

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

**CARL FANFAIR** and **GLORIA ANTOINE**,  
on behalf of themselves and all others similarly  
situated,

Petitioners,

v.

**HON. LAWRENCE KNIPEL**, in his official  
capacity as the administrative judge and a Justice  
of the Supreme Court of the State of New York,  
Kings County; **HON. CENCERIA P.**  
**EDWARDS**, in her official capacity as a Justice  
of the Supreme Court of the State of New York,  
Kings County; and the **NEW YORK STATE**  
**OFFICE OF COURT ADMINISTRATION**,

Respondents.

For a Judgment Under Article 78 of the Civil  
Practice Law and Rules

Index No.

**VERIFIED CLASS PETITION**

**PRELIMINARY STATEMENT**

1. This class action lawsuit seeks an order requiring Kings County Supreme Court Justices to comply with state law and determine, at the initial settlement conference in residential foreclosure proceedings, whether unrepresented homeowners should be appointed counsel. This action also seeks an order requiring the Office of Court Administration (“OCA”) to comply with state law and provide notice to unrepresented homeowners that they are entitled to a determination at initial settlement conferences as to whether they should be appointed counsel.

2. Thousands of New York families are on the brink of losing their homes, mired in foreclosure proceedings that are high stakes, confusing, and intimidating. The epicenter of this foreclosure crisis is Brooklyn, where many working-class Black residents are being forced out of

their long-time homes, deepening already stark racial disparities in wealth.<sup>1</sup>

3. For homeowners facing foreclosure, the difference between having a lawyer and not having one is often the difference between keeping and losing their homes. As the Chief Administrative Judge of the New York court system recently acknowledged, “It is crucial that New Yorkers at risk of foreclosure have access to free, high-quality legal representation.”<sup>2</sup> But many homeowners, unable to afford their own attorney, are struggling through the daunting foreclosure process without representation. Courts—including Kings County Supreme Court—are exacerbating this problem by failing to enforce laws that the New York State Legislature enacted to protect unrepresented homeowners.

4. During the 2008 mortgage foreclosure crisis, the Legislature enacted Rule 3408 of the Civil Practice Law and Rules to “provide[] assistance to homeowners . . . at risk of losing their homes by providing additional protections and foreclosure prevention opportunities.”<sup>3</sup> Rule 3408 (a) commands that at the beginning of every residential foreclosure case, judges must convene a settlement conference to determine “whether the parties can reach a mutually agreeable resolution to help the [homeowner] avoid losing his or her home.” Importantly, Rule 3408 (b) provides that if the homeowner appears at the initial settlement conference without counsel, they “shall be deemed to have made a motion to proceed as a poor person.” The court has an affirmative duty to “determine whether such permission shall be granted”—and, if yes, whether the homeowner should be appointed counsel to represent them in their foreclosure case.

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<sup>1</sup> Amir Kermani & Francis Wong, *Racial Disparities in Housing Returns*, National Bureau of Economic Research, Working Paper 29306 (2021), available at [https://www.nber.org/system/files/working\\_papers/w29306/w29306.pdf](https://www.nber.org/system/files/working_papers/w29306/w29306.pdf).

<sup>2</sup> New York State Unified Court System, *2021 Report of the Chief Administrator of the Courts on the Status of Foreclosure Cases* (2021), at 7, available at <https://www.nycourts.gov/legacyPDFS/publications/pdfs/ForeclosureAnnualReport2021.pdf>.

<sup>3</sup> Senate Introducer’s Mem in Support of 2008 Senate Bill 8143A, Bill Jacket, L 2008, ch 472 at 9.

5. But courts in Kings County and many counties across New York State have ignored Rule 3408 (b)'s command. When homeowners appear unrepresented at settlement conferences, courts do not deem them to have made poor person motions and do not determine whether they should be appointed counsel. Instead, courts press ahead with the proceedings, leaving the homeowners to fend for themselves as they face the loss of their homes. OCA has likewise failed to comply with Rule 3408 (e)'s requirement to provide homeowners notice that they are entitled to an appointment-of-counsel determination if they are unrepresented, and with the Uniform Civil Rules' directive to train the court-appointed referees overseeing settlement conferences on Rule 3408 (b).

6. The result is that today—nearly 15 years after the Legislature sought to provide homeowners meaningful protections against foreclosure—far too many New Yorkers continue to struggle through foreclosure proceedings without legal representation, leading to preventable foreclosure judgments. Among them are Petitioners Carl Fanfair and Gloria Antoine, two Black Brooklyn homeowners who are navigating the foreclosure process without a lawyer because the courts in their cases did not comply with Rule 3408.

#### **NAMED PARTIES**

7. Petitioner Carl Fanfair is the homeowner defendant in a residential mortgage foreclosure action in Supreme Court, Kings County.

8. Petitioner Gloria Antoine is the homeowner defendant in a residential mortgage foreclosure action in Supreme Court, Kings County.

9. Respondent the Honorable Lawrence Knipel is the Administrative Judge for Civil Matters of the Supreme Court, Kings County and also presides over residential mortgage foreclosure cases in Supreme Court, Kings County. Justice Knipel is sued in his official capacity only.

10. Respondent the Honorable Cenceria P. Edwards is a Justice of the Supreme Court, Kings County who presides over residential mortgage foreclosure cases, including Petitioners' cases. Justice Edwards is sued in her official capacity only.

11. Respondent the Office of Court Administration ("OCA") is the administrative arm of the New York State Unified Court System. OCA's principal offices are in Albany County, New York, and New York, New York.

### **FACTUAL ALLEGATIONS**

12. Paragraphs 40 to 57 are alleged on personal knowledge. All other facts are alleged on information and belief.

#### **A. The Legislature Enacted Rule 3408 to Help Homeowners Avoid Preventable Foreclosures.**

13. Under New York law, a mortgage foreclosure proceeding is an adversarial, judicial proceeding.

14. To initiate a residential foreclosure action, the plaintiff—typically a bank, or a government-sponsored entity such as Fannie Mae or Freddie Mac, or a loan servicer—files a summons, complaint, and a certificate of merit with the county clerk in the county where the property is located. The plaintiff must also serve the homeowner defendant with the complaint and a notice regarding the foreclosure process.

15. Rule 3408 (a) mandates that at the beginning of a residential foreclosure case, the court must convene an initial settlement conference for the purpose of "determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home." Pursuant to Rule 3408 (e), the court must "send a notice to parties advising them of the time and place of the settlement conference, the purpose of the conference and the requirements of [Rule 3408]."

16. Rule 3408 (b) dictates that if a homeowner appears at the conference without counsel, the court “shall” deem the homeowner “to have made a motion to proceed as a poor person” and “determine whether such permission shall be granted,” including whether to “appoint[] defendant counsel.” The court may move forward with the case only after making this determination. “If the court appoints defendant counsel . . . , it shall adjourn the conference to a date certain for appearance of counsel.”

17. The Legislature enacted Rule 3408 to “address the mortgage foreclosure crisis in [New York] state” precipitated by the 2007–2008 financial crisis, which saw “[m]any families . . . los[e] their homes and entire neighborhoods . . . devastated.”<sup>4</sup> The Legislature intended Rule 3408 to “provide[] assistance to homeowners . . . at risk of losing their homes by providing additional protections and foreclosure prevention opportunities.”<sup>5</sup>

18. The legislation received strong support from a broad array of stakeholders, who underscored that minimizing foreclosures was essential to the stability of families, neighborhoods, and the state as a whole. For example, the New York State Bar Association’s President’s Committee on Access to Justice explained that “[t]he home is generally a low or moderate income family’s greatest financial asset,” that a home “provides stability for a family,” and that “homeownership builds communities.”<sup>6</sup> Thus, striving to “to find a rational, mutually beneficial solution” to foreclosure cases through mandatory settlement conferences “achieves justice.”<sup>7</sup> Justice Mark C. Dillon of the Appellate Division, Second Department, observed that “requiring

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<sup>4</sup> Senate Introducer’s Mem in Support of 2008 Senate Bill 8143A, Bill Jacket, L 2008, ch 472 at 7.

<sup>5</sup> *Id.*

<sup>6</sup> Memorandum in Support of 2008 Senate Bill 8143A, President’s Committee on Access to Justice, Bill Jacket, L 2008, ch 472 at 25.

<sup>7</sup> *Id.*

early settlement conferences” in foreclosure cases would fulfill the “worthwhile purpose of . . . preserving family home ownership, particularly for minorities and the poor,” who were “most affected by the crisis in subprime mortgages.”<sup>8</sup>

**B. Respondents Have Failed to Comply with Rule 3408 and Protect Vulnerable Homeowners as the Legislature Commanded.**

19. Contrary to the Legislature’s command, Respondents have not complied with Rule 3408. Justices Knipel and Edwards, who preside over residential foreclosure cases in Kings County Supreme Court, routinely fail to deem homeowner defendants who appear *pro se* at the initial settlement conference to have moved to proceed as a poor person, and to determine whether the unrepresented homeowner qualifies as a poor person and for appointed counsel, as Rule 3408 (b) mandates.

20. In Kings County Supreme Court, the initial settlement conferences in residential foreclosure cases are conducted by court-appointed referees pursuant to an Order of Reference issued on June 1, 2011, by the court’s then-Administrative Judge for Civil Matters.<sup>9</sup> This Order of Reference, which was subsequently clarified on February 19, 2013 by Respondent Justice Knipel in his capacity as the court’s Administrative Judge for Civil Matters, delegated referees to preside over foreclosure settlement conferences on behalf of the assigned judges.<sup>10</sup> Although Part 202.12-a of the Uniform Civil Rules directs Respondent OCA to “establish requirements for educat[ing] and training” the referees delegated to conduct foreclosure settlement conferences, OCA has not established such requirements with respect to educating and training referees on Rule 3408 (b).

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<sup>8</sup> Hon. Mark C. Dillon, *The Newly-Enacted CPLR 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, but Not Legislatively Perfect*, 30 Pace L Rev 855, 856 (2010).

<sup>9</sup> *Deutsche Bank Nat. Tr. Co. v Izraelov*, 40 Misc 3d 1238(A) (Sup Ct, Kings County 2013).

<sup>10</sup> *Id.*

21. The court-appointed referee currently holds initial settlement conferences via an online, virtual conferencing platform. Dozens of conferences are scheduled for each calendar session and all the homeowner defendants attending the calendar session, as well as attorneys for the plaintiffs, are present on the virtual platform at the same time. Every participating litigant and attorney hears what is discussed in every other litigant’s conference, including personal, family, and financial information.

22. When a homeowner defendant appears *pro se*, instead of referring the case to the judge to make the poor-person and appointed-counsel determination Rule 3408 (b) requires, the referee moves without pause to the merits of the case. The referee typically asks, for example, about the status of the property, whether the homeowner intends to apply for a loan modification or other settlement option, and the basis for defendant’s assertion of an option to retain the property. Frequently, the referee also asks whether the homeowner wants the case to be referred to the assigned judge—which would allow the court to deem the case to be “released” from the settlement conference process—for the plaintiff to move towards a foreclosure judgment and auction.

23. By way of example, on February 28, 2023, initial settlement conferences were held virtually before the court-appointed referee in 42 residential foreclosure cases assigned to Respondent Justice Edwards. At least 19 of the homeowner defendants—more than 40%—were unrepresented. Similarly, over the course of 62 initial settlement conferences held on four days between April and June 2023, at least 30 of the homeowner defendants—almost 50%—were unrepresented. In every one of these cases, the referee failed to notify the homeowners of their rights under Rule 3408 (b).

24. Respondents likewise have not complied with Rule 3408 (e)’s command to notify

homeowners of their rights under Rule 3408 (b). Rule 3408 (e) requires that prior to the initial settlement conference, “[t]he court shall promptly send a notice to parties advising them of the time and place of the settlement conference, the purpose of the conference and the requirements of this section”—which include Rule 3408 (b)’s requirement that the court determine whether to appoint counsel to unrepresented homeowners. Rule 3408 (e) further specifies that “[t]he notice shall be in a form prescribed by the office of court administration, or, at the discretion of the office of court administration, the administrative judge of the judicial district in which the action is pending.” The notices that Kings County Supreme Court sends homeowners makes no mention of the requirements of Rule 3408 (b).

25. Although OCA maintains pages on the New York State Unified Court System website explaining various aspects of residential foreclosure proceedings, including homeowners’ rights at various stages of the foreclosure process, these pages make no mention of *pro se* homeowners’ entitlement under Rule 3408(b) to a determination regarding their eligibility for poor-person status and appointed counsel.

26. Unaware of their right to a determination to proceed as poor persons and appointed counsel, many *pro se* homeowners go through their entire foreclosure cases without attorneys to counsel them through the complicated, confusing, and daunting process.

27. By OCA’s own account, since Rule 3408 was enacted the percentage of homeowners who have received no legal assistance in their foreclosure cases has reached as high as 67% and has never dipped below 36%.<sup>11</sup> OCA reported that last year, at least 45% of

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<sup>11</sup> Data compiled from the Chief Administrator’s annual reports on the status of foreclosure cases.



homeowners appeared at their settlement conferences without “assistance” from legal counsel.<sup>12</sup> And the actual percentage of homeowners who are unrepresented in their foreclosure proceedings is likely to be higher than that figure indicates: Because OCA does not define “assistance,” that term may include homeowners who received limited help from an attorney but not full representation from an attorney bound by the Rules of Professional Conduct to zealously advocate for the homeowner throughout their case.

C. **Respondents’ Failure to Enforce the Protections of Rule 3408 Has Harmed Homeowners and Their Communities, as well as Lenders, Municipalities, and the State as a Whole.**

28. By failing to comply with Rule 3408, Respondents are facilitating preventable foreclosures that harm homeowners and lenders, destabilize neighborhoods and communities, and burden municipalities and the State.

29. *First*, Respondents’ non-compliance with Rule 3408 harms homeowners and their families—the very people the Legislature sought to support with the law. For homeowners facing foreclosure, the difference between having a lawyer and not having one is often the difference between keeping and losing their homes.<sup>13</sup> Notably, lawyers help homeowner defendants obtain loan modifications by negotiating with plaintiffs and assembling the necessary applications and documentation. Thus, Rule 3408 settlement conferences are far more likely to succeed—to avert foreclosure—when homeowners are represented. OCA itself recognizes that “[t]he availability of

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<sup>12</sup> New York State Unified Court System, *2022 Report of the Chief Administrator of the Courts on the Status of Foreclosure Cases* (2022) at 7, available at: <https://www.nycourts.gov/legacyPDFS/publications/pdfs/ForeclosureAnnualReport2022.pdf>.

<sup>13</sup> James G. Mandilk, *Attorney for the Day: Measuring the Efficacy of In-Court Limited-Scope Representation*, 127 Yale L J 1828 (2018); *see also* Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results from a Randomized Experiment*, 35 Law & Soc’y Rev 419, 423–26 (2001); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 Fordham Urban L J 37, 46–51 (2010).

representation for defendants who cannot retain counsel is a paramount concern, because it impacts directly upon the success of the conference process and the ability to reach settlement.”<sup>14</sup>

30. Lawyers can also be critical in helping homeowners prevail in their cases by asserting the defenses and consumer protections applicable to foreclosure actions that the Legislature has enacted to preserve homeownership whenever possible. For example, lawyers are critical in “advis[ing] defendants of potential legal defenses specifically related to . . . the federal Truth in Lending Act (‘TILA’), the Real Estate Settlement Procedures Act (‘RESPA’) and bankruptcy laws, the New York State Home Equity Theft Protection Act and Deceptive Practices Act, and statutory protections against high-cost home loans.”<sup>15</sup>

31. Foreclosures are catastrophic for homeowners and their families. Foreclosures trigger housing instability, financial hardship, and personal and family stress; disrupt social, employment, and educational relationships; and damage family members’ physical health.<sup>16</sup> By asserting defenses and disclosure and evidentiary requirements in settlement conferences, lawyers representing homeowners can persuade plaintiffs to agree on sustainable loan reinstatement or modification terms, among other interventions.<sup>17</sup>

32. Avoidable foreclosures also harm mortgage lenders because the cost of a successful

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<sup>14</sup> New York State Unified Court System, 2011 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009 (2011) at 3, available at <https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/ForeclosuresReportNov2011.pdf>.

<sup>15</sup> Hon. Mark C. Dillon at 895–97, *supra* n 8 (citations omitted); Melanca Clark & Maggie Barron, *Foreclosures: A Crisis in Legal Representation*, Brennan Center for Justice at New York University School of Law (2009) at 17–26, available at <https://www.brennancenter.org/sites/default/files/legacy/Justice/Foreclosure%20Report/ForeclosuresReport.pdf>.

<sup>16</sup> See Melanca Clark & Maggie Barron at 6–8, *supra* n 15; Alexander C. Tsai, *Home Foreclosure, Health, and Mental Health: A Systematic Review of Individual, Aggregate, and Contextual Associations*, PLOS ONE (2015); available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4388711/>.

<sup>17</sup> Melanca Clark & Maggie Barron at 2, 17–26, *supra* n 15.

loan modification or workout is often lower than the lender's cost of foreclosing and the loss attendant to a distressed sale of the home. By one estimate, a typical foreclosure costs a lender \$58,000.<sup>18</sup>

33. *Second*, preventable foreclosures inflict costs on neighborhoods and communities as well as entire municipalities and state governments. By one estimate, every foreclosure costs state and local governments up to \$20,000—in lost tax revenue, unpaid utilities, and extra costs for municipal services to address the increased crime and vagrancy often associated with vacant housing stock.<sup>19</sup> Not included in that figure are the considerable additional costs resulting from the social disorder caused by disrupted relationships and population turnover.<sup>20</sup>

34. *Third*, the harms caused by preventable foreclosures fall disproportionately on homeowners and communities of color, exacerbating an already significant racial wealth gap.<sup>21</sup> The median Black household has, approximately, only one-tenth the wealth of the median white household.<sup>22</sup> At least half of that wealth gap can be explained by differences in housing wealth.<sup>23</sup>

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<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.*

<sup>20</sup> See G. Thomas Kingsley, Robin Smith, & David Price, *The Impacts of Foreclosures on Families and Communities*, The Urban Institute (May 2009) at 13–21, available at <https://www.urban.org/sites/default/files/publication/30426/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.PDF>.

<sup>21</sup> See Amir Kermani & Francis Wong, *supra* n 1; J. Michael Collins, Carolina K. Reid, & Carly Urban, *Sustaining Homeownership After Delinquency: The Effectiveness of Loan Modifications by Race and Ethnicity*, 17 *Cityscape* 1, 163, 163–187 (2015), available at <https://www.huduser.gov/portal/periodicals/cityscape/vol17num1/ch13.pdf>.

<sup>22</sup> See Amir Kermani & Francis Wong at 1, *supra* n 1; Michael Mechanic, *Foreclosures Are Fueling America's Racial Wealth Gap*, *Mother Jones* (Dec. 6, 2021), available at <https://www.motherjones.com/politics/2021/12/homeownership-race-wealth-gap-housing-discrimination-black-latino-kermani-wong-brookings-research/>; see also Alexei Alexandrov, Laurie Godman, & Ted Tozer, *Normalizing Forbearance*, The Urban Institute (2022), available at <https://www.urban.org/sites/default/files/2022-07/Normalizing%20Forbearance.pdf>.

<sup>23</sup> Michael Mechanic, *supra* n 22 (citing *Panel Study of Income Dynamics*, University of Michigan Institute for Social Research, available at <https://psidonline.isr.umich.edu/> (last accessed June 6, 2023)).

35. The racial wealth gap in New York stems in part from housing discrimination that can be traced back more than a century. In the 1910s, when Black Americans escaping the Jim Crow South settled in Northern cities like New York City, they were met with discriminatory housing practices such as redlining and restrictive covenants, which gave rise to racially segregated neighborhoods.<sup>24</sup> As a result, by 1940, the Black homeownership rate was less than half the white homeownership rate.<sup>25</sup> Although the rate of Black homeownership increased intermittently over the ensuing decades, more than 240,000 Black homeowners in the United States lost their homes to foreclosure during the 2007–2009 financial crisis.<sup>26</sup> That housing crash caused the preexisting racial wealth gap to widen dramatically: whereas the wealth of U.S. families overall decreased by 28.5%, the fall for Black Americans was 47.6%.<sup>27</sup>

36. Recent research has confirmed the racial disparities in housing wealth are substantially explained by higher rates of foreclosures and distressed sales among homeowners in Black neighborhoods, where foreclosures are disproportionately concentrated.<sup>28</sup> These higher rates of foreclosures and distressed sales are attributable, in turn, to mortgage lenders' targeting of Black

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<sup>24</sup> *The Great Migration (1910-1970)*, National Archives, available at <https://www.archives.gov/research/african-americans/migrations/great-migration> (last accessed June 6, 2023).

<sup>25</sup> Christopher E. Herbert et al., *Homeownership Gaps Among Low-Income and Minority Borrowers and Neighborhoods*, U.S. Department of Housing and Urban Development, Office of Policy Development and Research (2005) at 85, available at <https://www.huduser.gov/publications/pdf/homeownershipgapsamonglow-incomeandminority.pdf>.

<sup>26</sup> Renae Merle, *Minorities hit harder by foreclosure crisis*, The Washington Post (June 19, 2010), available at <https://www.washingtonpost.com/wp-dyn/content/article/2010/06/18/AR2010061802885.html>.

<sup>27</sup> Signe-Mary McKernan et al., *Impact of the Great Recession and Beyond: Disparities in Wealth Building by Generation and Race*, The Urban Institute (2014) at 11, 16, available at <https://www.urban.org/sites/default/files/alfresco/publication-pdfs/413102-Impact-of-the-Great-Recession-and-Beyond.PDF>.

<sup>28</sup> Amir Kermani & Francis Wong, *supra* n 1; Testimony of Sarah Ludwig, Joint Hearing to Examine the Crisis Facing Homeowners in Brooklyn (March 15, 2019) at 3–4, available at [https://www.nysenate.gov/sites/default/files/article/attachment/testimony\\_provided\\_by\\_sarah\\_ludwig\\_-\\_founder\\_co-director\\_new\\_economy\\_project.pdf](https://www.nysenate.gov/sites/default/files/article/attachment/testimony_provided_by_sarah_ludwig_-_founder_co-director_new_economy_project.pdf).

borrowers for subprime loans<sup>29</sup>—precisely the kind of loan that motivated the Legislature to enact Rule 3408. In New York City in 2007, for example, Black borrowers entered into high-cost loans at a rate seven times higher than white borrowers.<sup>30</sup>

37. The COVID-19 pandemic has only worsened the racially disproportionate harms wrought by foreclosures. By March 2022, the U.S. Census Household Pulse Survey indicated that 9.4% of Black homeowners in New York State thought themselves very likely to lose their homes to foreclosure in the next two months—almost three times as high as the 3.4% of white homeowners who expressed the same fear.<sup>31</sup> In New York City specifically, in September 2021 an average of 8.48% of homeowners in majority-Black zip codes had fallen behind on their mortgage payments for more than 30 days—four times as high as the percentage in the City’s majority-white zip codes.<sup>32</sup>

38. Foreclosure proceedings are surging and increasing the urgency that Respondents are ordered to enforce the protections of Rule 3408.<sup>33</sup> The COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, which imposed a moratorium on residential foreclosure actions during the height of the pandemic, expired on January 15, 2022, allowing foreclosure proceedings to resume, and leaving thousands of families on the precipice of losing their homes.

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<sup>29</sup> Testimony of Sarah Ludwig, *supra* n 28.

<sup>30</sup> Amy Armstrong et al., *The High Cost of Segregation*, The Furman Center for Real Estate and Urban Policy (2009), available at [https://furmancenter.org/files/publications/The\\_High\\_Cost\\_of\\_Segregation\\_Furman\\_Center\\_Policy\\_Brief\\_November\\_2009.pdf](https://furmancenter.org/files/publications/The_High_Cost_of_Segregation_Furman_Center_Policy_Brief_November_2009.pdf).

<sup>31</sup> George Joseph, *NYC’s Black Neighborhoods Brace for Foreclosures*, The City (Mar. 22, 2022), available at <https://www.thecity.nyc/housing/2022/3/22/22992034/nyc-black-neighborhoods-foreclosures>.

<sup>32</sup> *Id.*

<sup>33</sup> Amy Yee & Alexandre Tanzi, *More Americans Are Losing Their Homes as Foreclosures on US Properties Rise*, Bloomberg (April 19, 2023), available at <https://www.bloomberg.com/news/articles/2023-04-19/foreclosures-on-us-properties-continued-to-rise-in-first-quarter>.

In April 2023, 2,050 housing units went into foreclosure in New York State.<sup>34</sup> And in the first quarter of 2023, Brooklyn saw 614 pre-foreclosure filings, by far the highest number of any New York City borough.<sup>35</sup>

39. Courts' compliance with Rule 3408 would facilitate more foreclosure settlement conferences successfully concluding with a mortgage modification or workout, reducing the number of foreclosures wiping out Black families' equity in their homes. That would substantially improve Black families' ability both to accumulate wealth and transmit it to the next generation, narrowing the racial wealth gap.

**D. Petitioners are Injured by the Courts' Failure to Enforce Rule 3408's Protections.**

*Carl Fanfair*

40. Petitioner Carl Fanfair is a New Yorker whose rights under Rule 3408 have not been enforced by Respondents.

41. Mr. Fanfair is a 47-year-old Black man who has lived in Brooklyn since he was two years old. He and his wife purchased their home at 177 Quincy Street in the Bedford-Stuyvesant neighborhood more than 20 years ago, when they were both in their early twenties. Mr. Fanfair resides in the home with his wife, their four children, and his mother-in-law.

42. Mr. Fanfair's home has long been a source of comfort, stability, and connection for him, his family, and his community. It is the place where the Fanfairs' children were born and have always called home. One of Mr. Fanfair's children and his wife have experienced medical

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<sup>34</sup> Nora Epstein, *Foreclosure Rates for All 50 States in April 2023*, SoFi (May 29, 2023), available at <https://www.sofi.com/learn/content/foreclosure-rates-for-50-states/#:~:text=New%20York,one%20in%20every%203%2C697%20households>.

<sup>35</sup> Eliza Theiss, *2023 Q1 Foreclosure Report: NYC Foreclosures Reach Highest Figure in 11 Quarters But Remain Well Below Pre-Pandemic Figures*, Property Shark (April 6, 2023), available at <https://www.propertyshark.com/Real-Estate-Reports/nyc-foreclosure-report/>.

complications for which extensive care was provided in the home and was instrumental to their healing. His wife struggles with lupus and recovered from open heart surgery in their home. Their home is also where the family cares for Mr. Fanfair's elderly mother-in-law, who is in her eighties and has limited mobility. Additionally, the home has become an important gathering space for community members. Mr. Fanfair hosts community events from there, including events for the hungry and the elderly, as well as Mother's and Father's Day activities.

43. Prior to the COVID-19 pandemic, Mr. Fanfair worked for General Electric and went from home to home repairing appliances; he was always able to make his mortgage payments. During the pandemic, however, Mr. Fanfair could not continue making in-home repairs because his wife and mother-in-law are at an elevated risk for serious complications from COVID-19. He lost his job and fell behind on his mortgage payments.

44. In 2022, after losing his job, Mr. Fanfair twice applied to his mortgage lender, Reliance First Capital, LLC, for loan modifications. Both times he received modification packages and both times he completed his trial payments. His first application was rejected, however, because Mr. Fanfair did not make payments while awaiting paperwork from his lender, a requirement of which he was unaware. He reapplied in August 2022 and completed trial payments in November 2022. In December 2022, he was advised via phone call that he was approved for what was presented to him as a loan modification, and that final paperwork from the lender was forthcoming. But in January 2023, upon being contacted by individuals inquiring about the sale of his property, Mr. Fanfair learned that a foreclosure case had been filed against him weeks prior.

45. When Reliance First Capital, LLC initiated foreclosure proceedings against him, Mr. Fanfair could not afford to retain an attorney to represent him in the case while continuing to make the monthly payments on his mortgage.

46. Mr. Fanfair appeared *pro se* at his initial settlement conference on March 28, 2023. The judge assigned to his case was Respondent Justice Edwards. At that conference, the referee did not refer to case to Justice Edwards to determine whether Mr. Fanfair qualified for poor-person status and appointed counsel. Mr. Fanfair realized when he appeared at the conference that it was just him against the plaintiff's lawyer, who were well-acquainted with the foreclosure system. Mr. Fanfair was not aware that he had the right to have the court determine if he should be appointed counsel. He attempted to explain his circumstances to the plaintiff's attorney, who promised him to send him paperwork but never did.

47. After the settlement conference, Mr. Fanfair sought in vain to get legal assistance. He went to rooms in the courthouse where he was told that there would be lawyers to help him, but the lawyers were not there. He tried calling lawyers and got disconnected, then called back only to hear the phone line ring without response. The whole process has been confusing and frustrating to Mr. Fanfair as he fights to keep his family's home. Mr. Fanfair still does not have an attorney in his foreclosure action.

*Gloria Antoine*

48. Petitioner Gloria Antoine is another New Yorker whose rights under Rule 3408 have not been enforced by Respondents.

49. Ms. Antoine is a 59-year-old Black woman who has lived in Brooklyn for more than three decades. She owns a house at 8910 Glenwood Road in the Canarsie neighborhood, which she purchased in 2004 for her family. It is home to Ms. Antoine, her brother, and her 18-year-old son Kentrell, who was born and grew up in the home. Ms. Antoine loves the community in her neighborhood and she hosts Thanksgiving dinner for her family each year at her home. She has one tenant in the property.



50. When Ms. Antoine qualified for a mortgage loan to purchase her home, her household income consisted of her own income and her tenant's monthly rental payment.

51. Prior to the COVID-19 pandemic, Ms. Antoine's household income consisted of her income from driving for a rideshare service, working at a daycare, and her tenant's monthly rental payment.

52. During the pandemic, Ms. Antoine's income from her daycare job fell. Her tenant also was unable to make their monthly rental payments. As a result, Ms. Antoine began falling behind on her monthly mortgage payments.

53. In recent months, however, Ms. Antoine's diligent work in her two jobs has led to her income picking back up and her tenant has resumed paying rent. She intends to apply for a loan modification and believes if she is granted one, she would be able to continue paying off her mortgage and allow her family to stay in their home.

54. When U.S. Bank Trust National Association ("U.S. Bank") initiated foreclosure proceedings against her in August 2022, Ms. Antoine could not afford to retain an attorney while also keeping up with her mortgage payments. She reached out to a legal services organization for help and although it was not able to represent her, an attorney from the organization gave her some assistance in filing a *pro se* answer. But because of Ms. Antoine's lack of familiarity with the legal system, she was under the impression that the legal services attorney was her lawyer.

55. Ms. Antoine appeared *pro se* at her initial settlement conference on February 28, 2023. It was at this conference that she began to realize the legal services attorney was not representing her, because he did not appear at the conference.

56. The referee did not refer the case to Justice Edwards, the presiding judge, to determine whether Ms. Antoine qualified for poor-person status and appointed counsel. Instead,

the referee asked Ms. Antoine how she wanted to proceed in the case, and Ms. Antoine indicated she wanted to apply for a loan modification. Ms. Antoine was unaware that she had the right to have the court determine if she qualified for appointed counsel.

57. Although Ms. Antoine has been working hard to ensure that she has a strong loan-modification application, she is struggling to understand what is happening in her foreclosure case and what she can do to avoid losing the home she has lived in for almost two decades. Ms. Antoine needs an attorney to inform her of her rights and her options for staving off foreclosure, as well as to help her prepare a robust loan-modification application and to negotiate on her behalf with U.S. Bank. But she still does not have an attorney in her foreclosure action.

### **CLASS ACTION ALLEGATIONS**

58. This case is brought as a class action pursuant to CPLR 901 on behalf of all homeowner defendants currently in pre-judgment residential foreclosure proceedings in Kings County Supreme Court who have had or will have an initial settlement conference pursuant to Rule 3408 and were unrepresented or will be unrepresented at their initial settlement conference.

59. The proposed class is sufficiently numerous that joinder of all members is impracticable. Respondents routinely fail to discharge their mandatory duty to make Rule 3408 (b) determinations for hundreds of homeowners in residential foreclosure proceedings in Kings County Supreme Court who appear or will appear at their initial settlement conferences without counsel, and to notify these homeowners of their rights under Rule 3408 (b).

60. Members of the proposed class are affected by common questions of law and fact that predominate over questions affecting only individual members. Without limitation, these common questions include whether Respondents' failure to conduct poor-person and appointed-counsel determinations violates Rule 3408 (b) and whether Respondents' failure to notify homeowners of their rights under Rule 3408 (b) violates Rule 3408 (e).

61. Named Petitioners' claims are typical of those of the proposed class. Named Petitioners challenge the same failure by Respondents to comply with statutory obligations on grounds that apply to all members of the proposed class.

62. Named Petitioners will fairly and adequately protect the interests of the proposed class. Their interests in requiring courts to comply with their duties under Rule 3408 align closely with those of other members of the proposed class, and their counsel have extensive experience litigating similar matters on a class-wide basis.

63. A class action is superior to other available methods for fairly and efficiently adjudicating this controversy. The class action device will minimize financial, administrative, and procedural burdens that individual actions would impose on the Court and the parties. Petitioners' counsel anticipate no difficulty in managing this matter as a class action.

#### **JURISDICTION AND VENUE**

64. This Court has jurisdiction over this action pursuant to CPLR 506 (b) and 7804 (b).

65. Venue lies in this court under CPLR 506 (b) in that Respondents' acts and omissions occurred in Kings County.

#### **FIRST CAUSE OF ACTION**

#### **ARTICLE 78 REVIEW OF NONCOMPLIANCE WITH CPLR 3408 *(Against Respondents Knipel and Edwards)***

66. Petitioners repeat and re-allege the allegations in the preceding paragraphs as if fully set forth herein.

67. By their conduct, as alleged above, Respondents Knipel and Edwards have failed to perform mandatory duties enjoined upon them by law and acted arbitrarily and capriciously.

**SECOND CAUSE OF ACTION**

**ARTICLE 78 REVIEW OF NONCOMPLIANCE WITH CPLR 3408 AND  
22 NYCRR 202.12-a  
(against Respondent OCA)**

68. Petitioners repeat and re-allege the allegations in the preceding paragraphs as if fully set forth herein.

69. By their conduct, as alleged above, Respondent OCA has failed to perform mandatory duties enjoined upon it by law and acted arbitrarily and capriciously.

**PRAYER FOR RELIEF**

**WHEREFORE**, Petitioners request that this Court:

- (a) Assume jurisdiction over this matter;
- (b) Certify this action as a class action and appoint the undersigned as class counsel;
- (c) Direct Respondents Knipel and Edwards to re-conduct the initial settlement conferences for all class members, including Petitioners Fanfair and Antoine, who have already had their initial settlement conferences and, in accordance with Rule 3408 (b), determine whether each qualifies for poor-person status and appointed counsel before further proceedings in their foreclosure cases;
- (d) Direct Respondents Knipel and Edwards to comply with their duties under Rule 3408 (b) to:
  - (i) Deem all class members who appear for initial Rule 3408 settlement conferences without counsel as having made motions to proceed as a poor person;
  - (ii) Resolve all such motions and determine whether each class member qualifies for poor-person status and appointed counsel before proceeding further with

their case; and

- (iii) If counsel is assigned to any class member, adjourn the conference until assigned counsel can attend and participate.
- (e) Direct Respondent OCA to comply with its duty under Rule 3408 (e) to prescribe the form of a notice for courts to inform residential homeowner defendants of their initial Rule 3408 settlement conference and the requirements of Rule 3408, including Rule 3408 (b)'s requirement that courts determine unrepresented homeowners' eligibility for poor-person status and appointed counsel; and its duty under 22 NYCRR 202.12-a (d) to establish requirements for educating and training nonjudicial personnel assigned to conduct foreclosure settlement conferences on Rule 3408 (b).
- (f) Award Petitioners their attorneys' fees and costs under the Equal Access to Justice Act, CPLR 8601; and
- (g) Grant all other relief the Court deems just and proper.

Dated: June 6, 2023  
New York, NY

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

By: /s/ Terry T. Ding

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*Counsel for Petitioners*


\*Applications for *pro hac vice*  
admission forthcoming

**VERIFICATION**

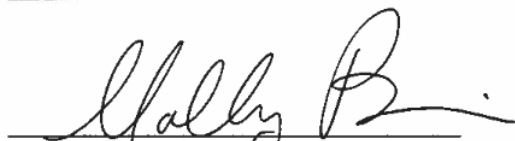
STATE OF NEW YORK )  
*County of New York* ) SS:  
APPELLATE DIVISION, )  
SECOND DEPARTMENT )

I, CARL FANFAIR, being duly sworn, deposes and says:

1. I am a named petitioner in this action.
2. I am making this verification under CPLR 3020(d).
3. I have read the Verified Class Petition and its factual contents are true to my personal knowledge, except as to those matters alleged on information and belief, and as to those matters, I believe them to be true.

  
CARL FANFAIR

Sworn to before me this  
*6th* day of June, 2023

  
Notary Public

**MOLLY K. BIKLEN**  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 02816356621  
QUALIFIED IN NEW YORK COUNTY  
COMMISSION EXPIRES 04/03/2025

**VERIFICATION**

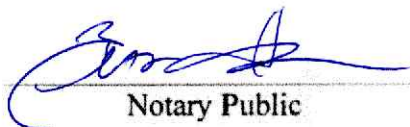
STATE OF NEW YORK )  
COUNTY OF NEW YORK ) SS:  
APPELLATE DIVISION, )  
SECOND DEPARTMENT )

I, GLORIA ANTOINE, being duly sworn, deposes and says:

1. I am a named petitioner in this action.
2. I am making this verification under CPLR 3020(d).
3. I have read the Verified Class Petition and its factual contents are true to my personal knowledge, except as to those matters alleged on information and belief, and as to those matters, I believe them to be true.

  
\_\_\_\_\_  
GLORIA ANTOINE

Sworn to before me this  
62 th day of June, 2023

  
\_\_\_\_\_  
Notary Public

**BETH HAROULES**  
Notary Public, State of New York  
No. 02HA4890292  
Qualified in New York County  
Commission Expires March 30, 2024