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In the  
United States Court of Appeals  
For the Second Circuit

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August Term, 2016  
Nos. 15-2181-cv(L), 15-2283-cv(Con), 15-2285-cv(Con),  
15-2487-cv(Con), 15-2506-cv(Con), 15-2687-cv(Con)

IN RE: WORLD TRADE CENTER  
LOWER MANHATTAN DISASTER SITE LITIGATION

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STANISLAW FALTYNOWICZ, LUCYNA FOREMSKA, RUBEN ACOSTA,  
VLADMIR AKOULOV, WALDEMAR BALCER, JOAQUIN CAMPUZANO,  
HENRYK CIBOROWSKI, JAN DOBROWOLSKI, MAREK GLOWATY,  
EUGENIUSZ JASTRZEBOWSKI, ZBIGNIEW KUCHARSKI, MARIA MORENO,  
IRENA PERZYNASKA, MARIAN RETELSKI, DARIUSZ WSZOLKOWSKI,  
BOGUSLAW ZALEWSKI,  
*Plaintiffs-Appellants,*

STATE OF NEW YORK,  
*Intervenor-Appellant,*

*v.*

BATTERY PARK CITY AUTHORITY, ET AL.,  
*Defendants-Appellees.*

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SANTIAGO ALVEAR,  
*Plaintiff-Appellant,*

STATE OF NEW YORK,  
*Intervenor-Appellant,*

*v.*

BATTERY PARK CITY AUTHORITY,  
*Defendant-Appellee.*

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PETER CURLEY, MARY ANN CURLEY,  
*Plaintiffs-Appellants,*

STATE OF NEW YORK,  
*Intervenor-Appellant,*

*v.*

BATTERY PARK CITY AUTHORITY,  
*Defendant-Appellee.\**

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Appeal from the United States District Court  
for the Southern District of New York.  
No. 21 MC 102 — Alvin K. Hellerstein, *Judge.*

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\* The Clerk of Court is directed to amend the caption as set forth above.

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ARGUED: OCTOBER 5, 2016  
DECIDED: JANUARY 19, 2017

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Before: LYNCH, DRONEY, *Circuit Judges*,  
and REISS, *Chief District Judge*.\*

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Appeal from orders of the United States District Court for the Southern District of New York (Hellerstein, J.) granting summary judgment in favor of Battery Park City Authority (“BPCA”). The district court held that BPCA, a public benefit corporation, had the capacity to raise a due process challenge under the New York State Constitution to a New York State statute that revived claims against public corporations for personal injuries sustained during the rescue, recovery, and cleanup efforts that followed the terrorist attacks of September 11, 2001. The court further held that the statute violated BPCA’s due process rights under the state constitution. This appeal followed. Because we conclude that there is insufficient New York State authority on the legal standards governing these issues, we **CERTIFY** two questions to the New York Court of Appeals.

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GREGORY J. CANNATA, Gregory J.  
Cannata & Associates, LLP, New  
York, New York, *for Plaintiffs-  
Appellants Stanislaw Faltynowicz,  
Lucyna Foremska, Ruben Acosta,*

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\* Chief Judge Christina Reiss, United States District Court for the District of Vermont, sitting by designation.

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*Vladmir Akoulov, Waldemar Balcer, Joaquin Campuzano, Henryk Ciborowski, Jan Dobrowolski, Marek Glowaty, Eugeniusz Jastrzebowski, Zbigniew Kucharski, Maria Moreno, Irena Perzynaska, Marian Retelski, Dariusz Wszolkowski, Boguslaw Zalewski.*

PAUL J. NAPOLI (Michael Cohan, *on the brief*), Worby Groner Edelman & Napoli Bern, LLP, New York, New York, *for Plaintiffs-Appellants Santiago Alvear, Peter Curley, Mary Ann Curley.*

ANDREW W. AMEND, Senior Assistant Solicitor General (Barbara D. Underwood, Steven C. Wu, Eric Del Pozo, *on the brief*), *for* Eric T. Schneiderman, Attorney General for the State of New York, New York, New York, *for Intervenor-Appellant State of New York.*

JOHN M. FLANNERY (Eliza M. Scheibel, *on the brief*), Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains, New York, *for Defendant-Appellee Battery Park City Authority.*

1 DRONEY, *Circuit Judge*:

2 This appeal requires us to determine whether Battery Park  
3 City Authority (“BPCA”), a public benefit corporation, has the  
4 capacity to challenge a New York State claim-revival statute as  
5 unconstitutional under the New York State Constitution, and  
6 whether that challenge succeeds on the merits. As we explain below,  
7 we believe we cannot resolve those questions without first certifying  
8 two predicate questions to the New York Court of Appeals:

9 (1) Before New York State’s capacity-to-sue doctrine  
10 may be applied to determine whether a State-  
11 created public benefit corporation has the capacity  
12 to challenge a State statute, must it first be  
13 determined whether the public benefit corporation  
14 “should be treated like the State,” *see Clark-*  
15 *Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d  
16 190, 192 (N.Y. 1987), based on a “particularized  
17 inquiry into the nature of the instrumentality and  
18 the statute claimed to be applicable to it,” *see John*  
19 *Grace & Co. v. State Univ. Constr. Fund*, 375 N.E.2d  
20 377, 379 (N.Y. 1978), and if so, what considerations  
21 are relevant to that inquiry?; and

22 (2) Does the “serious injustice” standard articulated in  
23 *Gallewski v. H. Hentz & Co.*, 93 N.E.2d 620 (N.Y.



1           To accomplish this goal, BPCA was created as a public benefit  
2 corporation,<sup>1</sup> *id.* § 1973, and authorized to, *inter alia*, “sue and be  
3 sued,” “acquire, lease, hold, mortgage and dispose of real property,”  
4 “fix, establish and collect rates, rentals, fees and other charges,” and  
5 “borrow money and issue negotiable bonds, notes or other  
6 obligations,” *id.* § 1974. BPCA maintains its own general fund, *see id.*  
7 § 1975, and is solely responsible for the repayment of its bond  
8 obligations, *see id.* § 1979. It has seven members, each appointed by  
9 the Governor with the advice and consent of the New York Senate.  
10 *Id.* § 1973(1).

11           BPCA has successfully developed the 92-acre site—known as  
12 Battery Park City—into a community that houses over 10 million  
13 square feet of commercial space, 13,500 residents, 4 public schools,  
14 and 36 acres of parks. *See Who We Are, BATTERY PARK CITY*

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<sup>1</sup> New York law defines a “public benefit corporation” as a “corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof.” N.Y. Gen. Constr. Law § 66(4).

1 AUTHORITY, <http://bpca.ny.gov/about/who-we-are/> (last visited Jan.  
2 13, 2017).

## 3 II. Plaintiffs' Claims Against BPCA

4 This consolidated appeal involves claims for personal injuries  
5 sustained by eighteen workers who participated in the large-scale  
6 cleanup operations across Lower Manhattan following the terrorist  
7 attacks of September 11, 2001. In the years that followed, these  
8 Plaintiffs developed a host of serious respiratory illnesses. Plaintiffs  
9 believe their illnesses stemmed from the cleanup work they had  
10 performed at several BPCA-owned properties impacted by the 9/11  
11 attacks. Specifically, Plaintiffs believe they had been exposed to  
12 harmful toxins as a result of BPCA's failure to adequately ensure  
13 worker safety at those sites. Consequently, between 2006 and 2009,  
14 Plaintiffs filed personal injury suits against BPCA in the United  
15 States District Court for the Southern District of New York, asserting

1 claims under New York labor law and common-law negligence.<sup>2</sup>  
2 Plaintiffs' suits, along with hundreds of others, were assigned to  
3 Judge Hellerstein and consolidated for pretrial purposes.

4 In July 2009, the district court dismissed a substantial number  
5 of these cases, including Plaintiffs', for failure to serve a timely  
6 notice of claim upon certain public defendants as required by New  
7 York law.<sup>3</sup> Specifically, the district court dismissed more than 600  
8 suits against BPCA, and another 124 suits against other public and  
9 municipal entities.

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<sup>2</sup> Plaintiffs filed suit in the Southern District of New York pursuant to the Air Transportation Safety and System Stabilization Act, which vested that court with "exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001." Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230 (codified at 49 U.S.C. § 40101 note). Unless inconsistent with or preempted by federal law, New York law governs Plaintiffs' claims. *See id.* § 408(b)(2).

<sup>3</sup> Under New York law, a plaintiff filing a personal injury claim against a public defendant must: (1) serve a notice of claim within ninety days of the claim's accrual, N.Y. Gen. Mun. Law § 50-e(1)(a); and (2) file suit within three years of the claim's accrual, N.Y. C.P.L.R. 214(5). A claim based on a latent injury from exposure to a harmful substance accrues "on the date of discovery of the injury by the plaintiff or on the date when through the exercise of reasonable diligence the injury should have been discovered, whichever is earlier." N.Y. C.P.L.R. 214-c(3).

1           **III. Jimmy Nolan’s Law**

2           In the wake of these dismissals, the New York Legislature  
3           enacted General Municipal Law § 50-i(4), known as “Jimmy Nolan’s  
4           Law,” which revived for one year all time-barred claims against  
5           public corporations for personal injuries sustained by workers who  
6           participated in post-9/11 rescue, recovery, or cleanup efforts. *See*  
7           N.Y. Gen. Mun. Law § 50-i(4)(a). The Legislature explained that  
8           “thousands of World Trade Center workers ha[d] developed  
9           disabling respiratory illnesses and other injuries at rates that greatly  
10          exceed those of the general population,” and that those workers  
11          “should not be denied their rights to seek just compensation simply  
12          because they were provided incorrect information about their work  
13          conditions, did not immediately recognize the casual connection  
14          between their injuries and their exposure, or were unaware of the  
15          applicable time limitations.” N.Y. State Assembly Mem. Supp.  
16          Legislation, *reprinted in* Bill Jacket for 2009 A.B. 7122, Ch. 440, at 6

1 (July 17, 2009). Following the law’s enactment, many workers,  
2 including Plaintiffs, revived their claims against BPCA.

3 **IV. BPCA’s Challenge to Jimmy Nolan’s Law**

4 In August 2014, BPCA moved for summary judgment against  
5 eight workers who had filed suit against BPCA pursuant to Jimmy  
6 Nolan’s Law, challenging the law as unconstitutional. BPCA  
7 contended, first, that it had the capacity to raise such a challenge  
8 despite its status as a public benefit corporation, and, second, that  
9 the law violated its due process rights under the New York State  
10 Constitution. The Attorney General of the State of New York  
11 (hereinafter the “Attorney General”) intervened to defend the law.

12 The district court (Hellerstein, J.) agreed with BPCA, and  
13 granted summary judgment in BPCA’s favor. *In re World Trade Ctr.*  
14 *Lower Manhattan Disaster Site Litig.*, 66 F. Supp. 3d 466, 468 (S.D.N.Y.  
15 2014). In so ruling, the district court held that BPCA is an entity  
16 independent of New York State and therefore has the capacity to

1 challenge the constitutionality of State statutes. *Id.* at 473. On the  
2 merits, the court held that “Jimmy Nolan’s Law does not fall within  
3 the narrow exception for revival statutes” under New York law, and  
4 is “unconstitutional under the Due Process Clause of the New York  
5 State Constitution, as applied to BPCA.” *Id.* at 476.

6 On March 5, 2015, BPCA moved to extend the district court’s  
7 ruling to an additional 171 workers, including Plaintiffs. Finding no  
8 relevant factual differences between those workers and the eight  
9 whose claims were previously dismissed, the district court granted  
10 BPCA’s motion. *In re World Trade Ctr. Lower Manhattan Disaster Site*  
11 *Litig.*, No. 21 MC 102 (S.D.N.Y. Apr. 13, 2015), ECF No. 5796.  
12 Plaintiffs and the Attorney General now appeal.

## 13 DISCUSSION

### 14 I. Standard of Review

15 We review *de novo* a district court’s grant of summary  
16 judgment. *Matthews v. City of New York*, 779 F.3d 167, 171 (2d Cir.

1 2015). Summary judgment is proper only if “the movant shows that  
2 there is no genuine dispute as to any material fact and the movant is  
3 entitled to judgment as a matter of law.” *Id.* (quoting Fed. R. Civ. P.  
4 56(a)). We also review *de novo* a district court’s interpretation and  
5 application of state law. *Phansalkar v. Andersen Weinroth & Co.*, 344  
6 F.3d 184, 199 (2d Cir. 2003) (per curiam).

## 7 **II. BPCA’s Capacity to Challenge Jimmy Nolan’s Law**

### 8 **a. The Capacity-to-Sue Rule**

9 New York follows the traditional capacity-to-sue rule, which  
10 states that “municipalities and other local governmental corporate  
11 entities and their officers lack capacity to mount constitutional  
12 challenges to acts of the State and State legislation.” *City of New York*  
13 *v. State of New York*, 655 N.E.2d 649, 651 (N.Y. 1995). Such entities are  
14 “purely creatures or agents of the State,” and so “cannot have the  
15 right to contest the actions of their principal or creator affecting  
16 them in their governmental capacity.” *Id.* In other words, “political

1 power conferred by the Legislature confers no vested right as  
2 against the government itself." *Id.* (quoting *Black River Regulating*  
3 *Dist. v. Adirondack League Club*, 121 N.E.2d 428, 433 (N.Y. 1954)). This  
4 rule is also a "necessary outgrowth of separation of powers doctrine:  
5 it expresses the extreme reluctance of courts to intrude in the  
6 political relationships between the Legislature, the State and its  
7 governmental subdivisions." *Id.* at 654.

8       The New York Court of Appeals has recognized four  
9 exceptions to this general rule: (1) where a public corporation has  
10 express statutory authorization to bring suit; (2) where the  
11 legislation adversely affects a public corporation's proprietary  
12 interest in a specific fund of moneys; (3) where the statute impinges  
13 upon "Home Rule" powers of a public corporation constitutionally  
14 guaranteed under article IX of the New York State Constitution; and  
15 (4) where the public corporation asserts that, if it is obliged to

1 comply with the statute, that very compliance will force the  
2 corporation to violate a constitutional proscription. *See id.* at 652.

3 Resolution of the issue of whether BPCA may mount its  
4 constitutional challenge would thus seemingly involve the  
5 straightforward application of the capacity-to-sue rule and its four  
6 recognized exceptions. However, BPCA asserts that, before this rule  
7 may be applied, two criteria must first be met: (1) it must be  
8 determined that the public entity “should be treated like the State,”  
9 as determined by a “particularized inquiry into the nature of the  
10 instrumentality and the statute claimed to be applicable to it;” and  
11 (2) the statute must restrict the public benefit corporation’s  
12 governmental powers. We address each criterion in turn.

13 **b. The “Particularized Inquiry” Test**

14 In *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, the New  
15 York Court of Appeals recognized that public benefit corporations  
16 are not political subdivisions of the State “but rather enjoy, for some

1 purposes, an existence separate and apart from the State.” 516  
2 N.E.2d 190, 192 (N.Y. 1987). The Court explained that a  
3 “particularized inquiry” is therefore “necessary to determine  
4 whether—for the specific purpose at issue—the public benefit  
5 corporation should be treated like the State.” *Id.*

6 Consistent with this framework, the New York Court of  
7 Appeals has considered whether a public benefit corporation should  
8 be “treated like the State” for purposes of, *inter alia*, receiving  
9 immunity from punitive damages, *Id.* at 192–93, falling within the  
10 scope of a statute prohibiting the defrauding of the “state or any  
11 political subdivision thereof,” *People v. Miller*, 519 N.E.2d 297, 298–99  
12 (N.Y. 1987) (internal quotation marks omitted), and providing  
13 economic relief on public construction contracts, *John Grace & Co. v.*  
14 *State Univ. Constr. Fund*, 375 N.E.2d 377, 377–79 (N.Y. 1978).

15 It is unclear whether New York courts have applied the  
16 particularized-inquiry test in the present context—that is, to

1 determine whether a public benefit corporation should be treated  
2 like the State for the purpose of having the capacity to raise a  
3 constitutional challenge to a State statute. Nonetheless, BPCA urges  
4 us to apply the particularized-inquiry test here. Were we to do so,  
5 BPCA maintains, we would conclude that BPCA should not be  
6 treated like the State and is therefore not subject to the bar imposed  
7 by the capacity-to-sue rule.<sup>4</sup> Indeed, the district court concluded as  
8 much in its opinion below. *See In re World Trade Ctr. Lower Manhattan*  
9 *Disaster Site Litig.*, 66 F. Supp. 3d at 471–73.

10 In response, the Attorney General argues that, although public  
11 benefit corporations may not be identical to the State in every  
12 respect, they are indistinguishable from the State for the purpose of  
13 challenging a State statute. In other words, the Attorney General

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<sup>4</sup> We pause here to note one of the ironies of this case. On the one hand, BPCA insists that it should not be treated like the State, and therefore may freely challenge Jimmy Nolan’s Law as unconstitutional. On the other hand, BPCA has consistently invoked as a defense New York’s 90-day notice-of-claim rule—a protection available to BPCA by virtue of its status as a public corporation. *See* N.Y. Gen. Mun. Law § 50-e.

1 contends that the capacity-to-sue rule is absolute, and does not turn  
2 on a particularized inquiry into the particular functions or purposes  
3 of the public corporation in question. Rather, the “relevant and  
4 dispositive factor” is whether the entity “remain[s] subject to the  
5 Legislature’s ongoing control.” Intervenor’s Reply Br. at 4.

6       The Attorney General asserts that these principles are plainly  
7 illustrated by the New York Court of Appeals’ decision in *Black River*  
8 *Regulating District v. Adirondack League Club*. In that case, the Black  
9 River Regulating District proposed a plan to build a reservoir and  
10 dam on the Moose River to regulate river flow, and raised funds for  
11 the project by issuing certificates of indebtedness. *Black River*, 121  
12 N.E.2d at 430, 434. The Legislature later passed a statute effectively  
13 barring the project. *Id.* at 430. The District brought suit, challenging  
14 the statute as unconstitutional. *Id.* at 431. The Court of Appeals held  
15 that the District lacked the power to raise such a challenge. *Id.* at 434.

16

1           The Court explained:

2           A regulating district charged with authority to carry out  
3           the public purpose is an agency of the State depending  
4           for its existence and performing its functions subject to  
5           the control and direction of the State. The number and  
6           nature of its powers are within the State’s absolute  
7           discretion and any alteration, impairment or destruction  
8           of those powers by the Legislature presents no question  
9           of constitutionality.

10    *Id.* at 432–33. The Court further reasoned that the District had “no  
11    special character different from that of the State,” that its purpose  
12    was “a State purpose,” and that its “issuance of certificates of  
13    indebtedness [did] not confer upon [it] an independent status by  
14    which [it has] standing.” *Id.* at 434. Accordingly, the District’s suit  
15    was barred. *See id.*

16           Although the Attorney General argues that *Black River*  
17    precludes BPCA’s challenge, we believe that the decision’s  
18    significance is not so clear. As an initial matter, it is not evident  
19    whether, at the time of the Court’s decision, the District was a  
20    “public benefit corporation” under New York law. The District’s

1 enabling laws created “river regulating districts” as “public  
2 corporations,” and defined that term as including “counties, towns,  
3 cities, villages, corporations created under this article and all other  
4 governmental agencies clothed with the power of levying general  
5 taxes.” N.Y. Env’tl. Conserv. Law §§ 430(7), 431 (1915). The law in  
6 effect in 1954, meanwhile, defined “public corporations” as  
7 including municipal corporations, district corporations, and public  
8 benefit corporations, each of which were defined separately. L.1941,  
9 ch. 460, § 3(1) (1941). Thus, we cannot discern whether the District  
10 was, at the relevant point in time, a public benefit corporation—as  
11 opposed to a municipal or district corporation—a fact that  
12 potentially undermines *Black River’s* significance to the present  
13 appeal.<sup>5</sup>

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<sup>5</sup> Indeed, the current enabling statute for river regulating districts again employs the general term “public corporation,” and provides that, for purposes of federal law, such districts are deemed to be municipal corporations. *See* N.Y. Env’tl. Conserv. Law §§ 15-2103(1), 15-2103(1-a). *But see Hudson River-Black River Regulating District*, NEW YORK STATE, <http://www.hrbrd.com> (last visited Jan. 13, 2017) (District, in its current incarnation, describing itself as a public benefit corporation); *N. Elec. Power Co. v. Hudson River-Black River Regulating Dist.*, 997

1           Even assuming the District was a public benefit corporation at  
2 the time of the Court’s decision, it is not clear to us that *Black River*  
3 altogether forecloses application of the particularized-inquiry test.  
4 As described above, the Court observed that the District had “no  
5 special character” apart from that of the State, that its sole purpose  
6 was a “State purpose,” and that its financial authority conferred no  
7 independent standing. *Black River*, 121 N.E.2d at 434. This language  
8 is not inconsistent with the particularized-inquiry test.

9           Our reading of *Black River* is further complicated by a later  
10 decision by the New York Court of Appeals in *Patterson v. Carey*. In  
11 that case, the Jones Beach State Parkway Authority, a public benefit  
12 corporation, financed a new parkway through the sale of bonds, and  
13 charged tolls on the parkway to discharge its bond obligations.  
14 *Patterson*, 363 N.E.2d 1146, 1149–50 (N.Y. 1977). Years later, the  
15 Parkway Authority announced a toll increase. *Id.* at 1150. The New

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N.Y.S.2d 793, 794 (N.Y. App. Div. 2014) (characterizing District, in its current incarnation, as a public benefit corporation).

1 York Legislature quickly enacted a statute suspending the increase.  
2 *Id.* at 1150–51. The Parkway Authority and the institutional trustee  
3 for the Authority’s bondholders filed suit against the State to declare  
4 the law unconstitutional. *Id.* at 1151. After concluding that the  
5 Parkway Authority and trustee had “sufficient standing” to bring  
6 suit, *id.* at 1151 n.\*, the Court of Appeals found the statute  
7 unconstitutional, *id.* at 1151.

8 BPCA interprets *Patterson* as holding that a “public benefit  
9 corporation has standing to bring a constitutional challenge to a  
10 state statute.” Appellee’s Br. at 17. It is not clear, though, that  
11 *Patterson* should be interpreted in this way for several reasons. First,  
12 the Court of Appeals’ discussion on standing is relegated to a  
13 footnote; the main text of the opinion concerns the merits of the  
14 plaintiffs’ constitutional challenge and makes no mention of  
15 standing principles or the capacity-to-sue rule.<sup>6</sup>

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<sup>6</sup> Indeed, the Court of Appeals has drawn a distinction elsewhere between “standing” and “capacity to sue,” stating that “[t]he issue of lack of capacity to

1           Second, both the Parkway Authority and the institutional  
2 trustee for the bondholders served as plaintiffs. Accordingly, the  
3 Court had no need to consider whether the Parkway Authority, on  
4 its own, would have had the legal capacity to raise its challenge  
5 against the State. Indeed, in concluding that the plaintiffs had  
6 standing, the Court cited *Jeter v. Ellenville Central School District*, 360  
7 N.E.2d 1086 (N.Y. 1977), apparently for the premise that, although a  
8 public entity might have “procedural standing” to participate in a  
9 suit challenging State legislation, it nevertheless lacks the  
10 substantive right to raise its own constitutional challenges. *See Jeter*,  
11 360 N.E.2d at 1088. This view is supported by the Court’s merits  
12 discussion, which focuses on the constitutional rights of the  
13 bondholders, not the Park Authority. *See Patterson*, 363 N.E.2d at

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sue does not go to the jurisdiction of the court, as is the case when the plaintiffs lack standing.” *City of New York*, 655 N.E.2d at 652. Thus, it is possible to read *Patterson* as ruling not on capacity to sue, the lack of which “is a ground for dismissal which must be raised by motion and is otherwise waived,” *id.*, but rather on jurisdictional standing, thus making the case of little relevance to the present appeal.

1 1152 (holding that “the statute is arbitrary and deprives *bondholders*  
2 of a contractual right without due process of law” (emphasis  
3 added)).

4 Finally, although the Court’s merits discussion reiterates the  
5 principle that a “public authority enjoys an existence separate and  
6 apart from the State, even though it exercises a governmental  
7 function,” *id.* at 1154 (internal quotation marks omitted), that  
8 language speaks to whether the Legislature impermissibly infringed  
9 the State Comptroller’s exercise of his discretionary power, and is  
10 separate from the Court’s due process analysis, *see id.* Based on these  
11 considerations, we are disinclined to read *Patterson* as BPCA does.  
12 Nonetheless, *Patterson* adds additional uncertainty to an already  
13 unsettled area of state law.

14 In light of the foregoing, we believe there is an absence of  
15 definitive guidance on the question of whether the particularized-  
16 inquiry test applies in the present context. To our knowledge, no

1 New York court has squarely addressed this question and, as  
2 discussed above, other relevant State-law decisions are inconclusive.  
3 As a result, we are unable to predict with confidence how the New  
4 York Court of Appeals would resolve this issue—a factor weighing  
5 in favor of certification. *See Griffin v. Sirva Inc.*, 835 F.3d 283, 293–94  
6 (2d Cir. 2016).

7       Moreover, it is less than clear to us from the caselaw how the  
8 particularized inquiry, if required, is to be conducted. We  
9 understand that such an inquiry focuses on “the nature of the  
10 instrumentality” in conjunction with “the statute claimed to be  
11 applicable to it.” *John Grace*, 375 N.E.2d at 379. However, given the  
12 diversity of the types of public benefit corporations and of the issues  
13 at stake in the various cases in which such inquiries have been  
14 conducted, we find it difficult to discern not only whether New York  
15 law requires us to conduct a particularized inquiry, but also what  
16 such an inquiry would involve in the particular case before us.

1                   **c. Restriction on Governmental Powers**

2           BPCA also asserts that, for the capacity-to-sue rule to apply,  
3 the statute at issue must restrict the public entity’s governmental  
4 powers. Here, BPCA contends, Jimmy Nolan’s Law imposes no  
5 restrictions on BPCA’s delegated powers and functions; rather, the  
6 law merely addresses procedural prerequisites to litigation against  
7 all public corporations. Accordingly, BPCA contends it is free to  
8 challenge the law’s constitutionality.

9           This argument is squarely foreclosed by the New York Court  
10 of Appeals’ decision in *City of New York v. State of New York*:

11           [T]he municipal plaintiffs argue that the lack of capacity  
12 to sue doctrine only applies to . . . statutory restrictions  
13 on a municipality’s power . . . . This contention ignores  
14 our precedents in which lack of capacity to sue has  
15 applied to block challenges to a far wider variety of  
16 State actions having differing adverse impacts on local  
17 governmental bodies and their constituents.

18           655 N.E.2d at 653. We therefore reject BPCA’s argument as meritless.

1           **III. The Constitutionality of Jimmy Nolan’s Law**

2           On the merits, BPCA argues that Jimmy Nolan’s Law violates  
3 its due process rights under the New York State Constitution.<sup>7</sup> The  
4 Attorney General asserts that the statute is constitutional. Before we  
5 can resolve this issue, we must first determine which legal standard  
6 applies when evaluating the constitutionality of a revival statute.

7           In *Robinson v. Robins Dry Dock & Repair Co.*, the New York  
8 Court of Appeals examined the constitutionality of a statute that  
9 revived for one year certain injured workers’ claims. *See* 144 N.E.  
10 579, 580 (N.Y. 1924). The Court began by recognizing that the  
11 situation was “accidentally produced”—the workers faced a  
12 limitations bar because they had originally pursued claims under an  
13 alternative statutory scheme, which was later overturned by the U.S.  
14 Supreme Court. *See id.* at 580, 582. Observing that disallowance of

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<sup>7</sup> The revival of time-barred claims does not implicate federal due process protections. *See, e.g., Stogner v. California*, 539 U.S. 607, 651, 653 (2003); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Presumably for that reason, BPCA raises no federal constitutional claim, and argues only that Jimmy Nolan’s law conflicts with the New York State Constitution.

1 the workers' claims would thus "deprive a plaintiff without fault of  
2 a cause of action based on defendants' wrong," and noting that the  
3 revival statute imposed "no arbitrary deprivation" of the  
4 defendants' rights, the Court concluded that the statute was a  
5 "reasonable" exercise of the Legislature's power and declared the  
6 statute constitutional. *Id.* at 582.

7 In *Gallewski v. H. Hentz & Co.*, the Court of Appeals considered  
8 the constitutionality of a revival statute that provided redress to  
9 persons unable to file claims by virtue of being residents of Nazi-  
10 occupied territories during World War II. *See Gallewski*, 93 N.E.2d  
11 620, 622 (N.Y. 1950). The Court of Appeals cited *Robinson*, and  
12 interpreted it as "holding that the Legislature may constitutionally  
13 revive a personal cause of action where the circumstances are  
14 exceptional and are such as to satisfy the court that serious injustice  
15 would result to plaintiffs not guilty of any fault if the intention of the  
16 Legislature were not effectuated." *Id.* at 624. Applying that test, the

1 Court held that the statute at issue was “entirely proper.” *Id.* As the  
2 Court explained, World War II caused an “upheaval of unparalleled  
3 magnitude” and a “thorough disruption of communication,” utterly  
4 preventing residents of occupied territories from filing claims in U.S.  
5 courts. *Id.* at 624–25. Allowing limitations periods to run during such  
6 a time, the Court concluded, “would not accord with elementary  
7 notions of justice and fairness.” *Id.* at 625.

8 Finally, in *Hymowitz v. Eli Lilly & Co.*, the Court of Appeals  
9 addressed the constitutionality of a statute that revived for one year  
10 all actions for injuries caused by the drug diethylstilbestrol (“DES”).  
11 See *Hymowitz*, 539 N.E.2d 1069, 1072 (N.Y. 1989). Due to the latent  
12 nature of DES injuries, many such suits were barred by the  
13 applicable statute of limitations, which accrued upon exposure to  
14 the toxic substance rather than discovery of the injury. See *id.* at  
15 1072–73. The Court began by reciting the “stringent,” “serious  
16 injustice” standard articulated in *Gallewski*. *Id.* at 1079. The Court

1 next observed that a “less strict test” had been applied in other cases,  
2 and cited the “reasonable[ness]” standard articulated in *Robinson. Id.*  
3 Though faced with these two differing standards, the Court  
4 concluded that the revival statute in question met “the highest  
5 standard” and so found no need to “light upon a precise test.” *Id.*<sup>8</sup>

6 Both BPCA and the Attorney General acknowledge these  
7 complexities. Nonetheless, the Attorney General asserts that, based  
8 on existing decisions, the “New York courts, if made to choose,  
9 would evaluate Jimmy Nolan’s Law under a reasonableness  
10 standard.” Intervenor’s Br. at 43. BPCA, meanwhile, insists that New

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<sup>8</sup> To further complicate our analysis, the Legislature has since enacted a new “discovery” rule to account for “the latent effects of exposure to any substance.” See L.1986, ch. 682, § 2. The rule provides:

[A] claim or action for personal injury . . . caused by the latent effects of exposure to any substance or combination of substances . . . shall be deemed to have accrued on the date of discovery of the injury by the plaintiff or on the date when through the exercise of reasonable diligence the injury should have been discovered, whichever is earlier.

N.Y. C.P.L.R. 214-c(3). To our knowledge, New York courts have yet to address how this rule might affect the analysis of a claim-revival statute under either *Robinson* or *Gallewski*.

1 York courts have consistently applied the “serious injustice” test.  
2 Appellee’s Br. at 41. Indeed, the district court below appears to have  
3 adopted this more stringent test. *See In re World Trade Ctr. Lower*  
4 *Manhattan Disaster Site Litig.*, 66 F. Supp. 3d at 473 (describing  
5 revival statutes as applicable “only in limited circumstances,” where  
6 “serious injustice” might otherwise result).

7 Faced with two differing legal standards, we are unable to  
8 determine which standard the New York Court of Appeals would  
9 apply. *See Griffin*, 835 F.3d at 293–94. The question is further  
10 complicated by the fact that neither party has cited to us, nor have  
11 we found, any case in which any New York state court has struck  
12 down any statute reviving expired claims. In the absence of any  
13 caselaw applying any of the differing verbal formulations to find  
14 such a statute unconstitutional, it is difficult to perceive whether the  
15 various tests differ in their concrete application, or under what  
16 circumstances New York would find a revival statute

1 unconstitutional under any of the proposed tests. We therefore turn  
2 next to the issue of whether certification on this question, as well as  
3 the preceding question, is appropriate.

#### 4 **IV. Certification to the New York Court of Appeals**

5 Pursuant to Second Circuit Local Rule 27.2, we may certify to  
6 the New York Court of Appeals “determinative questions of New  
7 York law that are involved in a case pending before us for which no  
8 controlling precedent of the Court of Appeals exists.” *Osterweil v.*  
9 *Bartlett*, 706 F.3d 139, 142 (2d Cir. 2013) (internal quotation marks  
10 and alterations omitted); *see also State Farm Mut. Auto. Ins. Co. v.*  
11 *Mallela*, 372 F.3d 500, 505 (2d Cir. 2004) (deeming certification  
12 appropriate “where state law is not clear and state courts have had  
13 little opportunity to interpret it,” “where an unsettled question of  
14 state law raises important issues of public policy,” and “where the  
15 question is likely to recur”).

1           Here, BPCA and the Attorney General contend that New York  
2 law is sufficiently settled for us to resolve both legal questions.  
3 Nonetheless, the parties agree that, should this Court determine  
4 otherwise, certification is the appropriate course. For the reasons  
5 described below, we believe that the legal questions presented by  
6 this case would more appropriately be answered by the New York  
7 Court of Appeals.

8           Before certifying questions to the Court of Appeals, we must  
9 first answer three others: (1) “whether the New York Court of  
10 Appeals has addressed the issue and, if not, whether the decisions of  
11 other New York courts permit us to predict how the Court of  
12 Appeals would resolve it”; (2) “whether the question is of  
13 importance to the state and may require value judgments and public  
14 policy choices”; and (3) “whether the certified question is  
15 determinative of a claim before us.” *Griffin*, 835 F.3d at 293–94  
16 (internal quotation marks omitted).

1           In our view, all three factors weigh in favor of certification.

2   First, as described in detail in Parts II and III, *supra*, we believe there  
3   is an absence of authoritative guidance concerning both legal  
4   questions.

5           Second, these questions are plainly of great importance to the  
6   State. Whether a public benefit corporation such as BPCA is  
7   sufficiently independent from the State and may therefore raise a  
8   constitutional challenge to State legislation involves competing  
9   policy concerns better addressed by the New York Court of Appeals.  
10   *See Schoenefeld v. New York*, 748 F.3d 464, 470 (2d Cir. 2014) (asserting  
11   that such policy concerns “should not be ceded to a federal court of  
12   appeals when it is unnecessary to do so in the first instance”); *see also*  
13   *City of New York*, 655 N.E.2d at 654 (observing “extreme reluctance of  
14   courts to intrude in the political relationships between the  
15   Legislature, the State[,] and its governmental subdivisions”).  
16   Whether the constitutionality of a revival statute should be judged

1 under the “serious injustice standard” or more lenient  
2 “reasonableness” standard likewise requires a series of “value  
3 judgments and public policy choices.” *See Griffin*, 835 F.3d at 294.

4 Finally, these questions are determinative of the present  
5 litigation. If the particularized-inquiry test applies, and if BPCA is  
6 judged to be sufficiently independent from the State, then the  
7 traditional capacity-to-sue rule will not attach and BPCA will be free  
8 to raise its constitutional challenge. However, if the particularized-  
9 inquiry test does not apply, or if it applies but BPCA is deemed to be  
10 indistinguishable from the State for the purpose of challenging a  
11 State statute, then BPCA will be subject to the traditional capacity-  
12 to-sue rule and—unless it can prove that it falls within one of the  
13 rule’s four limited exceptions—BPCA’s constitutional challenge will  
14 be dismissed. As to the merits of BPCA’s due process challenge, the  
15 legal standard by which that challenge is to be judged will in all

1 likelihood dictate the outcome of our analysis of the constitutionality  
2 of Jimmy Nolan’s Law.

3 In light of these considerations, we certify the following  
4 questions to the New York Court of Appeals pursuant to Second  
5 Circuit Local Rule 27.2 and New York Court of Appeals Rule 500.27:

6 (1) Before New York State’s capacity-to-sue doctrine  
7 may be applied to determine whether a State-  
8 created public benefit corporation has the capacity  
9 to challenge a State statute, must it first be  
10 determined whether the public benefit corporation  
11 “should be treated like the State,” *see Clark-*  
12 *Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d  
13 190, 192 (N.Y. 1987), based on a “particularized  
14 inquiry into the nature of the instrumentality and  
15 the statute claimed to be applicable to it,” *see John*  
16 *Grace & Co. v. State Univ. Constr. Fund*, 375 N.E.2d  
17 377, 379 (N.Y. 1978), and if so, what considerations  
18 are relevant to that inquiry?; and

19 (2) Does the “serious injustice” standard articulated in  
20 *Gallewski v. H. Hentz & Co.*, 93 N.E.2d 620 (N.Y.  
21 1950), or the less stringent “reasonableness”  
22 standard articulated in *Robinson v. Robins Dry Dock*  
23 *& Repair Co.*, 144 N.E. 579 (N.Y. 1924), govern the  
24 merits of a due process challenge under the New  
25 York State Constitution to a claim-revival statute?



1 filed in this Court. The parties shall bear equally any fees and costs  
2 that may be imposed by the New York Court of Appeals in  
3 connection with this certification.