UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 23-7247

Caption [use short title]

Motion for: Leave to File a Brief as Amici Curiae

Article 13, LLC

v.

Central Mortgage Company

Set forth below precise, complete statement of relief sought:

The New York Bankers Association ("NYBA"), New York Mortgage Bankers Association ("NYMBA"), American Bankers Association ("ABA"), Mortgage Bankers Association ("MBA"), Housing Policy Council ("HPC"), and Independent Bankers Association of New York State ("IBANYS"), seek leave to file an amicus brief in support of defendant-appellant LaSalle National Bank Association

MOVING PARTY: NYBA, NYMBA, ABA, MBA, HPC, and IBANYS, Amici Curiae

OPPOSING PARTY: Article 13, LLC

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Matthew A. Schwartz

OPPOSING ATTORNEY: Danielle P. Light

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Court- Judge/ Agency appealed from: United States District Court for the Eastern District of New York; Hon. Hector Gonzalez

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☒ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☒ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☒ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is the oral argument on motion requested? ☐ Yes ☒ No (requests for oral argument will not necessarily be granted)

Has the appeal argument date been set? ☐ Yes ☒ No If yes, enter date:

Signature of Moving Attorney:

/s/ Matthew A. Schwartz **Date:** 1/2/2024 Service : ☒ Electronic ☐ Other [Attach proof of service]

Form T-1080 (rev. 10-23)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTICLE 13, LLC, Plaintiff-Appellee, v. LASALLE NATIONAL BANK ASSOCIATION, Defendant-Appellant, PONCE DE LEON FEDERAL BANK, ALLIANCE MORTGAGE BANKING CORP., and VAN BUREN GROUP, INC. Defendants.	No. 23-7247

MOTION OF THE NEW YORK BANKERS ASSOCIATION, NEW YORK MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, MORTGAGE BANKERS ASSOCIATION, HOUSING POLICY COUNCIL, AND INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29 and Local Rule 29.1, the New York Bankers Association ("NYBA"), New York Mortgage Bankers Association ("NYMBA"), American Bankers Association ("ABA"), Mortgage Bankers Association ("MBA"), Housing Policy Council ("HPC"), and Independent Bankers Association of New York State ("IBANYS") (collectively, "*Amici*") move for leave to file the accompanying brief as *amici curiae* in support of Defendant-Appellant.

Pursuant to Federal Rule of Appellate Procedure 29(a), *Amici* state that Defendant-Appellant consents to the filing of this brief. Plaintiff-Appellee does not consent.

INTEREST OF *AMICI CURIAE*

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 State. 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, lent more than $100 billion in home and small business loans in 2021, and employ nearly 200,000 people in New York State.

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 State and provides advocacy and education to the mortgage banking industry.

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.

MBA is the national association representing the real estate finance industry, an industry that 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 a variety of publications. Its membership of more than 2,200 companies includes all elements of real estate finance.

HPC is a trade association comprising the leading national mortgage lenders and servicers; mortgage, hazard, and title insurers; and technology and data companies. HPC’s interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable homeownership opportunities in support of vibrant communities and long-term wealth-building for families.

The Independent Bankers Association of New York State ("IBANYS") is a not-for-profit association representing the interests of all independent community banks (including commercial and savings banks) located throughout New York State. IBANYS is dedicated to the belief that community banks are better able to fully serve their communities than any other financial institution. It provides community banks education, advocacy at the state and federal level, and other services to support community banks and the needs of their respective local communities.

Amici regularly file briefs in cases that affect the mortgage banking industry and are important to their members.* *Amici* file this brief due to the significant destabilizing effects of the Foreclosure Abuse Prevention Act ("FAPA") on the

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* *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.

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 State and U.S. Constitutions.

Retroactive application of FAPA would destroy lenders' vested rights to decelerate a mortgage by a voluntary discontinuance, as well as their rights to collect payment on mortgages after a voluntary discontinuance, in violation of both the State and federal Due Process and Takings Clauses and the federal Contract Clause. Retroactive application of FAPA also would severely damage the New York mortgage market, immediately destroying the value of a vast number of valid mortgage contracts and causing lenders to lend less or even exit the New York market altogether.

Amici file this brief to provide a history of the laws governing mortgages and foreclosure actions in New York state, so the Court can better understand the effects of applying FAPA retroactively here. *Amici* respectfully submit that the attached brief will be helpful to the Court in its resolution of this appeal.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court grant *Amici* leave to file the attached brief.

Dated: January 2, 2024
New York, New York

Respectfully submitted,

/s/ Matthew A. Schwartz

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23-7247

United States Court of Appeals

for the

Second Circuit

ARTICLE 13, LLC,

Plaintiff–Appellee,

— v. —

LASALLE NATIONAL BANK ASSOCIATION,

Defendant–Appellant,

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

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* NEW YORK BANKERS ASSOCIATION, NEW YORK MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, MORTGAGE BANKERS ASSOCIATION, HOUSING POLICY COUNCIL, AND INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the New York Bankers Association ("NYBA"), New York Mortgage Bankers Association ("NYMBA"), American Bankers Association ("ABA"), Mortgage Bankers Association ("MBA"), Housing Policy Council ("HPC"), and Independent Bankers Association of New York State ("IBANYS") 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.*

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* Under Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state as follows: (1) neither party's counsel authored the brief in whole or in part; (2) neither party nor its counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person other than *Amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. Defendant-Appellant has consented to the filing of this *amicus* brief. Plaintiff-Appellee does not consent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions, Statutes, and Regulations

Other Authorities

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, lent more than $100 billion in home and small business loans in 2021, and employ nearly 200,000 people in New York.

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Amici regularly file briefs in important cases that affect the mortgage banking industry. *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 State and U.S. Constitutions.

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 overrides 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. As a result, FAPA incentivizes lenders to pursue foreclosure actions to the end, rather than working out mutually beneficial agreements with borrowers. FAPA also penalizes a bank for bringing a foreclosure lawsuit even where the lawsuit was defective for a technical or procedural reason, often outside the bank's control.

Worse still, some courts—including the court below—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. This retroactive application could wipe out the value of a vast number of defaulted mortgages, hinder lenders' ability to use the liquidity generated from payments on those mortgages to extend new mortgages, and discourage lenders from doing business in a jurisdiction where the legislature can enact new, retroactive rules that erase the value of existing contracts.

Amici submit this brief to help this Court have a deeper understanding of 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 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.

Traditionally, 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 implicitly incorporated into their mortgage contracts. After some aberrational decisions from the New York intermediate courts beginning in 2018, the New York Court of Appeals reaffirmed the longstanding historical practice, recognizing that for "[m]ore than a century" a lender's "acceleration 'became final and irrevocable' only *after* 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). Indeed, "ten of the thirteen New York trial courts" that had considered the issue prior to 2019 had come to the same conclusion. *See U.S. Bank Tr., N.A.* v. *Adhami*, 2019 WL 486086, at *5 (E.D.N.Y. Feb. 6, 2019).

Among other things, the right to voluntarily discontinue foreclosure actions, 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 using the consistent stream of mortgage payments to make new mortgage loans to new borrowers.

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 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 rates and stricter lending requirements, because it is too risky to lend 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. As the New York Court of Appeals 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 both the Federal and State Due Process and Takings Clauses and the Federal Contract Clause.

ARGUMENT

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

A. Lenders Have Had the Right to Revoke an Acceleration by a Voluntary Discontinuance for More Than One Hundred Years.

For more than a century, lenders have had the right under New York law to revoke an acceleration by a voluntary discontinuance—and routinely exercised that right. 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." *Wells Fargo Bank, N.A.* v. *Burke*, 943 N.Y.S.2d 540, 542 (2d Dep't 2012).

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 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), https://ww2.nycourts.gov/sites/default/files/document/files/2019-12/ForeclosureAnnualReport2019.pdf.

In keeping 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 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).[1] 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

[1] 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).

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 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 institution 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 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.

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

FAPA is a departure from the law historically governing voluntary discontinuance, as recognized in *Engel*. New York courts have long held that a lender's voluntary discontinuance constitutes a revocation of an acceleration. 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). The New York Court of Appeals 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.").

New York's 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).

The Court of Appeals 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 the Court of Appeals in *Engel* did not establish a new rule of law in doing so. Instead, when the New York Court of Appeals 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*.

C. 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."[2] 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.[3] 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 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

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2 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.

3 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/.

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 have been required to file a certificate of merit in residential foreclosure actions. CPLR 3012-b.[4] 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 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).

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[4] 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).

Since 2016, CPLR 3408(m) has excused borrowers from defaults in serving responsive pleadings and raising affirmative defenses, as long as the borrower serves their answer "within thirty days of initial appearance at the settlement conference." Additionally, in practice, there is a significant delay 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 worsens this whole situation by imposing new restrictions on a lender's right to revoke an acceleration and later prevail when the borrower seeks a discharge of the mortgage contract. 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 actions. As relevant here, FAPA 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). 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.[5]

II. RETROACTIVE APPLICATION WOULD DAMAGE THE NEW YORK MORTGAGE MARKET.

A. Retroactive Application Would Harm 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

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[5] 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.

voluntarily discontinued the action, the lender now 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 would result in a substantial amount of immediate losses to loan portfolios by rendering accelerated mortgage notes valueless, directly affecting individuals and communities throughout New York.

Second, retroactive application of FAPA also would harm the secondary mortgage market and exacerbate 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.[6] If FAPA applied retroactively, 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 would require a review of court filings for every loan. As a result, retroactive application of FAPA would make it costly and time-consuming to sell New York mortgages, reducing the liquidity of the secondary market even

[6] 4A Real Estate Financing § 2L.02 (LexisNexis Matthew Bender).

for loans where there has *not* been a voluntary discontinuance. Retroactive application of FAPA thus would hamper the lending market.

Third, and relatedly, lenders would be less able to invest in New York in the future if FAPA were held to apply 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 courts allow it to change the law retroactively and render lenders' past investments valueless.

B. Retroactive Application Would Also Harm 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 spend 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, this Court's *Madden* decision substantially disrupted the lending market within the Second Circuit. In *Madden*, this Court 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* v. *Midland Funding, LLC*, 786 F.3d 246, 250 (2d Cir. 2015). *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.[7] 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.[8] Lending to households with income below $25,000 decreased 66% compared to a control group, while households with an income above $100,000

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

[8] *Id.* at 697.

were mostly unaffected.[9] The reduced availability of credit caused by *Madden* led to a 6% increase in personal bankruptcy 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.[10] Although FAPA has been the law for only a year, *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*

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

[10] *Id.*

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). The same standard applies under the U.S. Constitution. *See Romein*, 503 U.S. at 191 (retroactive application requires "a legitimate legislative purpose furthered by rational means"). In practice, there is a strong "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 accelerations that were revoked years—even decades—ago. The affected mortgage contracts would be suddenly and significantly altered and potentially wiped out. Moreover, lenders historically relied on the longstanding practice that a voluntary discontinuance revoked an acceleration and reset the statute of limitations. *See supra* at 10-12.

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 action 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.

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 contract's 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 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 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 Would Cause Unconstitutional Takings.

Retroactive application of FAPA also violates the Federal and State Takings Clauses, which protect lenders from governmental appropriation of their vested property rights. *See* U.S. CONST. amend. V;[11] N.Y. CONST. art. I, § 7. 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 "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

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

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 the retroactive application of FAPA is unconstitutional.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the length limitation of Local Rule 29.1 because it contains 6,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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