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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

OREGON BANKERS ASSOCIATION, LEWIS & CLARK BANK, BANK OF EASTERN OREGON, AND PEOPLE'S BANK OF COMMERCE, **PLAINTIFFS**, v. **STATE OF OREGON, ELLEN ROSENBLUM, in her official capacity as the Attorney General of the State of Oregon, and ANDREW STOLFI, in his official capacity as the Director of the Oregon Department of Consumer and Business Services,** **DEFENDANTS**.	Case No. 6:20-cv-1375 **COMPLAINT**

I. INTRODUCTION

1. This action challenges Oregon's attempt to interfere with the ability of banks and other financial institutions to make and manage real-estate loans to Oregon consumers and businesses as agreed by the parties. Plaintiffs Oregon Bankers Association ("OBA"), Lewis &

Clark Bank, Bank of Eastern Oregon, and People's Bank of Commerce, recognize that many borrowers face hardships related to COVID-19, and OBA and its members support assistance for these borrowers and uniform federal legislation and modifications agreed to between borrowers and lenders. But individual state laws, like the one challenged in this litigation, complicate financial institutions' ability to provide relief to affected borrowers and threaten the smaller, locally-responsive financial institutions the most.

II. PARTIES

2. OBA is a trade association serving state and national banks, savings banks and associations, and trust companies doing business in Oregon. Its members include national banks and federal savings associations, Oregon-chartered financial institutions, and out-of-state financial institutions doing business in Oregon. Its mission is to be the voice of Oregon banking. Its members have originated loans subject to Oregon's HB 4204, and its members service loans subject to Oregon's HB 4204, discussed further below. OBA's members include financial institutions which acquired judgments of foreclosure in Oregon Courts between March 8, 2020 and June 30, 2020. OBA's members also include state-chartered and federally-chartered financial institutions subject to HB 4204. Since the advent of the COVID-19 pandemic, OBA's members have worked diligently with borrowers impacted by COVID-19 to modify or forbear existing loans, both under voluntary programs and those imposed under the federal Coronavirus Aid, Relief, and Economic Security ("CARES") Act (discussed more fully below).

3. Lewis & Clark Bank is an Oregon-chartered commercial bank headquartered in Oregon City, Oregon, with branches in Astoria and Seaside, Oregon. Lewis & Clark Bank has originated and serviced loans subject to Oregon's HB 4204, discussed further below. Since HB 4204 was enacted, Lewis & Clark Bank has had at least three borrowers request deferrals under HB 4204. In addition, Lewis & Clark Bank has refrained from assessing contractually-allowed default interest because of the provisions of HB 4204 (described below).

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4. Bank of Eastern Oregon is an Oregon-chartered commercial bank headquartered in Heppner, Oregon, serving customers and communities in Eastern Oregon and Southeast Washington. Between March 8, 2020 and June 30, 2020, Bank of Eastern Oregon assessed contractually authorized late fees on loans it originated and serviced for failing to timely make periodic payments.

5. People's Bank of Commerce is an Oregon-chartered commercial bank headquartered in Medford, Oregon. People's Bank of Commerce has originated and serviced loans subject to Oregon's HB 4204, discussed further below. Since the advent of the COVID-19 pandemic, People's Bank of Commerce has modified over a hundred real-estate loans and provided over 1,000 Paycheck Protection Program loans totaling approximately $95 million dollars.

6. During the pandemic, nearly every bank doing business in Oregon, including federally and Oregon-chartered OBA members, has provided loan payment deferrals to their borrowers, many have waived fees and provided loan modifications, and some have stood up emergency loan programs for those impacted by COVID-19. In fact, Bank of Eastern Oregon is one of those banks. Additionally, Oregon's banks (including federally-chartered and state-chartered) originated 89% of the 64,978 (as of July 31, 2020) SBA Paycheck Protection Program loans totaling more than $7 billion provided to businesses in Oregon. Many of these recipients have commercial real estate loans, and many of the employees paid by the program have residential mortgage loans.

7. Defendant State of Oregon is a political subdivision of the United States.

8. Defendant Ellen Rosenblum is the Attorney General of the State of Oregon. Plaintiffs name Ms. Rosenblum in her official capacity.

9. Defendant Andrew Stolfi is the Director of the Oregon Department of Consumer and Business Services, which houses Oregon's Division of Financial Regulation. Plaintiffs name Mr. Stolfi in his official capacity.

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10. Under Oregon law, Defendants Stolfi and Rosenblum have the authority to enforce HB 4204.

III. JURISDICTION AND VENUE

11. This Court has jurisdiction of this action under 28 U.S.C. § 1331.

12. Venue is appropriate as all defendants reside in Oregon. 28 U.S.C. § 1391.

IV. FEDERAL AND STATE BANKING REGULATION

13. The federal government regulates banking through a number of agencies and statutes, including the National Bank Act 12 U.S.C. § 1 *et seq.* (regulating national banks), the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 *et seq.* (regulating federal savings associations or "thrifts"), and the Federal Deposit Insurance Act ("FDIA") 12 U.S.C. § 1811 *et. seq*. (establishing the Federal Deposit Insurance Corporation and governing aspects of FDIC-insured bank activities and operations). Federal regulation of banking is so pervasive that the normal presumption that "[C]ongress does not intend to preempt state law absent a clear manifestation of intent to the contrary…does not apply to regulations in the field of national banking." *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 971 (9th Cir. 2017).

14. Both the National Bank Act and HOLA provide national banks and federal savings associations, respectively, the authority to make loans secured by real property. 12 U.S.C. § 371; 12 U.S.C. § 1464(c)(1)(B). As to national banks, "state law may not significantly burden a national bank's own exercise of its real estate lending power." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12-13 (2007). As to federal savings associations, the Ninth Circuit has held federal regulation "so pervasive as to leave no room for state regulatory control." *Campidoglio LLC*, 870 F.3d at 971. Courts and regulators measure preemption against federal savings associations in the same manner as they do national banks. 12 U.S.C. § 1465(a); *see also* 12 C.F.R. § 7.4010(a); 12 C.F.R. § 160.2; 12 C.F.R. § 34.6.

15. The Office of the Comptroller of Currency ("OCC"), which regulates both national banks and federal savings associations, has issued regulations interpreting the

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preemptive force of federal law. Specifically, 12 C.F.R. § 34.4 provides a national bank may "make real estate loans…without regard to state law limitations concerning… [t]he terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan." The OCC specifies that national banks may make real estate loans without regard to state law regarding "[e]scrow accounts" and "servicing…of…mortgages," and also provides a national bank may make real estate loans without regard to state law limitations concerning "[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents." *Id.*

16. On June 17, 2020, the OCC issued a bulletin addressing actions taken by state and local authorities with respect to foreclosure moratoriums, loan forbearance, limitations on interest and fees banks may charge, and reporting requirements. OCC Bulletin 2020-62, "COVID-19 Relief Programs: Preemption" (June 17, 2020). The OCC stated, "While these state and local actions are well-intended, the OCC is concerned that the proliferation of a multitude of competing requirements will conflict with banks' ability to operate effectively and efficiently, potentially increasing the risk to banks' safety and soundness and ultimately harming consumers. . . . [F]ederal law preempts state and local laws that impermissibly conflict with banks' exercise of federally authorized powers under the standard set forth in *Barnett Bank of Marion County, N.A. v. Nelson*. Consistent with this standard, OCC regulations provide examples of the types of state laws that do not apply to banks' lending and deposit-taking activities. These include state law limitations on: terms of credit, such as the schedule for repayment and interest, amortization of loans, balance, payments due, minimum payments, and term to maturity; disbursements and repayments; and processing, origination, and servicing mortgages. OCC regulations also address interest and non-interest fees. OCC regulations

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preempt state laws that conflict with the real estate lending powers of banks and specifically preempt state laws that interfere with banks' ability to make mortgage loans secured by real estate. State action that limits banks' ability to foreclose on a defaulted loan and take possession of collateral, beyond what is provided for in the CARES Act, would interfere with banks' powers to make secured mortgage loans." *Id.*

17. Recognizing the significant competitive advantage federally-chartered depository institutions would otherwise have over their state-chartered counterparts, with respect to certain aspects of their operations and activities, federal law extends its preemptive effect to include state-charted banks on certain issues and areas of their operations. For example, the Depository Institutions Deregulation and Monetary Control Act ("DIDA"), "[i]n order to prevent discrimination against State-chartered insured depository institutions," expressly preempts state-law limitations on interest rates allowed to be charged by state-chartered banks under the law where the bank is located. 12 U.S.C. § 1831d(a); *see also Greenwood Trust Co. v. Com. of Mass.*, 971 F.2d 818, 827 (1st Cir. 1992) ("To the extent that a law or regulation enacted in the borrower's home state purposes [sic] to inhibit the bank's choice of an interest term under section 521, DIDA expressly preempts the state law's operation."). Similarly, the FDIA extends to state-chartered banks the preemptive force of the National Bank Act and OCC regulations in connection with the activities permissible for the branch of an out-of-state bank. 12 U.S.C. § 1831a(j)(1).

18. In an effort to allow Oregon-chartered banks to compete effectively with their federally-chartered counterparts, Oregon has extended to Oregon-chartered banks the right to "[e]ngage as principal or agent in activities in which national banks may engage…subject to conditions and restrictions that apply to national banks." ORS 708A.010(1)(a); *see also* ORS 708A.010(1)(b) (allowing Oregon-chartered banks to engage in the same activities as out-of-state chartered banks). In this way, the Oregon legislature has ensured state-chartered banks remain on even-footing with their out-of-state chartered and federally-chartered counterparts.

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19. On March 27, 2020, the CARES Act became federal law. The CARES Act includes provisions temporarily prohibiting foreclosures and requiring forbearance for specified periods with respect to "federally backed mortgage loans," which include any loan secured by a first or subordinate lien on residential real property designed principally for the occupancy of from 1- to 4- families that is (i) insured by the Federal Housing Administration under title II of the National Housing Act; (ii) insured under section 255 of the National Housing Act; (iii) guaranteed under section 184 or 184A of the Housing and Community Development Act of 1992; (iv) guaranteed or insured by the Department of Veterans Affairs; (v) made by the Department of Agriculture; or (vi) purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association. CARES Act, § 4022(a)(2).

20. Specifically, the CARES Act prohibited servicers of federally backed mortgage loans from initiating "any judicial or non-judicial foreclosure process, mov[ing] for a foreclosure judgment or order of sale, or execut[ing] a foreclosure-related eviction or foreclosure sale" for an initial 60-day period that has been subsequently extended by the relevant federal housing agencies on multiple occasions. CARES Act, § 4022(c)(2). *See* Federal Housing Finance Agency News Release, "FHFA Extends Foreclosure and Eviction Moratorium" (June 17, 2020).

21. Additionally, the CARES Act provides that borrowers with federally backed mortgage loans may request forbearance during the national emergency concerning COVID-19 declared by the President on March 13, 2020, and that such forbearance "shall be granted for up to 180 days, and shall be extended for an additional period of up to 180 days at the request of the borrower. . . ." CARES Act, §4022(b)(1)-(2).

22. The CARES Act also requires servicers of federally backed multifamily mortgage loans to provide forbearance for an initial period of up to 30 days and to extend the forbearance for up to two additional 30 day periods at the request of the borrower. CARES Act, § 4023(a)-(c). Federally backed multifamily mortgage loans are defined as any loan (other than temporary financing such as a construction loan) that (i) is secured by a first or subordinate lien on

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residential multifamily real property designed principally for the occupancy of 5 or more families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property, and (ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association. CARES Act, § 4023(f)(B).

V. HB 4204

23. On June 30, 2020, the Governor of Oregon signed HB 4204. The enrolled version of the bill is available at: https://olis.oregonlegislature.gov/liz/2020S1/Downloads/MeasureDocument/HB4204/Enrolled.

24. HB 4204 was passed in a Special Session of the Oregon legislature in the span of approximately one week. One legislator remarked that due to the short time-frame involved, "HB 4204 is a great example of an issue needing a great deal more analysis." Vote Explanation of Representative Rick Lewis, available at: https://www.oregonlegislature.gov/pcive/HB%204204%20Lewis%206-26-2020.pdf. Even legislators voting in favor of the measure expressed reservation, remarking that the "bill presents some unsettled legal questions….[and] I wish we had drafted the law more narrowly to prevent avoidable legal problems and interference with the recovery." Vote Explanation of Representative Marty Wilde, available at: https://www.oregonlegislature.gov/pcive/HB%204204%20Wilde%206-26-2020.pdf.

25. HB 4204 creates an "emergency period" running between March 8, 2020 and September 30, 2020, "except that the Governor may specify a later date by executive order not

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later than 30 days before September 30, 2020." This period is both before and after HB 4204 was enacted.

26. HB 4204 fundamentally alters financial institutions' loan contracts and collection practices during the "emergency period" and afterwards. Specifically, HB 4204 provides that if a borrower "notifies the lender that the borrower will not be able to make the periodic installment payment," "a lender may not treat as default a borrower's failure to make a periodic installment payment or to pay any other amount that is due to the lender" during the "emergency period." Under those circumstances, HB 4204 requires a lender to "[d]efer from collecting the periodic installment payment during the emergency period" and to "[p]ermit the borrower to pay an amount the borrower owes to the lender as a result of a deferral under this subsection at the scheduled or anticipated date on which full performance of the obligation is due."

27. In addition, HB 4204 prohibits lenders from exercising various contractual rights they might otherwise have in response to a missed payment, including assessing charges or fees, or imposing a default interest rate, among other remedies. In short, for borrowers who give the required notice, HB 4204 imposes on lenders a mandatory forbearance during the "emergency period," which may be for an extended period, and allows borrowers to postpone all forbearance payments until final maturity of their loans, which may be years or decades in the future.

28. With respect to residential properties with four or fewer dwelling units, HB 4204's deferral provision operates whenever a borrower "attest[s] that the borrower's failure to pay is a result of income loss related to the COVID-19 pandemic," regardless of the borrower's actual ability to pay their periodic payments. Lenders have no ability to evaluate or contest a borrower's attestation of income loss related to COVID-19. For commercial properties, or residential properties with more than four dwelling-units, the borrower need only provide "financial statements or other evidence that demonstrates a loss of income related to the COVID-19 pandemic." HB 4204 does not on its face require a commercial or multi-family borrower to demonstrate a COVID-19 related inability to make payments on a loan obligation.

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29. In addition to curtailing lenders' right to enforce contracts as written, HB 4204 provides that "[a]ny purported trustee's sale during the emergency period is void and does not transfer or foreclose any rights to subject property," and that "[a]ny purported execution sale of subject property during the emergency period is void and does not transfer or foreclose any rights to the subject property." HB 4204 imposes these restrictions despite the fact that the "emergency period" pre-dates the effective date of the law.

30. HB 4204 requires all lenders authorized to do business in Oregon to "provide written notice by mail to all of the lender's borrowers of a borrower's rights for accommodation under this section."

31. Finally, HB 4204 contains a private right of action, allowing borrowers to sue lenders for any action taken contrary to HB 4204's restrictions during the "emergency period." Again, HB 4204 imposes this right despite the fact that the "emergency period" (and any actions taken before the effective date) pre-dates the effective date of the law.

VI. THE IMPACT OF HB 4204

32. Under HB 4204, all of OBA's members must provide on-demand forbearance as explained above. At a minimum, HB 4204 denies OBA's members contractually-mandated payments at the time the contracts required them to be made. That denial injures OBA's members because they do not receive funds they would have absent HB 4204. In addition, HB 4204 strips OBA's members of their-bargained for remedies in the face of borrower defaults. As such, not only do OBA's members suffer the loss of contractually-required payments, they suffer the loss of normal recourse.

33. Additionally, under HB 4204, all of OBA's members must provide written notice by mail to all of their borrowers "of a borrower's rights for accommodation under this section" within 60 days of the effective date of HB 4204. HB 4204 imposes this requirement despite the fact that, as alleged herein, several of the rights HB 4204 purports to afford borrowers are pre-empted by federal law or unenforceable because they violate lenders' constitutional rights.

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34. HB 4204 impacts small community banks, and in particular those banks with a large portion of their loan portfolios in Oregon, most severely, insofar as it provides no mechanism to ensure banks maintain liquidity in the event of HB 4204-imposed forbearances. Indeed, the "emergency period" under HB 4204 has no outer limit, raising the potential that small banks can be without contractually-obligated loan payments for *months or years*. Even if the "emergency period" ends on September 30, 2020, HB 4204 denies lenders their negotiated payments until a loan terminates, which, for recently-made loans, may be as far as 30-years in the future. But HB 4204 does nothing to alter banks' requirements or their payments to investors and insurers, which continue regardless of borrowers' invocation of HB 4204's provisions. *Cf.* OCC Bulletin 2020-62, "COVID-19 Relief Programs: Preemption" (June 17, 2020) ("[T]he proliferation of a multitude of competing requirements will conflict with banks' ability to operate effectively and efficiently, potentially increasing the risk to banks' safety and soundness and ultimately harming consumers.").

35. HB 4204 also threatens retroactive liability for banks based on conduct occurring *before* enactment. As enacted, the "emergency period" begins in March 2020, and HB 4204 prohibits lenders from treating a missed payment as a default (or taking other contractually-authorized steps) at *any time* during the emergency period. So OBA members who imposed or collected fees or charges based on a missed periodic payment in March, April, or May of 2020 (before HB 4204's effective date) are exposed to a private right of action (and attorney fees) for conduct that was legal at the time it occurred.

36. HB 4204 also provides that even though a lender "shall . . . [d]efer from collecting the periodic installment payment during the emergency period," the lender "may," after conducting an escrow analysis, "adjust the amount of any escrow impound payment the borrower has an obligation to make . . . and may take into account any shortage or deficiency that results from deferring payments under this subsection." To the extent the provision does not allow a

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lender to require borrowers to maintain sufficient funds in escrow accounts, it impairs both lenders' rights under federal law and their right to protect the asset securing their loans.

37. Compliance with HB 4204—especially in conjunction with lenders' voluntary deferral programs and those mandated by the CARES Act—will require lenders operating in Oregon to dedicate hundreds of hours to developing and deploying HB 4204-specific protocols and programs, and to determine how those protocols and programs interact with both lenders' voluntary forbearance and modification programs and programs mandated under federal law.

VII. FIRST CLAIM FOR RELIEF: FEDERAL PREEMPTION (28 U.S.C. § 2201)

38. Plaintiffs incorporate the above-stated allegations as though stated herein.

39. The Supremacy Clause, U.S. Const. Art. VI, clause 2, provides that federal law "shall be the supreme law of the land…anything in the Constitution or laws of any State to the contrary notwithstanding."

40. Sections 3 and 9 of HB 4204 significantly interfere with financial institutions' express power under federal law to make real-estate loans. Sections 3 and 9 unilaterally change the payment schedule and due date of loans, prohibit institutions from imposing negotiated interest rates and fees, prohibit institutions from protecting their security via escrow accounts, and require financial institutions to provide disclosures not mandated by federal law. Federal law, including but not limited to the NBA and HOLA and regulations promulgated thereunder, preempt those sections of HB 4204 as-applied to national banks and federal savings associations. Various provisions of federal law, including but not limited to the FDIA, as amended by DIDA, and regulations promulgated thereunder, pre-empt those sections of HB 4204 as applied to out-of-state chartered banks.

41. Congress has clearly spoken in the area of housing relief related to COVID-19 by enacting specific provisions in the CARES Act relating to federally backed mortgages. As

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applied to federally backed mortgages covered by the provisions of the CARES Act, HB 4204 directly conflicts with Congress' intent in addressing the impact of COVID-19 on housing.

42. Plaintiffs seek a declaration that federal law preempts HB 4204 sections 3 and 9 in total, and an injunction preventing their enforcement.

43. Under ORS 708A.010, Oregon-chartered banks have the same powers as their federally-chartered counterparts. Oregon-chartered banks, however, will not have the same powers as their federal counterparts if Oregon-chartered banks are restricted in the exercise of those powers. Because federal law allows national banks and federal savings associations to make real-estate loans unburdened by HB 4204, ORS 708A.010 provides Oregon-chartered banks the same powers.

44. Plaintiffs seek a declaration that under ORS 708A.010, Oregon-chartered banks can exercise the same powers as national banks and federal savings associations, including powers exercised by virtue of federal preemption.

VIII. SECOND CLAIM FOR RELIEF: CONTRACTS CLAUSE (28 U.S.C. § 2201 & 42 U.S.C § 1983)

45. Plaintiffs incorporate the above-stated allegations as though stated herein.

46. 42 U.S.C. § 1983 prohibits any State from depriving any citizen of the United States of any of the "rights, privileges, or immunities secured by the Constitution and laws" of the United States.

47. The Contracts Clause, U.S. Const., Art. I, section 10, clause 2 provides: "No State shall...pass any Law impairing the obligation of Contracts."

48. HB 4204 substantially impairs Plaintiffs' preexisting contractual relationships by altering the contractual obligations owed to Plaintiffs and by depriving them of the benefit of their contractual rights and protections. Specifically, section 3 of HB 4204 prohibits banks from treating borrowers' failure to pay as a default or taking any contractually authorized actions in response to a default. In fact, HB 4204 goes so far as to authorize borrowers to sue Plaintiffs and

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recover attorney fees if Plaintiffs attempt to exercise contract terms to which those borrowers agreed in exchange for valuable consideration. In addition, Section 9 requires lenders to "inform" borrowers of illusory rights, jeopardizing lenders' rights to enforce their contracts as-written in the future.

49. HB 4204 broadly adjusts the rights and responsibilities of lenders and borrowers beyond the degree necessary to advance the purpose of addressing the conditions caused by COVID-19. The scope of the forbearance requirement is not reasonably tailored to alleviating financial hardship. In the case of properties with four or fewer dwelling units, borrowers need only attest to suffering financial hardship to obtain forbearance, regardless of whether those borrowers are in fact capable of continuing to make payments. Under HB 4204, forbearance is required even where a borrower earns income from rent on the property for which payments are deferred. Payments may be deferred under HB 4204 until the date on which full performance of the obligation is due, which can be decades into the future. Furthermore, HB 4204 does not include any provisions permitting financial institutions to take action in response to damage to property, or to require borrowers to maintain sufficient escrow funds, thereby removing lenders' rights to take action to preserve the value of the collateral.

50. Plaintiffs seek a declaration that HB 4204 sections 3 and 9 impair Plaintiffs' contractual rights in violation of Article I, Section 10 of the United States Constitution, and an injunction preventing the enforcement of that provision. Plaintiffs also request the costs of prosecuting this action, including attorney's fees under 42 U.S.C. § 1988, and such other relief as the Court finds just and reasonable.

IX. THIRD CLAIM FOR RELIEF: RETROACTIVITY, DUE PROCESS AND TAKINGS (28 U.S.C. § 2201 & 42 U.S.C § 1983)

51. Plaintiffs incorporate the above-stated allegations as though stated herein.

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52. 42 U.S.C. § 1983 prohibits any State from depriving any citizen of the United States of any of the "rights, privileges, or immunities secured by the Constitution and laws" of the United States.

53. The Due Process Clause, U.S. Const. amend. XIV, section 1, provides that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ."

54. The Takings Clause, U.S. Const. amend. XIV, clause 4, incorporated against the State of Oregon through the Fourteenth Amendment, provides, "[N]or shall private property be taken for public use, without just compensation."

55. HB 4204 did not take effect until it was signed into law on June 30, 2020, more than three months after the start of the emergency period on March 8, 2020. Yet, as detailed above, HB 4204 states that (i) lenders may not exercise many of their essential contractual rights and protections, (ii) courts are barred from entering judgments of foreclosure and sale or issuing writs of execution, and (iii) any execution or trustee's sales during the emergency period is void. HB 4204 even creates a private right of action for actual damages, costs, and attorney fees against lenders who exercise certain contractual rights during the emergency period.

56. Substantive statutes are presumed to apply only prospectively, absent clear legislative intent to the contrary. *See, e.g., Robert Camel Contracting v. Kraustsheid*, 205 Or. App. 498, 502, 134 P.3d 1065 (2006). HB 4204 is substantive, rather than remedial, because it impairs existing rights, creates new obligations, and imposes additional duties with respect to past transactions. *Id.* However, HB 4204 does not contain a retroactivity clause expressly stating that the legislature intended these provisions to apply retroactively to events occurring between March 8, 2020 and June 30, 2020, as opposed to applying prospectively for the duration of the emergency period. Accordingly, HB 4204 should be read as not applying retroactively.

57. Between March 8, 2020 and June 30, 2020, OBA members legally exercised contractual rights now prohibited by HB 4204.

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58. If HB 4204 is read to apply retroactively to conduct or events occurring between March 8, 2020 and June 30, 2020, HB 4204 would violate the Due Process Clause by arbitrarily and irrationally imposing substantial retroactive liability for banks based on conduct that was legal at the time it occurred, and by voiding final judgments and other vested property rights.

59. Between March 8, 2020 and June 30, 2020, Oregon courts entered judgments of foreclosure and sale in favor of OBA members. Those judgments constitute vested property rights that cannot be taken by the State without providing just compensation.

60. If read to apply retroactively to judgments that have already been entered or execution or trustee's sales that have already been completed, HB 4204 would take vested property rights without just compensation in violation of the Fifth Amendment to the United States Constitution and Article I, section 18 of the Oregon Constitution.

61. Defendants' enactment and enforcement of HB 4204 are actions taken under the color of State law within the meaning of 42 U.S.C. § 1983, and are in contravention of Plaintiffs' constitutional rights.

62. Plaintiffs seek a declaration that HB 4204 does not apply retroactively to prohibit conduct that occurred prior to HB 4204's effective date or void judgments entered before that date, and an injunction preventing such retroactive application, because Plaintiffs have no adequate remedy at law. Plaintiffs also request the costs of prosecuting this action, including attorney's fees under 42 U.S.C. § 1988, and such other relief as the Court finds just and reasonable.

63. Alternatively, Plaintiffs seek a declaration that retroactive application of HB 4204's provisions to conduct or judgments entered before its effective date would violate the Due Process and Takings Clauses, and in injunction preventing such retroactive application, because Plaintiffs have no adequate remedy at law. Plaintiffs also request the costs of prosecuting this action, including attorney's fees under 42 U.S.C. § 1988, and such other relief as the Court finds just and reasonable.

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X. PRAYER

WHEREFORE, Plaintiffs pray for:

1. Declaratory and injunctive relief declaring sections 3 and 9 of HB 4204 unconstitutional for violating the Supremacy Clause and the Contracts Clause of the U.S. Constitution, and restraining defendants from enforcing those provisions;

2. A judgment (i) declaring that HB 4204 does not apply retroactively to prohibit conduct that occurred prior to HB 4204's effective date or void judgments entered before that date, and an injunction preventing such retroactive application, or, in the alternative (ii) Declaratory and injunctive relief declaring retroactive application of HB 4204 unconstitutional for violating the Due Process and Takings Clauses of the U.S. Constitution, and restraining defendants from enforcing those provisions retroactively;

3. Plaintiff's costs and attorney's fees under 42 U.S.C. § 1988; and

4. For any such further relief as may be just and proper.

DATED this 13th day of August, 2020.

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