New York Supreme Court
Appellate Division—Second Department

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Structured Asset Investment Loan Trust 2006-BNC3,

Docket No. 2020-09391

Plaintiff-Appellant,

–against–

ROBYN R. SIMON,

Defendant-Respondent,

NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and JOHN DOE (being fictitious, the names unknown to Plaintiff intended to be tenants, occupants, persons or corporations having or claiming an interest in or lien upon the property described in the complaint or their heirs at law, distributes, executors, administrators, trustees, guardians, assignees, creditors or successors),

Defendants,

LETITIA JAMES, Attorney General of the State of New York,

Intervenor-Respondent.

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

Brian S. McGrath
HINSHAW & CULBERTSON LLP
800 Third Avenue
New York, New York 10022
(212) 471-6200
bmcgrath@hinshawlaw.com

Counsel for Amici Curiae New York Mortgage Bankers Association and Mortgage Bankers Association

Matthew A. Schwartz
Leonid Traps
Austin P. Mayron
Howard H. Kim
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
schwartzmatthew@sullcrom.com

Counsel for Amicus Curiae New York Bankers Association

(Additional counsel listed on inside cover)

Queens County Index No. 702414/16

Natalie Grigg
WOODS OVIATT GILMAN, LLP
500 Bausch & Lomb Place
Rochester, New York 14604
(585) 445-2610
ngrigg@woodsdefaultservices.com

Adam M. Swanson
Jessie Bonaros
McCARTER & ENGLISH, LLP
825 Eighth Ave., 31st Floor
New York, New York 10019
(203) 399-5928
aswanson@mccarter.com

Counsel for Amicus Curiae New York Mortgage Bankers Association

Andrew R. Doersam
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Ave. NW
Washington, DC 20036
(202) 663-5035
adoersam@aba.com

Counsel for Amicus Curiae American Bankers Association

James C. Sivon
SIVON, NATTER & WESCHLER, P.C.
2550 M St. NW, 3rd Floor
Washington, DC 20037
(202) 262-4271
jsivon@snwlawfirm.com

Counsel for Amicus Curiae Housing Policy Council

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The New York Bankers Association ("NYBA") is a not-for-profit association of more than 100 community, regional, and money center commercial banks and savings associations located throughout New York. NYBA's mission is to improve and promote a unified banking industry through educational programs, public relations, political action, and other services. NYBA's members have aggregate deposits of more than $2 trillion, lent more than $100 billion in home and small business loans in 2021, and employ nearly 200,000 people in New York.

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

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $23 trillion banking industry and its two million employees. ABA members—located in each of the fifty states and the District of Columbia—include financial institutions of all sizes and types.

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

The Housing Policy Council ("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.

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 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.

PRELIMINARY STATEMENT

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 caselaw 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 foreclosure action. Worse yet, the New York Attorney General argues that FAPA should apply *retroactively* to existing mortgages. In other words, the Attorney General urges this court to time-bar a lender's claims for default on an existing mortgage even if, had it not been for FAPA, those claims would have been timely. This retroactive application could wipe out the value of a very large number of defaulted mortgages, thus hindering the ability of lenders to use the liquidity generated from payments on those mortgages to extend new mortgages and discouraging lenders from doing business in a jurisdiction where the legislature can enact new, retroactive rules that erase the value of existing contracts.

To avoid having this Court strike down the retroactive application of FAPA as unconstitutional, the Attorney General presents an incomplete and distorted history of New York's mortgage laws and a misleading recitation of the constitutional law governing retroactive application. *Amici* submit this brief to help this Court have a deeper understanding of the relevant issues.

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 (typically monthly) over a period of 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.

For more than one hundred years, lenders in New York relied on their right to reset the statute of limitations on their claims for accelerated payments by voluntarily discontinuing those claims. Among other things, this process allowed lenders to work with borrowers to make up for missed payments and keep borrowers in their homes. 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.

The Attorney General (at 1) erroneously claims that FAPA reflects a "longstanding view previously adopted by the Appellate Divisions" that a lender could not reset the statute of limitations on its claims by voluntarily discontinuing those claims. But the "longstanding" caselaw the Attorney General cites to support this proposition exclusively post-date 2018. In fact, as the New York Court of Appeals recognized in *Freedom Mortgage Corp.* v. *Engel*, 37 N.Y.3d 1 (2021), 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." *Id*. at 28 (emphasis added). Although FAPA overturned *Engel*'s core holding, FAPA did not—nor did it purport to—overturn this portion of the Court of Appeals' well-reasoned historical analysis. The Attorney General asserts that *Engel*'s holding was "aberrational" (at 2) and "disturbed . . . settled law" (at 8), but omits to inform the Court that "ten of the thirteen New York trial courts" that had considered the issue prior to 2019 came 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). *Engel* is not the historical aberration—FAPA is.

The Attorney General (at 6) also incorrectly frames FAPA as a response—apparently delayed by 15 years—to the 2007-2008 financial crisis and the short-lived "robo-signing" controversy. The Attorney General's historical narrative, however, omits the intervening statutes and rules enacted specifically to remedy issues arising out of the financial crisis, including CPLR 3012-b, which resolved the robo-signing issue nearly a decade before FAPA was enacted.

Finally, the Attorney General (at 20) paints the voluntary discontinuance of a foreclosure action—which, among other things, affords a borrower the opportunity to stay in their home—as an "abusive foreclosure practice[]." That could not be further from the truth. Lenders are not in the business of foreclosing on borrowers' homes; they are in the business of financing home ownership and using the consistent stream of payments from a borrower to make new mortgage loans to new borrowers. Foreclosure is a lender's last resort. *See Engel*, 37 N.Y.3d at 36 ("[A] noteholder has little incentive to repeatedly accelerate and then revoke its election because foreclosure is simply a vehicle to collect a debt and postponement of the claim delays recovery.").

Second, applying FAPA retroactively would severely damage the New York mortgage market. Doing so could not only immediately destroy the value of a very large number of valid mortgage contracts, but also may cause lenders to lend less or exit the market altogether because it is too risky to lend in a jurisdiction where the rules can be changed retroactively. *Amici* expect that applying FAPA retroactively will result in fewer mortgages being originated in New York, with higher rates and stricter lending requirements.

Third, when viewed through an accurate historical lens and considering the destruction of the value of existing mortgages, applying FAPA retroactively violates several constitutional provisions.[1] As the Court of Appeals held in *Engel*, lenders had the contractual right to decelerate a mortgage by a voluntary discontinuance for more than one hundred years (unless otherwise provided for in the mortgage contract), and lenders relied on that right. 37 N.Y.3d at 28-29. Applying FAPA retroactively would destroy that vested right, as well as lenders' right to collect further payments after a voluntary discontinuance, in violation of both the State and federal Due Process and Takings Clauses and the federal Contract Clause.

DISCUSSION

I. The Attorney General's Historical Narrative Is Incorrect And Incomplete.

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

The Attorney General (at 17) claims that lenders had the right to revoke an acceleration by a voluntary discontinuance only for a brief period "from February 18, 2021 to December 30, 2022." To the contrary, the historical record establishes that lenders had such a right, and exercised it, for more than one hundred years.

[1] As shown in Plaintiff-Appellant's brief, retroactive application is not required by FAPA's text. *See* U.S. Bank Br. at 5-11. *Amici* will focus on the issues that arise from applying FAPA retroactively.

The agreements between a mortgage lender and borrower form a unique contractual relationship. 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 (i), (ii), and (iii) of this Section 22 are met, Lender may require that I pay immediately the entire amount remaining unpaid under the Note and under this Security Instrument.

(Record on Appeal (R.) 101.) 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 precisely to revoke a previous acceleration. *See, e.g.*, *Adhami*, 2019 WL 486086, at *4. This option is beneficial to both parties. In certain circumstances, a voluntary discontinuance allows a lender to go through additional procedural steps required by (often intervening) state and federal regulations to bring a foreclosure action. But in many circumstances, a voluntary discontinuance is the result of an agreement by the parties 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. And both parties can avoid further litigation.

The Office of Court Administration has praised New York's settlement 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).

For over 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. Co.*, 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). 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. 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 not be able to establish that the mortgage was accelerated or that the statute of limitations has elapsed. Accordingly, prior to *Engel*, a lender who voluntarily discontinued a foreclosure action justifiably relied on *Loeb*, *Kilpatrick*, *Mebane*, and *Patella*, to establish that the discontinuance decelerated 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. Such a failure to appear “demonstrates an indifference to the consequences of an adverse determination” and “constitutes an admission of the allegations” in the foreclosure action. *In re Gembarovsky*, 632 N.Y.S.2d 344, 345 (4th Dep’t 1995). A borrower cannot claim prejudice arising from a lender’s election to discontinue an action in which the borrower has not even appeared.

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

Contrary to the Attorney General’s assertion that *Engel* deviated from historical practice, New York courts have long held that a lender’s voluntary discontinuance constitutes a revocation of an acceleration. 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 Court of Appeals also has recognized that this was the longstanding practice until only recently. *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.”).

The Second Department first held only in *2017* that a voluntary discontinuance—standing alone—*may* be insufficient to establish that a lender had revoked its election. *See NMNT Realty Corp.* v. *Knoxville 2012 Tr.*, 58 N.Y.S.3d 118, 120 (2d Dep't 2017) (holding a lender's previous motion to discontinue a prior foreclosure action "raised a triable issue of fact" regarding whether the previous acceleration had been revoked). Less than two years 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 appellant." *See Ditech Fin., LLC* v. *Naidu*, 109 N.Y.S.3d 196, 199 (2d Dep't 2019).

Engel did not establish a new rule of law when it rejected the newly developed approach reflected in *Ditech* as "both analytically unsound as a matter of contract law and unworkable from a practical standpoint." *Engel*, 37 N.Y.3d at 30. Instead, *Engel* merely "declare[d] pre-existing law." *See People ex rel. Rice* v. *Graves*, 273 N.Y.S. 582, 587 (3d Dep't 1934). When the 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.), *aff'd* 290 N.Y.S. 129 (1st Dep't 1936), *aff'd as modified* 274 N.Y. 388 (1937). FAPA thus did not overturn the 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.

The New York foreclosure process already is one of the longest and 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 foreclosure in New York now takes 1,823 days—or five years—to complete, frustrating lenders' ability to recover for mortgage defaults and consuming almost the entirety of the six-year statute of limitations.[3] The process is laden with protections for borrowers, 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

[2] Benjamin M. Lawsky, *Report on New York's Foreclosure Process*, N.Y.S. Dep't of Fin. Servs. at 3 (May 2015).

[3] Attom Team, *Increased Foreclosure Activity in First Six Months of 2022 Approaches Pre-Covid Levels*, ATTOM (July 14, 2022).

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 their payments (12 C.F.R. § 1024.41(f)(1)(i)) or if a borrower has submitted a complete loss mitigation package (*id*. § 1024.41(c)(3)(i)(D)(1); *see also* 3 NYCRR 419.10). RPAPL § 1304 also requires a lender to send a pre-foreclosure notice to a borrower at least ninety days before filing a foreclosure action. This ninety-day period substantially exceeds the default thirty days required under the Fannie Mae/Freddie Mac Uniform Instrument and ensures that borrowers receive ample time and notice to cure a default or negotiate a resolution with their lender.

Moreover, since 2013, lenders in New York 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 solved any issues related to robo-signing, it resulted in an

[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).

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

Once a lender commences a residential foreclosure action, CPLR 3408 requires it to participate in mandatory 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 settlement conferences take months, and sometimes years, to complete, and, under CPLR 3408(n), all motions are "held in abeyance while the settlement conference process is ongoing." While the case is delayed for a settlement conference, lenders do not presently benefit from any tolling under CPLR 204(a).

Since 2016, CPLR 3408(m) has excused borrowers from defaults in serving responsive pleadings and raising affirmative defenses, 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 of 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 makes the whole situation worse by imposing new restrictions on a lender's right to revoke an acceleration and later bring suit to recover for the remaining value 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). Further, among other provisions, FAPA provides that, in a foreclosure action "if the statute of limitations is raised as a defense . . . a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed, judicial determination . . . that the instrument was not validly accelerated." CPLR 213(4)(a). Together, these provisions have the effect of barring a lender from instituting a foreclosure 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 previously.[5]

[5] Under FAPA, a lender can revoke an acceleration after filing a foreclosure action only by executing an agreement with the borrower under General Obligation Law § 17-105(1). This puts 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.

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 10-11. Specifically, if a lender initiated a foreclosure action more than six years ago, but voluntarily discontinued the action, the lender now would be barred from initiating another foreclosure action. Further, a borrower who fails to make timely mortgage payments after a voluntary discontinuance could receive a windfall of an unenforceable mortgage. Retroactive application of FAPA would result in a substantial amount of immediate losses to loan portfolios, directly affecting individuals and communities throughout New York.

Retroactive application of FAPA would also harm the secondary mortgage market and exacerbate liquidity concerns for lending institutions, 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 were held to apply 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.

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

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 for loans where there has *not* been a voluntary discontinuance. Retroactive application of FAPA thus would hamper the lending market, especially during the current circumstance of well-publicized liquidity issues at some banks and market volatility related to bank failures, mergers, and economic uncertainty.

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 disincentivized 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, so 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 in the event of default and borrowers will face increased litigation costs—as well as a greater risk of losing their homes—contrary to FAPA's stated purpose.

The substantial negative impact that a change in law can have on the lending market is not hypothetical. For example, the Second Circuit's 2015 *Madden* decision substantially disrupted the lending market within the circuit. In *Madden*, the Second Circuit held that a loan validly originated by a national bank that was not usurious according to state law could later become usurious upon transfer to a non-bank third party. *See Madden* v. *Midland Funding, LLC*, 786 F.3d 246, 250 (2d Cir. 2015). *Madden*—in addition to being wrong as a matter of law—led to disastrous 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

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

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 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.[10] Finally, 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.[11]

Although FAPA has been the law for only a few months, *amici* expect it to cause similar financial 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

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[8] *Id.* at 697.

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

[10] *Id.* at 25.

[11] *Id.*

lenders. N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law."); U.S. CONST. amend. XIV, § 1, cl. 3 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law.").

"To comport with the requirements of due process [under the New York Constitution], retroactive application of a newly enacted provision must be supported by a legitimate legislative purpose furthered by rational means." *Regina Metro. Co.* v. *N.Y.S. Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 375 (2020) (internal quotation marks and citation omitted). The same standard applies under the U.S. Constitution. *See Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992) (recognizing that 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.").

"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 not "brief" and "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, the idea that a voluntary discontinuance constitutes a revocation of acceleration that resets the statute of limitations was longstanding practice upon which lenders historically relied. *See supra* at 10-11.

Second, retroactive application is not integral to FAPA's fundamental purpose. Both the statutory text and the Sponsor Memo relate to the goal of reversing *Engel*, which can be accomplished without applying FAPA retroactively. In fact, the legislature did not hold any hearings or make explicit findings on the issue of retroactive application. There is thus no persuasive reason to apply FAPA retroactively where prospective application is sufficient to achieve FAPA's purpose and retroactive application would seriously harm the New York mortgage market.

One court already has determined that retroactive application of FAPA would affect lenders' "substantive and vested rights" and render the law "invalid." *See MTGLQ Investors, L.P.* v. *Gross*, 2023 WL 2671011, at *4 (Sup. Ct. West. Cnty. Mar. 16, 2023) (FAPA does not apply retroactively because "FAPA was not intended to be used as a means to reach back in the case history and bypass determinations rendered by courts, who have evaluated the facts and evidence within an action, and dismantle such determinations upon a discontinuance that previously had no bearing and now alter the substantive rights of a party."); *see also Newrez LLC* v. *Kalina*, 2023 WL 2721698, at *1 (Sup. Ct. Albany Cnty. Mar. 23, 2023) ("[FAPA] does not expressly state that it applies retroactively. Accordingly, there is a presumption that the statutory amendment is prospective in its application."); *Deutsche Bank Nat'l Tr. Co.* v. *Feurtado*, Index No. 719810/2019 (Sup. Ct. Queens Cnty. Mar. 31, 2023) ("FAPA is not applied retroactively."). Because a lender's revocation of a prior action has the effect of resetting the clock on the statute of limitations as if the prior action had never occurred, retroactive application of FAPA essentially creates a new limitations period and bars new claims. 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.

FAPA's statutory text and legislative history do not help the Attorney General overcome the presumption against retroactivity, which is "based on 'elementary considerations of fairness that dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.'" *Regina Metro. Co.*, 35 N.Y.3d at 370 (alterations adopted) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994)). Over a hundred years of reliance on the *Engel* rule counsel against retroactive application of FAPA.[12]

B. Retroactive Application Violates the Federal Contract Clause.

Applying FAPA retroactively also would violate 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. 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. FAPA would read in a new restriction to those rights—restrictions that the parties did not negotiate and were not suggested by the then-existing law—that a voluntary discontinuance cannot constitute an "affirmative

[12] 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.

act" of revocation. Doing so would not only impair the lenders' acceleration and deceleration 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.

To determine whether a statute violates the Contract Clause, courts look to 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.

First, FAPA substantially impairs the mortgage relationship because lenders had no forewarning that the value of their mortgages could be wiped out. "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, and FAPA provides no grace period.

Second, applying FAPA retroactively to impair lenders' rights to decelerate a mortgage is neither a reasonable nor appropriate means to achieve FAPA's purpose because prospective application is sufficient. 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.

The Second Circuit's decision in *The Vigilancia* is instructive. In 1890, New York enacted a law requiring the consent of at least two-thirds of the stock of a corporation for the corporation to issue a mortgage. *Atl. Tr. Co.* v. *The Vigilancia*, 73 F. 452, 456 (2d Cir. 1896). The Second Circuit 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. The retroactive application of FAPA likewise violates the federal Contract Clause.

The Attorney General (at 22) cites to the Eastern District's decision in *East Fork* and makes the conclusory assertion that FAPA does not impair any contractual rights. There, the court held that FAPA did not violate the Contract Clause because the subject mortgage did not expressly grant the lender a right to decelerate the mortgage or reset the statute of limitations. *East Fork Funding LLC* v. *U.S. Bank*, *N.A.*, 2023 WL 2660645, at *5 (E.D.N.Y. Mar. 23, 2023). Moreover, the court found that FAPA did not prevent the parties from agreeing to a voluntary discontinuance or another action that would reset the statute of limitations; FAPA only prevented the lender from doing so unilaterally. *Id.* But *East Fork* was wrongly decided and misses at least two points of law.

First, the court ignored that the Contract Clause's protections are not limited to the terms expressly written into a contract. *Romein*, 503 U.S. at 189 ("[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)). Based on longstanding precedent, lenders reasonably expected that a voluntary discontinuance could revoke an acceleration—the rule set out in *Loeb* and confirmed by ten out of thirteen trial courts to address the issue prior to 2019. *See supra* at 12. Indeed, FAPA's legislative history concedes that "in practice . . . lenders resort[ed] to the voluntary dismissal or discontinuance of foreclosure actions . . . to reset and, in effect, extend the statute of limitations." Senate Introducer's Mem. at 6. This well-settled understanding became part of the contracts' terms.

Second, the mortgage contract entitles the lender to receive payments from the borrower. FAPA wipes out the lender's ability to enforce that right—destroying the entire value of the contract—if the lender accelerated the mortgage more than six years ago by filing a foreclosure action, no matter whether the lender revoked its election. FAPA thus impairs the lender's right to receive payments and its right to revoke its election.

C. Retroactive Application Would Cause Unconstitutional Takings.

Retroactive application of FAPA violates the State and U.S. Takings Clauses, which protect lenders from governmental appropriation of their vested property rights. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation");[13] N.Y. CONST. art. I, § 7 ("Private property shall not be taken for public use without just compensation."). 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

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

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

CONCLUSION

Amici respectfully request that the Court hold that the retroactive application of FAPA is unconstitutional.

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Respectfully submitted,

<u>/s/ Matthew A. Schwartz</u>

Matthew A. Schwartz
Leonid Traps
Austin P. Mayron
Howard H. Kim
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
(212) 558-4000
schwartzmatthew@sullcrom.com

Counsel for Amicus Curiae New York Bankers Association

Brian S. McGrath
HINSHAW & CULBERTSON LLP
800 Third Avenue
New York, New York 10022
(212) 471-6200
bmcgrath@hinshawlaw.com

Counsel for Amici Curiae New York Mortgage Bankers Association and Mortgage Bankers Association

Natalie Grigg
WOODS OVIATT GILMAN, LLP
500 Bausch & Lomb Place
Rochester, New York 14604
(585) 445-2610
ngrigg@woodsdefaultservices.com

Adam M. Swanson
Jessie Bonaros
McCARTER & ENGLISH, LLP
825 Eighth Ave., 31st Floor
New York, New York 10019
(203) 399-5928
aswanson@mccarter.com

Counsel for Amicus Curiae New York Mortgage Bankers Association

Andrew R. Doersam
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Ave. NW
Washington, DC 20036
(202) 663-5035
adoersam@aba.com

Counsel for Amicus Curiae American Bankers Association

James C. Sivon
SIVON, NATTER & WESCHLER, P.C.
2550 M St. NW, 3rd Floor
Washington, DC 20037
(202) 262-4271
jsivon@snwlawfirm.com

Counsel for Amicus Curiae Housing Policy Council

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/s/ Matthew A. Schwartz
Matthew A. Schwartz
Counsel for Amicus Curiae New York Bankers Association
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