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2024-01508, 2024-04531 and 2024-05479

Court of Appeals

of the

State of New York

PATTI VAN DYKE,

Plaintiff-Respondent,

– against –

U.S. BANK, NATIONAL ASSOCIATION,

Defendant-Appellant.

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-RESPONDENT AND INTERVENOR

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PRELIMINARY STATEMENT

In response to a foreclosure crisis of a scale not seen since the Great Depression—which was largely precipitated by the marketing of predatory, toxic mortgage loans designed to sate a crazed mortgage securitization market—New York introduced a series of consumer protections. These protections sought to ensure that distressed homeowners receive notice of impending risk of foreclosure, access to free housing counseling and legal services, meaningful opportunities to negotiate home-saving solutions, and the ability to defend foreclosure actions on the merits. Before these protections, the majority of residential foreclosure actions were default proceedings with no involvement by defendant homeowners whatsoever. Foreclosing plaintiffs rarely needed to substantiate their claims with admissible evidence or demonstrate compliance with contractual or statutory conditions precedent. Indeed, the norm came to be mass-produced, auto-generated foreclosure complaints filed by the thousands, supported only by fabricated "robo-signed" evidence. This prompted the New York State Courts, followed by the state legislature, to implement a series of policies to ensure that foreclosing plaintiffs were actually entitled to foreclose, and that judgments of foreclosure and sale were not premised on fabricated evidence.

As a result, thousands of foreclosure cases came to a sudden halt, with lenders and their counsel unwilling to swear to a meritorious basis for their claims,

that attorneys had reviewed the allegations with plaintiffs before filing the complaint, or that procedural requirements (such as predicate notices) had been followed.[1] Plaintiffs abandoned thousands of cases, leaving some to be deemed abandoned for failure to timely proceed to default judgment, while others were voluntarily discontinued by plaintiffs who, still today, have been commencing new foreclosure actions on loans based on the same defaults from years ago. This historical background explains why this Court is now compelled to consider, for the third time in four years, the application of statute of limitations issues in residential foreclosure actions, despite the fact that these cases prosecuted by some of the world's largest financial institutions, represented at every stage by specialized counsel. *Amici* respectfully submit that the Foreclosure Abuse Prevention Act ("FAPA") is intended to be retroactive, that retroactive application is constitutional, and that the Decision and Order of the Appellate Division, First Department should be affirmed. *Amici* will not rehash the constitutional arguments

[1] *See, 2015 Report Of The Chief Administrator Of The Courts Pursuant to Chapter 507 of The Laws of 2009,* https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/2015ForeclosureReport.pdf%20 (last visited August 25, 2025) ("As previously reported in 2012, 2013 and 2014, the Judiciary continues to work with homeowners whose foreclosure cases were commenced prior to October 2010 to ensure they have an opportunity to participate in the conference process. In foreclosure cases filed before that time, many plaintiffs relied on documents 'robo-signed' by bank representatives who claimed to have personally reviewed thousands of documents in implausibly short periods of time. Once these actions were filed, the plaintiffs were unable to proceed with their cases as the required documentation was missing. Since the plaintiffs could not proceed with the action, requests for judicial intervention (RJI) were never filed, leaving the affected homeowners in limbo with no access to the settlement conference process. These cases comprise what is known as the 'shadow inventory.'").

capably made by the Attorney General and Ms. Van Dyke and instead provide background on the state of the law before the enactment of FAPA.

INTERESTS OF *AMICI*

Amici are non-profit organizations that provide free legal services to distressed homeowners and low-and moderate-income New Yorkers facing threats to affordable homeownership. The majority of clients represented by *Amici* are seniors and people of color. *Amici* have collectively represented homeowners in thousands of foreclosure proceedings including homeowners in current foreclosure and quiet title actions in which the mortgage loans at issue were the subject of prior actions commenced as long as fifteen years ago, which were either abandoned, voluntarily discontinued, or dismissed. Their experience representing at-risk homeowners eligible for free legal services is necessarily distinct from that of the small number of homeowners who are able to pay for private counsel. *Amici* therefore have an important perspective concerning implementation of the Foreclosure Abuse Prevention Act.

Amici possess extensive knowledge of the harms experienced by low-and-moderate-income homeowners whose loans are accelerated by foreclosure actions, and which accrue interest and foreclosure fees even though many of those actions were abandoned years after being commenced. These homeowners were unable to tender monthly payments to their mortgage servicer after a foreclosure action was

commenced—whether or not that foreclosure action was dismissed—because mortgage servicers routinely reject installment payments after a putative acceleration of the loan. *Amici* have represented countless homeowners who receive statements from their mortgage servicers demanding full payment of the accelerated loan balance after prior foreclosure actions were commenced, and who have been reported to credit reporting agencies as in default on the accelerated balance of their loans—regardless of whether the plaintiff in a foreclosure action was able to demonstrate its status as the owner or holder of the mortgage note.

Additionally, *Amici* have direct knowledge of countless homeowners sued in foreclosure who failed to timely assert a defense based on the foreclosing plaintiff's lack of "standing" because they lacked access to counsel, only to have such defense deemed waived, and they are intimately familiar with New York law which permitted, until recently, the waiver of "standing" defenses in foreclosure cases and which permitted foreclosing plaintiffs to proceed to judgments of foreclosure and sale even where plaintiffs could not make the required evidentiary showing—facts which are incompatible with the Appellant's assertion that an earlier foreclosure action was a "nullity" that failed to accelerate the loan even in the absence of an adjudication to that effect.

Consequently, *Amici* have knowledge of the courts' inundation with successive foreclosure actions that could have been resolved through affordable

loan modifications or other home-saving solutions during earlier foreclosure actions at mandatory foreclosure settlement conferences pursuant to CPLR Rule 3408, but which now have such large arrears that settlements through loan modifications are impossible. They also have first-hand knowledge of the lost opportunity for many homeowners to access time-limited homeowner relief programs which, had earlier foreclosure actions not been abandoned, could have led to home-saving solutions, which programs are no longer available when lenders bring back from the dead—a decade or more later—long-abandoned foreclosure actions.

ARGUMENT

I. The Games Lenders Play to Manipulate the Statute of Limitations.

Whereas most parties seeking to enforce a breached contract must sue within six years of the breach, mortgage contracts consider each missed monthly payment to be a separate breach, meaning that over the course of a thirty-year mortgage there could be as many as 360 separate claims with 360 distinct limitations periods. *Freedom Mtge. Corp. v. Engel*, 37 NY3d 1 (2021). The concept of "acceleration" is thus central to statute of limitations analysis in foreclosures, because a lender can only sue to foreclose on the property securing the loan when it exercises the right to call due—to "accelerate"—the total amount owed. *Id.* There are several ways to accelerate, but the most obvious is to file a

foreclosure action demanding the total amount due, so the foreclosure statute of limitations is typically measured from the filing of a prior foreclosure action.[2] Almost every foreclosure action presenting a statute of limitations issue is therefore the lender's second (or third or fourth) foreclosure action.

Lenders who seek to enforce long-defaulted debt therefore need a villain to blame for why their first (and second, and third) foreclosure actions failed, and why they are entitled to assert claims that, in any other context, would be time-barred. Their parade of villains is long: deadbeat homeowners and their nefarious attorneys, slow-moving courts, indulgent legislators. But the primary reason why these ancient cases are still clogging courts' dockets is that lenders rushed to file foreclosure actions in bulk despite lacking evidence of who owned which loans or of compliance with required procedural safeguards. Then lenders failed to properly pursue or litigate them for years. As homeowners began to raise statute of limitations defenses in newly filed foreclosure actions, the lenders turned to novel arguments to evade the consequences of their conduct, conjuring post-hoc arguments about what their actions years—or even decades—earlier meant. These

[2] Even upon acceleration, the claims for individual monthly installments that accrued more than six years prior to acceleration are time-barred. *U.S. Bank Trust, N.A. v. Miele*, 186 AD3d 526 (2d Dep't 2020) (claims for unpaid mortgage installments that accrued more than six years prior to commencement dismissed as time-barred).

arguments should be rejected because they were incorrect then, and they are incorrect now.

A. The Game of Disingenuous Arguments About the Retroactive Application of FAPA

Immediately after this Court's February 2021 decision in *Freedom Mortgage v. Engel*, 37 NY3d 1 (2021)—which reversed a line of cases from the First, Second and Third Departments to hold that a voluntary discontinuance, alone, served to revoke acceleration resulting from the filing of a foreclosure action, and thereby reset the statute of limitations—lenders rushed to revive previously-dismissed actions that had been decided under the prior controlling case law. *E.g. Wells Fargo Bank, National Association v. Islam*, 193 AD3d 1016 (2d Dep't 2021) *recalling and vacating* 188 AD3d 1116 (2d Dep't 2020); *Pryce v. Nationstar Mortgage, LLC*, 193 AD3d 999 (2d Dep't 2021) *recalling and vacating* 189 AD3d 1094 (2d Dep't 2020). Homeowners who had finally secured closure of their actions found themselves once again subjected to foreclosure lawsuits that the current owners of their loans had successfully exhumed from their graves.

The Legislature also sprang into action, introducing the first version of FAPA mere weeks later. The Senate version of the Bill was introduced on March 8, 2021 (https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S05473&term=2021&Summary=Y&Actions=Y) (last visited August 21, 2025), with the Assembly

version of the bill introduced on May 20, 2021 (https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A07737&term=2021&Summary=Y&Actions=Y) (last visited August 21, 2025). After amendments, the Assembly passed the bill with bipartisan support on March 23, 2022, and the Senate passed the bill on May 3, 2022 with 51 votes, an overwhelming display of bipartisan support. The bill was delivered to Governor Hochul on December 20, 2022, and signed into law on December 30, 2022—less than two years after this Court decided *Engel*.

Notwithstanding the speed with which the Legislature acted, Appellant's Reply Brief argues that the length of time that elapsed before FAPA was signed into law indicates that the legislature did not intend for it to be retroactive. App. Reply Br. 13-14. This Court, however, has described the Legislature as acting promptly when it passed remedial legislation "at the next session" following this Court's decision in an earlier case. *Matter of Gleason (Michael Vee, Ltd.)*, 96 NY2d 117, 122 (2001). Given the competing priorities in each legislative session and the fact that the Legislature is only in session between January and June, the suggestion that the Legislature failed to act promptly cannot be taken seriously. Not to mention that even engaging in such analysis requires ignoring FAPA's plain language in its enacting clause (as capably addressed in the Attorney General's brief). Appellant also argues that it "relied on the certainty it could raise … lack of

standing in a subsequent action" when it discontinued the 2009 action in 2022 and commenced a new action in 2022 (App. Reply Br. 15), but there was no such certainty at the time under the governing law, especially since FAPA had already been introduced and passed, and was merely awaiting signature by the Governor.

Though Appellant and counsel for other lenders now argue that, on its face, FAPA's plain language does not support its retroactive application, the very same counsel and lobbyists for the lenders who opposed FAPA's enactment decried its retroactive impact before its passage and after its enactment. *See, e.g.,* Jeffrey B. Steiner & Megan Vallerie*, The Statute of Limitations for Mortgage Foreclosures Faces Potential Changes*, N.Y.L.J., Jul. 19, 2022 available at https://plus.lexis.com/api/permalink/e771021d-9314-4443-855b-d2bf03e0f622/?context=1530671 (last visited August 21, 2025) ("Lenders should also note that the bill (if enacted in its current form) will affect not just new, but also pending foreclosure actions unless the auction has occurred"); Adam M. Swanson & Timothy William Salter, *NY Legislature Takes Aim at Lenders' Right to Revoke Mortgage Acceleration*, N.Y.L.J., Apr. 5, 2022, available at https://www.mccarter.com/insights/ny-legislature-takes-aim-at-lenders-right-to-revoke-mortgage-acceleration/ (last visited August 22, 2025); Diana M. Eng & Andrea Roberts, *Can the Foreclosure Abuse Prevention Act Survive a Constitutional Challenge?*, N.Y.L.J., Jan. 6, 2023 available at

https://www.blankrome.com/publications/can-foreclosure-abuse-prevention-act-survive-constitutional-challenge (last visited August 22, 2025); Diana M. Eng & Andrea Roberts, *New York's Foreclosure Abuse Prevention Act: What You Need to Know*, N.Y.L.J., Jan. 11, 2023, available at https://www.blankrome.com/publications/new-yorks-foreclosure-abuse-prevention-act-what-you-need-know (last visited August 22, 2025); Adam Leitman Bailey, Jackie Halpern Weinstein & Danny Ramrattan, *A Lender's Guide to Hiking Through the Retroactive Trails of the Foreclosure Abuse Prevention Act*, N.Y.L.J., Feb. 14, 2023, available at https://alblawfirm.com/articles/a-lenders-guide-to-hiking-through-the-retroactive-trails-of-the-foreclosure-abuse-prevention-act/ (last visited August 22, 2025).

The legislative history also includes multiple submissions from industry advocates and legislators opposing the bill's retroactive effect. *See, e.g.,* Letter of Independent Bankers Ass'n of New York State, Bill Jacket at 180-183; Letter of New York Bankers Ass'n, Bill Jacket at 85-89.

The same lenders who opposed FAPA's passage because of its retroactivity now shamelessly argue that it is unclear whether FAPA was meant to be retroactive. To be charitable, it strains credulity for Appellant to argue that FAPA's plain language stating that it shall apply to all cases in which a judgment of foreclosure and sale has not been enforced does not mean what it says.

B. The Game of Reinterpreting Voluntary Discontinuances as Revocation of Acceleration to Reset the Statute of Limitations.

This appeal represents another one of the games lenders play with the statute of limitations—misrepresenting the law that previously existed and the effect that had on prior litigation. Because the voluntary discontinuance at issue on this appeal was executed more than six years after the commencement of the foreclosure action, it never could have reset the statute of limitations: not before this Court decided *Engel*, not in the 22 months between when *Engel* was decided and when FAPA was enacted, and not now. Moreover, Appellant's claim that *Engel* merely reaffirmed longstanding law that a voluntary discontinuance served to reset the statute of limitations is refuted by *Engel* itself.

1. Stipulations or Other Putative "Revocations" Executed After Expiration of the Limitations Period Could Never Reset the Limitations Period.

The Stipulation on which Appellant relies was executed on March 17, 2022 and so-ordered on March 24, 2022—more than twelve years *after* the acceleration effected by commencement of the foreclosure action on October 30, 2009, and long after expiration of the six-year statute of limitations on October 30, 2015.

Engel did not alter the long-settled law that once the limitations period expires, a mortgagee cannot revive it through later procedural acts or agreements, absent compliance with the limited statutory revival provisions in the General Obligations Law § 17-101 *et seq*. *See Engel*, 37 NY at 28 ("[T]he Appellate

Division departments have consistently held that . . . revocation can be accomplished by an 'affirmative act' of the noteholder *within six years of the election to accelerate*.") (emphasis supplied); *GMAT Legal Title Trust 2014-1 v. Kator*, 213 AD3d 915, 917 (2d Dep't 2023) (even prior to FAPA, discontinuance after expiration of the six-year limitations period could not reset the statute of limitations); *Federal Natl. Mtge. Assn. v. Sajdak*, 192 AD3d 764 (2d Dep't 2021) (action time-barred because prior foreclosure action was not discontinued until after the expiration of statute of limitations); *Kashipour v. Wilmington Sav. Fund Socy., FSB*, 144 AD3d 985, 987 (2d Dep't 2016) (no revocation of acceleration within the six-year limitations period triggered by the initiation of the prior action). Because the Stipulation here was executed nearly seven years after the limitations period had run, any purported "revocation" of acceleration was ineffective to re-set the statute of limitations, under the law as it existed before *Engel*, and as modified by *Engel*.

2. Appellant Mischaracterizes the State of the Law Before *Engel*

As the Appellant does here, lenders regularly misrepresent the state of the law as it existed before *Engel*, in an effort to overstate the impact of FAPA. However, as this Court explicitly held in *Engel* when it was asked whether a discontinuance could serve to revoke acceleration and thereby reset the limitations period, "this court has never addressed what constitutes a revocation in this

context…and no clear rule has emerged with respect to…whether a noteholder's voluntary motion or stipulation to discontinue a mortgage foreclosure action…constitutes a sufficiently 'affirmative act.'" 37 NY3d at 28-29. Appellant erroneously argues that FAPA upended decades of well settled precedent that had merely been nudged forward by *Engel* even though *Engel* itself recited that it had not previously been clear that a voluntary discontinuance could reset the limitations period.[3] As explained in the Attorney General's brief, lenders have grossly overstated what vested interest or property rights they could possibly have relied upon in voluntarily discontinuing foreclosure actions before *Engel.*

C. Lenders Play Games by Claiming that Their Own Prior Actions Failed to Accelerate the Debt.

1. FAPA Merely Codified Existing Case Law Regarding the Burden to Establish that Prior Actions Failed to Accelerate the Loan.

As lenders pursue time-barred foreclosure claims, they have devised creative arguments to excuse themselves from the same statutes of limitations that govern other civil litigants. In addition to arguing that they had silently "revoked" acceleration (and thereby reset the statute of limitations) when they jettisoned earlier actions, lenders also began arguing that prior actions never actually served

[3] In fact, to the extent there was a clear rule prior to *Engel* it was that a discontinuance, without more, was insufficient to revoke acceleration for purposes of restarting the statute of limitations in foreclosure actions. *E.g.,* *Bank of N.Y. Mellon v Craig,* 169 AD3d 627, 628 (2d Dep't 2019); *U.S. Bank N.A. v Charles*, 173 AD3d 564 (1st Dep't 2019); *21st Mtge. Corp. v. Nweke*, 165 AD3d 616, 617 (2d Dep't 2018).

to accelerate the loan and trigger the statute of limitations, overlooking the undisputed fact that, upon commencement of a foreclosure action, a homeowner's loan is effectively accelerated: monthly installment payments are rejected, statements demanding payment of the accelerated balance are sent, and borrowers are reported to credit reporting agencies as in foreclosure.

In spite of all this, lenders have the temerity to argue that actions that they or their predecessors commenced, in which they represented that they were the proper parties to pursue foreclosure, were in fact not commenced by the proper parties and thus could not have accelerated the loan. In many of those earlier cases the defendants defaulted in appearing or failed to raise defenses related to ownership of the loan, so accepting these arguments requires ignoring uncontroverted facts.

In a foreclosure action, the plaintiff's status as the holder or assignee of the underlying promissory note has been referred to as "standing to foreclose." *Aurora Loan Servs. LLC v. Taylor*, 25 NY3d 355, 361 (2015); *U.S. Bank, N.A. v. Nelson*, 36 NY3d 998, 999 (2020).[4] This Court and each department of the Appellate Division have consistently held that, where the defendant has raised the lack of standing as a defense, it is the plaintiff's burden to prove that it has standing. *E.g., JPMorgan Chase Bank, N.A. v. Caliguri*, 36 NY3d 953, 954 (2020); *PNC Bank,*

[4] *But see Nelson*, 36 NY3d at 1000 (Wilson, J., concurring) (noting that what has been defined as "standing" is more accurately a question of whether the plaintiff has satisfied the essential element of establishing that it is a party to the contract).

N.A. v. Salcedo, 161 AD3d 571, 571-72 (1st Dep't 2018); *U.S. Bank, N.A. v. Muroff*, 234 AD3d 1010, 1012 (2d Dep't 2025); *Goldman Sachs Mtge. Co. v. Mares*, 166 AD3d 1126, 1128 (3d Dep't 2018); *U.S. Bank Trust, N.A. v. Pieri*, 197 AD3d 930, 931 (4th Dep't 2021).

Prior to FAPA, a dismissal in a prior foreclosure action based upon a lack of standing served as a judicial determination that the prior plaintiff lacked the authority to accelerate the loan, so the statute of limitations had not yet begun to run. *U.S. Bank N.A. v. Auguste*, 173 AD3d 930, 932 (2d Dep't 2019). Where a prior case had not been dismissed on those grounds, however, it was the lender's burden to prove that the prior plaintiff lacked standing. Appellate courts throughout the State generally resisted lenders' efforts to shift the burden to homeowners to prove that the prior case was proper, instead squarely placing the burden on the lenders to prove otherwise. *E.g.* *Federal National Mortgage Association v. Schmitt*, 172 AD3d 1324, 1325-26 (2d Dep't 2019); *Avail Holding LLC v. Ramos*, 820 Fed. Appx. 83 (Mem), 85 (2d Cir 2020); *Bank of N.Y. Mellon v. Ahmed*, 181 AD3d 634, 635-36 (2d Dep't 2020).

FAPA's estoppel provisions merely codified and strengthened this line of cases while seeking to correct some aberrant decisions that, counter to prevailing authority, improperly allocated the burden of establishing plaintiff's standing in an earlier action. The Legislature recognized that allowing lenders to make these

belated challenges would unfairly and inequitably penalize homeowners for the carelessness of lenders. It allowed a lender to sit on its rights for years, only to use an ostensible lack of standing or failure to comply with other requirements in the prior action as a sword in a subsequent action. *See* Senate Introducer's Memo, N.Y. Bill Jacket, 2022 A.B. 7377, Ch. 821, at 56 (the purpose of Section 7 is to "clarify, codify and harmonize established principles of estoppel applicable to the statute of limitations . . ."); *id.* at 63-64 (discussing principles behind Section 7). Section 7 vindicates the principle that equity should not reward a lender for gamesmanship or for careless, dilatory conduct.

FAPA's estoppel provision is well reasoned, because it would be particularly unfair to charge a defendant in a subsequent action with the burden of showing that the lender had standing in the prior action, particularly when the evidence needed to determine standing is likely to be in the lender's, not the homeowner's, possession. *See Nelson*, 36 NY3d at 1010-11 (Wilson, J., concurring in result) ("the chain of indorsements on a note entitling the plaintiff to foreclose on a mortgage is nothing that would take the plaintiff by surprise – it is information principally in the possession of the plaintiff and often unknown to the defendant").

By contrast, FAPA Section 7 appropriately balances this equitable principle against the rule of judicial estoppel. Where the defendant in a prior action raised and prevailed based upon a lack of standing, the lender in a subsequent action may

still argue that the loan was not accelerated by the prior action. In that scenario, judicial estoppel, as preserved in the language of Section 7, continues to prevent a defendant homeowner from arguing that the debt has been accelerated.[5] But if there has not been such a judicial determination, then it is the lender that is estopped, not the homeowner.

Amici have represented many clients who faced similar scenarios as the one faced by Ms. Van Dyke in 2022, when she stipulated to the discontinuance of her thirteen-year-old foreclosure case. The loan had changed hands numerous times since origination in 2007, and servicing rights had similarly been transferred on multiple occasions. Resp. Br. at 5-6. After the discontinuance, the case was over, but the lender still considered her to be in default, and it took no action that would have indicated that her loan had returned to a regular installment status. *Id.* When Ms. Van Dyke sought closure in 2022 through a quiet title action under RPAPL § 1501(4), Appellant brazenly denied that her loan had been accelerated even though she had been a defendant in a foreclosure action for thirteen years and even though

[5] Although a persuasive argument can be made that even if there was ultimately a judicial determination of a lack of standing, the loan was nonetheless effectively accelerated when the foreclosure action was commenced because the mortgage servicer, as agent of the loan's owner, treated the loan as accelerated by, among other things, sending statements demanding payment of the accelerated loan balance, rejecting monthly installment payments, and reporting the borrower to credit reporting agencies as in foreclosure on the accelerated debt. Nonetheless, the legislature's adoption of the estoppel provision in FAPA Section 7 was a reasonable decision to recognize and codify the existing case law holding otherwise, not the sea-change that lenders now claim it to be.

it filed a new foreclosure action against her on the same debt, as if no time bar applied.

Amici have represented clients in a similar posture in countless cases, facing successive foreclosure actions on long-ago accelerated debt. FAPA's estoppel provision merely codifies and extends the prevailing case law at the time—rather than requiring courts now to travel back in time to determine a question that was not addressed in the previous case, under FAPA courts need not consider whether the prior action might possibly have been subject to dismissal.

2. Appellant Misrepresents the Prior Summary Judgment Decision in The 2009 Action.

The denial of summary judgment in the 2009 action did not determine the issue of standing – quite the opposite. "'The denial of a motion for summary judgment establishes nothing except that summary judgment is not warranted at [that] time' . . . and does not constitute an adjudication on the merits[.]" *Jones v. Town of Carroll*, 158 AD3d 1325, 1328 (4th Dep't 2018) (internal citations omitted); *accord Metropolitan Steel Indus., Inc. v. Perini Corp.*, 36 AD3d 568, 570 (1st Dep't 2007); *Baker v. R.T. Vanderbilt Co., Inc.*, 260 AD2d 750, 751 (3d Dep't 1999).

In the 2009 action, the motion court identified triable issues of fact, holding that "[i]ssues of fact exist as to possession of the note such that *neither side* is entitled to summary judgment." (R. 51.) (emphasis supplied) The First Department

affirmed this holding. *Bank of NY Mellon Trust Co. v Van Dyke*, 180 AD3d 480 (1st Dep't 2020). Those issues remained undetermined when the action was discontinued, and "so ordering" that stipulation was not an adjudication of the absence of standing when, in fact, the Supreme Court had also determined that Ms. Van Dyke had failed to establish that Appellant's predecessor lacked standing.

3. Even if Appellant's Predecessor Lacked Standing, the Action was Not a "Nullity."

Appellant misrepresents the first action as a "nullity." App. Br. *passim.* No court ever determined that the action was a nullity, nor did the so-ordered stipulation do so. To describe an acceleration by complaint as a "nullity" because the plaintiff allegedly lacked standing is irreconcilable with the law, which treated standing in foreclosure cases as a waivable defense prior to the enactment of RPAPL § 1302-a, and permitted actions to proceed to judgments of foreclosure and sale regardless of plaintiff's inability to prove standing to foreclose. *See, e.g., Wells Fargo Bank Minn. N.A. v. Mastropaolo,* 42 AD3d 239 (2d Dep't 2007).[6]

This Court has described acceleration by commencing a foreclosure case as an "unequivocal overt act[.]" *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 NY 472, 476 (1932). The act cannot be considered unequivocal if its effectiveness

[6] Even after enactment of RPAPL § 1302-a, the standing defense is still waived if a defendant is unable to meet the high bar required to vacate a default and for leave to file an untimely answer. *See US Bank N.A. v. Eisler,* 237 AD3d 999 (2d Dep't 2025).

depends on whether the defendant raises or waives the standing defense. Rather, *Albertina* separates the act of acceleration from the viability of the foreclosure action. Standing, if asserted as a defense, may be an impediment to the maintenance of the foreclosure action, but it does not invalidate the acceleration.

Moreover, the Second Department has held that, even where an action is a nullity because commenced against a deceased party, the commencement of the action nonetheless constitutes a valid acceleration. *Wilmington Savings Fund Soc'y v. Burgress*, 232 AD3d 933, 935 (2d Dep't 2024); *Wilson 3 Corp. v. Deutsche Bank Nat'l Trust Co.*, 219 AD3d 870, 871 (2d Dep't 2023); *Deutsche Bank Nat'l Trust Co. v. Rivera*, 200 AD3d 1006, 1008 (2d Dep't 2021). This recognizes the reality that once a lender files a foreclosure action, the loan is treated as accelerated by the mortgage servicer regardless of whether the foreclosure action suffered from fatal defects.

II. The Legislature Passed FAPA To Finally, And Decisively, Put an End to the Games Foreclosing Lenders Play

As amply detailed in the Attorney General's brief, New York's lawmakers have spent close to two decades crafting, enacting, and clarifying numerous consumer protections aimed at preserving homeownership following the foreclosure crisis. Over the same period, *Amici* have represented the clients who are the intended beneficiaries of those protections, often having to educate courts, plaintiffs' attorneys and lender representatives of relevant changes to New York

foreclosure law and practice. Each incremental protection has been met with fierce resistance and often outright defiance by the foreclosure plaintiffs' bar. FAPA represents a clear acknowledgement by lawmakers that despite countless efforts to protect homeowners, the mortgage servicing industry has continued to thwart meaningful reform, requiring further action. Indeed, this case exemplifies the issue, as lenders have willfully refused to abide by FAPA's provisions even after every department of the Appellate Division to consider the question has upheld the constitutionality of FAPA's retroactive application.

A. FAPA §§ 4 and 8 Prohibit Lenders from Unilaterally Resetting Statutes of Limitation, A Tactic *Amici* See Repeatedly in Foreclosure Litigation.

In addition to FAPA § 7, FAPA §§ 4 and 8 also prohibit lenders from unilaterally manipulating statutes of limitations. Of course, lenders have never had a "right" to control the operation of the applicable limitations period—no litigant is entitled to do so. Over time, however, the mortgage servicing industry has devoted substantial ingenuity to evading this core legal principle. From "de-acceleration letters" that purported to return loans to installment status, to declaring that discontinuing a case was sufficient to reset the clock, foreclosing plaintiffs have devised numerous ways to extend their time to sue borrowers. No other industry has so comprehensively refused to acknowledge the temporal parameters of its right to seek legal recourse. Recognizing that mortgage lenders would continue to knowingly sue on time-barred debts unless explicitly forbidden from doing so, in

direct response to this Court's ruling in *Engel*, the Legislature clarified in FAPA §§ 4 and 8 that lenders do not possess unilateral control over the running of the statute of limitations.

This clarification was sorely needed. The power imbalance between a struggling homeowner and a sophisticated financial institution is exacerbated when the more powerful party simply refuses to obey basic rules of litigation. *Amici* have litigated countless cases for homeowners where the foreclosing plaintiff claims an action is not time-barred because, for example, it sent a "de-acceleration letter" at some point after (or during the pendency of) a prior foreclosure action. Frequently these letters—purportedly sent years ago and often lacking admissible evidence of actual mailing or delivery—are the sole basis for salvaging an otherwise time-barred claim. And yet just as frequently, courts allowed these foreclosures to proceed because lenders insist on their right to set the terms of their own litigation. FAPA §§ 4 and 8 make clear that foreclosing lenders cannot arrogate to themselves the right to unilaterally reset the statute of limitations.

Similarly, *Amici* have handled numerous cases in which a foreclosing plaintiff, faced with the prospect that a successive foreclosure will be dismissed as time-barred, seeks to revive the prior action. In these cases, lenders wield their duplicative filings as a cudgel against exhausted homeowners and overburdened courts: either allow the newer, time-barred action to proceed, or deal with a years-

old, long-abandoned case. *Amici* often then have to defend two simultaneous actions when neither action would be viable if the statute of limitations were properly applied. It is difficult to imagine another legal context in which this scenario would be permissible and yet it is commonly encountered by *Amici* in their representation of low-and-moderate-income struggling homeowners.

The extent to which these time-barred cases burden the dockets of courts throughout New York cannot be overstated. The glut of duplicative, time-barred foreclosure actions has a devastating impact on the timely resolution of these cases, particularly where borrowers have colorable defenses requiring adjudication. By enacting FAPA, the Legislature heard accounts of litigation scenarios such as these; FAPA §§ 4 and 8 directly forbid such lender conduct in all cases in which a judgment has not yet been enforced.

The scenario in Ms. Van Dyke's case is similar, but instead of a time-barred successive action, she sought to exercise her statutory right to seek cancellation and discharge of the mortgage securing the debt pursuant to RPAPL § 1501(4)v.[7]

[7] The very existence of RPAPL § 1501(4) is testament to how seriously New York intends to enforce statutes of limitations of mortgages, insofar as it creates a specific cause of action to quiet title in order to cancel and discharge mortgages which are time-barred. Indeed, that statute explicitly states that in an action brought to secure the discharge of a mortgage whose enforcement is time-barred "it shall be immaterial whether the debt upon which the mortgage or lien was based has, or has not, been paid; and also whether the mortgage in question was, or was not, given to secure a part of the purchase price." N.Y. R.P.A.P.L. § 1501(4). It is hard to conceive a more unequivocal statement by the Legislature that statutes of limitations governing mortgage loans should be enforced vigorously.

Resp. Br. 4-5. In response, the current owner of the loan determined that the best way to fight the quiet title would be to bring a new, separate foreclosure action, and seek dismissal of Ms. Van Dyke's complaint. Of course, Appellant knew by 2022 that the clock had already run on its claim.[8] It had first accelerated the debt with its 2009 foreclosure and reaffirmed the acceleration in 2010 in correspondence with Ms. Van Dyke. (R. 118.) Yet it persisted in litigating this time-barred claim in multiple actions against Ms. Van Dyke, and continues to press its time-barred claims to this day. *Amici* are familiar with all of these situations, which are unequivocally barred by FAPA.

B. FAPA Eliminates the Incentive for Lenders to File Meritless Actions and Relieves Pressure on Foreclosure Dockets.

FAPA's legislative history shows the extent to which lenders relentlessly pursue time-barred claims. FAPA has been the law for almost three years, and yet lenders continue to file actions on time-barred debt, apparently hoping that this Court will strike down FAPA, or relying on the statistical probability that the defendant will lack access to counsel and fail to preserve the statute of limitations defense, which is waived if not timely asserted. CPLR Rule 3211(e). Even as every single department of the Appellate Division that has considered the issue has applied FAPA retroactively and upheld its constitutionality, *Amici* continue to

[8] It also knew then that FAPA had been passed by the Legislature and was awaiting signature by the Governor.

encounter new cases in which homeowners are sued in successive actions on time-barred debts.

In debating FAPA, New York lawmakers heard from advocates and stakeholders, including representatives of many *Amici*, explaining why homeowner protections continue to be critically important in the face of continued industry resistance and a worsening economic and political climate for homeowners. The mortgage lending industry, supported by teams of high-powered lobbyists, also descended upon Albany and argued that being forced to follow the law would signal the end of mortgage lending in New York, just as they argued against each and every consumer protection enacted since the onset of the Great Recession. Where the political branches have balanced competing interests in enacting laws on complicated matters of State policy, those laws "may not be casually set aside by the judiciary." *McGee v. Korman*, 70 NY2d 225, 231 (1987).

C. Time-Barred Foreclosure Actions Undermine the Efficacy of New York's CPLR 3408 Foreclosure Settlement Conferences.

The pursuit of stale foreclosure claims has an adverse impact on New York's mandatory settlement conference process, which was devised to encourage home-saving solutions and to divert foreclosure actions from contested litigation. CPLR Rule 3408. Time-barred foreclosure actions purport to seek recovery based on the original default date, which often means *Amici* are counseling homeowners who are alleged to owe hundreds of thousands of dollars in mortgage debt. Settlement

conferences in the prior, abandoned actions, when the loan balances had not been bloated by a decade or more of interest and fees, had a far better chance of achieving a home saving solution, but these outcomes are far less likely in a subsequent action.

It might be possible to eventually eliminate a portion of that accumulated debt through years of hard-fought litigation, but at CPLR 3408 settlement conferences, the amount of the debt that is collectible has not yet been challenged and the negotiation process will be informed by the amount demanded in the complaint, which makes reasonable settlements almost impossible in these actions.

Even where a complaint seeks plainly time-barred debt, there is no procedural means to address this issue unless a homeowner relinquishes their right to settlement conferences, and commits to years of litigation.[9] No homeowner should accept a modification of a loan that is improperly inflated by time-barred debt. Yet many of *Amici*'s clients have no choice but to do just that because litigating a statute of limitations defense is expensive and time-consuming. For most of *Amici's* clients, who are desperate for closure, the stress of watching arrears increase while awaiting adjudication is unbearable. As a result, if they

[9] Because of New York's prohibition against dual tracking (the practice whereby mortgage servicers negotiate loss-mitigation with borrowers while simultaneously pursuing foreclosure judgments), motion practice is held in abeyance while the parties explore loss mitigation. N.Y. C.P.L.R. Rule 3408(n) and 22 N.Y.C.R.R. § 202.12-a(c)(7). While this is an important element of homeowner protection, it means that borrowers must decide whether to accept modification offers based on inflated amounts before a court has adjudicated any of their defenses.

settle, foreclosure defendants see their years-long default payoffs re-amortized at higher interest rates for shorter terms, yielding new monthly payments that are often well beyond most homeowners' means. *Amici* see that time and again borrowers accept these precarious settlements because they feel powerless to litigate the statute of limitations defense. Accordingly, mandatory settlement conferences pursuant to CPLR 3408 are undermined and far less effective as a result of the inflated balances claimed in actions that should be time-barred.

This Court's affirmation that FAPA is retroactive and constitutional will resolve much of this burden. Homeowners will feel confident that the courts will enforce the statute of limitations, and lenders will have less incentive to prolong litigation. A clear ruling on FAPA will incentivize both sides to enter into meaningful, affordable settlements which benefit foreclosing lenders, at-risk homeowner defendants, and the surrounding communities which bear the brunt of avoidable foreclosures.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court affirm the decision of the Appellate Division, First Department.

Dated: August 25, 2025
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CERTIFICATE OF COMPLIANCE

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

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

On August 25, 2025

deponent served the within: **BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-RESPONDENT AND INTERVENOR**

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Sworn to before me on this 25th day of August, 2025.

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