No. 24-1178

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR THE RMAC TRUST, SERIES 2016-CTT,

Petitioner,

v.

CASSANDRA FOX,

Respondent.

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

PETITIONER'S REPLY

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REPLY BRIEF

Respondent's opposition does not dispute the reasons for granting certiorari that Petitioner identified in its petition. The questions presented—whether retroactive application of CPLR 205-a(a) violates constitutional protections against uncompensated takings and deprivations of property without due process—are important and recurring, *see* Petition 32–36, and the lower court's resolution of those questions conflicts with this Court's precedent, as well as decisions from multiple circuits, *see id.* at 30–32.

The thrust of Respondent's opposition is that this is not the case and now is not the time for this Court to resolve the undisputedly significant and economically consequential issues of federal law presented in the petition. All of Respondent's arguments lack merit. First, Respondent's attack on this Court's jurisdiction is groundless, as Petitioner properly invokes this Court's Article III "appellate Jurisdiction," the petition raises questions of federal law, and the decision below does not rest on an adequate and independent state ground. Second, this case presents an appropriate vehicle for this court to resolve the constitutionality of CPLR 205-a(a), as the vehicle-related concerns Respondent raises are illusory and will not prevent this Court from deciding the merits. Finally, the prospect of a decision from New York Court of Appeals in two appeals from non-foreclosure cases concerning a different section of FAPA is no reason to deny certiorari. Respondent does not suggest that such a decision will eliminate the need for the Court to resolve the important and recurring questions surrounding CPLR 205-a(a)'s constitutionality, and further percolation is

unnecessary in light of the direct conflict between that section and this Court's decisions and is unwarranted in light of FAPA's serious economic consequences. The petition should therefore be granted.

I. This Court has Jurisdiction over the Petition

This Court has jurisdiction over the petition, and Respondent's suggestion to the contrary lacks merit. This Court's certiorari jurisdiction extends to "[f]inal judgments … rendered by the highest court of a State in which a decision could be had … where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution…." 28 U.S.C. § 1257(a); *See also Ohio v. Reiner*, 532 U.S. 17, 20 (2001) ("We have jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law."). The First Department's May 3, 2023 decision applied CPLR 205-a(a) to find Petitioner's mortgage foreclosure claim time-barred, *see* 3a, and rejected in a single sentence Petitioner's constitutional challenge to retroactive application of that section, *id.*

Furthermore, the decision below does not rest on an adequate and independent state ground. *See Cruz v. Arizona*, 598 U.S. 17, 25 (2023) ("This Court will not take up a question of federal law presented in a case if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment."). To constitute an adequate and independent state ground—and thus deprive this Court of jurisdiction—the state-law ground supporting the judgment must be "clear from the face of the [state court's] opinion." *Michigan v. Long*, 463 U.S. 1032, 1040–41

(1983). A state law ground that the state court could have, but did not, rely on is not an adequate and independent state ground. *Oregon v. Guzek*, 546 U.S. 517, 23 (2006) (explaining that "a *possible* adequate and independent state ground" does not deprive this Court of jurisdiction (emphasis added) (internal quotation marks omitted)).

Petitioner's failure to file proof of service[1] of statutorily-required notice to the New York Attorney General of its constitutional challenge to CPLR 205-a(a) is not an adequate and independent ground supporting the judgment below. Nothing in the First Department's opinion suggests that it relied on New York statutes requiring notice to the attorney general of constitutional challenges to state statutes, *see* CPLR 1012(b); N.Y. Executive Law § 71, in its May 4, 2023 decision affirming the judgment of the trial court. To the contrary, that court's opinion suggests that it *did not* rely on those statutes. CPLR 1012(b)(3) and Executive Law § 71(3) provide that a court "shall not consider" a constitutional challenge to a statute absent filing of proof of service of the required notice on the Attorney General. But the court—after finding that, under FAPA, the newly

1. Notably, Respondent does not argue that Petitioner *failed to serve* the required notice on the Attorney General—only that no proof of such notice was filed with the state courts. Respondent in fact provided notice of its constitutional challenge to the statute to the Attorney General in connection with its motion for leave to appeal in the Court of Appeals. Respondent thereafter served on the Attorney General its motion for leave to renew or reargue its motion for leave to appeal in the Court of Appeals. Additionally, this is the first time Respondent has raised this issue, despite arguing against discretionary review on constitutional grounds in four different motion briefings.

enacted CPLR 205-a(a) applied to bar Petitioner's foreclosure claim—stated that it had "*considered the parties' remaining arguments*"—including Petitioner's constitutional challenge to retroactive application of CPLR 205-a(a)—"and f[ou]nd them unavailing." 4a.

Nor does Respondents' argument that Petitioner's foreclosure claim is untimely under pre-FAPA law (specifically, CPLR 205(a) as interpreted in *ACE Securities Corp. v. DB Structured Products, Inc.*, 38 N.Y.3d 643 (2022)) constitute an adequate and independent state ground. The First Department not only did not apply CPLR 205(a) or cite to *ACE Securities*, it expressly held that CPLR 205(a) *did not* apply. 2a ("FAPA amends CPLR 205 to provide that it no longer applies to mortgage foreclosure actions…."). Instead, it applied CPLR 205-a(a), enacted as part of FAPA. *See id.* That court's observation that Petitioner "is concededly not the original plaintiff and is not acting on behalf of the original plaintiff," 3a—which Respondent relies on in her opposition, *see* Opp. at 4—simply reflected that court's application of CPLR 205-a(a)(1), which provides that "a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff." *See* 3a (quoting CPLR 205-a(a)(1)) (internal quotation marks omitted).

Respondent argues that Petitioner's failure to file proof of notice to the Attorney General deprived the First Department and the New York Court of Appeals of jurisdiction and, as a result, any jurisdiction this Court might exercise over the petition is not "appellate." This argument fails for two reasons. First, the proof-of-notice requirement is not jurisdictional. When characterization

of a procedural requirement as "jurisdictional" actually matters—that is, when deciding whether the harsh consequences attending the jurisdictional label should apply[2]—New York courts apply a "strict, narrow" definition of that term.[3] "Lack of jurisdiction should not be used to mean merely that elements of a cause of action are absent, but that the matter before the court was not the kind of matter on which the court had power to rule." *See Manhattan Telecommunications Corp. v. H&A Locksmith, Inc.*, 21 N.Y.3d 200, 203 (2013) (citations and internal quotation marks omitted).

CPLR 1012 and Executive Law § 71 are not jurisdictional in this "strict, narrow sense." *Id.* Nor do New York courts treat them as jurisdictional. When litigants fail to file proof of notice, New York appellate courts routinely affirm the judgment below, rather than dismissing the appeal. *See, e.g.*, *People v. Crockett*, 124 A.D.3d 1340, 1341 (4th Dep't 2015) (affirming, rather than dismissing appeal, despite defendant's failure to provide notice to attorney general); *see also People v. Castillo*, 234 A.D.3d 557, 558 (1st Dep't 2025) (same). And the statutory text makes clear that the proof-of-notice requirement applies only when the Court "ha[s] jurisdiction in an action

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2. Subject matter jurisdiction "can never be forfeited or waived," and, as such, lack of subject matter jurisdiction "may be raised at any time." *Henry v. New Jersey Transit Corp.*, 39 N.Y.3d 361, 371 (2023).

3. Like this Court, *see, e.g.*, *United States v. Arbaugh*, 546 U.S. 500, 510 (2006), the New York Court of Appeals has observed that courts often use the term "jurisdiction" loosely to refer to concepts that are not actually jurisdictional, *see Manhattan Telecommunications Corp. v. H&A Locksmith, Inc.*, 21 N.Y.3d 200, 203 (2013).

or proceeding" in the first place. *See* CPLR 1012(b)(3); N.Y. Exec. Law § 71(3).

Second, even if the proof-of-notice requirement were jurisdictional, the petition still falls within the scope of Article III, § 2, clause 2's grant of "appellate Jurisdiction" to this Court. Respondent's contrary argument fails for two reasons. First, it rests on the false premise that the First Department did not "rule[] on" Petitioner's constitutional challenge. It did. *See supra* at 4–5. Second, it misunderstands what makes a proceeding "appellate." Petitioner seeks from this Court reversal of the judgment of another tribunal (the New York Supreme Court, Appellate Division, First Department). That is the essence of an appellate (in contrast to an original) proceeding. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284–85 (2005) (equating "appellate authority" with the power "'to reverse or modify' a state court judgment"); APPELLATE, Black's Law Dictionary (12th ed. 2024) ("(Of a court) having jurisdiction over appeals; specif., vested with the power to review and to affirm, reverse, or modify the decision of another tribunal.").

II. This Case is an Appropriate Vehicle for this Court to Resolve the Important Constitutional Questions Presented in the Petition

This case also presents an appropriate vehicle for this Court to resolve the important and recurring constitutional questions presented in the petition, as none of the concerns Respondent raises in her opposition will prevent this Court from deciding the merits.

First, Respondent's contention that Petitioner's foreclosure claim would be untimely under pre-FAPA law

(specifically, CPLR 205(a)), *see* Opp. at 7–10, and that the issues presented in the petition would therefore not be dispositive, is unavailing. The record belies Respondent's suggestion that FAPA is not dispositive. The First Department's original decision addressed the timeliness of Petitioner's foreclosure claim under CPLR 205(a) and concluded that the claim "was not time-barred." 27a. The First Department's second decision reached the opposite result, finding Petitioner's foreclosure claim untimely *under FAPA*.

Respondent argues that, under *ACE Securities Corp. v. DB Structured Products, Inc.*, 38 N.Y.3d 643 (2022), a transferee, like Petitioner, may not rely on CPLR 205(a) when the original foreclosure action was initially brought by a transferor. *ACE Securities* does not resolve that disputed question of state law, and "neither expressly nor tacitly overruled" existing authority in New York recognizing transferees' right to rely on CPLR 205(a)'s savings provision. *See U.S. Bank, Nat. Ass'n v. Kim*, No. 850238/2018, 2023 WL 5317517, at *2 (N.Y. Sup. Ct. Aug. 11, 2023) (concluding that *ACE Securities* did not overrule the holding in *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193 (2d Dep't 2017), that a successor in interest to a plaintiff that filed first foreclosure action was entitled to invoke CPLR 205(a) in subsequent action).[4] Moreover, as Respondent herself concedes, *see* Opp. at 3, *ACE Securities* was decided *before* the First Department issued

4. Respondent's interpretation of CPLR 205(a) would render CPLR 205-a(a)(1), which expressly precludes "a successor in interest or an assignee of the original plaintiff" in a mortgage foreclosure action from relying on FAPA's savings provision, superfluous. *See Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 587 (1998) ("A construction that would render a provision superfluous is to be avoided.").

its original decision holding that Petitioner's foreclosure claim was timely under CPLR § 205(a)—and, indeed, before briefing of the appeal was complete. Yet, none of the lower courts in this case relied upon *ACE Securities* or even cited that case.

Conjecture about what might happen on remand does not render this case an inappropriate vehicle for the important questions presented in the petition. This Court should grant review regardless of speculation that New York courts might, on remand, reach a different outcome than the one they have already reached.

Second, the record is more than sufficient to permit resolution of Petitioner's constitutional challenges. Respondent does not, and cannot, explain what further development of the record would entail or what additional discovery might need to be taken to decide whether FAPA violates the Takings and Due Process Clauses. And the existing record conclusively demonstrates conflict between FAPA and this Court's precedents.

Third, Respondent's cursory argument that Petitioner did not preserve its takings clause challenge also lacks merit. None of the primary briefing in the First Department raised the issue of FAPA's constitutionality because FAPA was not enacted until December 30, 2022, after briefing was complete and just a week before the First Department issued its original decision on January 5, 2023. FAPA, specifically, CPLR 205-a(a) was not raised until February 2023, when Respondent moved for reargument before that court. Petitioner's takings clause challenge was presented to the First Department following that court's second opinion in connection with Petitioner's

June 5, 2023 motion in that court for reargument or for leave to appeal to the Court of Appeals. 65a–70a. And Respondent cites no authority supporting the proposition that a failure to raise an argument in response to such a motion amounts to a failure to preserve that argument.

III. This Court Should Decide The Issues Presented in the Petition Now

Respondent argues that this Court's intervention is unnecessary, because, a week after the Petition was filed, the New York Court of Appeals calendared argument in two cases involving retroactive application of a different provision of FAPA. Opp. at 5; *see Van Dyke v. U.S. Bank, N.A.*, 235 A.D.3d 517 (1st Dep't 2025), *leave to appeal granted*, 43 N.Y.3d 905; *Article 13 LLC v. Ponce De Leon Fed. Bank*, 132 F.4th 586 (2d Cir. 2025), *certified question accepted*, 43 N.Y.3d 982. This Court should not delay resolution of the important constitutional issues presented in this petition for the Court of Appeals to decide two cases which will not—and cannot—conclusively resolve those questions, and may well have no effect on this case and other foreclosure proceedings affected by FAPA.

Van Dyke and *Article 13* not only involve a different provision of FAPA—CPLR 213(4)(b)—but, unlike this case, do not involve mortgage foreclosure actions. *See Van Dyke*, 235 A.D.3d at 518; *Article 13*, 132 F.4th at 594. In light of those distinctions, *Van Dyke* and *Article 13* are unlikely to resolve the issues raised in the petition. Unlike this case, *Van Dyke* and *Article 13* do not directly involve an amendment to a statute of limitations that operates to bar a previously valid claim—and thus may not necessarily present the central conflict with this

Court's precedent applying the Due Process Clause that CPLR 205-a(a) does. *See Block v. N. Dakota ex. Rel. Bd. Of Univ. & Sch. Lands*, 461 U.S. 273, 286 n.23 (1983); *Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 96, 102 (1906); *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902); *Sohn v. Waterson*, 84 U.S. 596, 599 (1873). In addition, it is also possible that those cases could be resolved on a threshold question of statutory interpretation that leaves all of the important constitutional questions in this case unresolved. Specifically, section 10 of FAPA—the provision which New York courts have relied on to give the statute retroactive effect—is limited in scope to "all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced"—in other words, foreclosure actions. Unlike this case, neither *Van Dyke* nor *Article 13* is an "action commenced on" a mortgage; *Van Dyke* arose from an action to discharge a mortgage, *see* 235 A.D.3d at 517, and *Article 13* arose from a quiet title action, *see* 132 F.4th at 586. If the Court of Appeals resolves *Van Dyke* and *Article 13* by holding that FAPA does not apply retroactively to non-foreclosure actions, the constitutional issues presented in this case will remain both relevant and unresolved.

The need for this Court's review is even stronger given that retroactive application of CPLR 205-a(a) to claims pending at the time of its enactment is indisputably unconstitutional. Retroactive application of FAPA to extinguish previously valid claims directly violates a long line of this Court's precedent. *See, e.g.*, *Block*, 461 U.S. at 286 n.23; *Herrick*, 200 U.S. at 102; *Wilson*, 185 U.S. at 62; *Sohn*, 84 U.S. at 599. Indeed, Respondent's

opposition ignores the conflict identified in the petition between the decision below and this Court's precedent. Further percolation of these issues could take years, during which the harm caused by FAPA will only escalate. *See generally* Br. of Amicus Curiae American Legal and Financial Aid Network and Legal League in Support of Petitioner. It is exceedingly unlikely that any petition for certiorari in *Van Dyke* will be briefed in time for this Court to resolve in the coming term, and *Article 13* will require a trip back to the Second Circuit before it arrives before this Court.

At a minimum, this Court should hold this petition until the Court of Appeals resolves *Van Dyke* and *Article 13*, in order to preserve the possibility that these legally important and economically significant constitutional questions will be resolved this term. If that Court holds that FAPA applies retroactively and does not thereby violate constitutional guarantees against takings and deprivations of property without due process, this Court should then promptly grant this petition and calendar this case for argument.

CONCLUSION

This Court should grant certiorari.

August 18, 2025

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