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.

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' VERIFIED CLASS PETITION

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PRELIMINARY STATEMENT

Petitioners seek a writ of mandamus from this Court to help remedy a crisis in residential foreclosure proceedings in Kings County Supreme Court. A state law mandates that at the initial settlement conferences in such proceedings, judges have an affirmative duty to determine whether unrepresented homeowners are indigent and should be appointed counsel. But judges in Kings County Supreme Court—and across the state—are routinely failing to make these determinations. As a result, thousands of homeowners are facing a heightened risk of losing their homes to preventable foreclosure because they do not have the assistance of counsel. This risk is particularly acute for Black homeowners like Petitioners Carl Fanfair and Gloria Antoine, who are being forced at disproportionate rates out of the homes and communities they have long lived in.

For homeowners in foreclosure proceedings, the difference between having and not having a lawyer is often the difference between keeping and losing their homes. For this reason, the New York State Legislature in 2008 enacted Rule 3408 of the Civil Practice Law and Rules, which commands that at the beginning of every residential foreclosure case, judges must convene a mandatory settlement conference to determine "whether the parties can reach a mutually agreeable resolution to help the [homeowner] avoid losing his or her home." (CPLR 3408 [a].) In furtherance of this goal, Rule 3408 mandates that any homeowner who appears unrepresented at the initial settlement conference "shall be deemed to have made a motion to proceed as a poor person" and "[t]he court shall determine whether such permission shall be granted"—including whether to appoint the homeowner counsel. (CPLR 3408 [b].) And "[i]f the court appoints [the homeowner] counsel . . . , it shall adjourn the conference" to allow the homeowner's attorney to appear and engage in the settlement discussions. (*Id.*).

Rule 3408 thus imposes a mandatory duty on courts to consider, as a threshold matter, whether unrepresented homeowners should be appointed counsel before courts can move forward with foreclosure proceedings. Yet courts are failing to do so. Accordingly, this petition for a writ of mandamus seeks to compel Respondents to comply with the duties enjoined on them by Rule 3408 and to enforce the procedural protections for homeowners that the Legislature enacted.

FACTUAL BACKGROUND

I. THE LEGISLATURE ENACTED RULE 3408 TO HELP HOMEOWNERS AVOID PREVENTABLE FORECLOSURES.

In 2008, the New York State 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." (Senate Introducer's Mem in Support of Senate Bill 8143A, Bill Jacket, L 2008, ch 472 at 7.)[1] The Legislature stated clearly that it intended Rule 3408 to "provide[] assistance to homeowners . . . at risk of losing their homes by providing additional protections and foreclosure prevention opportunities." (*Id.* at 9.) Shortly after the passage of Rule 3408, Justice Mark C. Dillon of this Court observed that the new law fulfilled the "worthwhile purpose of . . . preserving family home ownership, particularly for minorities and the poor," who were "most affected by the crisis in subprime mortgages." (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] (citation omitted).)

[1] When Rule 3408 was initially enacted in 2008, it did not cover all residential foreclosure cases, but the Legislature quickly amended it in 2009 to cover all residential foreclosure cases regardless of loan type. (L 2009, ch 507 at *13.)

Three provisions of Rule 3408 are relevant here. First, Rule 3408 (a) requires that at the beginning of a residential foreclosure action, the court must convene a settlement conference for the purpose of determining, among other things, "whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home." (CPLR 3408 [a] [1].)

Second, Rule 3408 (b) mandates that if a homeowner appears at the initial settlement conference without an attorney, the court "shall . . . deem[]" the homeowner "to have made a motion to proceed as a poor person." (CPLR 3408 [b].) The court "shall" then "determine whether such permission shall be granted," including whether to "appoint[] defendant counsel." (*Id.*) "If the court appoints defendant counsel . . . , it shall adjourn the conference to a date certain for appearance of counsel." (*Id.*) As the Third Department has recognized, whether an unrepresented homeowner qualifies for poor-person status and assigned counsel under Rule 3408 (b) is "a threshold issue that must be resolved" before the case can proceed. (*Carrington Mtge. Servs., LLC v Fiore*, 198 AD3d 1106, 1109 [3d Dept 2021].) And a court's failure to make this threshold determination may "affect[] everything that occur[s] thereafter" in the case. (*Id.* at 1109 n 4.)

Third, Rule 3408 (e) directs that upon the scheduling of 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. (CPLR 3408 [e].) 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." (*Id.*)

In addition, the Uniform Civil Rules for the Supreme Court provide that the Office of Court Administration ("OCA") "shall establish requirements for education and training of all . . . nonjudicial personnel assigned to conduct foreclosure conferences." (22 NYCRR 202.12-a [d].) Among these nonjudicial personnel are referees appointed by Kings County Supreme Court to oversee the foreclosure settlement conferences in that court. (Verified Petition ("VP") ¶ 20; *see Deutsche Bank Nat. Tr. Co. v Izraelov*, 40 Misc 3d 1238(A) [Sup Ct, Kings County 2013].)

II. RESPONDENTS HAVE FAILED TO COMPLY WITH RULE 3408 AND 22 NYCRR 202.12-a.

Contrary to the Legislature's command, Respondents have not enforced Rule 3408's protections for homeowners. Across New York State and in Kings County in particular, courts routinely fail to deem homeowners who appear unrepresented at the initial settlement conference to have moved to proceed as a poor person, and to determine whether they qualify for poor-person status and appointed counsel, as Rule 3408 (b) requires. What is more, courts are not providing notices that inform unrepresented homeowners of their right to be considered for appointed counsel, as Rule 3408 (e) requires. Nor has OCA ensured that referees delegated to oversee settlement conferences are educated and trained on the mandates of Rule 3408 (b), as 22 NYCRR 202.12-a (d) requires.

In Kings County Supreme Court, Respondents Justices Knipel and Edwards preside over residential foreclosure actions but delegate referees to oversee the initial settlement conferences held pursuant to Rule 3408 (a). (VP ¶¶ 19–21.) When a homeowner appears at the initial conference without an attorney, the referee—who has not been trained on Rule 3408 (b)—neither deems the homeowner to have made a motion to proceed as a poor person nor refers the case to the presiding judge to determine whether the homeowner qualifies for poor-person designation and appointed counsel. (VP ¶¶ 22–23; *see* Affidavit of Tiffany Muse ("Muse Aff") ¶¶ 3–5 [observing

56 initial settlement conferences between January and March 2023 in Kings County Supreme Court in which the homeowner was unrepresented and the court did not make the Rule 3408 (b) determination]; Affidavit of Brianna Sturkey ("Sturkey Aff") ¶¶ 3–7 [observing 21 such conferences in April and May 2023]; Affidavit of Soleiman Moustafa ("Moustafa Aff") ¶¶ 3–7 [observing 9 such conferences in May and June 2023]; *see also* Affirmation of Isis R. Mattei ("Mattei Affirmation") ¶¶ 3–5; Affirmation of Alice A. Nicholson ("Nicholson Affirmation") ¶¶ 3–5; Affirmation of Justin F. Pane ("Pane Affirmation") ¶¶ 3–5; Affirmation of Ivan E. Young ("Young Affirmation") ¶¶ 3–5.) Instead, the referee moves without pause to the merits of the case, asking, for example, about the status of the property and whether the homeowner intends to apply for a loan modification. (VP ¶ 22.)

That is precisely what happened in the foreclosure cases of Petitioners Carl Fanfair and Gloria Antoine. Mr. Fanfair appeared *pro se* at his initial settlement conference on March 28, 2023. (VP ¶ 46.) The referee did not refer the case to Justice Edwards, the presiding judge, to make the determination required by Rule 3408 (b), and Mr. Fanfair was wholly unaware of his right to such a determination. (*Id.*) Similarly, Ms. Antoine appeared *pro se* at her initial settlement conference on February 28, 2023. (VP ¶ 55.) The referee did not refer the case to Justice Edwards to make the determination required by Rule 3408 (b), and Ms. Antoine did not know she was entitled to such a determination. (VP ¶ 56.) Instead, the referee asked Ms. Antoine how she wanted to proceed in the case and discussed her intention to apply for a loan modification. (VP ¶ 56.)

Moreover, the notices that Kings County Supreme Court sends homeowners regarding their initial settlement conferences do not comply with Rule 3408 (e). The notices do not advise homeowners of "the requirements of [Rule 3408]." (CPLR 3408 [e].) Most notably, the notices do not mention Rule 3408 (b)'s requirement that courts affirmatively consider whether unrepresented

homeowners should be permitted to proceed as poor persons and appointed counsel. (VP ¶ 24; *see* Affirmation of Terry Ding ("Ding Affirmation"), Exhibits A–C.) Nor do the notices advise homeowners of "the purpose of the conference" (CPLR 3408 [e]): to "determin[e] whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home" (CPLR 3408 [a]; *see* VP ¶ 24; Ding Affirmation, Exhibits A–C.)

Unaware of their right to be considered for appointed counsel, many homeowners go through their entire foreclosure cases without attorneys to counsel them through the complicated, confusing, and daunting process. (VP ¶ 26; Mattei Affirmation ¶ 9; Nicholson Affirmation ¶ 9; Pane Affirmation ¶ 9; Affirmation of Carol P. Richman ("Richman Affirmation") ¶ 9; Young Affirmation ¶ 9.) By OCA's own account, since Rule 3408 was enacted the percentage of homeowners who received no legal assistance in their foreclosure cases has reached as high as 67% and never dipped below 36%. (VP ¶ 27.)[2] Last year, more than 45% of homeowners appeared at their foreclosure settlement conferences without assistance from legal counsel. (VP ¶ 27.)[3]

Lawyers not only explain to homeowners the nature of the foreclosure proceedings against them and their options for defending themselves, but also help homeowners obtain loan modifications by negotiating with plaintiffs and assembling the necessary applications and documentation. (VP ¶ 29.) Thus, Rule 3408 settlement conferences are far more likely to succeed—to avert foreclosure—when homeowners are represented. (VP ¶ 29.) OCA itself recognizes that "[t]he availability of representation for defendants who cannot retain counsel is a paramount concern, because it impacts directly upon the success of the conference process and the

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[2] Data compiled from the Chief Administrator's annual reports on the status of foreclosure cases.

[3] *See* 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.

ability to reach settlement." (VP ¶ 29.)[4]

Lawyers can also play a crucial role in helping homeowners prevail in their foreclosure cases by asserting applicable defenses and consumer protections the Legislature enacted with the intent to save homeownership. (VP ¶ 30.) Justice Dillon has observed that lawyers "advis[e] defendants of potential legal defenses specifically related to, *inter alia*, 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." (Dillon at 895–97 (citations omitted).)

For these reasons, Rule 3408's mandates are critical for ensuring that homeowners do not lose their homes to preventable foreclosures. A 2018 study of more than 1,200 foreclosure-related motions found that clients who received even limited-scope in-court legal representation in their cases were significantly more likely to keep their homes. (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 & Socy Rev 419, 423–26 [2001] [study of New York City Housing Court finding that tenants represented by lawyers were more likely to obtain favorable dispositions].) Yet almost fifteen years after the Legislature enacted Rule 3408, courts still are failing to enforce its protections.

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[4] 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 ("[W]e are especially concerned about an increase in the number of unrepresented defendants participating in conferences and the possibility that this will result in fewer settlements.").

III. PETITIONERS ARE INJURED BY THE COURTS' FAILURE TO ENFORCE THE PROTECTIONS OF RULE 3408 AND 22 NYCRR 202.12-a.

Among the many New Yorkers harmed by Respondents' non-compliance with Rule 3408 and 22 NYCRR 202.12-a are Petitioners Carl Fanfair and Gloria Antoine. Mr. Fanfair and Ms. Antoine are both Black residents of Brooklyn who have lived with their families in their homes for decades. (VP ¶¶ 41–42, 49.) Both are facing foreclosure and neither can afford to pay for their own attorney. (VP ¶¶ 45, 54.) Because the court in their foreclosure cases did not consider appointing counsel for them, they remain unrepresented as they fight to stave off the loss of their homes. (VP ¶¶ 47, 57.)

Mr. Fanfair has lived in Brooklyn since he was two years old. (VP ¶ 41.) He and his wife purchased their home in the Bedford-Stuyvesant neighborhood more than 20 years ago and live there with their four children and his mother-in-law. (*Id.*) Mr. Fanfair feels deeply connected to his home and his neighborhood. (VP ¶ 42.) He hosts community events from his home, including events for the hungry and the elderly, as well as Mother's and Father's Day activities. (*Id.*)

Prior to the COVID-19 pandemic, Mr. Fanfair worked for General Electric. (VP ¶ 43.) But he was unable to work in person during the pandemic because his wife has pre-existing health conditions that make her vulnerable to serious infections and because his mother-in-law is elderly. (*Id.*) As a result, he lost his job and fell behind on his mortgage payments. (*Id*.) When foreclosure proceedings were initiated against him, Mr. Fanfair could not afford to retain an attorney. (VP ¶ 45.) But when he appeared pro se at his initial settlement conference on March 28, 2023, the court did not consider whether Mr. Fanfair should have been appointed counsel. (VP ¶ 46.) Without an attorney, Mr. Fanfair has experienced immense confusion and frustration as he tries to navigate the legal system by himself. (VP ¶ 47.)

Ms. Antoine is also a long-time resident of Brooklyn; she has called the borough home for

three decades. (VP ¶ 49.) She purchased her home in the Canarsie neighborhood almost 20 years ago for her family. (*Id*.) She lives there with her brother and her son Kentrell, who grew up in the home. (*Id*.) Ms. Antoine is deeply embedded in her local community and hosts Thanksgiving dinner for her family each year at her home. (*Id*.)

Ms. Antoine makes her mortgage payments using income from her two jobs—driving for a rideshare service and working at a daycare—and her tenant's rental payments. (VP ¶ 51.) During the pandemic, however, she fell behind on her mortgage payments because her employment income fell and her tenant stopped making rental payments. (*Id.* ¶ 52.) When foreclosure proceedings were initiated against her, Ms. Antoine could not afford to retain an attorney while also keeping up with her mortgage payments. (*Id.* ¶ 54.) Thus, she appeared pro se at her initial settlement conference on February 28, 2023, where the court did not consider whether she should have been appointed counsel. (VP ¶¶ 55–56.)

Without an attorney, Ms. Antoine has found the foreclosure process confusing and frustrating. Early in her case, she reached out to a legal services organization for assistance. (VP ¶ 54.) Although the organization was not able to represent her, one of its attorneys gave her some help in filing a pro se answer. (*Id*.) But because Ms. Antoine lacks familiarity with the legal system, she was under the impression that the legal services attorney was her lawyer. (*Id*.) It was not until the attorney did not appear at her initial settlement conference that Ms. Antoine began to understand he was not representing her. (VP ¶ 55.) Recently, Ms. Antoine's diligent work in her two jobs has led to her income picking back up and her tenant has resumed paying rent. (VP ¶ 53.) She believes that if she is granted a loan modification, she would be able to continue paying off her mortgage. (*Id*.) But she is struggling to understand what she needs to do to submit a strong loan modification application and how to negotiate with the plaintiff to keep her home. (VP ¶ 57.)

LEGAL STANDARD

A writ of mandamus is the appropriate remedy under Article 78 where a government "body or officer failed to perform a duty enjoined upon it by law." (CPLR 7803 [1]; *see Pitt v Walsh*, 69 AD3d 860, 860–61 [2d Dept 2010].) When "plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to [a writ of mandamus] directing defendants to discharge those duties." (*Klostermann v Cuomo*, 61 NY2d 525, 541 [1984].) In particular, "mandamus will lie if [government bodies] have abdicated their . . . . duty to enforce" the law (*Jurnove v Lawrence*, 38 AD3d 895, 896 [2d Dept 2007] [citation omitted]), including where they have "failed or refused to conduct a hearing or decide a particular matter where there was a mandatory, nondiscretionary duty to do so" (*Davidson v LaGrange Fire Dist.*, 82 AD3d 1227, 1229 [2d Dept 2011]; *see e.g. Levy v Davis*, 302 AD2d 309, 311 [1st Dept 2003] [granting mandamus petition to compel court "to conduct a hearing . . . and to render a decision" as required by statute]).

ARGUMENT

Petitioners seek, on behalf of a class of similarly situated homeowners, a writ of mandamus from this Court ordering Respondents to comply with their duties: (1) under Rule 3408 (b) to consider whether class members should be permitted to proceed as poor persons and appointed counsel in their foreclosure cases; (2) under Rule 3408 (e) to give notice to class members prior to their initial settlement conferences of their rights under Rule 3408 (b); and (3) under 22 NYCRR 202.12-a (d) to educate and train referees on the requirements of Rule 3408 (b).[5]

[5] Specifically, Petitioners seek to a represent a class of homeowners 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 conference. (VP ¶ 58.)

I. RULE 3408 AND 22 NYCRR 202.12-a IMPOSE MANDATORY DUTIES ON RESPONDENTS TO SAFEGUARD THE RIGHTS OF HOMEOWNERS FACING FORECLOSURE.

New York law is clear: Under Rule 3408 (b), at initial settlement conferences in residential foreclosure cases, judges have a mandatory duty to determine whether unrepresented homeowners should be permitted to proceed as poor persons and appointed counsel, and to adjourn matters if counsel is appointed. Moreover, Rule 3408 (e) requires OCA and courts to notify homeowners of their rights under Rule 3408 (b). Petitioners are entitled to mandamus relief because Respondents have failed to perform these mandatory, non-discretionary duties.

The text of Rule 3408 unambiguously sets forth the duties of courts presiding over residential foreclosure proceedings. Rule 3408 (a) provides that in such proceedings, "the court shall hold a mandatory conference" to "determin[e] whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home." (CPLR 3408 [a].) Next, Rule 3408 (b) requires that, at the initial settlement conference, "any defendant currently appearing pro se[] *shall* be deemed to have made a motion to proceed as a poor person" and "[t]he court *shall* determine whether such permission shall be granted pursuant to [CPLR 1101]." (CPLR 3408 [b] (emphases added).) If the court grants the homeowner permission to proceed as a poor person, it may appoint them an attorney. (CPLR 1102 [a].) And "[i]f the court appoints defendant counsel . . . , it *shall* adjourn the conference to a date certain for appearance of counsel and settlement discussions." (CPLR 3408 [b] (emphasis added).) The Legislature's "cho[ice] [of] the peremptory word 'shall'" in each of these provisions evidences its intent for the statute to be "mandatory in nature." (*Podolsky v Narnoc Corp.*, 196 AD2d 593, 594–95 [2d Dept 1993]; *see*

e.g. Liu v Ruiz, 200 AD3d 68, 74 [1st Dept 2021] [holding that a "statute is mandatory" because "it plainly states that the court 'shall[]'" issue a ruling within a specified time frame].)

The Third Department recently recognized that Rule 3408 (b) imposes on judges an affirmative and mandatory duty to determine unrepresented homeowners' eligibility for assigned counsel. (*See Carrington Mtge. Servs., LLC v Fiore*, 198 AD3d 1106, 1108 [3d Dept 2021].) In *Carrington*, the homeowner defendants appeared pro se at their initial settlement conference, but Supreme Court failed to assess whether they qualified for poor-person status and appointed counsel. (*Id.* at 1108.) The parties did not reach settlement and Supreme Court granted the plaintiff's motion for a final judgment of foreclosure and sale. (*Id.* at 1107.) The Third Department explained that "[b]ecause defendants appeared at the [initial] settlement conference without representation, each was 'deemed to have made a motion to proceed as a poor person' and Supreme Court was required to determine such motion." (*Id.* at 1108, quoting CPLR 3408 [b].) The court held that because Supreme Court had neither deemed the homeowners to have made a motion to proceed as poor persons nor determined such motion, it "fail[ed] to adhere to its obligations under CPLR 3408 (b)." (*Id.*)

Rule 3408 also imposes mandatory duties on OCA and courts to give notice to homeowners of their rights in residential foreclosure proceedings—including their rights under Rule 3408 (b). Rule 3408 (e) requires that once the initial settlement conference is scheduled, "[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*." (CPLR 3408 [e] (emphases added).) "The requirements of this section" include Rule 3408 (b)'s requirement that the court determine pro se homeowners' eligibility for poor-person status and appointed counsel. (*See* CPLR 3408 [b].) Rule 3408 (e) further provides that the "notice *shall* be in a form prescribed by [OCA],

or, at the discretion of [OCA], the administrative judge of the judicial district in which the action is pending." (CPLR 3408 [e] (emphasis added).) Again, because the Legislature used "the peremptory word 'shall'" in Rule 3408 (e), the duties it imposes on OCA and courts are "mandatory in nature." (*Podolsky*, 196 AD2d at 594–95.)

Finally, the Uniform Civil Rules imposes a mandatory duty on OCA to educate and train any referees delegated to oversee settlement conferences. (*See* 22 NYCRR 202.12-a [d] ["The Chief Administrator *shall* establish requirements for education and training of all . . . nonjudicial personnel assigned to conduct foreclosure conferences." (emphasis added)].)

II. RESPONDENTS HAVE FAILED TO PERFORM THE MANDATORY DUTIES ENJOINED ON THEM BY RULE 3408 AND 22 NYCRR 202.12-a.

Despite the clear mandates of Rule 3408 and 22 NYCRR 202.12-a, courts are failing to comply. In Kings County Supreme Court, judges presiding over residential foreclosure cases—including Justice Edwards in Mr. Fanfair's and Ms. Antoine's cases—have not been determining whether unrepresented homeowners should be permitted to proceed as poor persons and appointed counsel. Nor has OCA prescribed a notice for courts to use that notifies homeowners of their rights under Rule 3408 or trained referees overseeing settlement conferences on the requirements of Rule 3408 (b). Respondents are thus undermining the "clear legislative intent to aid homeowners threatened with foreclosure" (*Indep. Bank v Valentine*, 113 AD3d 62, 63 [2d Dept 2013]).

A. Justices Knipel and Edwards have failed to make the determinations mandated by Rule 3408 (b) in residential foreclosure proceedings in Kings County, including in Mr. Fanfair's and Ms. Antoine's proceedings.

Mr. Fanfair and Ms. Antoine are both Kings County homeowners who are in foreclosure proceedings because of financial struggles precipitated by the pandemic. They have been forced

to navigate the proceedings without the aid of an attorney because of Justice Edwards' failure to consider whether they qualify for appointed counsel under Rule 3408 (b).

Mr. Fanfair fell behind on his mortgage payments after losing his job at General Electric during the pandemic. (VP ¶ 43.) Working in person created a dangerous risk of COVID-19 exposure for Mr. Fanfair's loved ones because he lives with his wife, who has lupus and has had open-heart surgery, and his elderly mother-in-law. (VP ¶ 42.) When Reliance First Capital initiated foreclosure proceedings against him, Mr. Fanfair could not afford to retain an attorney so he appeared *pro se* at his initial settlement conference on March 28, 2023. (VP ¶¶ 45–46.) The referee delegated by Justice Edwards to oversee the conference did not stop the proceedings to allow the court to determine whether Mr. Fanfair qualified for poor-person status and appointed counsel. (VP ¶ 46.) Mr. Fanfair did not even know he was entitled to such a determination under Rule 3408 (b) and is still without a lawyer. (VP ¶ 47.)

Ms. Antoine similarly was unable to keep up with her mortgage payments during the pandemic when her income from her two jobs fell and her tenant stopped making rental payments. (VP ¶ 52.) When U.S. Bank initiated foreclosure proceedings against her, Ms. Antoine could not afford to retain an attorney while also keeping up with her mortgage payments. (VP ¶ 54.) She appeared pro se at her initial settlement conference on February 28, 2023. (VP ¶ 55.) The referee delegated by Justice Edwards to oversee the conference did not stop the proceedings to allow the court to determine whether Ms. Antoine qualified for poor-person status and appointed counsel. (VP ¶ 56.) She, too, was unaware of her right to such a determination under Rule 3408 (b) and still does not have an attorney representing her in her foreclosure proceedings. (VP ¶¶ 56–57.)

Mr. Fanfair's and Ms. Antoine's experiences are far from unique. Justices Knipel and Edwards, who preside over residential foreclosure cases in Kings County Supreme Court, are

uniformly failing to make the determinations mandated by Rule 3408 (b). In a sample of 179 initial settlement conferences observed between January and June this year, there were at least 86 cases in which the homeowner appeared at the conference without an attorney. (*See* Muse Aff ¶¶ 3–4 [observing 56 such conferences]; Sturkey Aff ¶¶ 3–7 [observing 21 such conferences]; Moustafa Aff ¶¶ [observing 9 such conferences].) In none of those conferences did the court determine whether the homeowner should have been permitted to proceed as a poor person and appointed counsel. (*Id*.)

These recent observations are bolstered by the testimony of many long-time foreclosure litigators who regularly practice in Kings County Supreme Court. (*See* Mattei Affirmation ¶¶ 3–5; Nicholson Affirmation ¶¶ 3–5; Pane Affirmation ¶¶ 3–5; Young Affirmation ¶¶ 3–5.) Attorney Ivan Edgardo Young has been practicing in foreclosure cases in Kings County and throughout the New York City metropolitan area for 12 years and has never seen the court make the Rule 3408 (b) determination. (Young Affirmation ¶¶ 3–5.) The same is true for Alice A. Nicholson and Isis Rakia Mattei, who have represented homeowners in Kings County Supreme Court and other courts in New York State for 13 years and 7 years, respectively, but have never seen the courts make the Rule 3408 (b) determination. (Mattei Affirmation ¶¶ 3–5, Nicholson Affirmation ¶¶ 3–5.)

Because Justices Knipel and Edwards have "fail[ed] to adhere to [their] obligations under CPLR 3408 (b)" (*Carrington*, 198 AD3d at 1108), mandamus relief is appropriate to compel them to make poor-person and appointed-counsel determinations for all members of the putative class.[6]

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[6] As Petitioners will detail in their forthcoming motion for class certification, classwide relief is appropriate in this case given Respondents' failure to comply with Rule 3408 (b) as to all unrepresented homeowners in residential foreclosure cases before Kings County Supreme Court. (*See e.g. Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [2d Dept 1980] [noting the role of class actions to "accommodate pressing needs for an effective yet balanced group remedy in vital areas of social concern"].)

New York courts have consistently granted mandamus relief under Article 78 where government bodies—including courts—have failed to comply with legally mandated duties. (*See e.g. Levy*, 302 AD2d at 311 [granting mandamus petition to compel court "to conduct a hearing . . . and to render a decision" as required by statute]; *Liu*, 200 AD3d at 74 [reversing denial of mandamus petition where court failed to timely issue ruling as mandated by statute]; *Liang v Hart*, 132 AD3d 765, 765–766 [2d Dept 2015] [ordering mandamus petition granted to compel court to rule on pending motions]; *see also Utica Cheese, Inc. v Barber*, 49 NY2d 1028, 1030 [1980] [issuing writ of mandamus against agency ordering "that a hearing be held and a determination rendered promptly" as required by state law].)

Further, as to Mr. Fanfair and Ms. Antoine, as well as all other class members whose initial settlement conferences have already been held, Kings County Supreme Court must re-conduct their initial settlement conferences and make the determinations required by Rule 3408 (b). And for any of these homeowners who are determined to qualify for appointed counsel, the court must "adjourn the conference to a date certain for appearance of counsel" (CPLR 3408 [b]) and vacate any developments in their proceedings that were "potentially infected by [the homeowners'] lack of counsel" (*Carrington*, 198 AD3d at 1109 n 4).

This is exactly the remedy the Third Department indicated is appropriate in *Carrington*. There, the Third Department recognized that where a court fails to make the "threshold" Rule 3408 (b) determination at the initial settlement conference, subsequent developments in the case are "all potentially infected by defendants' lack of counsel." (*Id.* at 1109 & n 4.) The Third Department therefore ordered Supreme Court to "render a determination as to [the homeowners'] eligibility for assigned counsel as of the [date of the initial] settlement conference." (*Id.* at 1109.) And the Third Department observed that if indeed the homeowners "were entitled to counsel and

deprived thereof, Supreme Court's failure to . . . determin[e] whether there was a need for assigned counsel affected everything that occurred thereafter." (*Id.* at 1109 n 4.) For the same reason, Kings County Supreme Court must vacate any developments in the cases of homeowners who were eligible for appointed counsel at the time of their initial conferences that were "potentially infected by [their] lack of counsel." (*Id.*)

B. Respondent OCA has failed to notify homeowners of their rights in foreclosure settlement conferences as required by Rule 3408 (e) and to train referees as required by 22 NYCRR 202.12-a.

Petitioners are also entitled to mandamus relief because Respondent OCA has failed to perform the mandatory duties enjoined upon it by Rule 3408 (e) and 22 NYCRR 202.12-a.

Rule 3408 (e) requires that "[t]he court shall promptly send a notice to parties advising them of the time and place of the [initial] settlement conference, the purpose of the conference and the requirements of [Rule 3408]." (CPLR 3408 [e].) This "notice shall be in a form prescribed by [OCA], or, at the discretion of [OCA], the administrative judge of the judicial district in which the action is pending." (*Id.*)

But the notices sent by Kings County Supreme Court make no mention of a key Rule 3408 requirement: that the court must determine under Rule 3408 (b) whether unrepresented homeowners should be permitted to proceed as poor persons and appointed counsel. Nor do the notices mention "the purpose of the conference" (CPLR 3408 [e]): to "determin[e] whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home" (CPLR 3408 [a]). For example, a March 2022 notice issued by Kings County Supreme Court asks the homeowner, "Are you representing yourself?", without explaining that if yes, the court must assess whether they qualify for appointed counsel, or that the purpose of the conference is to encourage a resolution that would allow the homeowner to keep their home. (Ding

Affirmation, Exhibit A.) Similarly, the notices that Mr. Fanfair and Ms. Antoine received in February and March 2023 instruct them how to log in to the virtual conference but does not inform them that if they have no attorney, the court must assess whether they qualify for appointed counsel. (Ding Affirmation, Exhibit B [Notice sent to Mr. Fanfair], Exhibit C [Notice sent to Ms. Antoine].) The notices likewise do not inform Mr. Fanfair and Ms. Antoine that the conferences are intended to encourage a resolution that would allow them to stay in their homes. (*Id.*) Thus, OCA has not complied with its mandatory duty to prescribe the form of the notice that Rule 3408 (e) requires.

Without notice of their Rule 3408(b) rights, it is near-impossible for homeowners struggling to navigate their already confusing foreclosure cases to advocate for the legal representation they sorely need—and may well be entitled to. Neither Mr. Fanfair nor Ms. Antoine were aware that they have a right to be considered for appointed counsel. (VP ¶¶ 46, 56.) As a result, both have expended significant amounts of their own time and effort trying to find legal assistance and are still without representation as they fight to save their homes. (VP ¶¶ 6, 47, 57.)

Moreover, although the Uniform Civil Rules direct OCA to "establish requirements for education and training of all . . . nonjudicial personnel assigned to conduct foreclosure conferences" (22 NYCRR 202.12-a [d]), OCA has failed to ensure that referees overseeing settlement conferences in Kings County Supreme Court are educated and trained on the requirements of Rule 3408 (b) (VP ¶ 20).

Because OCA has failed to perform the mandatory duties enjoined on it by Rule 3408 (e) and 22 NYCRR 202.12-a, mandamus relief is appropriate to compel their performance.

III. PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES.

Under New York's Equal Access to Justice Act, prevailing parties in "any civil action brought against the state" are entitled to fees and other expenses they have incurred. (CPLR 8601 [a].) "[A] party has 'prevailed' within the meaning of the State EAJA if it has succeeded in acquiring a substantial part of the relief sought in the lawsuit." (*New York State Clinical Laboratory Assn. v Kaladjian*, 85 NY2d 346, 355 [1995].) Although the state may avoid the imposition of fees if it can demonstrate its position was "substantially justified or that special circumstances make an award unjust" (CPLR 8601 [a]), "[t]he burden of establishing substantial justification rests with the State, which must make a strong showing to support its position," (*Graves v Doar*, 87 AD3d 744, 747 [2d Dept 2011] (citation omitted)).

Petitioners are entitled to the relief they seek in this case and to attorneys' fees because the duties that Rule 3408 and 22 NYCRR 202.12-a impose on Respondents are clear and unequivocal. *See* Section I, *supra*. Therefore, Respondents cannot meet their burden to justify their failure to perform these unequivocal, mandatory duties. (*See New York State Clinical Laboratory Assn.*, 85 NY2d at 356 [noting that a "substantially justified" position must have a "reasonable basis both in law and fact"]; *e.g. Graves*, 87 AD3d at 747 [finding State's position was not substantially justified where it was not supported by law].) Nor do any special circumstances make an award of fees and expenses unjust here.

CONCLUSION

For the reasons stated above, Petitioners request that the Court grant the relief that Petitioners request.

Dated: June 7, 2023
New York, NY

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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*Applications for *pro hac vice*
admission forthcoming

WORD COUNT CERTIFICATION

I hereby certify that:

This brief complies with the word count limitation of 22 NYCRR 202.8-b because the total word count, according to the word count function of Microsoft Word, the word processing program used to prepare this document, of all printed text in the body of the brief, exclusive of the caption, table of contents, table of authorities, and signature block is 6,109.

Dated: June 7, 2023
New York, N.Y.

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