No. 24-1178

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE RMAC TRUST, SERIES 2016-CTT,

Petitioner,

v.

CASSANDRA FOX,

Respondent.

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

BRIEF OF *AMICI CURIAE* NEW YORK MORTGAGE BANKERS ASSOCIATION, AMERICAN INSTITUTE OF SERVICING AND LEGAL EXECUTIVES, NEW YORK BANKERS ASSOCIATION, MORTGAGE BANKERS ASSOCIATION, AND AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The New York Mortgage Bankers Association, American Institute of Servicing and Legal Executives, New York Bankers Association, Mortgage Bankers Association, and American Bankers Association ("Joint *Amici*") submit this *Amicus Curiae* Brief in support of U.S. Bank National Association on its petition for writ of certiorari from *U.S. Bank National Association, not in its individual capacity but solely as Trustee for the RMAC Trust, Series 2016-CTT v. Cassandra Fox*, 216 A.D. 3d 445 (N.Y. App. Div. 1st Dept. 2023).

The Joint *Amici* regularly appear in cases of national and state significance to the mortgage banking industry. They submit this brief because their members have been directly and adversely impacted by the indefinitely retroactive application of New York's Foreclosure Abuse Prevention Act (2022 N.Y. Laws ch. 821, §10) ("FAPA"), which has destabilized the mortgage industry and foreclosure practices across the state. As organizations with longstanding expertise in mortgage lending, servicing, and enforcement, the Joint *Amici* are well-positioned to inform the Court of the broader industry and constitutional implications of retroactive foreclosure legislation. They respectfully submit that their perspective will assist the Court in resolving this important matter.

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1. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in any part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution to fund its preparation and submission. All parties have been timely notified of the filing of this brief in accordance with Sup. Ct. R. 37.2.

SUMMARY OF ARGUMENT

This case presents a fundamental and recurring constitutional question of national importance: whether a State may, through retroactive legislation, extinguish vested property rights secured by mortgage contracts without just compensation, meaningful due process, or clear legislative authorization for retroactivity. This Court's intervention is essential to prevent States from using retroactive legislation to extinguish property rights without compensation, in violation of the Takings Clause and Due Process Clause—undermining both the rule of law and the stability of mortgage markets nationwide.

Since its enactment on December 30, 2022, New York's Foreclosure Abuse Prevention Act ("FAPA") has upended decades of settled foreclosure law and practice. Through drastic amendments to multiple provisions of New York's Civil Practice Law and Rules ("CPLR"), FAPA has been applied with indefinite retroactive effect, reaching back to extinguish mortgage holders' rights in foreclosure actions that were initiated years earlier. Courts have relied on FAPA to override well-established legal doctrines, disregard lienholders' compliance with the law in effect at the time, and bar valid claims without notice or remedy. The result is the uncompensated destruction of vested property interests—raising serious constitutional concerns and injecting profound uncertainty into the mortgage lending industry.

As relevant to *Fox* and thousands of similar foreclosures statewide, FAPA's §10 provides that the Act "shall take effect immediately and shall apply to all actions commenced on a [bond or note, the repayment of which is

secured by a mortgage on real property] in which a final judgment of foreclosure and sale has not been enforced." 2022 N.Y. Laws ch. 821, §10. Yet despite its 1,502 words, FAPA's text contains no mention of retroactivity—and the Senate sponsor's extensive 9,221-word memorandum similarly omits any reference to it. Nevertheless, FAPA has been uniformly interpreted by the State Attorney General and intermediate appellate courts to reach backward in time, upsetting settled legal expectations and flouting this Court's longstanding presumption against post hoc legislative interference with vested rights. As this Court has emphasized, "statutory retroactivity is not favored" (*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 [1988]), and it is permissible only where the legislature clearly and unambiguously expresses such intent (*see Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 286–87 [1994]). FAPA contains no such expression. The unprecedented indefinite retroactivity also conflicts with this Court's instruction that any retroactive period not be "harsh and oppressive" (*Welch v. Henry*, 305 U.S. 134, 147 [1938]; *see also Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 [1984]). This Court has likewise held that unforeseeable retroactive judicial expansions, especially of vague statutory language, deprive litigants of their right to fair warning. *See Rogers v. Tennessee*, 532 U.S. 451, 457 (2001).

The facts of *Fox* exemplify the constitutional and practical dangers posed by FAPA. In 2010, U.S. Bank's predecessor commenced a foreclosure action which was ultimately dismissed by the trial court and the dismissal affirmed on February 9, 2021. *See OneWest Bank, FSB v. Fox*, 191 A.D.3d 481 (N.Y. App. Div. 1st Dept. 2021). U.S. Bank filed a second foreclosure on June 9, 2021, relying

on the fundamental procedural safeguard enshrined in CPLR §205(a) (New York's "savings statute"), which extends the limitations period for actions refiled within six months of dismissal. The trial court dismissed the action as time-barred, but the Appellate Division reversed on January 5, 2023, holding that the action was timely under CPLR §205(a). *See U.S. Bank N.A. v. Fox*, 212 A.D.3d 422 (N.Y. App. Div. 1st Dept. 2023). Days before that ruling, on December 30, 2022, the Legislature enacted FAPA, which became effective immediately and imposed a more restrictive foreclosure-specific savings provision. *See* CPLR §§205(c) and 205-a. Fox moved for reargument, and the Appellate Division reversed its prior decision, holding that the new statute retroactively barred the foreclosure, despite U.S. Bank's undisputed compliance with the law in effect when it filed suit. *See U.S. Bank N.A. v. Fox*, 216 A.D. 3d 445 (N.Y. App. Div. 1st Dept. 2023).

Fox epitomizes the constitutional harms and systemic risks posed by indefinite retroactivity. A foreclosure deemed timely by the appellate court was later dismissed by that same court under a statute enacted well after the case was filed. The retroactive application imposed new burdens on U.S. Bank that did not exist at the time of filing—in direct conflict with this Court's retroactivity jurisprudence. *See e.g. Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994).

With a clear and undisputed factual record, a final state court judgment, and a direct conflict with settled law, *Fox* is an ideal vehicle for this Court to resolve the important constitutional questions presented. The presumption against statutory retroactivity is most often invoked in cases involving contractual and property

rights—precisely the interests at stake here. This Court has repeatedly emphasized the importance of stability and predictability in those areas. *Fox* therefore offers a compelling opportunity to reaffirm those foundational principles.

The Second Circuit already recognized the profound and troubling implications of FAPA, In *East Fork Funding LLC v. U.S. Bank N.A.*, 118 F. 4th 488 (2d Cir. 2024), the Court observed that "FAPA's interpretation has implications for the New York mortgage market, New York property owners, and New York State law governing retroactive application of statutes." *Id.* at 498. Although the Second Circuit acknowledged the stakes, it declined to reach the federal constitutional question. That question is now clearly presented on a complete record and in a procedural posture that warrants this Court's review.

ARGUMENTS

Point I

FAPA Exacerbates an Already Untenable Judicial and Regulatory Landscape, Threatening the Enforceability of Mortgage Loans Across New York

FAPA purports to address foreclosure abuse related to the statute of limitations, but in reality, it compounds the legal and procedural obstacles that have already made mortgage enforcement in New York extraordinarily onerous. The Legislature cited no evidence that mortgagees were abusing the statute of limitations or prevailing through misconduct. Instead, FAPA retroactively targets judicial precedents that mortgagees were legally entitled to rely on.

As discussed below, New York already imposes one of the most unforgiving foreclosure timelines in the country—where even minor missteps can extinguish enforcement rights. By layering new procedural traps onto an already dysfunctional system, FAPA transforms foreclosure from a legal remedy into a legal minefield.

CPLR §213(4) provides that "an action upon a bond or note, the payment of which is secured by a mortgage upon real property" must be "commenced within six years." If a foreclosure is not initiated within the statutory time period, then the mortgage is subject to cancellation and discharge. *See* New York Real Property Actions and Proceedings Law ("RPAPL") §1501(4).

Although six years may seem sufficient to complete a foreclosure, New York's foreclosure process is among the most arduous and time-consuming in the nation. In recent years, approximately 13,000 mortgage foreclosures have been commenced annually in New York.[2] The average timeline from commencement to judicial auction takes 1,910 days—more than five years—placing New York among the most procedurally burdensome states for foreclosure.[3] These delays persist, even though foreclosure inventory has sharply declined—a trend already underway

2. State of New York Unified Court System. (31 Dec. 2024). *2024 Annual Report.* https://www.nycourts.gov/whatsnew/pdf/24_Annual_Report.pdf

3. NOLO (19 May 2025). *States With Long Foreclosure Timelines.* https://www.nolo.com/legal-encyclopedia/states-with-long-foreclosure-timelines.html

when FAPA was enacted.[4] The prolonged timeline reflects a combination of overregulation, systemic court delays, and frequent shifts in appellate doctrine.

The impediments to foreclosure begin immediately upon a borrower's payment default, Regulation X of the Real Estate Settlement Procedures Act prohibits mortgagees from filing a foreclosure action until the borrower is more than 120 days delinquent. *See* 12 C.F.R. §1024.41(f)(1)(i). It also bars foreclosure if the borrower has submitted a complete "loss mitigation" application to resolve the mortgage delinquency. *See* 12 C.F.R. §1024.41(g). RPAPL §1304(1) imposes further delay by requiring mortgagees to provide 90 days' notice before commencing an action.

Once foreclosure is commenced, mortgagees must attend an indefinite number of mandatory CPLR §3408 settlement conferences, during which litigation is stayed. *See* CPLR §3408(m). New York's official position is that foreclosure cases may remain in the CPLR §3408 settlement part for "months or even years," and this delay is acceptable so long as it increases the chance that more homeowners can "remain in their homes."[5]

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4. State of New York Unified Court System (31 Dec. 2022). *2022 Report of the Chief Administrator of the Courts on the Status of Foreclosure Cases Pursuant to Chapter 507 of the Laws of 2009.* https://www.nycourts.gov/legacyPDFS/publications/pdfs/ForeclosureAnnualReport2022.pdf

5. State of New York Unified Court System (31 Dec. 2023). *2022 Report of the Chief Administrator of the Courts on the Status of Foreclosure Cases Pursuant to Chapter 507 of the Laws of 2009.* https://www.nycourts.gov/legacyPDFS/publications/pdfs/ForeclosureAnnualReport2023.pdf

Notably, neither Regulation X, nor RPAPL §1304, nor these settlement conferences tolls the limitations period. *See Everhome Mortgage Company v. Aber*, 195 A.D. 3d 682, 684-685 (N.Y. App. Div. 2d Dept. 2021).

If settlement does not materialize, then the mortgagee must make two separate motions under RPAPL §1321(1) and RPAPL §1351(1) to obtain a foreclosure judgment. In opposition to the motions, a defendant can raise a multitude of common law and statutory defenses—the latter can be raised "at any time during the action." *Wells Fargo Bank, N.A. v. DeFeo*, 200 A.D. 3d 1105 (N.Y. App. Div. 2d Dept. 2021). Unlike the federal system, where appellate jurisdiction is limited to final judgments, New York permits appeals from virtually any adverse interlocutory order or judgment. A single interlocutory appeal can delay a foreclosure case for years in New York, where the intermediate appellate departments process over 10,000 perfected appeals and 20,000 motions annually.[6]

Even the Court of Appeals acknowledged that New York's foreclosure process has devolved into doctrinal and procedural disorder, shaped by legislative ambiguity and rigid intermediate appellate rulings it has described as "both analytically unsound as a matter of contract law and unworkable from a practical standpoint," *Freedom Mtge. Corp. v. Engel*, 37 N.Y. 3d 1, 30 (N.Y. 2021), and as producing "nonsensical results." *Bank of Am., N.A. v. Kessler*, 39 N.Y. 3d 317, 328 (N.Y. 2023).

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6. State of New York Unified Court System. (31. Dec. 2024). *2024 Annual Report.* https://www.nycourts.gov/whatsnew/pdf/24_Annual_Report.pdf

Given that the average New York foreclosure takes more than five years to complete, most actions already run dangerously close to the expiration of the six-year limitations period. During that time, mortgage loans are routinely sold, assigned, or securitized—often more than once. However, under FAPA, if a foreclosure is dismissed after the statutory period, then a transferee is time-barred from seeking to enforce the mortgage loan. *See* CPLR §205(c) and §205-a(a)(1).

No other class of litigants is subjected to this level of procedural scrutiny and systemic roadblocks in the pursuit of the lawful enforcement of a contractual right and equitable remedy. The aforementioned procedural hurdles become even more daunting when combined with FAPA's indefinite retroactivity provision, which unsettles expectations, destabilizes reliance interests, and transforms foreclosure from a legal remedy into a procedural gauntlet.

Point II

The FAPA §10 Indefinite Retroactivity Clause, as Applied to CPLR §205-a, is Unconstitutional

I. Indefinite Retroactivity of FAPA and CPLR §205-a Constitutes an Unconstitutional Taking and Threatens to Destabilize the Mortgage Market

The indefinite retroactive application of FAPA and CPLR §205-a in *Fox* extinguished U.S. Bank's mortgage lien—a property interest protected by the Fifth Amendment—based on legislation enacted long after the foreclosure action was commenced. Allowing

this unprecedented legislation to stand would subject countless lienholders to similar constitutional violation and destabilize the mortgage industry.

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no "private property [shall] be taken for public use, without just compensation." U.S. Const. amend. V; *see also Kelo v. City of New London*, 545 U.S. 469, 472 n.1 (2005). The New York Constitution likewise provides that "[p]rivate property shall not be taken for public use without just compensation." N.Y. Const. art. I, §7(a).

Two types of takings are recognized. First, a *per se* taking occurs when the government deprives an owner of all economically beneficial use. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018–1019 (1992). Second, a regulation may effect a taking under a multi-factor test which considers: (1) economic impact; (2) interference with investment-backed expectations; and (3) the character of the government action. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

This Court has long recognized that liens, including mortgage liens, constitute protected property interests under the Fifth Amendment. *See Armstrong v. United States*, 364 U.S. 40, 48 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594 (1935); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 75–78 (1982); *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 198 (2007); *Tyler v. Hennepin County*, 598 U.S. 631 (2023).

Similarly, a cause of action can constitute a protected property interest, particularly when it arises from a vested legal or contractual right. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (recognizing a cause of action as a species of property protected by due process); *Adams v. United States*, 391 F. 3d 1212, 1225–1226 (Fed. Cir. 2004); *All. of Descendants of Tex. Land Grants v. United States*, 37 F. 3d 1478, 1481 (Fed. Cir. 1994). A vested cause of action is a form of property entitled to the same constitutional protection as tangible interests. *See Pritchard v. Norton*, 106 U.S. 124, 132 (1882) ("Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.").

Here, a valid mortgage lien was extinguished solely due to the retroactive application of a statute enacted after the foreclosure commenced. U.S. Bank filed the action in reliance on then-existing CPLR §205(a), which at the time permitted re-filing within six months of a prior dismissal not on the merits.

The savings statute, codified as CPLR §205(a), has been a part of New York's remedial framework for centuries. As the Court of Appeals recognized in *Malay v. City of Syracuse*, 25 N.Y. 3d 323, 327 (N.Y. 2015), "[t]racing its roots to seventeenth century England, the remedial concept embodied in CPLR §205(a) has existed in New York law since at least 1788." *See also Winston v. Freshwater Wetlands Appeals Bd.*, 224 A.D. 2d 160, 164–65 (N.Y. App. Div. 2d Dept. 1996) (noting that CPLR §205(a) traces its origins to 19th-century New York codes and even earlier English statutes dating back over 350 years). More than a century ago, New York's highest court

emphasized that CPLR §205(a) serves a "broad and liberal purpose" and is "not to be frittered away by any narrow construction." *Gaines v. City of New York*, 215 N.Y. 533, 539 (N.Y. 1915).

By depriving U.S. Bank of all economically beneficial use of its lien, FAPA effected a total wipeout of property rights, which under *Lucas* is the functional equivalent of a physical taking requiring compensation. *Lucas* 505 U.S. at 1019. At minimum, the retroactive application of FAPA and CPLR §205-a constituted a regulatory taking under the *Penn Central* framework. First, the economic impact on Plaintiff is total as FAPA extinguished the lien and any remedy to enforce it.

Second, retroactively nullifying a timely foreclosure action undermines U.S. Bank's reasonable investment-backed expectations, grounded in long-settled procedural protections and foreclosure remedies recognized by New York courts for centuries. U.S. Bank timely commenced the mortgage foreclosure at issue in reliance on CPLR §205(a). In doing so, U.S. Bank also relied on longstanding expectations under New York's mortgage and contract law, which authorize foreclosure as a remedy for a borrower's default. The legislature's retroactive amendment upends these settled rights and expectations by singling out foreclosure plaintiffs for uniquely harsh and discriminatory treatment. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 532–533 (1998) (plurality) (holding that retroactive laws imposing severe burdens on a specific party violated the Takings Clause by disrupting investment-backed expectations).

Finally, the character of the government action weighs heavily in favor of finding a taking. Although the New York Senate claimed that FAPA was intended to eliminate abusive litigation tactics related to the statute of limitations (N.Y. Committee Report, 2021 S.B. 5473, 244th Sess.), it provided no evidence to support this contention. In reality, FAPA and CPLR §205-a serve no broad public purpose. Instead, they transfer vested property rights from mortgagees to a narrow group of defaulting mortgagors and their opportunistic successors, without providing just compensation, destabilizing the mortgage market in the process. The retroactive and targeted nature of these laws suggests a punitive intent. *See Landgraf* 511 U.S. at 266 (warning that retroactive legislation may be used to target unpopular groups for political purposes).

Indeed, New York law already provides meaningful protections against purported manipulation of the statute of limitations without FAPA's sweeping retroactive changes. Under well-established precedent, in the absence of acceleration, each missed installment gives rise to a separate six-year limitations period. *See Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (N.Y. App. Div. 3d Dept. 2003); *Wells Fargo Bank, N.A. v. Cohen*, 80 A.D.3d 753 (N.Y. App. Div. 2d Dept. 2010); CPLR §213(4). Any purported foreclosure delay benefits the borrower who remains in possession without payments while lenders cover taxes and insurance to protect their interests, all while the limitations clock continues to run on each missed payment. *See, e.g.*, *Milone v. U.S. Bank N.A.*, 164 A.D. 3d 145, 156 (N.Y. App. Div. 2d Dept. 2018) (explaining that borrowers are not harmed by extended foreclosure litigation because "with each passing month that the

[mortgagor] remains in possession of the premises, the statute of limitations continues to expire as to missed payments due more than six years ago on a rolling monthly basis"), abrogated on other grounds by *Engel*, 37 N.Y.3d at 20.

Simply, FAPA fails both the *Lucas* and *Penn Central* framework and constitutes an unconstitutional taking. FAPA's retroactivity did more than terminate a lawsuit—it wiped out U.S. Bank's lien and transferred its value to the homeowner without compensation. *See Calder v. Bull*, 3 U.S. 386, 388 (1798) ("a law that takes property from A. and gives it to B. [] is against all reason and justice"). If states can retroactively void valid liens after foreclosure actions begin, the foundation of mortgage lending is at risk. Though this case concerns a single mortgage, the principle threatens an industry built on clear, enforceable rights.

This case gives the Court a critical opportunity to reaffirm constitutional limits on retroactive laws that impair vested property interests. Without such guidance, other states may follow, endangering property rights and destabilizing mortgage markets nationwide. The Court should hold that retroactive laws extinguishing vested foreclosure rights constitute a taking unless just compensation is provided. Such a rule would protect settled expectations, preserve states' ability to legislate prospectively, and promote stability and fairness in real property law.

II. Retroactive Application of FAPA Violates Due Process

a. Substantive Due Process Prohibits Retroactive Application of FAPA and CPLR §205-a

The retroactive application of FAPA to extinguish a foreclosure claim that was timely when filed also violates core substantive due process protections, undermining legal certainty essential to the mortgage industry. Both the Due Process Clause of the Fifth Amendment and Article I, §6 of the New York Constitution prohibit the government from depriving any person of life, liberty, or property without due process of law. *U.S. Const.* amend. V; *N.Y. Const.* art. I, §6.

Retroactive legislation is strongly disfavored under the law because it offends "fundamental notions of justice that have been recognized throughout history." *Apfel* 524 U.S. at 532; *see also Landgraf* 511 U.S. at 265 ("The presumption against retroactive legislation is deeply rooted in our jurisprudence" and reflects "elementary considerations of fairness"); *Bowen* 488 U.S. at 208. Retroactive legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). This Court has cautioned that retroactive lawmaking raises special concerns because it may serve as a vehicle for legislative retribution against unpopular groups. *See Landgraf* 511 U.S. at 266. To satisfy substantive due process, retroactive legislation must serve a legitimate legislative purpose and be rationally related to achieving that purpose. *See Romein* 503 U.S. at 191.

FAPA's retroactive application violates substantive due process by imposing new legal burdens on parties who relied in good faith on longstanding foreclosure law, without advancing any legitimate legislative purpose. Although the Legislature claimed FAPA aimed to curb foreclosure abuses, they offered absolutely no evidence to support this unsubstantiated claim. Extinguishing valid claims retroactively does not deter future misconduct; it punishes past lawful conduct, targeting mortgagees who complied with existing rules.

The disparate treatment of mortgage holders is clear. While CPLR §205(a) broadly permits plaintiffs to recommence an action within six months of a procedural dismissal, the amendment under CPLR §205-a and CPLR 205(c) restricts that right solely in foreclosure cases, singling out mortgage lenders for harsher treatment. Such punitive legislation, which retroactively deprives a targeted group of substantive rights, violates the Due Process Clause.

FAPA and CPLR §205-a fail even rational basis review. Retroactive laws extinguishing vested rights must serve a legitimate purpose through reasonable means. The Legislature could have addressed purported foreclosure abuse prospectively but instead penalized reliance on longstanding law. This retroactive penalty is neither necessary nor proportionate to the statute's aims and reflects legislative retribution rather than legitimate regulation.

b. Retroactive Application of FAPA Violates Procedural Due Process

FAPA also violates procedural due process by retroactively imposing a new limitations bar without any fair notice or grace period. When statutes shorten limitations periods or extinguish valid claims, due process requires that affected parties be afforded reasonable time to act. *See Texaco Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982); *Block v. North Dakota*, 461 U.S. 273, 286 n.23 (1983); *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930). Courts have long held that extinguishing rights without such notice is unconstitutional. *See Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 599 (1873); *Wheeler v. Jackson*, 137 U.S. 245, 255 (1890).

U.S. Bank possessed a constitutionally protected property interest as a lienholder, a status the Supreme Court has affirmed as protected despite its nonpossessory nature. *See Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 198 (2007). That interest includes the vested right to pursue a legal cause of action. *See e.g. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). FAPA instantaneously reshaped the legal landscape, affording no time to protect vested claims. It took effect immediately and wiped out accrued rights, even where actions had already been filed under the long-standing protections of CPLR §205(a). This unexpected and punitive effect deprived mortgagees of their rights without any procedural safeguards. Such deprivation constitutes a clear violation of fundamental due process and undermines the legal certainty essential to the mortgage industry.

Point III

FAPA's Indefinitely Retroactive Application is Destabilizing the Secondary Mortgage Market

Predictably, the indefinite retroactive application of FAPA is materially impacting New York's mortgage market because it undermined the fundamental principle of legal certainty upon which prudent lending and investment decisions are predicated. This legal destabilization has chilled investor confidence, disrupted pricing models, and reduced the availability of capital. Lenders and servicers are increasingly hesitant to operate in a market where rules can be changed after the fact, leading to constrained credit access, higher borrowing costs, and long-term damage to the state's housing and financial ecosystems. Without an accurate basis to price the extraordinary costs associated with judicial delays into mortgage contracts, foreclosure delays are likely to have negative consequences for the provisioning of credit.[7]

Residential Mortgage-Backed Securities ("RMBS") are a substantial portion of the fix-income securities market. RMBS are "large and complex aggregations of residential mortgage and home equity loans." *See United States v. Gramins*, 939 F. 3d 429, 434 (2d Cir. 2019); *United States v. Litvak*, 889 F. 3d 56, 69 (2d Cir. 2018). "Banks typically create RMBS by packaging together groups of mortgages and issuing bonds backed by the principal and

7. Journal of Economics and Business (Mar.-Apr. 2016); *A Cost-Benefit Analysis of Judicial Foreclosure Delay and a Preliminary Look at New Mortgage Servicing Rules*, Volume 84, Pages 30-49.

interest payments of the homeowners who receive the mortgages." *Gramins* 939 F. 3d at 434. "Investors assess the value of RMBS in part by estimating the probability of repayment or default on the various loans that comprise them." *Id.* at 435. RMBS are popular fixed income securities because they pay comparatively high yields to investors by virtue of the mortgage loan interest rates.

"RMBS are priced in terms of percentage of face value, with the face value of each RMBS derived from the value of its component mortgages." *Id.* "RMBS are 'bought and sold at very high prices' and, as a result, typically 'marketed to large, sophisticated financial institutions' like banks and hedge funds." *Litvak* 889 F. 3d at 60. "Given the large size and unique features of each RMBS, the RMBS market lacks an 'exchange' of the sort on which traditional corporate stocks and Treasury bonds trade", and "the price at which a given RMBS will trade is generally not publicly known." *Gramins* 939 F. 3d at 435.

Market participants across the mortgage and servicing industry increasingly regard New York as an outlier jurisdiction[8], where the legal risks associated with delinquent loans and mortgage servicing rights are too uncertain to quantify reliably. The consequence is not merely discounted bids on the secondary market—often, there are no bids at all. Investors prefer to forgo opportunities rather than assume the legal and financial ambiguities involved in enforcing rights within New York. This growing aversion is damaging liquidity for

8. Attom (9 Apr. 2025). *U.S. Foreclosure Activity Increases Quarterly in Q1 2025*. https://www.attomdata.com/news/market-trends/foreclosures/q1-and-march-2025-foreclosure-market-report/

distressed assets in the state and signaling a broader retreat of capital and confidence from the New York mortgage market. This erosion of market confidence has driven the value of New York mortgage portfolios down when compared to national portfolio values, discouraging buyers and severely constraining liquidity, particularly for smaller banks.

Non-performing loan pools with New York collateral—including RMBS—consistently trade at significant discounts relative to the national average.[9] This disparity is plainly illustrated by data published by the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac"), federally chartered corporations that were created by the United States Congress. *See Pirelli Armstrong Tire Corp. Retireee Medical Benefits Trust v. Raines*, 534 F. 3d 779, 783 (D.C. Cir. 2008). Fannie Mae and Freddie Mac were created "to increase affordable housing for moderate and low-income families [by] purchas[ing] mortgages originated by other lenders and help[ing] lenders convert their home loans into mortgage-backed securities." *Id*. at 783. Through Fannie Mae and Freddie Mac, Congress aspired "to provide stability and liquidity to the mortgage market [and] allow[] mortgage lenders to provide more loans, thereby increasing the rate of homeownership in America." *Id*.

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9. *Compare* Freddie Mac. (30 Apr. 2024). *Freddie Mac Sells $5.7 Million in Non-Performing Loans.* https://capitalmarkets.freddiemac.com/seasonedloanofferings/docs/npl_sale_announcement_2024_3.pdf *with* Freddie Mac. (1 Apr. 2025). *Freddie Mac Sells $261 Million in Non-Performing Loans.* https://capitalmarkets.freddiemac.com/seasonedloanofferings/docs/freddie_mac_sells_261_million_in_non_performing_loans.pdf

Congress' ambition has been undermined by the retroactive application of FAPA because New York mortgages are far less marketable than home loans in other jurisdictions. For example, in April 2024—two years after FAPA's deleterious impact was felt—Freddie Mac auctioned a pool of twenty deeply delinquent mortgage loans totaling $5.7 million in unpaid principal balance, all secured by New York properties. The cover bid was in the low-to-mid 80% range of Unpaid Principal Balance ("UPB"), notably lower than the cover bids for national pools. For instance, in its April 2025 Standard Pool Offering, Freddie Mac's cover bid was in the low 100% range of UPB for a national pool of $261 million.

Fannie Mae's Community Impact Pool offerings also reflect this trend. In May 2024, Fannie Mae sold a pool of 51 deeply delinquent loans totaling $14.3 million in UPB, concentrated in the New York metropolitan area. The cover bid was 86.2% of UPB, translating to approximately 30.7% of the Broker Price Opinion ("BPO") value. This is significantly lower than the cover bid of 101.29% of UPB (41.35% of BPO) for a national pool of $280 million in October 2024.[10] These disparities illustrate that New York mortgage loans are not nearly as palatable to prospective investors as secured loans in other jurisdictions, even

10. *Compare* Fannie Mae. (23 May 2024). *Fannie Mae Announces Winner of Twenty-Fourth Community Impact Pool of Non-Performing Loans*. https://www.fanniemae.com/newsroom/fannie-mae-news/winner-twenty-fourth-community-impact-pool-non-performing-loans *with* Fannie Mae (10 Oct. 2024). *Fannie Mae Announces Winner of its Latest Non-Performing Loan Sale*. https://www.fanniemae.com/newsroom/fannie-mae-news/winner-twenty-fifth-non-performing-loan-sale

though New York's property values are among the highest in the country.[11]

Finally, a significant consequence of FAPA's retroactive application is the dramatic increase in diligence costs for buyers evaluating loan pools with New York populations. Due to the legal uncertainty introduced by the Act, prospective investors must undertake far more extensive—and expensive—independent loan-level reviews to assess litigation risk. In jurisdictions with stable legal frameworks, RMBS purchases can often rely on sampling and standardized assumptions to evaluate risk. By contrast, New York now requires granular, loan-by-loan scrutiny to determine whether FAPA's indefinitely retrospective provisions could impair enforceability. This meticulous level of diligence not only drives up transaction costs but also discourages market participation altogether, particularly in high-volume trades where speed and cost-efficiency are paramount.

Point IV

The Second Circuit Expressed Doubt and Concern About FAPA's Retroactive Application and Its Constitutionality

Consistent with the Joint *Amicus*' position that the retroactive application of FAPA amendments in cases like *Fox* was erroneous under this Court's retroactivity precedent, the Second Circuit has expressed serious doubt

11. US News & World Reports. (29 Apr. 2025). *Median Home Prices in Every State.* https://www.usnews.com/360-reviews/services/moving-companies/median-home-prices-state

both about whether the Legislature intended FAPA to apply retroactively and whether, if it did, such retroactive application could withstand constitutional scrutiny. In *East Fork Funding LLC v. U.S. Bank, N.A.* 118 F. 4th 488, 498 (2d Cir. 2024), the Second Circuit observed that "the legislature did not regard FAPA as establishing a new legal requirement but as 'clarify[ing] the meaning of existing statutes' and 'restor[ing] longstanding law'" (*id.* at 496). However, it noted that "the rulings of the intermediate appellate courts are insufficient to predict how the Court of Appeals would decide the issue [of FAPA's retroactive scope]" (*id.* at 497). The Circuit Court emphasized that "the statute's plain language does not dictate [whether, and to what extent, FAPA should apply retroactively because] [e]ven if FAPA applies retroactively to all pending actions involving mortgage contracts signed before the statute's enactment, it is not clear whether it must also apply to a [legal action or omission] taken before FAPA's enactment" (*id.* at 498). The Court further recognized that "FAPA is susceptible to an interpretation that would eliminate the constitutional issue" in the case (*id.*).

In the concurrence, one Judge noted that FAPA's retroactive application improperly "attaches new legal consequences to events completed before its enactment" (*id.* at 499), and that it "would attach a different legal consequence to a mortgage contract than obtained when the parties executed the contract" (*id.*). The concurrence further noted that "[s]uch increased retroactivity is more difficult to harmonize with the text of FAPA," which is not clearly drafted to "require[] altering the legal effect of [a prior] action that has already [occurred] when FAPA came into force" (*id.* at 499–500). Taken together, the

majority and concurring opinions in *East Fork Funding LLC* reflect the Second Circuit's view that FAPA is best interpreted to apply only to post-enactment conduct, and that applying it retroactively would likely conflict with this Court's precedent in, *inter alia*, *Landgraf*.

In *Article 13 LLC v. Ponce De Leon Bank*, 132 F. 4th 586 (2d Cir. 2025), the Second Circuit observed that while New York's appellate departments have applied FAPA retroactively, they have not addressed whether such application violates the State or Federal Constitutions with respect to each individual FAPA amendment. *Id.* at 592–593. The court reiterated that FAPA's plain language alone is insufficient to decide whether a mortgagee's due process rights are improperly infringed upon by the retroactivity clause. This stands in marked contrast to the approach taken by the state appellate courts in interpreting FAPA §10 and reflects a clear divergence in reasoning between federal and state jurists.

Point V

This Court Has Enjoined Unconstitutional New York Statutes on Due Process Grounds and Should Now Sever FAPA's Retroactive Application

In *Chrysafis v. Marks*, 141 S. Ct. 2482 (2021), this Court enjoined enforcement of a New York statute on due process grounds in a manner that is instructive here. There, the Court considered Part A of the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 ("CEE&FPA") (2020 N.Y. Laws ch. 381), which imposed a blanket moratorium on residential evictions.

Under the statute, tenants could unilaterally halt eviction proceedings by submitting a self-certified hardship declaration—without affording landlords any opportunity to contest the claim. As with FAPA, the legislative record supporting CEE&FPA gave no meaningful consideration to the constitutional rights of property owners.

Landlords challenged the law on the ground that it denied them a meaningful opportunity to be heard. The district court denied injunctive relief. See *Chrysafis v. Marks*, 544 F. Supp. 3d 241 (E.D.N.Y. 2021). On emergency application, this Court enjoined enforcement of the statute, holding that "[t]his scheme violates the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause." *Chrysafis*, 141 S. Ct. at 2482. In response, the New York Legislature amended the statute to address the constitutional infirmity. *See* 2021 N.Y. Laws ch. 417 *amending* 2020 N.Y. Laws ch. 381.

Chrysafis illustrates that this Court will not hesitate to intervene when New York enacts statutes that infringe on constitutional rights. Whether through injunctive relief or constitutional invalidation, the Court has made clear that state legislation cannot circumvent the procedural and substantive safeguards guaranteed by the Due Process and Takings Clauses

At minimum, striking FAPA's retroactive effect would uphold constitutional guarantees while preserving the Legislature's prospective policy choices. Foreclosure actions commenced after December 30, 2022, would remain governed by FAPA, but the statute cannot lawfully

be applied to extinguish rights that vested before its enactment.

Respectfully submitted,

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