemption statutes, 12 U.S.C. § 1723a(c)(2), 12 U.S.C. § 1452(e), and 12 U.S.C. § 4617(j)(2), exempted the relevant entities (the FHFA, Fannie, and Freddie), from "all taxation," except for taxes on real property. The statute relating to the FHFA, specifically, was quite similar to the FCUA's exemption. It provided:

> The Agency [as Conservator], including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority, except that any real property of the Agency [as Conservator] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed . . . .

12 U.S.C. § 4617(j)(2).

The Sixth Circuit held that the correct way to interpret the statute was to read the phrase "all taxation" according to its plain meaning, which "has to include the State and County real estate transfer taxes

here." *Oakland*, 716 F.3d at 940. "In other words, a straightforward reading of the statute leads to the unremarkable conclusion that when Congress said 'all taxation,' it meant *all* taxation." *Ibid*. The court further held that because Congress had enacted a specific exception for real property, it was improper to infer additional exceptions. *See ibid.*

The Sixth Circuit also relied on precedent, including this Court's decision in *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), as well as its own prior decision in *Michigan*, which the Sixth Circuit recognized "clearly held that the credit unions had a separate statutory immunity under § 1768 that precluded the application of Michigan's sales tax." *Oakland*, 716 F.3d at 941. The court explained that the FCUA, at issue in *Michigan*, was "much like the [statute] at issue here," and reached all taxes, even those that "were not a specifically enumerated exemption in the statute." *Ibid*. In other words, the decision in *Michigan* "stand[s] for the proposition that when Congress broadly exempts an entity from "taxation" or 'all taxation' it means *all* taxation." *Ibid*.

The Sixth Circuit's decisions do not stand alone. In fact, every circuit court that has considered whether taxes similar to the MRT can lawfully be collected from entities like the FHFA has concluded that the answer is "no." *Montgomery Cnty. Comm'n v. Fed. Hous. Fin. Agency*, 776 F.3d 1247, 1256 (11th Cir. 2015) (holding that Alabama, Florida, and Georgia transfer taxes could not be collected from the FHFA, Fannie Mae, and Freddie Mac); *City of Spokane v. Fed. Nat'l Mortg. Ass'n*, 775 F.3d 1113, 1115 (9th Cir. 2014) (same for Washington locality's transfer taxes); *Town of Johnston v. Fed. Hous. Fin. Agency*, 765 F.3d 80, 83

(1st Cir. 2014) (same for Massachusetts and Rhode Island property transfer taxes); *Bd. of Cnty. Comm'rs of Kay Cnty. v. Fed. Hous. Fin. Agency*, 754 F.3d 1025, 1027 (D.C. Cir. 2014) (same for Oklahoma transfer tax); *Delaware County v. Fed. Hous. Fin. Agency*, 747 F.3d 215, 222-23 (3d Cir. 2014) (same for Pennsylvania and New Jersey transfer taxes); *Hennepin County v. Fed. Nat'l Mortg. Ass'n*, 742 F.3d 818, 824 (8th Cir. 2014) (same for Minnesota transfer taxes); *Montgomery County v. Fed. Nat'l Mortg. Ass'n*, 740 F.3d 914, 921 (4th Cir. 2014) (same for Maryland and South Carolina transfer and recordation taxes); *DeKalb County v. Fed. Hous. Fin. Agency*, 741 F.3d 795, 801 (7th Cir. 2013) (same for Illinois and Wisconsin transfer taxes). Each of these cases involved the same federal tax exemption statutes at issue in the Sixth Circuit's decision in *County of Oakland*—and each rejected the States' ability to impose taxes on the transfer of real property.

Under those federal decisions, this case and *Hudson Valley Federal Credit Union v. New York State Department of Taxation & Finance*, 980 N.E.2d 473 (N.Y. 2012), would have come out differently. That is because the federal circuits apply the opposite legal presumption as New York's highest court: while New York holds that the absence of a specific exemption for taxes on mortgages means that they are not exempt, the federal circuits hold that a broad exemption from "all taxation" applies to any tax that is not specifically carved out of the exemption—including a tax on recording mortgages. For example, no federal circuit court has hesitated to hold that 12 U.S.C. § 4617(j)(2)—which applies to the FHFA as a conservator and does not mention mortgages—exempts the

FHFA from paying recording taxes. Instead, the courts all hold that charging a recording tax to the FHFA would violate Congress's command that the FHFA "shall be exempt from all taxation." *Ibid*.

3. Outside of judicial decisions, governments also disagree about whether the FCUA prohibits the collection of recordation taxes from credit unions. As explained *supra*, the United States takes the position that taxes like New York's MRT cannot be collected on credit union mortgages.

Virginia's attorney general has taken a similar position. Virginia imposes recordation taxes on deeds and mortgages. *See* Va. Code Ann. §§ 58.1-801, -802, -803, -804. The state attorney general has opined that "12 U.S.C. § 1768 must be interpreted as exempting Federal credit unions from the recordation tax imposed by § 58.1-801 when such entity is the grantee in the transaction" because Congress "permits the taxation of real or tangible personal property held by Federal credit unions . . . but otherwise exempts the Federal credit unions from 'all taxation' by state and local governments." 2014 Op. Va. Att'y Gen. No. 13-105 at 2. A prior opinion "determined that Federal credit unions are exempt from the recordation tax imposed on grantors by § 58.1-802." *Ibid*. Although no opinion has expressly addressed the mortgage recording tax in § 58.1-803 or the construction mortgage recording tax in § 58.1-804, the logic of these opinions necessarily supports the conclusion that Virginia should not be collecting those taxes from credit unions, either.

On the other hand, Maryland's attorney general has taken the position that "[s]ince 12 U.S.C. §1768 contains no language expressly or impliedly covering loans by a federal credit union or instruments given in

connection with a loan, a mortgage or deed of trust given a federal credit union is not exempted from Maryland recordation tax by that federal statute." 75 Op. Md. Att'y Gen. 451, 453 (1990).

Tennessee's Department of Revenue has taken an apparent middle position, stating that "credit unions are exempt from recordation taxes if they are the grantee in a warranty deed or the grantor in a trust deed." *See* Tenn. Dep't of Rev., REC-10-Credit Unions Exempt from Recordation Tax (May 7, 2021), https://tinyurl.com/2p8rmmf8.

4. These authorities indicate a sharp disagreement about the scope of federal tax exemptions, including the FCUA's. The New York Court of Appeals, having been made aware of the disagreement, decided to leave it in place—even as the lower courts in this case acknowledged the conflict. This Court alone can bring clarity and uniformity to the law.

II. The New York Court of Appeals' Decisions Conflict With This Court's Decisions

The decision below also conflicts with a long line of this Court's decisions interpreting indistinguishable federal tax exemptions, as well as this Court's modern textualist precedents.

1. "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Indeed, "[t]his Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020).

Here, the FCUA's plain language provides that "Federal credit unions[and] their property . . . shall be exempt from all taxation . . . except that any real property and any tangible personal property of such Federal credit unions shall be subject to . . . taxation to the same extent as other similar property is taxed." 12 U.S.C. § 1768. This language—"all taxation"—is deliberately capacious, and naturally includes taxes on a credit union's mortgages, which can either be understood as taxes on the credit unions themselves, or on the credit unions' intangible property, *i.e.*, their security interests in loans.

2. This Court's most closely analogous precedents bear this out. In *Bismarck*, this Court held that the State of North Dakota could not lawfully charge sales taxes to a federal land bank. At the time, a tax exemption provided that "every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate." 314 U.S. at 96 n.1 (quotation marks omitted). The federal land bank in that case acquired some farms through foreclosure, purchased lumber and other building materials, and did not pay $8.02 in sales taxes on those materials. *See id.* at 98.

This Court held that the bank was not required to pay the tax. The Court explained that "[t]he unqualified term 'taxation' . . . clearly encompasses within its scope a sales tax such as the instant one." *Bismarck*, 314 U.S. at 99. The Court further held that it was error to use the phrase "'including the capital and reserve or surplus therein and the income derived therefrom'" to "delimit[] the scope of the exception" because the

phrase was "simply an illustrative application of the general principle." *Id*. at 99-100.

Under *Bismarck*, the correct reading of the relevant language of the FCUA is that "Federal credit unions organized hereunder . . . shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority." 12 U.S.C. § 1768. The excerpted text—*i.e.*, ", their property, their franchises, capital, reserves, surpluses, and other funds, and their income," *ibid*.—merely illustrates the breadth of the statute; it does not limit its scope.

In other decisions, this Court held that it does not matter that a tax is levied on the act of recording a loan (as opposed to being imposed directly on an entity exempted from taxation), *Fed. Land Bank of New Orleans v. Crosland*, 261 U.S. 374, 377 (1923), and it also does not matter whether the tax is imposed on the entity as a lender, or on its customer as the borrower, *see Laurens Fed. Sav. & Loan Ass'n v. S.C. Tax Comm'n*, 365 U.S. 517, 520-21 (1961); *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 31 (1939). In all of these situations, federal law prohibited the collection of state recording taxes. The same is true here.

This Court's decision in *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988), is not to the contrary. There, the Court explained that "an exemption of property from all taxation had an understood meaning: the property was exempt from *direct* taxation, but certain privileges of ownership, such as the right to transfer the property, could be taxed." *Id*. at 355. Parties seeking to thwart the application of federal tax exemption statutes frequently point to this language to argue that tax exemptions like the FCUA's, which

likewise apply to "all taxation," should be read to refer only to direct taxation, and not to excise taxes. But those arguments have uniformly failed because, as courts have recognized, *Wells Fargo*'s analysis was limited to statutes that exempt a particular class of *property* from taxation; it has no relevance to statutes that exempt a particular class of *entity* from taxation. *See, e.g.*, *Montgomery Cnty. Comm'n*, 776 F.3d at 1256; *Bd. of Cnty. Comm'rs of Kay Cnty.*, 754 F.3d at 1029; *Delaware County*, 747 F.3d at 222; *DeKalb County*, 741 F.3d at 800. For tax exemptions protecting entities, the relevant line of authority is *Bismarck*—which the Court in *Wells Fargo* never even discussed, let alone overruled.

3. None of the arguments the New York Court of Appeals advanced in *Hudson Valley* are persuasive responses. There, the court considered it important that other tax exemption statutes specifically exempted taxes on "mortgages," "loans," or "advances," while the FCUA does not expressly identify those assets. *See* 980 N.E.2d at 475-77. *Bismarck* forecloses that argument: the statute at issue there did not list sales taxes—and instead used broad language comparable to the FCUA's—but the Court found that it covered sales taxes anyway.

To the extent the New York Court of Appeals believed that there is a relevant difference between a tax on credit unions or their property, and a tax on the privilege of recording a mortgage, that was also incorrect. First, the characterization of a tax for purposes of federal exemptions is a question of federal law, not state law. *See, e.g.*, *First Agric. Nat'l Bank of Berkshire Cnty. v. State Tax Comm'n*, 392 U.S. 339, 347 (1968) ("Because the question here is whether the tax affects

federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax."). A State could not, for example, enact a tax that only takes money from federal credit unions, accompanied by a sentence saying, "this should not be construed as a tax on federal credit unions, even though they have to pay it," and somehow escape the import of the FCUA's exemption. Second, as this Court recognized in *Crosland*, it is a stretch to describe the act of recording a mortgage as a "privilege," or to suggest that it is optional. *See* 261 U.S. at 377-78 (rejecting an indistinguishable argument when the law made "it practically necessary to record such deeds," so that even though the bank "has a choice" to record a deed or not, the choice was no different from a person "act[ing] under duress"). In New York, recording is a prerequisite to perfecting a security interest, and therefore an essential step for any mortgage lender. The burden of recording, and of paying the MRT to make the recording effective, also falls first on lenders, including credit unions. In this context, there is no meaningful distinction between an excise tax and a tax on the credit union or its property—just as there is no meaningful difference between sales taxes and taxes on the entities that pay them. More broadly, as the Sixth Circuit explained in *County of Oakland*, accepting this argument "would lead to a somewhat absurd result" because almost no taxes are imposed directly on entities, as opposed to on their activities. *See* 716 F.3d at 943. Thus, a holding that the FCUA's tax exemption only applies to direct taxes on entities would require the Court to believe that when Congress exempted federal credit unions from "all taxation," it meant only that they were exempt from an extremely

narrow range of taxes. *See id.* at 944. That is not the best reading of the statute.

The New York Court of Appeals also believed that it mattered that when the FCUA's tax exemption was first enacted in 1937, credit unions were not empowered to make mortgage loans. *See Hudson Valley*, 980 N.E.2d at 476. But "the fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command." *Bostock*, 140 S. Ct. at 1749 (brackets and quotation marks omitted). Indeed, this Court squarely rejected an indistinguishable argument in *Lockhart v. United States*, 546 U.S. 142, 145 (2005). There, a statute enacted in 1991 repealed statutes of limitations insofar as they prevented the collection of certain student loans; the petitioner, seeking to assert such a statute of limitations to prevent garnishment of his Social Security benefits to pay his student loans, argued "that Congress could not have intended in 1991 to repeal the Debt Collection Act's statute of limitations as to offsets against Social Security benefits—since debt collection by Social Security offset was not authorized until five years later." *Id*. at 145-46. This Court rejected the argument, explaining that "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Id*. at 146 (quoting *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991)). It should do the same here.

III. The Question Presented Is Important

As the amicus briefs previously filed in the *Hudson Valley* case make clear, the question presented is

important to the United States government, to the States, to credit unions, and to millions of credit union members. Every day, credit unions and their members are engaging in mortgage transactions, including purchases and refinancing. If petitioner is correct that the FCUA prohibits collection of the MRT, then New York has unlawfully collected real estate taxes in thousands of these transactions since 2015. The volume of transactions, and the sheer number of people affected, make this an important question.

The issue matters outside New York as well. Based on a review of state laws, petitioner believes that mortgage recording taxes are also collected in eight other States. *See* Ala. Code § 40-22-2; Fla. Stat. § 201.02; Ga. Code Ann. § 48-6-61; Md. Code Ann., Tax-Prop. § 12-102; Minn. Stat. § 287.035; Okla. Stat. tit. 68, §§ 1904, 1907; Tenn. Code Ann. § 67-4-409; Va. Code Ann. §§ 58.1-803, -804. Many localities are also authorized to collect such taxes. Some of these jurisdictions believe that the FCUA permits them to collect recording taxes from federal credit unions, and others do not. And even the States that have not yet attempted to collect recordation taxes will benefit from knowing the scope of their power to do so. Accordingly, it matters across the Nation whether recordation taxes fall within the FCUA's tax exemption.

The nationwide significance for credit unions is undeniable. The National Credit Union Administration (NCUA) reports that as of September 30, 2021, there were 4990 credit unions serving 128.6 million members. *See* NCUA, Industry at a Glance (2021), https://tinyurl.com/3en4kuas. Those credit unions had outstanding $1.22 trillion in loans, 52% of which were mortgage or real estate loans. *Ibid*.

These figures show the startling effect of the lower courts' decisions. Congress did not say that credit unions should be halfway exempt from taxes; it commanded that they shall be exempt from "all taxation" with only limited exceptions. 12 U.S.C. § 1768. But if the decision below is correct, then *half* of credit unions' lending business—with a volume of about $600 billion—is not exempt from taxation, and the FCUA's tax exemption is not accomplishing Congress's intended purpose. States should not lightly be able to circumvent Congress's protections for a special class of financial institutions by taxing a critically important—and economically massive—fraction of their activities.

IV. This Case Is an Ideal Vehicle to Address the Question

Finally, this case is an ideal vehicle to address the question presented. There are no disputed facts, and the entire case turns on that single legal issue. That is why the intermediate appellate court was comfortable granting declaratory judgment to respondents. Pet. App. 4a.

In the trial court, respondents argued that petitioner lacked standing, and that the credit union was the proper party. The court rejected that argument as a matter of state law, Pet. App. 9a, and it is obviously incorrect as an Article III matter. Petitioner suffered concrete injury in fact (paying thousands of dollars of unlawful MRT), that is traceable to respondents' conduct (levying the MRT), and redressable in court through damages and injunctive relief. *See, e.g.*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599 (2007) (explaining that "a taxpayer has standing to challenge the *collection* of a specific tax assessment"

because "being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer").

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

John F. Harnes
LAW OFFICES OF JOHN F. HARNES PLLC
445 Hamilton Avenue
Suite 1102
White Plains, NY 10601
(917) 810-8460

Paul Quartararo
PAUL QUARTARARO, ESQ., PLLC
3278 Franklin Avenue
Suite 5
PO Box 65
Millbrook, NY 12545
(845) 605-1355

Tejinder Singh
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

March 11, 2022

APPENDIX

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

Decisions

October 12, 2021

CASES

* * *

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.

* * *

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

D66311
T/htr

____AD3d___ Argued - March 9, 2021

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

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)

[April 28, 2021]

* * *

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 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:

/s/

Aprilanne Agostino
Clerk of the Court

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF DUTCHESS

Index No. 52772/2017

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

v.

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.

DECISION AND ORDER

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 [2nd 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 [2nd 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 [2nd 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 EEC 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 [2nd 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 [3rd 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

/s/
HON. JAMES D. PAGONES, A.J.S.C.

APPENDIX D

---

12 U.S.C. § 1768 provides in relevant part:

§ 1768. Taxation

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. . . .

N.Y. Tax Law § 253 provides:

§ 253. Recording tax

1. A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six, is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article. If the principal debt or obligation which is or by any contingency may be secured by such mortgage recorded on or after the first day of July, nineteen hundred and seven, is less than one hundred dollars, a tax of fifty cents is hereby imposed on such mortgage, and shall be collected and paid as provided in this article.

1-a. (a) In addition to the tax imposed by subdivision one of this section, there shall be imposed on each mortgage of real property situated within the state, except mortgages wherein the mortgagee is a natural person or persons, or is a credit union as defined in section two of the banking law , and in either case the mortgaged premises consist of real property improved by a structure containing six residential dwelling units or less, each with separate cooking facilities, a special additional tax of twenty-five cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of execution thereof or at anytime thereafter by such mortgage. The tax, if any, imposed by this subdivision shall in cases of real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, each dwelling unit having its own separate cooking facilities, be paid by the mortgagee, and such tax shall not be paid or payable, directly or indirectly, by the mortgagor except as otherwise provided in sections two hundred fifty-eight and two hundred fifty-nine of this article and except such tax shall be paid in such cases by the mortgagor where the mortgagee is an exempt organization described in paragraph (b) of this subdivision. In all other cases, such tax shall be paid by the mortgagor except that the tax shall be paid by the mortgagee where the mortgagor is an exempt organization described in paragraph (b) of this subdivision. All of the provisions of this article shall apply with respect to the special additional tax imposed by this subdivision to the same extent as if it

were imposed by said subdivision one of this section, except as otherwise expressly provided in this article.

(b) An organization organized other than for profit which is operated on a nonprofit basis no part of the net earnings of which inures to the benefit of any officer, director or member and which is exempt from federal income taxation pursuant to subsection (a) of section five hundred one of the internal revenue code shall be exempt from the special additional tax imposed by this subdivision.

2. (a) In addition to the taxes imposed by subdivisions one and one-a of this section, there shall be imposed on each mortgage of real property situated within the state recorded on or after the first day of July, nineteen hundred sixty-nine, an additional tax of twenty-five cents for counties outside of the metropolitan commuter transportation district, as defined pursuant to section twelve hundred sixty-two of the public authorities law , and thirty cents for counties within such metropolitan commuter transportation district for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of execution thereof or at any time thereafter by such mortgage, saving and excepting the first ten thousand dollars of such principal debt or obligation in any case in which the related mortgage is of real property principally improved or to be improved by a one or two family residence or dwelling. All the provisions of this article shall apply with respect to the additional tax imposed by this subdivision to the same extent as if it were imposed by the said subdivision one of this section, except as otherwise expressly provided in this article. Notwithstanding article eighteen-A of the

general municipal law and titles eleven and fifteen of article eight of the public authorities law, no mortgage of real property situated within the state in counties located within the metropolitan commuter transportation district, the Niagara Frontier transportation district, the Rochester-Genesee transportation district, the capital district transportation district, and the central New York regional transportation district executed, given, made, or transferred or assigned by or to an agency created under article eighteen-A of the general municipal law, an authority created under title eleven or fifteen of article eight of the public authorities law, an agent or agent of such agent of such agency or authority, a project operator receiving financial assistance from such agency or authority, a project occupant of such agency or authority, or an owner of a project receiving financial assistance from such agency or authority shall be exempt from the additional tax imposed by this subdivision. For the purposes of this subdivision the term "financial assistance" shall have the same meaning as defined in section eight hundred fifty-four of the general municipal law. The imposition of this additional tax on mortgages recorded in a county outside the city of New York, other than one of the counties from time to time comprising the metropolitan commuter transportation district, the Niagara Frontier transportation district, the Rochester-Genesee transportation district, the capital district transportation district or the central New York regional transportation district may be suspended for a specified period of time or without limitation as to time by a local law, ordinance or resolution duly adopted by the local legislative body of such county.

(b) Any local law, ordinance or resolution suspending the imposition of this additional tax as provided in paragraph (a) of this subdivision, or amending or repealing such local law, ordinance or resolution, shall take effect only on the first day of the third month succeeding the month in which such local law, ordinance or resolution is duly adopted. Such a local law, ordinance or resolution shall not be effective unless a certified copy thereof is mailed by registered or certified mail to the state tax commission at its office in Albany at least sixty days prior to the date the local law, ordinance or resolution shall take effect. However, the tax commission may waive and reduce such sixty-day notice requirement to a requirement that such certified copy be mailed by registered or certified mail within a period of not less than thirty days prior to such effective date if it deems such action to be consistent with its duties under this article. A certified copy of any local law, ordinance or resolution adopted pursuant to this subdivision shall also be filed with the state comptroller within five days after the date it is duly adopted.

3. Notwithstanding any other provision of law to the contrary, the mortgage recording tax shall not be imposed upon any mortgage executed by a voluntary nonprofit hospital corporation, fire company or voluntary ambulance service as defined in section one hundred of the general municipal law, or upon any mortgage executed by or granted to the dormitory authority.