No. 24-1178

IN THE

Supreme Court of the United States

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

Petitioner,

v.

CASSANDRA FOX

Respondent.

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

BRIEF OF AMICUS CURIAE USFN IN SUPPORT OF PETITIONERS

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July 2025

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INTEREST OF AMICUS CURIAE[1]

USFN—America's Mortgage Banking Attorneys® ("USFN") is a national, not-for-profit association of law firms that specialize in matters of real estate finance. Founded in 1988, USFN consists of organizations that represent the nation's largest banks, mortgage servicers, lenders, investors and government-sponsored enterprises in connection with defaulted home mortgages. Practice fields of USFN firms include residential foreclosures, bankruptcy, loan modifications and other workouts, title resolution, inventoried property closings, and litigation related to these areas. Membership also includes industry-affiliated suppliers of products and services.

USFN was established to promote competent, professional, and ethical representation among its membership and for the mortgage servicing industry, and to represent the collective interests of these institutions. As part of its mission, USFN supports the interests of its members and the industry through education, networking opportunities, publications, political and governmental advocacy, and legal and regulatory compliance by encouraging the use of standard procedures, technologies, and best practices.

USFN has a particular interest in this matter because New York mortgage foreclosure practice is a core business

1. Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case, nor their counsel, authored this brief in whole or in part. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. R. 37.2, counsel of record for the parties were provided with timely notice of *amicus curiae*'s intent to file this brief.

of several of its members and their clients. Related laws affect key business processes of USFN members, and greatly impact the legal advice provided to the clients they serve. Insofar as the Foreclosure Abuse Prevention Act (L. 2022, ch. 821, "FAPA") has caused a sea change to its members in New York, USFN has a significant interest in the Court's grant of a writ of certiorari to evaluate constitutionality of the statute.

SUMMARY OF ARGUMENT

FAPA brought about sweeping changes to the calculation of the statute of limitations to foreclose, rendering thousands of previously timely foreclosures to be untimely upon its enactment. FAPA is more than an overhaul of various statutes and court rules, in effect a sharp criticism on how the judiciary previously interpreted the statute of limitations in mortgage foreclosure cases. The law has resulted in the reversal of decades of precedent that foreclosing lenders and the judiciary had relied upon and created inequitable and unjust results for those enforcing mortgage agreements.

FAPA's drafters cast blame in many directions, taking particular aim at the judiciary. The Sponsor's Memo navigates through a lengthy list of decisions the drafters believed the judiciary got wrong, ranging from who, how, and when New York's "savings statute" could be used to restart an action that would otherwise be untimely, to what it means to "voluntarily discontinue" a foreclosure claim, and whether lenders could revoke acceleration of the mortgage debt. The drafters seemed to believe this wide body of caselaw was wrongly decided not because it was inconsistent with the longstanding precedent that

New York courts believed governed these issues, but primarily because the rulings went in the direction the drafters did not prefer. FAPA does not merely undo a few rogue decisions, it abrogates virtually the entire body of decisional law impacting foreclosure statute of limitations dating back over a century.

As further supported by the Sponsor's Memo, the drafters also appear to cast blame on foreclosing lenders and their counsel for pursuing strategies in line with then-existing judicial precedent. A reasonable reading of FAPA when combined with the Sponsor's Memo suggests its drafters felt that lenders were wrong to restart actions in reliance on the savings statute the Legislature itself had written; were wrong to restart actions that had been previously voluntarily withdrawn even where the default remained uncured; and were even wrong to rely on precedent from New York's highest court. In application, the drafters seem to view FAPA's punishment for restarting foreclosure—loss of the mortgage interest—as always befitting. But nothing about the way statute of limitations jurisprudence evolved could have ever presaged the direction FAPA would take it.

With so many stakeholders apparently in the wrong, who can be deemed to have had it right? The story FAPA tells is that foreclosure defense counsel—at least one of whom was involved with the drafting of the law—always had the better of the arguments. In undoing a century's worth of precedent, FAPA is rightfully seen as a codification into law of defense counsel's statute of limitations arguments, with retroactive application ensuring that any prior judicial "misunderstanding" would be rectified.

Uprooting decades of established precedent and customary practice in favor of legislatively adopting foreclosure defense counsel's previously unsuccessful arguments was unwarranted by the evolution of this jurisprudence—whether in *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1 (N.Y. 2021) (herein "*Engel*") or the various other decisions the Sponsor's Memo recites. More than anything, it was inorganic and leaves more questions than it answers. The drafters claim FAPA was spurred by the New York Court of Appeals landmark decision in *Engel*, but the portion reversing *Engel* comprises only a small piece of the excessive whole.

While it is not the role of this Court to substitute its own policy judgments in favor of New York's when it comes to matters of state law, that limitation only extends so long as the U.S. Constitution is not implicated. Where, as here, New York has enacted a law that so clearly violates the Due Process Clause through its retroactivity (along with violating the Takings Clause, as addressed by Petitioner), it is important for this Court to understand a complete background and how this law came to be. To assist the Court in wading through FAPA jurisprudence and whether its retroactive application is constitutional, this brief examines the wide body of precedent that FAPA disrupts and the unnatural way the legislation came about. This holistic examination will bring to the Court's attention the unfairness rendered by the law—inuring only to the benefit of foreclosure defense counsel and their clients while leaving harmful effects that are far reaching and widespread. The harm bears on a principal inquiry brought by Petitioner: does retroactive application of FAPA violate the due process rights of foreclosing lenders? USFN respectfully submits that, in the interest

of fairness, and most importantly, constitutionality, the answer to that inquiry is yes, and joins in the Petitioner in urging the Court to grant the writ of certiorari.

ARGUMENT

New York's Evolving Foreclosure Landscape

Historically, statute of limitations litigation in New York was rare in connection with mortgage foreclosures. Indeed, the notion that a foreclosure would not only potentially take more than six (6) years to complete, but would routinely fail based on a homeowner defense, would have been something out of the fiction section.

That all changed with the financial crisis in the mid-to-late 2000s. The ensuing wave of foreclosures spurred the Legislature to take protective action for homeowners. Among many other things, it implemented in 2008, Real Property Actions and Proceedings Law ("RPAPL") § 1304, which created a rigid pre-foreclosure notice requirement for lenders, and New York Civil Practice Law and Rule ("CPLR") § 3408, mandating foreclosure settlement conferences at the outset of cases. The intent presumably was for homeowners to become better educated about their options and have sufficient time pre-foreclosure to resolve their default; and if that failed, to then mediate the dispute under the supervision of a court-appointed referee before the foreclosure could proceed.

These measures were implemented in an environment of dramatically increased regulations governing mortgage servicing, stricter reviews of plaintiffs' standing to foreclose, the requirement of additional sworn documents

by both litigants and counsel, and the obligations created by various bank and servicer settlements with regulators. By the early 2010s, not only had many foreclosures failed for one or more of these reasons, but those that stayed alive saw ballooning timelines where a case might already be several years old by the time the plaintiff was "released" from the settlement conference part to continue the action.

Suddenly, New York's six (6) year statute of limitations period mattered a lot, carrying with it "all or nothing" stakes that lenders were forced to confront for the very first time. Naturally, lenders were not eager to discharge these loans and release the underlying mortgages, and where they could, opted instead to proceed on what is commonly known as a "foreclosure restart"—the refiling of a previously dismissed or discontinued foreclosure action. Then existing New York law unequivocally allowed for this possibility, given that the six (6) year limitations period typically did not start running until the filing of the foreclosure claim, and even if an action progressed outside that period, the Legislature's "savings statute"—CPLR § 205(a)—permitted a claim to be refiled within a certain time-period following a dismissal.

New York Statute of Limitations to Foreclose – the pre-FAPA World

The six (6) year statute of limitations applicable to foreclosure actions is prescribed by CPLR § 213(4). Generally, New York courts had been in agreement that "acceleration"—a demand by the lender under the terms of the mortgage for immediate payment in full from the defaulting borrower—starts the clock on the six (6) year period. *See, e.g., Loiacono v. Goldberg,* 240 A.D2d 476

(N.Y. App. Div. 2d Dep't 1997); *U.S. Bank N.A. v. Charles,* 173 A.D.3d 564, 565 (N.Y. App. Div. 1st Dep't 2019). This principle has roots dating back almost a century, to *Albertina Realty Co. v. Rosbro Realty Corp.* 258 N.Y. 472, 476 (N.Y. 1932), where New York's Court of Appeals found that acceleration of the mortgage debt occurs where there is an "unequivocal overt act," such as filing a foreclosure complaint demanding all sums due. In *Engel*, issued in 2021, the Court of Appeals reiterated that acceleration must be done by way of "unequivocal overt act," which starts the limitations period running. 37 N.Y.3d at 8.

With the wave of foreclosure restarts beginning in the early 2010s, New York appellate courts had occasion to opine extensively on the concept of acceleration. Courts routinely held that, outside of limited exceptions, the initiation of foreclosure through a complaint containing an allegation demanding immediate payment in full serves to accelerate the mortgage debt. *See, e.g., NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1068 (N.Y. App. Div. 2d Dep't 2017); *Deutsche Bank Nat. Trust Co. v. DeGiorgio*, 171 A.D.3d 1267, 1268 (N.Y. App. Div. 3d Dep't 2019). While the answer to when and how the mortgage debt could be accelerated—thus starting the six (6) year limitations clock—was usually straightforward, the question of whether the lender could revoke an acceleration and by what means, became less so.

In 2018, the most influential branch of New York's Appellate Division pertaining to foreclosure jurisprudence, the Second Department,[2] issued *Freedom Mortg.*

2. The Second Department covers Long Island, part of New York City, and surrounding counties in the Lower Hudson Valley.

Corp. v. Engel, 163 A.D.3d 631, 633 (2d Dept. 2018) ("*Reversed Engel*"). The Court held that the mere act of discontinuing a foreclosure did not revoke acceleration, meaning the limitations period would continue running notwithstanding the discontinuance. Without warning, this decision instantly rendered many previously timely foreclosure restarts to be untimely.

In the landscape in which it was given, *Reversed Engel* could only be seen as rogue. It conflicted with both century-old precedent from New York's Court of Appeals regarding the legal effect of a voluntary discontinuance and even the Second Department's contemporaneous decisions on similar issues. Particularly, in a case dating back over a century, *Loeb v. Willis*, 100 N.Y. 231, 235 (N.Y. 1885), the Court of Appeals held that a voluntary discontinuance of foreclosure "annulled" all proceedings, "so that the action is as if it never had been." *Id.* Prior to *Reversed Engel*, the Second Department had agreed that "the discontinuance of an action annuls that which has been done therein." *Weldotron Corp. v. Arbee Scales, Inc.*, 161 A.D.2d 708, 709 (N.Y. App. Div. 2d Dep't 1990). But curiously, it departed from its own precedent in *Reversed Engel*, even after acknowledging that a lender "may revoke its election to accelerate the mortgage . . . [through] an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure." 163 A.D.3d at 632. That acknowledgment, combined with its longstanding

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The volume of its foreclosure decisions typically outnumbers that of the other branches (the First, Third, and Fourth Departments) by a significant margin, allowing it to opine on the widest body of issues.

adherence to the principle that a voluntary discontinuance annuls all proceedings within, should have led to the opposite result.

It came as no surprise that the Court of Appeals took the case and reversed. In doing so, it reaffirmed a longstanding principle that "where the maturity of the debt has been validly accelerated by commencement of a foreclosure action, the noteholder's voluntary withdrawal of that action revokes the election to accelerate, absent the noteholder's contemporaneous statement to the contrary." *Engel*, 37 N.Y.3d at 19. The decision had roots not just in the precedent cited above but also another early twentieth century case, *Kilpatrick v. Germania Life Ins. Co.*, 83 N.Y. 163, 168 (N.Y. 1905), where the Court found that a lender could revoke acceleration so long as it had not become "final and irrevocable."

Because *Engel* merely served to reaffirm longstanding principles, it returned New York to the status quo prior to *Reversed Engel* whereby lenders could revoke acceleration and stop the limitations period running by either voluntarily discontinuing foreclosure or sending written notification of the revocation, commonly known as a "deacceleration notice." The notion pushed by FAPA's drafters, that it "corrected" a landscape created by *Engel*, can only be accepted if one believes that the series of ultimately reversed intermediate appellate decisions issued between 2018 and 2021 (*Reversed Engel* and its progeny) was truly the landscape (as opposed to what settled law had been during the entirety of the period from the late 1800s through December 30, 2022, outside of that brief period between July 2018 and February 2021). A fair review of the history of relevant jurisprudence would not lead to that conclusion.

Other jurisprudence focused on the application of New York's savings statute previously applicable to foreclosures, CPLR § 205(a). This Rule permitted the refiling of a claim outside the limitations period, if that claim had been timely asserted in a prior action and ultimately dismissed, so long as the manner of dismissal did not fall within one of the precluded categories (*inter alia*, for neglect to prosecute if "the judge [] set forth on the record the specific conduct constituting the neglect … demonstrat[ing] a general pattern of delay."). *Id.*

During the decade leading up to FAPA, New York courts clarified that a successor in interest to the original foreclosure plaintiff from the prior action could avail itself of the savings statute (*Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193 (N.Y. App. Div. 2d Dep't 2017). Exclusion from usage of the savings statute because of a prior neglect to prosecute dismissal was also extremely rare, requiring detailed findings by a trial court regarding neglect and delay on the part of the foreclosing plaintiff (*e.g., Wells Fargo Bank N.A. v. Kehres*, 199 A.D.3d 869, 871 (N.Y. App. Div. 2d Dep't 2021)).

Against this backdrop, lenders and practitioners had every reason to be confident in pursuing foreclosure restarts after prior actions had been voluntarily discontinued, or in reliance on a deacceleration notice or the savings statute. The contrary positions advanced by foreclosure defense counsel were routinely and consistently rejected by New York courts based on longstanding principles of law. Thus, when FAPA was enacted, none of its provisions could have been plausibly believed by any stakeholder to have been the *de facto* correct position on these issues.

How FAPA Unwound New York Statute of Limitations Jurisprudence in Favor of Previously Rejected Defense Counsel Arguments

Although it presents itself as a response to *Engel*, FAPA uproots virtually the entire body of New York statute of limitations jurisprudence, reaching far beyond *Engel*. The Sponsor's Memo opens as follows:

> There is an urgent need to pass this bill to overrule the Court of Appeals' recent decision in [] Engel. Engel effectively put the ability to unilaterally manipulate, arrest, stop, and restart the limitations period prescribed CPLR 213 (4), at will, directly in the hands of mortgage foreclosure plaintiffs and their servicers, to the clear detriment of New York homeowners. No other civil plaintiff in this state is extended such unilateral and unfettered powers. . . . [Engel] not only exempts mortgage foreclosure plaintiffs from having the statute of limitation applied to them, but gives them unilateral and unbridled control to manipulate calculation of the six-year period provided under CPLR 213 (4). . . .

In the drafters' own words, FAPA would "overrule" the holding in *Engel* that voluntarily discontinuing foreclosure by itself revokes acceleration of the debt sufficient to stop the statute of limitations from running. And a key provision of FAPA, the addition of CPLR § 3217(e), is certainly targeted toward that end by rendering voluntary discontinuances ineffective to revoke acceleration and reset the limitations period.

While FAPA was largely touted as a means to legislatively overrule *Engel*, a review of its entirety reflects that the addition of CPLR § 3217(e) is but one of seven (7) significant substantive changes to the CPLR and New York real property law impacting the statute of limitations to foreclose. The legislative reversal of *Engel* ended up only a small portion of FAPA, despite the legislation being pushed as "urgent" for the purpose of "overruling" *Engel*. As it turns out, the issue was not so much urgency due to *Engel* but, as the Sponsor's Memo makes clear, a longstanding disagreement by a small few with how New York's judiciary had been ruling on numerous statute of limitations issues.

In terms of the most impactful measures, the Legislature: i) created a more restrictive version of the savings statute applicable only to foreclosure plaintiffs (the addition of CPLR § 205-a); ii) disallowed lenders to revoke an acceleration of the mortgage debt by way of "deacceleration notice" to a borrower (the addition of CPLR § 203(h)); iii) significantly limited the ability of a lender to argue that the plaintiff in the prior action had not accelerated the debt through commencement of foreclosure (the addition of CPLR §§ 213(4)(a, b)); and iv) closed the door on foreclosure restarts absent leave of court where a disposition of the prior action remained uncertain (changes to RPAPL § 1301).

Each change is accompanied by a section in the Sponsor's Memo addressing what the drafters believed the judiciary got wrong, citing the various decisional law (beyond *Engel*) that FAPA would in effect reverse.

FAPA's Savings Statute

The most impactful change, and the one most directly relevant to this case, is the addition of a new savings statute applicable to foreclosures, CPLR § 205-a. *Engel* had no bearing on the savings statute and how it applies, so the creation of this new savings statute applicable only to foreclosures, disconnected from *Engel*'s terrain, is entirely freestanding. In the new provision, the drafters departed from the language of the original savings statute in four key respects: i) significantly broadening precluded categories to encompass "any form of neglect," providing a non-exhaustive list of rules that meet this parameter; ii) requiring *completion* of service in the six (6) month period rather then mere "effecting" of service; iii) mostly prohibiting a successor in interest to the original plaintiff from using the statute; and iv) setting forth that the statute may only be used once.

In offering justification for the changes, the drafters did not hold back: "there has been extraordinary abuse and judicial misinterpretation of the savings provision . . . in the context of mortgage foreclosure actions." *See* Sponsor's Memo at CPLR 205-A section. Yet, the discussion opens with the removal of a requirement the Legislature itself had added in 2008, that to be considered a dismissal for neglect, the dismissal order must contain findings of specific conduct that show a pattern of delay. Perhaps a bit of irony is that the opening objection is to the Legislature's own prior enactment and how the judiciary reasonably interpreted same, which is disingenuously framed by FAPA's drafters as "idiosyncratic writing." *See* Sponsor's Memo at CPLR 205-A (citing *Kehres*, *supra*, and others). The drafters do not even seem to have considered

whether judges in other practice areas might also be susceptible to this manner of "misinterpretation" or what situates foreclosures judges differently.

The revised savings statute also limits who can use it by prohibiting a new action by a successor in interest unless acting on behalf of the original plaintiff. This portion of FAPA can only be interpreted as legislative reversal of *Eitani*, 148 A.D.3d 193, where New York's Appellate Division found that a successor noteholder could avail itself of the savings statute when seeking "to enforce the very same right—i.e., to foreclose on the subject property based on the same default on the subject note and mortgage." Instead of addressing *Eitani's* stated rationale, FAPA's drafters contend that holdings on this issue from non-foreclosure contexts were wrongly not being followed, a position that had been long advanced by foreclosure defense counsel—and rejected by the Courts (*e.g., U.S. Bank Nat. Assn. v. Gordon*, 158 A.D.3d 832 (N.Y. App. Div. 2d Dep't 2018)).

In perhaps the most confusing change, the drafters also revised the requirement for meeting the six (6) month service period. Previously, the new action had to be filed and service "effected" within the period, but under FAPA, service must instead be "completed" within the period. This matters in instances where service cannot be accomplished through personal service on the defendant, and the plaintiff must resort to substitute service, which is not "completed" until the affidavit of service is filed and a ten (10) day period passes (*see* CPLR §§ 308(2, 4)), sometimes adding weeks to the process. The Sponsor's Memo fails to even address this change, and if anything, shows that certain of the drafters—and perhaps the entire

Legislature—may not have appreciated the distinction and its impact. As Justice Grossman of the Supreme Court in Putnam County astutely pointed out:

> [T]here is in the legislative history no statement concerning the purpose of the statutory modification at issue here, i.e., that whereas CPLR § 205(a) in 2021 required that service of process be "*effected*" within the specified six-month grace period, CPLR § 205—a now requires that service of process be "*completed*" within that six-month period. There is no indication why that statutory language was changed, no indication of any remedial purpose. Indeed, the legislative history reflects no consciousness on the part of the Legislature of any change in that regard.

HSBC Bank USA, N.A. v. Besharat, 195 N.Y.S.3d 380 (N.Y. Sup. Ct. Putnam Cty. 2023). To offer no rationale for the change, which presumably at least one of the drafters intentionally sought and understood, is reasonably viewed as another unnecessary swipe at foreclosing plaintiffs who justifiably believed they had timely restarted under the then-applicable savings statute.

Removal of Unilateral Revocation of Acceleration

Another key provision of FAPA is the removal of a lender's ability to unilaterally revoke acceleration of the mortgage debt sufficient to reset the statute of limitations. Dating back over a century to *Kilpatrick*, 83 N.Y. 163, the law in New York had been that a noteholder could revoke acceleration of the mortgage debt so

long as the borrower had not changed their position in reliance on the election to accelerate. This principle had been restated and accepted over the years: "only if a mortgagor can show substantial prejudice will a court in the exercise of its equity jurisdiction restrain the [holder] from revoking its election to accelerate." *E.g., Golden v Ramapo Improvement Corp.*, 78 A.D.2d 648 (N.Y. App. Div. 2d Dep't 1980). In fact, in the decade leading up to the passage of FAPA, there could have been no plausible dispute that under New York law, "[a] lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action." *NMNT Realty Corp.*, 151 A.D.3d 1068, 1069–70; *CitiMortgage, Inc. v. Dalal*, 187 A.D.3d 567 (N.Y. App. Div. 1st Dep't 2020). *Engel* merely reaffirmed this longstanding legal principle. 37 N.Y.3d at 28-29, 34-36.

Nevertheless, FAPA's addition of CPLR § 203(h) made this common, legally permissible practice suddenly impermissible. It prohibits (without exception) the unilateral resetting of the statute of limitations by a lender, whether by way of deacceleration notice or otherwise. The drafters couched the change through citation to New York General Obligations Law § 17-105, contending that provision controls this terrain and had been defied through lender's practices, yet failed to acknowledge the development of this right through the common-law and its roots dating back over a century. Instead, in claiming that this right was "erroneously permitted under existing decisional law" (Sponsor's Memo at CPLR 203(h)), FAPA's drafters effectively erased yet another century's worth of precedent.

Significantly Narrowing of Right to Argue No Prior Acceleration

FAPA next takes aim at depriving lenders the ability to even argue that a prior foreclosure failed to accelerate the debt. Under New York law, only a noteholder with legal standing may bring foreclosure, serving to accelerate the debt. *See, e.g., Aurora Loan Services, LLC v. Taylor*, 25 N.Y.3d 355, 361-362 (N.Y. 2015). FAPA's addition of CPLR §§ 213(4)(a, b) makes this now arguably untrue. The provision would allow a stranger to a mortgage loan to file foreclosure and effectuate an acceleration of the debt that leads to the running of the limitations period, with the true noteholder unable to later argue improper acceleration unless "the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated."

To justify this severe limitation, the Sponsor's Memo claims that it would be too burdensome on the judiciary and opposing parties to delve into the standing of a plaintiff in the prior action or compliance with the condition precedent of sending a default notice. *See* Sponsor's Memo at CPLR 213(4) section. In that regard, FAPA's drafters indicate that the lines of decisional law permitting foreclosing plaintiffs in restarts to advance these arguments, such as *Bank of NY Mellon v Lagasse*, 188 AD3d 775, 777 (N.Y. App. Div. 2d Dep't 2020), should no longer be followed. But there is no acknowledgement that many prior foreclosures had flamed out because of an issue with standing, irrespective of whether the prior Court specifically ruled there was no acceleration. Indeed, the drafters do not appear to have grappled with the fact

that legal standing and the satisfaction of a condition precedent are necessities for acceleration. Their concern instead seems to be that homeowners and defense counsel have a difficult time overcoming these arguments, and thus, they should be disallowed.

Heightening Leave of Court Threshold to Pursue a Restart

Lastly, FAPA added language in RPAPL § 1301 making leave of court a condition precedent to filing a foreclosure restart where there was some open question regarding the disposition of the prior action. Taking issue with the "whittl[ing] away" of the provision, FAPA's drafters objected to a series of decisions from New York's Appellate Division (*Wells Fargo Bank, N.A. v. Irizarry*, 142 A.D.3d 610, 611 (N.Y. App. Div. 2d Dep't 2016), *Bank of America, N.A. v. Ali*, 202 A.D.3d 726 (N.Y. App. Div. 2d Dep't 2022), among others) where it relaxed the leave of court requirement when the lender had plainly stopped prosecuting the prior action, demonstrating abandonment and an intent to proceed with the new action instead.

Though this change in FAPA has been less heralded, it reflects a carefully crafted scheme to strip lenders of mortgages where there has been a questionable dismissal resulting in a subsequent foreclosure action. Because the pattern of impacted matters from this change is more random and unpredictable, what it really creates is a lottery system that awards free homes to borrowers who never contested the original foreclosure and through happenstance wound up with a procedural fact pattern falling under this umbrella.

Questions Raised by the Origin of FAPA

Through the historical lens of how the jurisprudence had evolved, there can be little debate that FAPA was borne unnaturally. The backdrop thus spurs reasonable inquiry into potential motivations and who was behind it. Again, USFN recognizes it is not this Court's function to opine on New York's legislative process. However, when the result has U.S. Constitutional consequences, it is important to examine how and why the law came to be.

FAPA's Sponsoring Senator is James Sanders Jr. from the 10th Senate District. Among Senator Sanders' staff during the relevant time-period was Ivan Young, Esq., who was billed as having held the role of "Counsel to Senator Sanders." *See* https://www.nysenate.gov/newsroom/press-releases/2023/james-sanders/governor-kathy-hochul-signs-foreclosure-abuse-prevention (last visited July 2, 2025). Prior to his time working with Senator Sanders, Mr. Young was well known to the plaintiff's bar as the principal of Young Law Group, PLLC, a firm specializing in foreclosure defense.[3]

The press release for FAPA issued by Senator Sanders offers quotes from certain key players involved in the bill's passage, including from Mr. Young, who stated:

> I thank Governor Hochul for signing this monumental bill into law that will assist

3. Aside from any role related to FAPA, Mr. Young had been defense counsel on the losing end of several cases where statute of limitations to foreclose was the central issue. *See, e.g., HSBC Bank USA, Nat. Assn. v. Michael*, 191 A.D.3d 850 (N.Y. App. Div. 2d Dep't 2018); *U.S. Bank Nat. Assn. v. Gordon*, 176 A.D.3d 1006 (N.Y. App. Div. 2d Dep't 2019).

> homeowners throughout New York State save their homes from foreclosure. With this new law, the foreclosure pendulum has swung back in favor of homeowners.

But unmentioned in the press release were certain foreclosures pending at the time of FAPA's enactment, which remain active currently: *OneWest Bank, FSB v. James Sanders, Jr.*, Index No. 28746/2009 (now 712882/2020) (Queens County) (the "Sanders Action"); *Deutsche Bank Nat. Trust Co., as Trustee, etc. v. Ivan Young a/k/a Ivan E. Young, et al.*, Index No. 207546/2022 (Suffolk County) ("Young I"); and *The Bank of New York Mellon fka The Bank of New York, as Trustee, etc. v. Ivan Young a/k/a Ivan E. Young, et al.*, Index No. 608195/2018 (Suffolk County) ("Young II"). It is, if nothing else, noteworthy that the Sponsoring Senator of FAPA, and his legislative aide and foreclosure defense counsel, were defendants in pending foreclosures at all times relevant to the creation and passage of FAPA.

Turning to these matters individually, the case postures prove interesting in the FAPA context. The Sanders Action, a foreclosure of a Queens property that Senator Sanders owns, has been pending since 2009, situating the case outside the six (6) year limitations period running from commencement. Presently in the pre-trial part, should the action not succeed or be dismissed for any reason, the breadth and availability of the savings statute will likely come into play. Indeed, public records reflect that the original plaintiff, OneWest Bank, FSB, changed its name multiple times before ultimately merging into First Citizens Bank and Trust Company. *See* FDIC "BankFind" History for OneWest

Bank, FSB, https://banks.data.fdic.gov/bankfind-suite/bankfind/details/58978?activeStatus=0%20OR%201&bankfindLevelThreeView=History&branchOffices=true&name=ONEWEST%20BANK%2C%20NATIONAL%20ASSOCIATION&pageNumber=1&resultLimit=25&searchPush=true&sortField=NAME&sortOrder=ASC (last visited July 2, 2025). If there were ever a restart of the Sanders Action, it seems unlikely that the action would be brought in the name of the "original plaintiff."

With respect to Young I, a foreclosure of a Bay Shore, NY property owned by Mr. Young, the action is a restart of a previously discontinued 2019 action. Like the Sanders Action, Young I is now past the six (6) year period running from the commencement of the 2019 action. Mr. Young is contesting the action on statute of limitations grounds, among other defenses.

Perhaps most notable is Young II, a foreclosure that is post-judgment and sale, with an appeal still pending. Prior to the sale, Mr. Young had argued, *inter alia*, that FAPA should be applied retroactively and the action dismissed on that basis. The facts he contends support this argument concern a prior foreclosure on the same mortgage loan that had been commenced in 2008, more than six (6) years prior to Young II. While this argument was not successful in the trial court, it is still being pursued in the Second Department.

In the press release referenced *supra*, Mr. Young stated that "the foreclosure pendulum has swung back in favor of homeowners." But to characterize FAPA as a mere swing of the pendulum understates the reality, as

this was not a modest recalibration but an unconstitutional overcorrection. It would be understandable to question whether the Sanders Action, Young I, and Young II played a part in FAPA's enactment.

FAPA's History and Due Process

The above legal and historical analysis from the plaintiff practitioner perspective gives context to the issues presented. Particularly, Petitioner seeks this Court's review as to whether the retroactive application of CPLR § 205-a under FAPA violates the Due Process Clause of the U.S. Constitution. In that regard, it is well-established that retroactive application of statutes is generally disfavored due to "considerations of fairness." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). The background and genesis of FAPA are relevant to the fairness inquiry.

The history of jurisprudence on foreclosure statute of limitations reflects that New York's judiciary relied on longstanding precedent derived from the common law, with nothing aberrant or unusual about how the law evolved, or that might have signaled to foreclosing plaintiffs that the precedent upon which they relied carried significant risk. Indeed, much of what foreclosing plaintiffs did, including in this case, was to simply rely on the savings statute the Legislature itself had written, including an amendment from 2008 that was being plainly interpreted by the judiciary.

Then came *Engel*, which certain legislators used as the pretext for the creation of FAPA. But *Engel* ended up only a small portion of the entire law, as FAPA unwound

decades of case law over a broad variety of issues. It codified previously rejected defense counsel arguments, where at least one of those defense counsel appears to have been involved in the law's creation. Compounding matters, key players in the law's creation faced pending foreclosures that retroactive application of FAPA could conceivably impact.

The law regarding statute of limitations to foreclose in New York had evolved in a natural, predictable manner over the past century. With basically no forewarning, FAPA uprooted it all. And with New York's appellate courts giving FAPA essentially unlimited retroactive effect, thousands of previously valid mortgage interests have been or will be extinguished.

Under these circumstances, Petitioner and similarly situated foreclosing lenders have not received due process to the extent FAPA is being applied retroactively to foreclosures filed before its passage. Accordingly, these issues are worthy of consideration by this Court.

CONCLUSION

USFN respectfully asks that the petition for a writ of certiorari be granted.

Respectfully submitted,

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July 2025

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