CTQ-2025-00001
On Questions Certified by the United States Court of Appeals
for the Second Circuit (USCOA Docket No. 23-7247)

Court of Appeals

of the

State of New York

ARTICLE 13, LLC,

Plaintiff-Respondent,

– and –

OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL,

Intervenor,

– against –

PONCE DE LEON FEDERAL BANK, ALLIANCE MORTGAGE BANKING CORP. and VAN BUREN GROUP, INC.,

Defendants,

– and –

LASALLE NATIONAL BANK ASSOCIATION,

Defendant-Appellant.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

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Date Completed: August 26, 2025

CP COUNSEL PRESS (800) 4-APPEAL • (384347)

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NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Brian S. McGrath, and upon a copy of the proposed Brief for *Amicus Curiae* attached as an exhibit thereto, the undersigned will move this Court on September 8, 2025, at 10:00 A.M., or as soon thereafter as counsel may be heard, at the Court of Appeals Hall, Albany, New York for an order pursuant to N.Y.C.R.R. § 500.23(a): (1) granting the New York Bankers Association ("NYBA"), the New York Mortgage Bankers Association ("NYMBA"), the American Bankers Association ("ABA"), and the Mortgage Bankers Association ("MBA") leave to appear as *amicus curiae*

in the above-captioned appeal; (2) accepting the brief attached hereto as Exhibit A; and (3) granting such other and further relief as the Court may deem just and proper. Further, should this Court accept the proposed brief, *Amici* would request opportunity for appearance at oral arguments before the Court should oral arguments be scheduled in due course.

Dated: New York, New York
August 26, 2025

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AFFIRMATION IN SUPPORT

Brian S. McGrath, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury:

1. I am a partner at Hinshaw & Culbertson LLP, counsel for *Amici*. I am familiar with the legal issues involved in the above-captioned appeal. I submit this affirmation in support of the Motion of the New York Bankers Association ("NYBA"), New York Mortgage Bankers Association ("NYMBA"), American Bankers Association ("ABA"), and Mortgage Bankers Association ("MBA") to submit the attached Brief as *Amicus Curiae* in support of the appeal by Defendant-

Appellant, U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2007-2AX, Mortgage Pass- Through Certificates, Series 2007-2AX ("Appellant" or "U.S. Bank"), sued herein as LaSalle National Bank Association.

2. Pursuant to Court of Appeals rule 500.0(f), NYBA, NYMBA, ABA, and MBA, each states that it is not a subsidiary of any other corporation. *Amici* are nonprofit trade groups and have no shares or securities that are publicly traded.

3. NYBA is a not-for-profit association of more than 100 community, regional, and money center commercial banks and savings associations located throughout New York. NYBA's mission is to improve and promote a unified banking industry through educational programs, public relations, political action, and other services. NYBA's members have aggregate deposits of more than $2 trillion, annually lend more than $70 billion in home and small business loans, and employ nearly 200,000 people in New York.

4. NYMBA is a not-for-profit association comprising both bank and non-bank mortgage lenders and servicers, as well as a wide variety of mortgage industry-related firms. NYMBA is dedicated to the maintenance of a strong real estate finance system throughout New York and provides advocacy and education to the mortgage banking industry.

5. ABA is the principal national trade association of the financial services industry in the United States. Founded in 1875, ABA is the voice for the nation's $23.7 trillion banking industry and its 2.1 million employees. ABA members—located in each of the fifty states and the District of Columbia—include financial institutions of all sizes and types.

6. MBA is the national association representing the real estate finance industry, which employs more than 400,000 people in virtually every community in the country. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and publications. Its membership of more than 2,200 companies includes all elements of real estate finance.

7. The proposed brief explains why the Foreclosure Abuse Prevention Act ("FAPA") should not be applied retroactively to cases commenced before its enactment, and why such application runs afoul of constitutional protections under the New York State Constitution.

8. The issues before the Court have profound importance for the mortgage lending industry and consumers. The proposed brief presents arguments relating to state of the law, as it existed before FAPA's enactment, and the effects on the mortgage and industry after its enactment. For that reason, the proposed brief will be of assistance to the Court

9. No party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner.

10. No party or party's counsel contributed money that was intended to fund preparation or submission of the brief, and no person or entity, other than movant or movant's counsel, contributed money that was intended to fund preparation or submission of the brief.

11. The proposed brief is attached hereto as Exhibit A

WHEREFORE, I respectfully request that this Court enter an Order: (i) granting this Motion for Leave to file the proposed brief attached hereto as Exhibit A as *Amicus Curiae*; (ii) accepting the brief that has been filed and served along with the motion; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 26, 2025

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EXHIBIT A

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BRIEF FOR *AMICI CURIAE* NEW YORK BANKERS ASSOCIATION, NEW YORK MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION AND MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT

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DISCLOSURE STATEMENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The New York Bankers Association ("NYBA") is a not-for-profit association of more than 100 community, regional, and money center commercial banks and savings associations located throughout New York. NYBA's mission is to improve and promote a unified banking industry through educational programs, public relations, political action, and other services. NYBA's members have aggregate deposits of more than $2 trillion, annually lend more than $70 billion in home and small business loans, and employ nearly 200,000 people in New York.

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people in virtually every community in the country. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and publications. Its membership of more than 2,200 companies includes all elements of real estate finance.

Amici regularly file briefs in important cases that affect the mortgage banking industry and are important to their members.[1]* *Amici* file this brief due to the significant destabilizing effects of the Foreclosure Abuse Prevention Act ("FAPA") on the mortgage industry throughout New York, and to address the consequences of applying FAPA retroactively. In particular, *Amici* believe that the retroactive application of FAPA would severely harm their members, disrupt the lending industry statewide, and violate the New York State Constitution (as well as the United State Constitution).

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[1]* *See, e.g.*, *East Fork Funding LLC* v. *U.S. Bank, N.A.*, CA2 No. 23-659 (filed Aug. 8, 2023), Dkt. 51-3; *U.S. Bank, N.A.* v. *Simon*, 2d Dep't No. 2020-9391 (filed Apr. 10, 2023), Dkt. 20; *Flagstar Bank, FSB* v. *Kivett*, U.S. No. 22-349 (filed Nov. 23, 2022); *Bank of Am., N.A.* v. *Kessler*, N.Y. No. 2022-00061 (filed Nov. 11, 2022); *Hymes* v. *Bank of Am., N.A.*, CA2 No. 21-403 (filed June 11, 2021), Dkt. 47; *Bank of N.Y. Mellon* v. *Dieudonne*, N.Y. No. 2019-1059 (filed Nov. 22, 2019); *Siegel* v. *HSBC N. Am. Holdings Inc.*, CA2 No. 18-2540 (filed Nov. 30, 2018), Dkt. 43-2; *United States ex rel. O'Donnell* v. *Countrywide Bank, FSB*, CA2 No. 15-496 (filed Apr. 29, 2015), Dkt. 104.

INTRODUCTION

Enacted by the State of New York on December 30, 2022, the Foreclosure Abuse Prevention Act ("FAPA") constitutes a dramatic and harmful sea change for the New York mortgage market. FAPA reverses prior law and states that, whenever a lender files a complaint for accelerated mortgage payments owed by a defaulting borrower, the statute of limitations on the lender's claims for those payments begins to run and cannot be stopped by the voluntary discontinuance of the action. It also re-wrote the circumstances of when a new action could be filed following the non-final disposition of a timely filed action and how to determine whether a prior acceleration was valid. As a result, FAPA incentivizes lenders to aggressively pursue foreclosure actions to the end, rather than working out mutually beneficial agreements with borrowers.

FAPA also penalizes mortgagees for their good faith efforts to remedy technical or procedural defects, many of which—as this case demonstrates—are outside the mortgagee's control. FAPA's punitive scheme extends to situations where, as applicable here, a complete stranger to the note and mortgage, without the authority to sue to enforce the instruments, may effectuate an acceleration of the underlying debt and the holder of the note and mortgage is thereafter precluded from arguing that the statute of limitations has not run. FAPA effectively permits the exercise of a contractual right by a non-party and bars the contracting party from

presenting evidence to the court that it did not avail itself of the benefits of its contract.

Worse, some courts have applied FAPA *retroactively* to existing mortgages (and even to foreclosure proceedings begun prior to FAPA's enactment), thus time-barring lenders' claims for default on existing mortgages even if, absent FAPA, those claims would have been timely. While Amici recognizes these decisions (*see, e.g.*, *97 Lyman Ave. LLC v. MTGLQ Investors, L.P.*, 233 AD3d [2d Dep't 2024]), this retroactive application could wipe out the value of a vast number of defaulted mortgages. These financial losses limit the amount of financing available, hinder lenders' ability to use the proceeds generated from liquidation of those mortgages to extend new mortgages, and ultimately discourage lenders from lending in a jurisdiction where the legislature can enact new, retroactive rules that erase the bargained-for value of existing contracts.

Amici submit this brief to help this Court better understand the longstanding history of New York's mortgage laws and the economic and constitutional implications of applying FAPA retroactively.

First, FAPA creates an entirely new and ill-advised legal regime governing mortgages in New York. Mortgage contracts in New York have long contained provisions allowing lenders to "accelerate" all payments due by a defaulting borrower by bringing a single legal action to collect all payments at the same time.

Without acceleration, the defaulting borrower's payments would be due only periodically over many years, or even decades, forcing lenders to bring new actions for each missed installment and seriously impairing their ability to recover and reinvest the loaned funds.

As recognized by this Court in the *Engle* decision, for "[m]ore than a century" the law in New York was that a discontinuance of an action deaccelerated the loan returning it to an installment contract absent evidence that "the borrower changed his position in reliance on that election." *Freedom Mortg. Corp*. v. *Engel*, 37 N.Y.3d 1, 28 (2021) (emphasis in original). Consistent with this law, lenders in New York relied on their right to reset the statute of limitations on their claims for accelerated payments by voluntarily discontinuing foreclosure actions—a right that was also implicitly incorporated into their mortgage contracts. In its decision the *Engle* Court, recognized and rejected the aberrational decisions from New York's intermediate courts which had deviated from the law beginning in 2018. Indeed, "ten of the thirteen New York trial courts" that had considered the issue prior to 2019 had upheld the longstanding law that a voluntary discontinuance deaccelerated the loan and returned it to an installment contract. *See U.S. Bank Tr., N.A.* v. *Adhami*, 2019 WL 486086, at *5 (E.D.N.Y. Feb. 6, 2019).

Also fundamental to this dynamic process was the clear legal understanding that where there was never an effective acceleration (*i.e.*, the party purporting to

accelerate the debt did not have standing to foreclose), the statute of limitations never began to run. *See, e.g.*, *Mejias v Wells Fargo N.A.*, 186 AD3d 472, 474 (2d Dept 2020) ("[A]n acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so.").

Among other things, the right to exercise the contractual right to re-set the acceleration date (or establish that a loan had never been properly accelerated) allowed lenders to work with borrowers to make up for missed payments and keep borrowers in their homes. Lenders benefitted by avoiding foreclosure and continuing to receive loan payments. New York's courts and legislature nurtured this system, including by crafting a system of mandatory lender-borrower settlement conferences and promoting voluntary discontinuances to achieve informal resolution of foreclosure actions, to the benefit of both borrowers and lenders. The prior system—which achieved thousands of voluntary discontinuances—created substantial reliance interests for the lenders as they deemed foreclosure only a last resort. *See Engel*, 37 N.Y.3d at 36. Instead, lenders could focus on financing home ownership and efficiently servicing New York loans with the borrower protections created following the financial crisis.

Second, applying FAPA retroactively would severely damage the New York mortgage market. Doing so could not only immediately destroy the value of a vast

number of valid mortgage contracts, but may also cause lenders to lend less or even exit the market altogether. *Amici* expect that applying FAPA retroactively will result in fewer mortgages being originated in New York, with higher interest rates and stricter lending requirements, in recognition of the lending risks in a jurisdiction where the rules can be changed retroactively.

Third, when viewed through the historical lens and considering the destruction of the value of existing mortgages, applying FAPA retroactively violates several constitutional provisions of the New York Constitution. As this Court held in *Engel*, lenders for more than one hundred years had the contractual right to de-accelerate a mortgage by a voluntary discontinuance (unless otherwise provided for in the mortgage contract) and relied on that right. 37 N.Y.3d at 28-29.

Applying FAPA retroactively would destroy lenders' vested rights, as well as their rights to collect further payments after a voluntary discontinuance, in violation of New York State Due Process and Takings Clauses, as well as similar provisions of the Federal Constitution.

ARGUMENT

I. FAPA DISRUPTED LONGSTANDING HISTORICAL PRACTICES UNDER NEW YORK MORTGAGE LAWS.

A. Commencement of a Foreclosure Action by a Plaintiff Without Standing Does Not Accelerate the Mortgage Debt.

Foreclosure actions commenced by parties without standing are ineffective to constitute a valid acceleration of the mortgage debt. *See Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 (2d Dept 2012). FAPA restricts application of this bright-line rule by limiting it to circumstances where a prior foreclosure action is dismissed based on an "expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated." CPLR 213(4). By creating an estoppel against mortgages, FAPA leaves mortgagees without any recourse, despite suffering injury to their lien as a result of the unauthorized conduct of third-parties with no connection to the loan.

The requirement that lack of standing must be raised as a defense in the foreclosure action, and that there be a dismissal on that ground, before the invalid acceleration is available as a defense in a quiet title action deprives mortgagees of a bona fide defense. Often, as this case demonstrates, a mortgagee facing a lawsuit to discharge its mortgage is not the same entity as the plaintiff who attempted to accelerate the debt by commencing the prior foreclosure action. Additionally, in instances where the foreclosure action is uncontested, there is no party to raise the

defense and it is deemed waived. *See* CPLR 3211(e). Even more concerning, if a foreclosure action is commenced by an unauthorized party and stays dormant without any activity, the statute of limitations would run under FAPA, even before the owner of the loan has any notice that its loan has been accelerated. In instances where a foreclosing plaintiff determines after commencement that it did not have standing to commence, its good faith efforts to remedy this defect, particularly by discontinuing the action, would serve no purpose other than to punish the party with standing.

B. Lenders Have Had the Contractual Right to Revoke an Acceleration for More Than One Hundred Years.

For more than a century, lenders have been permitted under New York law to exercise their contractual rights to revoke an acceleration of a mortgage loan, including by voluntary discontinuance of a foreclosure action (or to establish that no acceleration had ever occurred). This historical practice makes sense given the unique contractual relationship between a mortgage lender and borrower. One distinguishing feature of that relationship is its "extraordinary length . . . frequently spanning decades." *Engel*, 37 N.Y.3d at 23 n.4. Another distinguishing feature is that the mortgage contract may provide the lender the right to accelerate the entire amount due upon a default, rather than be limited to recover for only the defaulted installment payments. *Id*. at 21. "As with other contractual options, the holder of an

option may be required to exercise an option to accelerate the maturity of a loan in accordance with the terms of the note and mortgage." *Burke*, 94 AD3d at 983.

Mortgage lenders and borrowers often use standardized forms, *Engel*, 37 N.Y.3d at 20, and here the parties used a version of Fannie Mae's and Freddie Mac's New York Uniform Instrument, which included the following acceleration clause:

> [I]f all conditions stated in subsections (a), (b), and (c) of this Section 22 are met, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument.

(D. Ct. Dkt. 41-9 at 16.) Courts have long recognized that an acceleration clause is "solely for the benefit of" the lender, *Duval* v. *Skouras*, 44 N.Y.S.2d 107, 111 (Sup. Ct. N.Y. Cnty. 1943); *Cohn* v. *Spitzer*, 129 N.Y.S. 104, 106 (4th Dep't 1911), and must be "enforced according to [its] terms," *George H. Nutman, Inc.* v. *Aetna Bus. Credit, Inc.*, 453 N.Y.S.2d 586, 587 (Sup. Ct. Queens Cnty. 1982). Nevertheless, lenders "can—and often do—anticipate and tolerate defaults relating to timely payment, permitting the borrower to correct such deficiencies without a significant disturbance in the contractual relationship." *Engel*, 37 N.Y.3d at 21.

One reason a lender will voluntarily discontinue a foreclosure action is to revoke a previous acceleration. *See, e.g.*, *Adhami*, 2019 WL 486086, at *4. This option is beneficial to both parties. At times, a voluntary discontinuance allows a lender to go through additional procedural steps required by State and federal regulations to bring a foreclosure action. But usually, a voluntary discontinuance

stems from the parties' agreement to modify the mortgage's payment terms, thus allowing borrowers to keep their homes and lenders to retain the existing mortgages without paying the costs related to foreclosure. *See, e.g.*, *U.S. Bank N.A.* v. *Speller*, 80 Misc.3d 1233(A), at *8-9 (Sup. Ct. Putnam Cnty. Oct. 31, 2023) (describing revocation after lender and borrower agreed to new repayment plan). And both parties can avoid further litigation.

New York State requires the parties to a mortgage foreclosure action to hold settlement conferences to seek to resolve their disputes before litigation proceeds. CPLR 3408. The New York State Office of Court Administration has praised this process for its effectiveness: "Of homeowners who participated in the settlement conferences, 32% obtained modifications of their home loans to an affordable level. These modifications have allowed thousands of families in communities across the state to continue to build equity in their own homes." Lawrence K. Marks, *2019 Report of the Chief Administrator of the Courts on the Status of Foreclosure Cases* at 5 (2019).[2]

In line with this overall system, for more than a century, New York courts have held that an acceleration becomes final and irrevocable—*i.e.*, cannot be undone by a voluntary discontinuance—"only after the borrower change[s] his position in

[2] https://ww2.nycourts.gov/sites/default/files/document/files/2019-12/ForeclosureAnnualReport2019.pdf

reliance on that election." *Engel*, 37 N.Y.3d at 28 (citing *Kilpatrick* v. *Germania Life Ins.*, 183 N.Y. 163, 168 (1905)); *see Golden* v. *Ramapo Imp. Corp.*, 432 N.Y.S.2d 238, 241 (2d Dep't 1980) ("[O]nly if a mortgagor can show substantial prejudice will a court in the exercise of its equity jurisdiction restrain the mortgagee from revoking its election to accelerate."). As with any other contractual option, a lender can revoke its election by any "affirmative act," unless otherwise specified by the contract. *EMC Mortg. Corp.* v. *Patella*, 720 N.Y.S.2d 161, 162-63 (2d Dep't 2001).[3]

Historically, lenders have revoked elections to accelerate mortgages by voluntarily discontinuing the foreclosure action resulting from the election. *See, e.g.*, *Adhami*, 2019 WL 486086, at *5; *Speller*, 80 Misc.3d 1233(A), at *13. Unless otherwise provided for in the note or mortgage, a lender has the right to "revoke its election to accelerate the mortgage," *Patella*, 720 N.Y.S.2d at 162; *Fed. Nat'l Mortg. Ass'n* v. *Mebane*, 618 N.Y.S.2d 88, 89 (2d Dep't Dep't 1994), including by "giv[ing] actual notice to the borrower of the lender's election to revoke," *U.S. Bank N.A.* v. *Crockett*, 61 N.Y.S.3d 193 (Sup. Ct. Kings Cnty. 2017).

Given that the commencement of a foreclosure action can serve as a lender's election to accelerate the mortgage, *Wilmington Sav. Fund Soc'y, FSB* v. *Ave. Basin Mgmt., Inc.*, 181 N.Y.S.3d 318, 319 (2d Dep't 2022), it is particularly appropriate

[3] This longstanding principle of New York law was reaffirmed by the Second Department. *Abadin v. HSBC Bank USA, N.A.*, 194 N.Y.S.3d 134, 135 (2d Dep't 2023).

for a lender to revoke its election by a voluntary discontinuance where the institution of the foreclosure action was the act that accelerated the mortgage, *Engel*, 37 N.Y.3d at 19. When an action is discontinued, "all the proceedings therein thus [are] annulled." *Loeb* v. *Willis*, 100 N.Y. 231, 235 (1885); *see Mahon* v. *Remington*, 9 N.Y.S.2d 47, 47 (4th Dep't 1939). So, where the filing of a foreclosure action was the act by which the lender accelerated the mortgage, a voluntary discontinuance wiped away the acceleration altogether.

If the borrower defaults again and the lender brings a subsequent foreclosure action, the borrower will have the burden of proof on a statute of limitations defense. *Connell* v. *Hayden*, 443 N.Y.S.2d 383, 391 (2d Dep't 1981); CPLR 3018(b). The borrower cannot point to the complaint in the prior foreclosure action as the acceleration because the complaint must be treated "as if it never had been." *Loeb*, 100 N.Y. at 231. The borrower thus will be unable to establish that the mortgage was accelerated or that the statute of limitations has elapsed. Accordingly, prior to FAPA, a lender who voluntarily discontinued a foreclosure action justifiably relied on precedent like *Loeb*, *Kilpatrick*, *Mebane*, *Patella*, and *Engel* to establish that the discontinuance de-accelerated the mortgage and reset the statute of limitations.

Further, a lender can voluntarily discontinue a foreclosure action unilaterally only in limited situations. Under CPLR 3217(a)(1), a lender may voluntarily discontinue a foreclosure action without a court order or consent from the borrower

only "before a responsive pleading is served"—ordinarily within twenty days of the complaint. *See* CPLR 3012(a). Thus, for a lender to discontinue a foreclosure action unilaterally, the action must be new or the defendant must have failed to appear.

C. Recent Pre-FAPA Court Decisions Did Not Change the Law Governing Voluntary Discontinuances.

FAPA is a departure from the law historically governing the re-setting of the statute of limitations in mortgage foreclosure matters, as recognized in *Engel*. New York courts have long held that a lender's voluntary discontinuance constitutes a revocation of a valid acceleration.[4] And for "more than a century," lenders could do so unilaterally. *Speller*, 80 Misc.3d 1233(A), at *11. Prior to 2019, "[t]en of the thirteen New York trial courts that considered the issue" found that "[w]ithdrawing the prior foreclosure action is an affirmative act of revocation that tolls the statute of limitations." *Adhami*, 2019 WL 486086, at *5 & n.7 (internal quotation marks and citation omitted). This Court also has recognized that, prior to FAPA, this was New York's longstanding law. *Engel*, 37 N.Y.3d at 29 ("Prior to 2017 . . . multiple trial courts had concluded that a noteholder's voluntary withdrawal of its foreclosure action was an affirmative act of revocation as a matter of law.").

[4] Again, the prior case law, affirmed by numerous appellate decisions, was clear that where a party without standing to foreclose initiated the foreclosure action, no valid acceleration has been effected and the statute of limitations had not run.

The Appellate Division, Second Department, first held only in *2017* that a voluntary discontinuance—standing alone—*may* be insufficient to establish that an election was revoked. *See NMNT Realty Corp.* v. *Knoxville 2012 Tr.*, 58 N.Y.S.3d 118, 120 (2d Dep't 2017) (holding a lender's motion to discontinue a prior foreclosure action "raised a triable issue of fact" regarding whether the previous acceleration had been revoked). About one year later, the Second Department took another step and held, for the first time, that a stipulation of voluntary discontinuance could not "in itself, constitute an affirmative act to revoke [an] election to accelerate," where "the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant." *See Freedom Mtge. Corp.* v. *Engel*, 163 A.D.3d 631, 633 (2d Dep't 2018).

This Court in *Engel* rejected the Second Department's newly developed approach as "both analytically unsound as a matter of contract law and unworkable from a practical standpoint." *Engel*, 37 N.Y.3d at 30. But this Court in *Engel* did not establish a new rule of law in doing so. Instead, when this Court in *Engel* overturned contrary lower court decisions, it "declare[d] what the law always was and that the holdings of the [other] decisions were wrong and never were the law." *See Sears, Roebuck & Co.* v. *9 Ave.-31 St. Corp.*, 286 N.Y.S. 522, 529 (Sup. Ct. N.Y. Cnty.).

FAPA thus did not overturn the New York Court of Appeals' well-reasoned historical analysis in *Engel*.

D. The Lengthy New York Foreclosure Process Adequately Protects Borrowers and Confirms That Retroactive Application Is Inappropriate.

As reported by the New York Department of Financial Services, the foreclosure process in New York already is one of the most burdensome in the country—"harm[ing] nearly all New Yorkers, including borrowers, and not just the banks and mortgage investors who are unable to obtain returns on their investments."[5]

The average New York foreclosure now takes 1,823 days—or five years—to complete, frustrating lenders' ability to recover for mortgage defaults and consuming almost the entire six-year statute of limitations.[6]

The process is laden with procedural hurdles and protections, including several enacted in the wake of the financial crisis. *E.g.*, CPLR 3012-b (requiring certificate of merit in foreclosure actions) and 3408 (requiring settlement conferences in residential foreclosure actions); RPAPL §§ 1303 (requiring notice to

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[5] Benjamin M. Lawsky, *Report on New York's Foreclosure Process*, N.Y.S. Dep't of Fin. Servs. at 3 (May 2015) https://www.dfs.ny.gov/system/files/documents/2020/03/fore_proc_report_052015.pdf

[6] Attom Team, *Increased Foreclosure Activity in First Six Months of 2022 Approaches Pre-Covid Levels*, ATTOM (July 14, 2022), https://www.attomdata.com/news/market-trends/foreclosures/attom-midyear-2022-u-s-foreclosure-market-report/

borrower), 1304 (same), and 1306 (requiring filing of notice to superintendent of financial services); 3 NYCRR 419.10 (prohibiting servicers from certain actions); and 12 C.F.R. § 1024.41 (describing loss mitigation procedures).

Further, federal regulations provide that a lender cannot institute a foreclosure action until a borrower is more than 120 days delinquent on payments (12 C.F.R. § 1024.41(f)(1)(i)) or if a borrower has submitted a complete loss mitigation package (*id*. § 1024.41(c)(3)(i)(D)(1); *see also* 3 NYCRR 419.10). RPAPL § 1304 also requires a lender to send a pre-foreclosure notice to a borrower at least ninety days before filing a foreclosure action. This ninety-day period substantially exceeds the default thirty days required under the Fannie Mae/Freddie Mac Uniform Instrument and ensures that borrowers receive ample time and notice to cure a default or negotiate a resolution with their lender.

Moreover, since 2013, lenders in New York must file a certificate of merit in residential foreclosure actions. CPLR 3012-b.[7] Under this rule, a lender's attorney must submit a signed certificate "certifying the attorney has reviewed the facts of the case" and "review[ed] the pertinent documents." *Id*. While this requirement may have provided benefits in some situations, it resulted in an unexpected delay in

[7] Prior to 2013, an administrative order required plaintiffs' counsel in foreclosure actions to file affirmations confirming the accuracy of the pleadings. *See* Administrative Order No. 548/10 (Oct. 20, 2010), *superseded by* Administrative Order No. 431/11 (Mar. 2, 2011)

pending foreclosure actions as lenders and servicers scrambled to enact policies to comply with the rule.

CPLR 3408 requires lenders in a residential foreclosure action to participate in settlement conferences to "determin[e] whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home." These conferences take months, and sometimes years, to complete, and, under CPLR 3408(n), all motions are "held in abeyance while the settlement conference process is ongoing." While the case is delayed for a settlement conference, lenders do not presently benefit from any tolling under CPLR 204(a).

Since 2016, CPLR 3408(m) has excused borrowers from defaults in serving responsive pleadings and raising affirmative defenses, if the borrower serves their answer "within thirty days of initial appearance at the settlement conference." Additionally, in practice, a significant delay occurs in obtaining rulings on motions, spanning anywhere from two months to several years. During all these delays, the clock on the six-year statute of limitations continues to run from the date of the original acceleration, hindering a lender who may be required to re-commence the litigation.

FAPA now exacerbates the issue by imposing new restrictions on a lender's right to revoke an acceleration or, in an action seeking the discharge of its mortgage, to present a defense by demonstrating that the loan was never properly accelerated

by a stranger without standing. Under FAPA, "the voluntary discontinuance of [a foreclosure] action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the statute of limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute." CPLR 3217(e). FAPA also provides that "once a cause of action upon an instrument . . . has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof." CPLR 203(h). FAPA thus affects both lender-driven foreclosure actions and borrower-initiated cancellation action.

As relevant to this quiet title action, FAPA also provides that, in "any action seeking cancellation and discharge of record of an instrument . . . a defendant shall be estopped from asserting that the period allowed by the applicable statute of limitation for the commencement of an action upon the instrument has not expired because the instrument was not validly accelerated prior to, or by way of commencement of a prior action, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated." CPLR 213(4)(b). This is a significant departure as courts in this state have consistently restricted enforcement of mortgages to those with standing. Prior to FAPA, the "express judicial determination" requirement did not exist.

Together, these provisions bar a lender from prevailing in a cancellation action, even in the event of a new or continuing default by the borrower, if the lender accelerated the mortgage via a foreclosure action more than six years before.[8]

II. RETROACTIVE APPLICATION DAMAGES THE NEW YORK MORTGAGE MARKET.

A. Retroactive Application Harms Lenders.

Retroactive application of FAPA deprives lenders of the ability to assert contractual rights that were formed at the creation of each mortgage. *See supra* at 10-12. *First*, if a lender initiated a foreclosure action more than six years ago, but voluntarily discontinued the action, or, where a party without standing purported to accelerate by commencing a foreclosure action, the lender, as the owner of the loan, would be estopped from asserting a related defense in a borrower's cancellation action. A borrower who fails to make timely payments after a voluntary discontinuance could bring such a cancellation action and receive a windfall of an unenforceable mortgage—a house with no obligation to continue paying for it. Retroactive application of FAPA results in a substantial amount of immediate losses

[8] Under FAPA, a lender can extend the statute of limitations after filing a foreclosure action only by executing an agreement with the borrower under General Obligation Law § 17-105(1), effectively putting the lender's right to revoke an acceleration in the borrowers' hands. Such an agreement was not necessary before FAPA, so there was no reason for prior voluntary discontinuances (including after consensual modifications) to comport with General Obligation Law § 17-105(1), and many did not do so.

to loan portfolios by rendering accelerated mortgage notes valueless, directly affecting individuals and communities throughout New York.

Second, retroactive application of FAPA also harms the secondary mortgage market and exacerbates liquidity concerns for lenders, particularly smaller banks. Lenders often obtain funding to originate new loans either by selling existing loans in the secondary market—often in bulk—or by securitizing them.[9] If FAPA's retroactive application is sustained, potential purchasers or securitizers of these loans would need to conduct due diligence on every single loan to ensure that the statute of limitations had not expired due to a voluntary discontinuance. This type of loan-level due diligence requires a review of title reports and court filings for every loan. As a result, retroactive application of FAPA makes it costly and time-consuming to sell New York mortgages, reducing the liquidity of the secondary market even for loans where there has *not* been any kind of acceleration. Retroactive application of FAPA thus would continue to hamper the lending market.

Third, and relatedly, lenders would be less able to invest in New York in the future if FAPA continues to be applied retroactively. Lenders—particularly highly regulated banks that need to maintain capital requirements under federal and State law and regulation—would have a harder time doing business in a jurisdiction whose

[9] 4A Real Estate Financing § 2L.02 (LexisNexis Matthew Bender).

courts allow it to change the law retroactively and render lenders' past investments valueless.

The passage of FAPA coincided with the rising of interest rates. These two factors have led to a significant decrease in origination activity. However, it is impossible to accurately quantify the impact of FAPA independent from the general downturn of the housing market. For this reason, *Amici* do not present any data about the actual effect of FAPA and instead offer this qualitative explanation of how FAPA has damaged the New York mortgage market.

B. Retroactive Application Would Harms Future Borrowers.

Under FAPA, lenders are discouraged from negotiating with borrowers beyond what is legally required due to the risk that the six-year statute of limitations will elapse. While lenders already may be required to contact, or attempt to contact, the delinquent borrower to negotiate loss mitigation strategies, *e.g.*, 12 C.F.R. §§ 1024.39-1024.40, time that lenders send on any non-required negotiation does not toll the statute of limitations. Accordingly, lenders will be forced to negotiate based only on what is procedurally required—nothing more and nothing less.

Further, "[n]othing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option." 12 C.F.R. § 1024.41(a). FAPA changes the cost-benefit analysis for lenders who now face significantly greater risk in agreeing to a new payment plan; lenders will have no choice but to fully pursue

foreclosure actions upon default, and borrowers will face increased litigation costs—as well as a greater risk of losing their homes—contrary to FAPA's stated purpose.

The substantial negative impact that a change in law can have on the lending market is not hypothetical. For example, the Second Circuit's decision in *Madden* v. *Midland Funding, LLC*, 786 F.3d 246, 250 (2d Cir. 2015) substantially disrupted the lending market. In *Madden*, the Second Circuit held that a loan validly originated by a national bank that was not usurious according to state law could later become usurious upon transfer to a non-bank third party. *See Madden,* 786 F.3d at 250. *Madden* led to negative consequences for the lending market. After *Madden*, loan sizes in New York and Connecticut decreased by an average of $400 to account for the increased risk to lenders.[10] Borrowers with FICO scores below 625 faced a 48% decline in the number of loans issued in New York and Connecticut, in contrast to an average increase of 124% outside the Second Circuit.[11] Lending to households with income below $25,000 decreased 66% compared to a control group, while households with an income above $100,000 were mostly unaffected.[12] The reduced availability of credit caused by *Madden* led to a 6% increase in personal bankruptcy

[10] Colleen Honigsberg et al., *How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment*, 60 J.L. & ECON. 673, 700 (2017).

[11] *Id*. at 697

[12] Piotr Danisewicz & Ilaf Elard, *The Real Effects of Financial Technology:Marketplace Lending and Personal Bankruptcy*, at 27 (2018).

filings in the Second Circuit compared to outside the circuit; and there were statistically significant drops in the volume of loans for debt refinancing (27%), small businesses (9%), and medical costs (50%), leading to the unavoidable conclusion that *Madden* caused a significant reduction in the amount and availability of credit, particularly to the individuals with the greatest need.[13] Although FAPA has been the law for just over two years, *Amici* expect its retroactive application to cause similar wide-ranging harm.

III. RETROACTIVE APPLICATION OF FAPA IS UNCONSTITUTIONAL.

A. Retroactive Application Violates Due Process.

Retroactive application of FAPA violates lenders' due process rights by overriding well-settled expectations based on more than a century of established practice. Both the State and U.S. Constitutions protect the due process rights of lenders. N.Y. CONST. art. I, § 6; U.S. CONST. amend. XIV, § 1, cl. 3.

"To comport with the requirements of due process [under the New York Constitution], retroactive application of a newly enacted provision must be supported by a legitimate legislative purpose furthered by rational means." *Regina Metro. Co.* v. *N.Y.S. Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 375 (N.Y. 2020) (internal quotation marks and citation omitted). In practice, there is a strong

[13] *Id*.

"presumption against retroactive application of statutes." *Regina Metro Co.*, 35 N.Y.3d at 365; *see All. of Am. Insurers* v. *Chu*, 77 N.Y.2d 573, 586 (1991) (recognizing the "constitutionally based protection against legislative interference with vested rights, a doctrine with a long tradition"); *Jaquan L.* v. *Pearl L.*, 116 N.Y.S.3d 253, 256 (1st Dep't 2020) ("[A] remedial amendment will only be applied retroactively if it does not impair vested rights.").

The District Court—after making the conclusory finding that retroactive application of FAPA was "supported by a legitimate legislative purpose," *Article 13, LLC* v. *Ponce de Leon Fed. Bank*, 2023 WL 5179626, at *5 (E.D.N.Y. Aug. 11, 2023)—did not explicitly address whether retroactive application of FAPA constituted a "rational means" to further that legislative purpose. Instead, the District Court referenced other decisions that held retroactive application of FAPA to be constitutional because "FAPA did not shorten the six-year statute of limitations, and therefore did not affect the party's vested property rights." *Id.* (citations omitted). The District Court also held that Defendant-Appellant LaSalle National Bank Association failed to "meet its burden of establishing that the Legislature acted in an arbitrary and irrational way." *Id.* (citations omitted). The District Court thus did not explain how retroactive application of FAPA was a "rational means" to satisfy the due process analysis.

"Generally, there are two types of retroactive statutes that New York courts have found to be constitutional: those employing brief, defined periods that function in an administrative manner to assist in effectuating the legislation, and statutory retroactivity that—even if more substantial—is integral to the fundamental aim of the legislation." *Regina Metro Co.*, 35 N.Y.3d at 376. "Whether a new rule of New York State law is to be given retroactive effect requires an evaluation of three factors: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of retroactive application." *People* v. *Martello*, 93 N.Y.2d 645, 651 (1999). FAPA fails these basic requirements.

First, FAPA's effect is neither "brief" nor "defined." Rather, it is boundless, and can involve improper accelerations occurring years—even decades—ago, or accelerations that were revoked in accordance with well-settle law in existence at the time of revocation. The affected mortgage contracts would be suddenly and significantly altered and potentially wiped out. Moreover, lenders relied on the longstanding precedent that a valid acceleration could only occur upon commencement of a foreclosure action by a party with standing. Even worse, FAPA would retroactively limit the use of New York's "Savings Clause" which would have otherwise allowed for the re-start of a new action after the non-final dismissal of a timely filed action.

Second, retroactive application is not integral to FAPA's fundamental purpose. Both the statutory text and legislative history relate to the goal of reversing *Engel*, which can be accomplished without applying FAPA retroactively. *Speller*, 80 Misc.3d 1233(A), at *11. In fact, the legislature did not hold any hearings or make explicit findings on the issue of retroactive application. *Id.* at *37. There is thus no persuasive reason to apply FAPA retroactively where prospective application achieves FAPA's purpose. On the other side of the ledger, retroactive application would seriously harm the New York mortgage market.

Some courts already have refused to apply FAPA retroactively out of concern that doing so would affect lenders' "substantive and vested rights" and render the law "invalid." *MTGLQ Investors, L.P.* v. *Gross*, 2023 WL 2671011, at *4 (Sup. Ct. West. Cnty. Mar. 16, 2023); *see also Speller*, 80 Misc.3d 1233(A), at *30-32.

The District Court mistakenly relied on state court decisions that held retroactive application to be constitutional "where the FAPA did not shorten the six-year statute of limitations, and therefore did not affect the party's vested property rights." *Article 13, LLC*, 2023 WL 5179626, at *5 (citations omitted). True, FAPA did not directly change the length of time for the statute of limitations. But because a lender's revocation of a prior acceleration has the ultimate effect of resetting the statute of limitations as if the prior acceleration had never occurred, retroactive application of FAPA essentially creates a new limitations period and bars new

claims. Despite the fact that an invalid acceleration by a party without standing to sue could not accelerate the debt, by prohibiting lenders from raising this defense in an action seeking the discharge of the mortgage, FAPA permits the unjust discharge of the mortgage by facilitating the expiration of the statute of limitations, notwithstanding the absence of a valid acceleration. While this does not create a new statute of limitations period, it severely restricts lenders' rights by permitting a non-party to start the statute of limitations and depriving the lender of the six-year statute of limitations period.

At a minimum, "[w]hen . . . a limitations period is statutorily shortened, or created where none existed before, Due Process requires that potential litigants be afforded a reasonable time . . . for the commencement of an action before the bar takes effect." *Brothers* v. *Florence*, 95 N.Y.2d 290, 300 (2000) (internal quotation marks and citations omitted). Retroactive application of FAPA violates lenders' due process rights to the extent it immediately time-bars foreclosure actions that would have been allowed to proceed but for the enactment of FAPA. As retroactive application of FAPA would deprive lenders of substantive and vested rights, it violates the due process rights guaranteed by the State and U.S. Constitutions.

B. Retroactive Application Violates the Federal Contract Clause.

Retroactive application of FAPA also violates the Contract Clause, which provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of

Contracts." U.S. CONST. art. I, §10, cl. 1. To determine whether a statute violates the Contract Clause, courts consider whether the challenged law (1) substantially impairs a contractual relationship, (2) has a "significant and legitimate public purpose," and (3) is a "reasonable and appropriate means to pursue the professed public purpose." *Melendez* v. *City of New York*, 16 F.4th 992, 1031 (2d Cir. 2021).

Retroactive application of FAPA fails that test. The District Court addressed the constitutionality of FAPA under the Contract Clause only in a footnote and cited *East Fork Funding LLC* v. *U.S. Bank, N.A.*, 2023 WL 2660645, at *4-*6 (E.D.N.Y. Mar. 23, 2023), to find that FAPA does not impair contractual rights. *Id.* at *5 n.5. But the District Court's reliance on *East Fork Funding* is misplaced.

1. FAPA Substantially Impairs the Relationship Under the Mortgage Contract.

The court in *East Fork Funding* relied heavily on the fact that the at-issue mortgage did not contain an explicit provision regarding de-acceleration and "all the operative events" took place before *Engel*. 2023 WL 2660645, at *5. But *East Fork Funding* was wrongly decided for several reasons. *First*, the district court erred because longstanding precedent, recently reaffirmed by New York's highest court in *Engel*, establishes that lenders have had the right to de-accelerate a mortgage through a voluntary discontinuance for more than one hundred years. This well-settled understanding became an implied term in Plaintiff-Appellee's mortgage contract, *Fata* v. *S. A. Healy Co.*, 289 N.Y. 401, 406 (1943) ("[A]ll contracts are assumed to

be made with a view to existing laws on the subject."); *Ass'n of Surrogates & Supreme Ct. Reps.* v. *New York*, 940 F.2d 766, 774 (2d Cir. 1991), and the Contract Clause's protections extend to terms implied by law, *Gen Motors Corp.* v. *Romein*, 503 U.S. 181, 189 (1992) ("[C]hanges in the laws that make a contract legally enforceable may trigger Contract Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter any of the contracts' bargained-for terms . . . ."); *People ex rel. City of New York* v. *Nixon*, 229 N.Y. 356, 361 (1920) ("The obligation of a contract is determined by the law in force when it is made." (citation omitted)).

Second, FAPA wipes out a lender's ability to enforce its right to receive payments from the borrower, thus destroying the security interest given by the mortgage contract and its entire value. If the lender elected to accelerate the mortgage more than six years ago by filing a foreclosure action, regardless of any subsequent revocation, FAPA prohibits the lender from enforcing its right to receive payments or even challenging the validity of the prior acceleration. FAPA thus impairs the lender's right to receive payments and its right to revoke its election.

Indeed, prior to FAPA, lenders were entitled to revoke an acceleration by any "affirmative act," unless otherwise specified in their contracts with the borrower, *see Golden*, 432 N.Y.S.2d at 241, and to later bring a second foreclosure action or otherwise challenge the validity of a prior acceleration. FAPA imposes a new

restriction to those rights—one that the parties did not negotiate and was not suggested by then-existing law—that a voluntary discontinuance cannot constitute an "affirmative act" of revocation. Doing so would not only impair the lenders' acceleration and de-acceleration rights, but also potentially extinguish the value of contracts where the lender already relied on its rights to institute a foreclosure action more than six years ago and then voluntarily discontinued that action.

FAPA substantially impairs the mortgage relationship because lenders had no forewarning that the value of their mortgages could be wiped out. For the substantial-impairment inquiry, the Supreme Court "has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen* v. *Melin*, 138 S. Ct. 1815, 1822 (2018) (citations omitted). And this Court has found that the "primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted. Impairment is greatest where the challenged government legislation was wholly unexpected." *Sanitation & Recycling Indus., Inc.* v. *City of New York*, 107 F.3d 985, 993 (2d Cir. 1997). "Also relevant . . . is the extent to which the challenged provision provides for gradual applicability or grace periods." *Id*. (internal quotation marks and citation omitted). Here, the disruption is substantial as FAPA could completely void the mortgage contract, destroy the assumptions made

in a secured lending arrangement and strip lenders of their long-held contractual rights, and FAPA provides no grace period. *See Speller*, 80 Misc.3d 1233(A), at *18.

2. FAPA Is Neither a Reasonable Nor Appropriate Means to Further Its Professed Purpose.

Applying FAPA retroactively is neither a reasonable nor appropriate means to achieve FAPA's purpose because prospective application is sufficient. Retroactive application entails a permanent impairment of mortgage contracts, places the entire financial burden on lenders without compensation, and is not tailored to borrowers with financial need. *See Melendez* v. *City of New York*, 2023 WL 2746183, at *10-16 (S.D.N.Y. Mar. 31, 2023) (holding that a state guaranty law was "not a reasonable means to advance the City's interest"). In *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 63 (1935), the Supreme Court held unconstitutional a law merely *postponing* mortgagees' right to foreclose *during the Great Depression*. Here, retroactive application of FAPA would be even more disruptive and less justified. *See Speller*, 80 Misc.3d 1233(A), at *19-21.

This Court's decision in *The Vigilancia* is instructive. In 1890, a New York law required the consent of at least two-thirds of a corporation's stock for the corporation to issue a mortgage. *Atl. Tr. Co.* v. *The Vigilancia*, 73 F. 452, 456 (2d Dep't Cir. 1896). This Court held that, "[i]f the statute were intended to apply to mortgages . . . made prior to the enactment, we are unable to doubt that it would impair the obligation of the contract, and consequently be inoperative, as to such

mortgages, because of the constitutional interdiction." *Id*. at 457. Retroactive application of FAPA likewise violates the Federal Contract Clause.

C. Retroactive Application Results in an Unconstitutional Taking.

Retroactive application of FAPA also violates the "Takings Clause" of the New York Constitution, which provides: "[N]or shall private property be taken for public use, without just compensation." New York Const. Art. I, § 7. The Federal Constitution contains similar protections, and applies to the states.[14]

For mortgage contracts where a lender voluntarily discontinued a foreclosure action more than six years ago, FAPA categorically deprives the lender of its ownership interest in the property, transfers it to the borrower, and leaves the lender "without economically beneficial or productive options for its use." *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992); *see Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 601-02 (1935) (retroactive statute allowing mortgagors in default to repurchase properties at discount effected a taking); *City of Buffalo* v. *J.W. Clement Co.*, 28 N.Y.2d 241, 253 (1971) ("[W]henever a Law deprives the owner of the beneficial use and free enjoyment of his property . . . it deprives him of his property within the meaning of the Constitution."). Further, a judicial lien, which arises as a matter of law when a foreclosure proceeding is commenced, constitutes

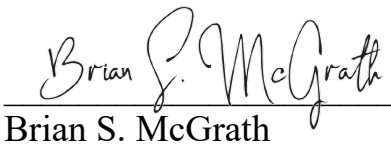
[14] The Federal Takings Clause also applies to the states. *See Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1942 (2017).

"compensable property" protected by the Fifth Amendment. *Armstrong v. United States*, 364 U.S. 40, 48 (1960). And even if there remains some economic value, FAPA still is an unconstitutional regulatory taking because it disrupts lenders' reasonable expectations that a previous voluntary discontinuance reset the statute of limitations. *See Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978) (analyzing regulatory taking based on: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with the distinct investment-backed expectations," and (3) "the character of the governmental action"). As such, FAPA constitutes a taking, for which the State must pay just compensation.

CONCLUSION

Amici respectfully request that the Court hold that FAPA does not apply to foreclosure actions commenced before its enactment, or, in the alternative, if retroactive application is intended, such application is unconstitutional.

Dated: New York, New York
August 26, 2025



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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: New York, New York
August 26, 2025

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STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On August 26, 2025

deponent served the within: **BRIEF FOR *AMICI CURIAE* NEW YORK BANKERS ASSOCIATION, NEW YORK MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION AND MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT**

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on this 26th day of August, 2025.

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

Job# 384347

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On August 26, 2025

deponent served the within: **MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF**

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on this 26th day of August, 2025.

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

Job# 384347