No. 24-1178

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE RMAC TRUST, SERIES 2016-CTT,

Petitioner,

v.

CASSANDRA FOX,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner, which was not an executor or administrator of OneWest Bank, FSB, had standing to invoke New York Civil Practice Law and Rules § 205(a), also known as the "savings statute," and file an otherwise untimely new action after OneWest Bank, FSB's case was dismissed at trial when its counsel appeared and was not ready to proceed.

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INTRODUCTION

Petitioner's characterization of the question presented ignores that the decision of the Appellate Division, First Department of the Supreme Court of the State of New York ("First Department") did not reach any constitutional question, as it lacked jurisdiction to entertain any such inquiry, and as the pertinent portion of the challenged statute, the Foreclosure Abuse Prevention Act ("FAPA")—which passed with overwhelming bipartisan support—merely codified existing law.

New York courts lack the power to entertain a challenge to a law's constitutionality absent proof of notice to the state's Attorney General. Here, the record is barren of any notice to the New York Attorney General with respect to Petitioner's constitutional challenges, which deprived the state courts of jurisdiction to consider them. As a result, Petitioner seeks this Court's exercise of original jurisdiction over its constitutional questions, in clear contravention of the federal constitution's Article Three limitation, as no prior tribunal possessed the power to consider these challenges. Moreover, Petitioner seeks to assert unpreserved challenges to the statute's constitutionality.

Moreover, the New York Court of Appeals ("Court of Appeals") had already issued its decision in *ACE Securities Corp. v. DB Structured Products, Inc.*, 38 N.Y.3d 643 (2022) ("ACE Securities") on June 16, 2022, five and a half months prior to the enactment of FAPA, where it held that HSBC Bank USA, NA was "not the same 'plaintiff' as the certificateholders who commenced the prior action," which precluded it from relying on the state's

statute of limitations savings provision in an otherwise time-barred case. 38 N.Y.3d at 650. There is no dispute that Petitioner was not the executor or administrator of OneWest Bank, FSB, and thus, under preexisting law, could not invoke the "savings statute" codified at CPLR § 205(a). Petitioner ignores that.

Additionally, although the First Department also held that FAPA's amendment to the "savings statute"—which eliminated the requirement that a court recite specific conduct demonstrating a general pattern of delay—was also a basis to affirm the trial court's dismissal of Petitioner's untimely second action, the result in this case would be the same regardless of whether or not FAPA was applied here.

Finally, this case provides a poor vehicle to address FAPA. Not only is FAPA not dispositive here, in light of *ACE Securities*, but a record does not exist with respect to Petitioner's constitutional challenges, given that Petitioner's objections were raised for the first time before the intermediate appellate court, and did not include its principal challenge made here under the Takings Clause. Moreover, the Court of Appeals is set to hear two separate cases on October 16, 2025, each of which addresses the reach and constitutionality of FAPA.

STATEMENT OF THE CASE

It is undisputed that Petitioner filed a summons and complaint more than six years from the date on which OneWest Bank, FSB ("OneWest") filed a summons and complaint to foreclose on the same real property, purporting the same default on the same mortgage.

It is undisputed that OneWest's complaint contained acceleration language that triggered the running of the six-year statute of limitations, CPLR § 213(4). OneWest's complaint was filed on December 29, 2010. The trial court dismissed OneWest's case at the trial held on December 16, 2019 when its counsel was unable to produce two of its three intended witnesses.

It is undisputed that Petitioner commenced the underlying action on June 9, 2021, which is more than six years from December 29, 2010.

It is undisputed that Petitioner is not the executor or administrator of OneWest.

Respondent Cassandra Fox ("Respondent or "Ms. Fox") filed a motion to dismiss Petitioner's untimely action on or around November 12, 2021. The Supreme Court of the State of New York, County of New York, dismissed the complaint, over Petitioner's opposition, by order dated February 15, 2022 and entered on February 17, 2022. Petitioner appealed to the First Department on June 1, 2022. Petitioner took issue with the language in the dismissal order; the sole issue was whether the dismissal order contained language establishing "specific conduct . . . demonstrat[ing] a general pattern of delay." Petitioner's position was that it entitled to invoke the savings statute in the absence of the carve-out for "dismissal for neglect to prosecute."

The Court of Appeals decided *ACE Securities* on June 16, 2022. Respondent filed her brief on June 30, 2022; Petitioner filed its reply on July 15, 2022.

FAPA was signed into law on December 30, 2022.

By decision and order dated January 5, 2023, the First Department reversed the trial court's dismissal of the complaint as time-barred upon the express finding that the dismissal order "did not set forth on the record any additional instances of neglect by the plaintiff that could 'demonstrate a general pattern of delay in proceeding with the litigation'[]."

Respondent timely filed a motion to renew and/or reargue, which Petitioner opposed; the First Department then issued the May 4, 2023 decision and order that is the subject of the present petition. Although the First Department found that CPLR §205-a—the "savings statute," as modified by FAPA, which no longer required a factual finding that a dismissal order "set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay"—was a reason to affirm the trial court's dismissal of Petitioner's untimely action, it also found that "plaintiff in this action is concededly not the original plaintiff and is not acting on behalf of the original plaintiff."

Petitioner filed two separate motions for leave to appeal to the Court of Appeals; each was denied. Its subsequent motion to reargue its motion for leave to appeal to the Court of Appeals was also denied.

The Court of Appeals has scheduled argument for October 16, 2025, during which it will hear two separate cases pertaining to FAPA.

The first is *Article 13 LLC v. Ponce De Leon Fed. Bank*, 132 F. 4th 586, 594 (2d Cir. 2025), in which the Second Circuit certified the following questions: (1) Whether, or to what extent does, Section 7 of the Foreclosure Abuse Prevention Act [FAPA], codified at N.Y. C.P.L.R. § 213(4)(b), apply to foreclosure actions commenced before the statute's enactment; and (2) Whether FAPA's retroactive application violates the right to substantive and procedural due process under the New York Constitution, N.Y. Const., art. I, § 6?

The second is *VanDyke v. U.S. Bank, N.A.*, 235 A.D.3d 517 (N.Y. App. Div. 2025) (*cert. granted* 43 N.Y.3d 905 (N.Y. 2025)), in which the First Department directly ruled on U.S. Bank's arguments regarding the retroactive application of FAPA, the Contracts Clause of the US Constitution, and the purported impairment of US Bank's "vested rights."

REASONS FOR DENYING CERTIORARI

1. Petitioner Deprived the New York Courts of Jurisdiction to Consider its Constitutional Challenges, Leaving No Appellate Jurisdiction for this Court to Exercise with Respect to Such Challenges

Pursuant to CPLR § 1012 (b), "[w]hen the constitutionality of a statute of the state . . . is involved in an action to which the state is not a party, the attorney-general shall be notified and permitted to intervene in support of its constitutionality" and "[t]he court . . . shall not consider any challenge to the constitutionality of [a] state statute . . . unless proof of service of the notice [to

the Attorney General] . . . is filed with such court." *See* New York Executive Law § 71 (3) ("The court . . . shall not consider any challenge to the constitutionality of [any] statute . . . unless proof of service of the notice required by this section or required by [CPLR § 1012 (b)] is filed with such court." Here, the state is not a party to this proceeding and the record lacks any evidence of notice to the state's attorney general regarding Petitioner's constitutional challenges. "Inasmuch as there is no proof in the record that the Attorney General was provided with notice of this proceeding or an opportunity to intervene . . . the court was prohibited from considering a constitutional challenge." *Rochester Police Dept. v. Duval*, 232 A.D.3d 1247, 1248 (N.Y. App. Div. 2024) (internal alteration, quotation marks and citations omitted); *see also Gina P. v. Stephen S.*, 33 A.D.3d 412, 416 (N.Y. App. Div. 2006).

Therefore, as Petitioner failed to demonstrate the required notice to the Attorney General, the Appellate Division (and Court of Appeals) lacked jurisdiction to consider its constitutional challenges.

Section 2 of Article III of the Constitution of the United States clearly limits this Court's power to "appellate Jurisdiction, both as to Law and Fact." As no lower tribunal has thus far ruled on (or even possessed jurisdiction to consider) Petitioner's constitutional challenges, there is no appellate jurisdiction for this Court to exercise with respect to these issues.

Thus, this Court should decline Petitioner's invitation to exercise original jurisdiction over its constitutional objections, and instead deny its petition in all respects.

2. FAPA is Not Dispositive in the Case Below

The First Department did not need to apply FAPA here to determine that Petitioner was not entitled to invoke the savings statute. This Court need not apply, invoke, or analyze FAPA to arrive at the same conclusion. If FAPA had never been enacted, the savings statute at CPLR § 205(a) still would not have been available to Petitioner. It reads, in relevant part (emphasis added):

> (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, **the plaintiff, or**, if the plaintiff dies, and the cause of action survives, **his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period**. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a

general pattern of delay in proceeding with the litigation.

The version of CPLR § 205(a) before FAPA was enacted read, in relevant part:

> (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, **the plaintiff, or**, if the plaintiff dies, and the cause of action survives, **his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period**. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

The Court of Appeals already addressed, in *ACE Securities*, a financial institution's argument that it should be allowed to invoke the savings statute where a different entity's action had been dismissed fewer than six months before, on grounds that "did not preclude CPLR § 205(a) relief." 38 N.Y. at 650. The Court of Appeals in *ACE Securities* expressly rejected HSBC's argument on the basis that HSBC was not the executor or administrator of the certificateholders who had filed the prior action. *Id.* at 654. It held that:

> "[c]ontrary to HSBC's contention, this conclusion is consistent with the public policy underpinning the savings statute. CPLR 205(a) is a remedial statute that, like its predecessors, is '"designed to insure to *the diligent* suitor"' an opportunity to have a claim heard on the merits (*Malay v. City of Syracuse*, 25 NY3d 323, 327 [2015] [emphasis added], quoting *Gaines v. City of New York*, 215 NY 533, 539 [1915]) when the suitor has 'initiated a suit in time' (*Carrick*, 51 NY2d at 252 [quotation marks and citation omitted]) but the claim was dismissed on some technical, non-merits-based ground. While the savings statute undoubtedly has a 'broad and liberal purpose' (*Gaines*, 215 NY at 539) to 'ameliorate the potentially harsh effect of the [s]tatute of [l]imitations' (*George*, 47 NY2d at 177; *see Matter of Goldstein v. New York State Urban Dev. Corp.*, 13 NY3d 511, 521 [2009]), '[t]he important consideration is that by invoking judicial aid [in the first action], a litigant gives timely notice to [the] adversary of a present purpose to maintain [its] rights before

> the courts' (*Gaines*, 215 NY at 539). Where, as here, the litigant commencing the second action is not the original plaintiff, application of CPLR 205(a) would protect the rights of a *dilatory*—not a diligent—suitor.

38 N.Y.3d at 655-656 (emphasis in original).

Here, Petitioner's position was that because the dismissal order did not set forth "specific conduct . . . demonstrat[ing] a general pattern of delay," the dismissal was "on grounds that did not preclude CPLR § 205(a) relief"—precisely HSBC's position in *ACE Securities*. 38 N.Y. at 650. Petitioner was not entitled to invoke the savings statute in 2021, under New York black letter law. The language pertaining to "administrators" and "executors" was not changed by FAPA.

Thus, *ACE Securities* eliminates any question as to Petitioner's standing to invoke the savings statute: it has none, as it is not the executor or administrator of the bank that lost its case because it could not produce two of its three witnesses at trial after nine years of litigation. Even if FAPA did not apply to this case, Petitioner was not entitled to invoke the "savings statute" in any event. As such, the Court should deny this petition.

3. The Takings Challenge is Unpreserved

Petitioner's principal objection contends that FAPA violates the Takings Clause of the Constitution of the United States. In the papers that resulted in the decision and order on review, however, Petitioner failed to raise this issue. This Court refuses to hear claims when the

proponent failed to present same properly before the Court below. *See Adams v. Robertson*, 520 U.S. 83, 86-87 (1997); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992). As such, Petitioner failed to preserve its challenge under the Takings Clause, and the Court should deny the petition, as it presents questions unpreserved for this Court's review.

4. The Court of Appeals Has Yet To Rule on the Banks' Constitutional Challenges to FAPA

There is no need for this Court to grant certiorari at this time. The Court of Appeals is set to hear arguments on the retroactive application of FAPA, the New York Constitution, and the United States Constitution in October 2025. Moreover, as set forth below, this case is an exceptionally poor vehicle for addressing the questions presented. Thus, the Court should deny the petition.

5. FAPA Does Not Effect an Unconstitutional Taking

Petitioner's first constitutional challenge to alleges a violation of the Takings Clause of the U.S. Constitution's Fifth Amendment. "The threshold step in any Takings Clause analysis is to determine whether a vested property interest has been identified." *Am. Economy Ins. Co. v. State*, 30 N.Y.3d 136, 155 (N.Y. 2017) (internal citations omitted).

"[A] person [has no] . . . vested interest in any rule of law entitling him to have the rule remain unaltered." *J. B. Preston Co. v. Funkhouser*, 261 N.Y. 140, 144 (1933), *affd*, 290 U.S. 163 (1933) (internal citations omitted). Similarly, it is a maxim of constitutional law that no person

possesses a vested right in a particular legal remedy. *See Honeyman v. Clark*, 278 N.Y. 467, 469 (1938), *affd sub nom.*, *Honeyman v. Jacobs*, 306 U.S. 539 (1939). "In dealing with statutes, other than those that manifest a legislative intent to create private rights of a contractual nature, this Court has applied the presumption that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Board of Educ.*, 302 U.S. 74, 79 (1937) (internal alteration, quotation marks and citations omitted).

Therefore, the relevant portion of FAPA cannot constitute a taking as the "proscribed use" of the note and mortgage (*i.e.*, Petitioner's ability to rely on CPLR § 205 [a]) was "not part of [Petitioner's] title to begin with." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

Even if this Court assumes that FAPA constituted a substantive change in the law, rather than its mere clarification, takings jurisprudence first divides between two branches: "physical takings and regulatory takings." *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002). Physical takings are "the result of a condemnation proceeding or a physical appropriation" (*id.*). Petitioner's note and mortgage are comprised of two physical, paper-based instruments, each constituting an item of personal property (*see Singh v. Becher*, 249 A.D.2d 154, 154 (N.Y App. Div. 1998)), and while the note and mortgage "constitute[] . . . property interest[s] protected by the Fifth Amendment" (*1256 Hertel Ave. Assoc., LLC v. Calloway*, 761 F.3d 252, 262 (2d Cir. 2014), Petitioner cannot contend that FAPA resulted in a physical appropriation of either

loan document. Rather, FAPA must be reviewed under a regulatory takings analysis, given that FAPA merely regulated Petitioner's use of its loan instruments. *See Tahoe-Sierra Preserv. Council, Inc., supra.*

"[R]egulatory takings jurisprudence . . . generally eschew[s] any set formula for determining how far is too far, preferring to engage in essentially ad hoc, factual inquiries." *Lucas*, 505 U.S. at 1015 (internal citations, quotation marks and alterations omitted), although case law recognizes two categories of regulatory takings that require no "case-specific inquiry": (i) regulation that causes an owner to suffer a "physical invasion of his property," and (ii) "regulation that denies all economically beneficial or productive use of land." *Id.* (internal quotation marks and citations omitted, emphasis added); *see also Horne v. Dept. of Agric.*, 576 U.S. 350, 361 (2015) (acknowledging the line *Lucas* draws between regulatory takings of land versus personal property). Regarding the second category, *Lucas* makes a clear distinction between real property to which the *per se* rule may apply and "personal property" that may be rendered "economically worthless" without constituting an unconstitutional taking "by reason of the State's traditionally high degree of control over commercial dealings" (*Lucas*, 505 U.S. at 1027-1028; *Horne, supra*). As FAPA caused no physical invasion through regulation, and as Petitioner's note and mortgage constitute personal property, rather than land, the *per* se rules cannot apply.

Instead, the Court must apply the multi-factor test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), the second prong of which requires evidence that the regulation interfered

with distinct investment-backed expectations. Here, while Petitioner claims in its brief that FAPA interfered with its investment-backed expectations, this is hearsay, as the record remains barren of any admissible evidence that Petitioner's purported expectation to rely on CPLR § 205 (a) was backed by any distinct investment, let alone a reasonable one. Moreover, it is simply unbelievable to suggest that Petitioner invested in the subject note and mortgage with the distinct expectation of relying on CPLR § 205 (a), as that would mean that it expected to neglect its prior foreclosure sufficient to warrant dismissal for abandonment. Ultimately, the very nature of a savings provision such as CPLR § 205 (a) eschews the potential for reasonable, investment-backed reliance, as reliance on said statute only arises as a result of the unanticipated.

To the extent that Petitioner relies on case law concerning the wholesale, half-decade-long transfer of vested possessory rights in real property from a bank to the borrower, and concurrent bar against the foreclosure of a farm mortgage (*see Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 580 (1935), such reliance is misplaced. A pre- *Penn Central* framework should not be applied to a non-categorical regulatory taking of personal property (*see Radford*, *supra*).[1] Indeed, as the challenged bankruptcy regulation in *Radford* forced the

1. Two years after *Radford*, this Court considered a nearly identical bankruptcy statute, and upheld this second bankruptcy law against a challenge under the Takings Clause. *See Wright v. Vinton Branch of Mtn. Tr. Bank of Roanoke, Va.*, 300 U.S. 440 (1937). The Court later compared these two cases in a footnote to illustrate when "laws . . . require the Court to re-examine its previous judgments or doctrine." (*Helvering v. Griffiths*, 318 U.S. 371, 401 (1943).

bank to suffer a physical invasion of its vested possessory rights in (farm) land, contemporary takings analysis would classify that as a *per se* or categorical taking (*see Lucas*, 505 U.S. at 1015).

In short, Petitioner failed to sustain its "substantial burden" to prove beyond a reasonable doubt that FAPA constitutes an unconstitutional taking. *E. Enterprises v. Apfel*, 524 U.S. 498, 523 (1998). Thus, the Court should deny the instant petition.

6. FAPA Comports with Due Process

Petitioner also claims that FAPA violates its due process rights by shortening the statute of limitations period without affording it a grace period. This is patently false. The statute of limitations to enforce a mortgage was and remains six years, pursuant to CPLR § 213(4). FAPA did not shorten the limitations period, but only further tailored the exception thereto embodied in the legislative grace of CPLR § 205 (a).

In any event, "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and [] the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. . . . [O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery v. Turner Elkhorn Min. Co.*, 428 U.S. 1, 15-16 (1976). That presumption remains intact "until its violation of the constitution is proved beyond all reasonable doubt." *Ogden v. Saunders*, 25 U.S. 213, 270, 6 L.Ed 606 (1827). Here, the record

is barren of any evidence that the Legislature acted in an arbitrary or irrational way. Having failed to make a record that FAPA lacks a legitimate legislative purpose, furthered by rational means, Petitioner cannot meet its burden to prove that FAPA violates due process beyond a reasonable doubt.

Nevertheless, the most compelling basis for interpreting FAPA as fully applicable to pending cases appears in its title: "foreclosure abuse prevention" (FAPA, §1). Per this Court, it has been "long considered that the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Dubin v. United States*, 599 U.S. 110, 120 (2023) (internal quotation marks and citations omitted); *Yates v. United States*, 574 U.S. 528, 540 (2015); *Porter v. Nussle*, 534 U.S. 516, 528 (2002); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). The Court must afford appropriate weight and deference due to the Legislature's deliberate use of the word "abuse."

When the Legislature finds a certain set of practices to constitute "abuse" of judicial power and amends the law to "prevent[]" it (FAPA, §1), retroactive application of such legislation constitutes an integral part of such legislation. Conversely, it would appear plainly anathema to basic notions of justice, and objectively irrational, for the Legislature to instruct the courts to prevent abuse of judicial power only in new cases, while forcing the courts' continued participation in all ongoing abuses of judicial power. Therefore, as retroactivity is clearly integral to full achievement of FAPA's fundamental purpose, that being "foreclosure abuse prevention" (FAPA, § 1), the statute applies retroactively, as written.

As such, FAPA comports with due process, and the Court should deny the instant petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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