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September 16, 2015

The Honorable Stanley C. Rosenberg
President of the Massachusetts Senate
The State House, Room 332
Boston, MA 02133

The Honorable Marc R. Pacheco
Massachusetts Senate President Pro Tem
The State House, Room 312B

The Honorable Karen E. Spilka
Chair, Senate and Joint Committees on Ways and Means
The State House, Room 212

The Honorable James B. Eldridge
Chair, Joint Committee on Financial Services
The State House, Room 218

The Honorable William N. Brownsberger
Chair, Joint Committee on the Judiciary
The State House, Room 504

The Honorable Linda Dorcena Forry
Chair, Joint Committee on Housing
The State House, Room 410

Re: Senate 1981, "An Act to 'Clear' Title to Foreclosed Properties"

Dear Senators,

I am writing in regard to Senate 1981, which I believe is unconstitutional under the United States Constitution's Contracts Clause. The Massachusetts Alliance Against Predatory Lending has already provided an extensive analysis of S1981's infirmities under Massachusetts law and detailed how it will disrupt well-settled Massachusetts property law – including case law stretching back to the nineteenth century.

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I want to highlight the Bill's interference with the mortgagee's obligations of contracts (and the obligations of those who purchase pursuant to foreclosure) and the rights of the mortgagor (the foreclosed homeowner). S1981 has the purpose of making title more secure by limiting the claims of a foreclosed homeowner regarding the fairness or legitimacy of foreclosure proceedings. It limits claims by a mortgagor in future cases to three years after the recording of the foreclosure affidavit, where a foreclosed home has been purchased by "arm's length" purchasers.[1]

The problem this legislation seeks to address is the result of the sub-prime lending practices that the Massachusetts Supreme Judicial Court – and many other courts and legislatures around the country and in Washington, D.C. – have criticized in the wake of the 2008 financial crisis. The Supreme Judicial Court has made clear in *Commonwealth v. Fremont Investment & Loan*, 897 N.E.2d 548, 452 Mass. 733 (2008), that those sub-prime practices were unfair trade practices under Massachusetts law. The mortgage companies that participated in them were on notice at the time they sold the sub-prime products that the products were dangerous to both the borrower and lender and unfair. More recently in *U.S. National Bank Association v. Ibanez*, 941 N.E.2d 40, 458 Mass. 637 (2010), the Supreme Judicial Court has again come to the aid of foreclosed homeowners. It has required that foreclosure procedures be strictly complied with and found that when there was a failure to follow the established procedure, that the foreclosed homeowners were entitled to relief.

Legislation that seeks to *retroactively* deprive mortgagors of those rights, which have been recognized by the Supreme Judicial Court, interferes with the contractual rights of those mortgagors. The United States Supreme Court has repeatedly recognized that state legislation that interferes with the obligations of contracts (including private contracts) violates the U.S Constitution's Contracts Clause.[2]

Usually it is the mortgage industry that relies on the Contracts Clause, because statutes more typically give additional rights to mortgagors than to mortgagees. The classic case here is *Home Building and*

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[1] I would point out that the statute does not use the term a bona fide purchaser, because "arm's length third party purchasers" are taking the property knowing that it has been in foreclosure and they are, thus, on notice that there may be claims by a mortgagor regarding the validity of the foreclosure proceedings.

[2] U.S. Constitution, article I, secs. 9, 10 ("No State shall … pass any … ex post facto Law, or Law impairing the Obligation of Contracts ….").

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Loan v. Blaisdell, 290 U.S. 398, 444-47 (1934), upholding a Minnesota statute passed in the depths of the Great Depression that allowed a *temporary* hold on foreclosure. The U.S. Supreme Court upheld the suspension because, among other reasons, an emergency existed and it was a temporary measure to allow people to stay in their homes. *Id.* at 444-47. Even *Blaisdell* was immensely controversial.

More recently mortgagees in Massachusetts used the Contracts Clause as one of their challenges to a Springfield ordinance that required mortgagees to post a $10,000 bond to maintain property during foreclosure. *See Easthampton Savings Bank v. Springfield*, 736 F.3d 46, 53 (1st Cir. 2013). (On certification from the U.S. Court of Appeals, the Supreme Judicial Court struck down Springfield's ordinance on the ground that is was preempted by Massachusetts statutes. *Easthampton Savings Bank v. Springfield*, 470 Mass. 284 (2014). Thus, there was no need to address the Contracts Clause analysis). As the Supreme Court made clear in *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978), a state law change that increases the obligation of a contract (in that case requiring additional funding of a pension after the corporation entered the pension contract), impairs the obligation of contracts. The Supreme Court's most recent significant adjudication of the Contracts Clause, *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), reaffirms that if there is an impairment of a party's contract rights there must be a significant and legitimate government interest and the alteration must be reasonable in light of the contract and surrounding conditions. *Energy Reserves* upheld a price cap in an industry that was already heavily regulated, yet a number of state cases have struck down legislation that expanded the rights of mortgagors. *See, e.g., Federal Land Bank of Wichita v. Story*, 756 P.2d 588 (Okla. 1988); *Federal Land Bank of Wichita v. Bott*, 732 P.2d 710 (1987); *Federal Land Bank of Omaha v. Arnold*, 426 N.W. 2d 153 (Iowa 1988).

S1981, by contrast, goes much further than *Blaisdell*. It makes a permanent restriction on the right to challenge foreclosure, which right the Massachusetts Supreme Judicial Court explicitly re-affirmed as recently as *Ibanez.* There are other problems as well, including the seeming validation of foreclosure even when the mortgagee may not have the mortgage, in subsection (e) of the bill. To be clear, this is a legislative rewriting of the rights of a mortgagor years *after* the mortgage was written, and after the Supreme Judicial Court has recognized the extensive rights of mortgagors to relief for the mortgage industry's unfair trade practices.

While it is completely understandable to want to give repose to the buyers of foreclosed property, that cannot be done at the expense of the constitutionally recognized contract rights of the original

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mortgagors. The rights of the humble, just as the rights of the mighty businesses, deserve the protection of the Contracts Clause.

Sincerely yours,

Al Brophy

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