IN THE SUPREME COURT OF GEORGIA

DAVID C. BELKE, GLENN A. COUEY, and JULIE P. COUEY, Petitioners, vs. COMMUNITY & SOUTHERN BANK, Respondent.	Docket No. S-14-C-1844

BRIEF OF AMICI CURIAE

GEORGIA WATCH, INC.
AND
THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

IN SUPPORT OF
THE PETITION FOR CERTIORARI

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Amici Georgia Watch, Inc. and the National Association of Consumer Advocates respectfully submit this Brief in support of the Petition for a Writ of Certiorari of David C. Belke, Glenn A. Couey, and Julie P. Couey, and show as follows:

STATEMENT OF INTEREST

Georgia Watch is a non-profit, non-partisan, public interest organization organized under Section 501(c)(3) of the Internal Revenue Code. Georgia Watch is well-positioned to provide insight into economic issues that impact Georgia citizens and consumers, including health care, energy and utility issues, identity

theft, foreclosure, predatory lending and access to civil justice.[1]

The National Association of Consumer Advocates ("NACA") is a non-profit association of over 1,700 attorneys and consumer advocates whose mission is "justice for all consumers."[2] NACA maintains a national forum for consumer advocates to share information and serves as a voice for consumers and its members to curb unfair and abusive business practices. NACA's members include private- and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers. NACA also has a charitable and educational fund incorporated under §501(c)(3) of the Tax Code. NACA has filed amicus briefs in a number of leading consumer-protection cases before the United States Supreme Court and other courts across the country.

Georgia Watch's and NACA's concern regarding the Court of Appeals' decision in *Community & Southern Bank v. DCB Investments, LLC*,[3] is that it poses a substantial risk to Georgia consumers and to Georgia's economy generally

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[1] http://www.georgiawatch.org/about/ (last viewed October 20, 2014).

[2] http://www.consumeradvocates.org/about-naca (last viewed October 20, 2014).

[3] 760 S.E.2d 210, 211 (Ga. Ct. App. 2014), *reconsideration denied* (July 29, 2014).

by jeopardizing the nearly 80-year-old balance of legal rights and protections that appears to have existed between secured lenders and consumers.

STATEMENT REGARDING STANDING OF THE AMICI

Rule 23 of the Rules of the Supreme Court of Georgia allows anyone to submit an amicus curiae brief in support of a motion made by a party. This Brief is presented in support of the above-captioned Petition for Certiorari.[4]

ARGUMENT AND CITATION OF AUTHORITY

Supplemental Issue Presented

The other key issue presented by this case is whether allowing debtors to contract out of Georgia's statutory foreclosure protections would injure others or have a strong negative effect on the public interest.[5]

Allowing parties to waive the protections of the confirmation statute would reduce lenders' incentive to auction real property for its fair-market value — the

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[4] See *In re Stroh ex rel. Adoption of T.M.G.*, 272 Ga. 894, 895 (2000) ("interested third parties" may appear as amici to support a petition for certiorari).

[5] The Amici do not minimize the petitioners' separate issue and argument that the confirmation statute represents a "condition precedent to suits for deficiencies," that is not susceptible to contractual waiver under such authority as *First Nat'l Bank & Trust Co. v. Kunes*, 230 Ga. 888 (1973). See Petitioners' Reply Brief at 1-2. The Amici seek to supplement the petitioners' argument by showing that allowing the conditions imposed under the foreclosure statutes to be waived by contract would have a strong negative impact on the public interest.

consequence of which is often reduced property values for neighboring property owners and other domino effects on neighborhoods. Allowing waiver of the protections afforded by Georgia's statutory foreclosure scheme would have a strong negative impact on the public interest and public order. This issue must be answered in the *negative*.

Introduction

The Court of Appeals placed a heavy thumb on the scale that, as this Court once tacitly observed, balanced the consumer protections of O.C.G.A. §§ 44–14–160, *et seq*. against the concept of freedom of contract.[6] Because the issue presented is one "of great concern, gravity, or importance to the public," certiorari should be granted.[7] This Court should declare that a contractual waiver of the protections in O.C.G.A. §§ 44-14-160, *et seq*., contravenes public policy and has a strong negative impact on the public interest, and, as a result, is unenforceable. Alternatively, this Court should vacate the Court of Appeals' opinion and remand for further findings.

Summary of the Facts and Procedural Posture

The petitioners personally guaranteed inextricably intertwined commercial

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[6] *You v. JP Morgan Chase Bank*, 293 Ga. 67, 70 (2013).

[7] Supreme Court Rule 40.

loans secured by two pieces of real property.[8] The guarantees included a general waiver of all defenses as to liability.[9] The loans went into default.[10] The lender foreclosed on one property securing the debt.[11] Without confirming the first sale the lender then foreclosed on the second property and sued the petitioners for a deficiency.[12] The trial court declared that, notwithstanding the petitioners' waivers, the lender's failure to comply with the judicial-confirmation requirements barred its deficiency suit, granted summary judgment to the petitioners, and denied the lender's cross-motion for summary judgment.[13] The Court of Appeals reversed the trial court's summary-judgment order.[14]

In its opinion, the Court of Appeals' reasoning neither tracked nor responded to all of the arguments made by the parties.[15] The Court of Appeals noted that

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[8] *DCB Investments*, 760 S.E.2d at 214.

[9] Id. at 212.

[10] Id.

[11] Id.

[12] Id. at 212–13.

[13] Id. at 211.

[14] Id. at 216–17.

[15] The parties had briefed the issue on appeal before publication of the decision in *HWA Properties, Inc. v. Community & Southern Bank*, 322 Ga. App. 877, 887 (2013), *cert. denied* (Nov. 18, 2013).

"Georgia's appellate courts are required to construe agreements in a manner that respects the parties' sacrosanct freedom of contract." It then noted that this freedom is not limitless: "contracts will not be avoided by the courts as against public policy, except where the case is free from doubt and where an injury to the public interest clearly appears."[16] The Court of Appeals, however, made no findings regarding the public policy issues involved; and, without engaging in the injury-to-the-public-interest analysis it just identified, held that the lender's "failure to obtain a valid confirmation of the foreclosure sale, pursuant to O.C.G.A. § 44–14–161," does not "impair its authority to collect the difference between the amount due on the note and the foreclosure sale proceeds from [petitioners Belke and the Coueys] based upon [their] personal guarantees]."[17]

I. The confirmation statute serves the important public purpose of encouraging foreclosure auctions at fair market value and preserving neighborhood real estate values.

It's hardly a secret that power-of-sale real-estate foreclosure auctions under O.C.G.A. § 44-14-161, *et seq*. are unlikely to fetch the highest and best knock-down prices. Lenders are the only bidders at foreclosure sales who "can make a

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[16] *DCB Investments,* 760 S.E.2d at 214 (internal quotations omitted).

[17] Id. at 216–17 (internal quotations omitted, brackets in the original), citing *HWA Properties, Inc*., 322 Ga. App. at 887–88, and *GMAC v. Newton*, 213 Ga. App. 405, 406–07 (1994).

'credit bid' (a bid based on the outstanding debt itself) while all other bidders must be able to immediately present the auctioneer with cash or a cash equivalent like a cashier's check."[18] Nor is it a secret that the typical buyer of real estate must finance his or her purchase price, and does not have cash on hand to buy real estate on the courthouse steps. Prospective bidders who do have access to adequate cash don't generally have full access to the property being foreclosed or the time to perform proper due diligence. Court-house-steps auctions are invariably made "as-is" and without implied or express warranties. The vast majority of potential actors in the market for real estate are therefore effectively barred from bidding at foreclosure sales. And, the price bidding that is generated necessarily includes reductions for the lack of a warranty and otherwise inherent speculative nature of such a transaction.

Worse, lenders lack incentive even to credit-bid property at foreclosure sales at their fair market values. For example, in 2009, the government sponsored enterprises ("GSEs") Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") "owned or guaranteed roughly half of all outstanding mortgages in the United States," and

[18] http://en.wikipedia.org/wiki/Foreclosure (last viewed October 20, 2014).

financed "three-quarters of new mortgages [that were] originated that year."[19] Yet the GSEs' mortgage servicing guidelines do not encourage lenders to sell properties at foreclosure for their highest and best values. Fannie Mae's guidelines, for example, emphasize auctioning properties for knock-down prices at their outstanding loan balances — but not necessarily their fair market value.[20]

In 1935, in the context of an economic crisis exacerbated by an epidemic of real estate foreclosures, the Georgia legislature enacted the confirmation statute that is now codified at O.C.G.A. § 44-14-161.[21] The purpose of this law is to encourage lenders to sell real estate for its "true" or fair market value in order to "limit and abate deficiency judgments in suits and foreclosure proceedings on

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[19] Congressional Budget Office, FANNIE MAE, FREDDIE MAC, AND THE FEDERAL ROLE IN THE SECONDARY MORTGAGE MARKET (Dec. 2010) at viii–ix.

[20] FANNIE MAE SINGLE FAMILY 2012 SERVICING GUIDE, Section 107 (March 14, 2012). https://www.fanniemae.com/content/guide/ svc031412.pdf (last viewed October 20, 2014). For uninsured first-line mortgage loans, Fannie Mae requires an opening bid of just "100% of the total mortgage indebtedness" in jurisdictions lacking redemption periods or states that impose transfer tax on the winning foreclosure bid. However, in other jurisdictions, Fannie Mae only requires the bidding start at just *$100* (or the minimum bid imposed by the particular jurisdiction), and that the bidding be raised either until a winning bid is placed, or the bidding reaches 100% of the mortgage balance. Id. at p. 801-47.

[21] Ga. Laws 1935, pp. 381–82.

debts."[22] From a macroeconomic perspective, the confirmation statute also protects the property values of innocent families and businesses from the domino effect of a below-market foreclosure auction on neighborhood property values.[23] Even this Court has recognized the "grave consequences foreclosures pose for individuals, families, neighborhoods, and society in general."[24]

II. Freedom of Contract can't be described as "sacrosanct" because it lacks substantial constitutional protection, and, by statute, contracts against public policy are unenforceable.

Now weighed against the public purpose of the confirmation statute is what the Court of Appeals describes as the "sacrosanct freedom of contract."[25] But one's

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[22] *Bank of North Georgia v. Windermere Development, Inc.,* 316 Ga. App. 33, 37 (2012) (cits. omitted).

[23] "The impact of foreclosure goes beyond just homeowners but also expands to towns and neighborhoods as a whole. Cities with high foreclosure rates often experience more crime and thefts with abandoned houses being broken in to, garbage collecting on lawns, and an increase in prostitution. [cit.] Foreclosures also impact neighboring housing sales on two levels—space and time. For any given time frame, foreclosures have a greater negative impact when they are closer to the property attempting to be sold. The conventional view suggested is that the increase in foreclosures will cause declines in the sales value of neighboring properties, which, in turn, will lead to an extension of the housing crisis." [footnote citation to Rogers, W. H., & Winter, W. (2009), The Impact of Foreclosures on Neighboring Housing Sales, J. OF REAL ESTATE RESEARCH, 31(4), 455–479]. http://en.wikipedia.org/wiki/Foreclosure (last viewed October 20, 2014).

[24] *You*, 293 Ga. at 75.

[25] *DCB Investments,* 760 S.E.2d at 214.

unfettered right to enter into contracts, or "freedom of contract," cannot be properly described as "sacrosanct." Substantive due process, as applied to the states under the Fourteenth Amendment, hasn't afforded protection to freedom of contract since the early 20th century.[26] And, as first declared in *Ogden v. Saunders*, 25 U.S. 213, 254 (1827), the contract-impairment-clause of the U.S. constitution protects only existing contracts from the *retrospective* effects of legislative fiat. The same goes for Georgia's constitution.[27]

Here, because the subject contracts into which the petitioners entered post-date

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[26] Modest substantive due process protections of freedom of contract under the Fourteenth Amendment to the U.S. Constitution was recognized towards the end of the 19th century. See *Frisbie v. United States*, 157 U.S. 160, 165 (1895) ("among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal"). But by the early 20th century substantive due process no longer protected freedom of contract; the United States had "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730–31 (1963).

[27] See *Webb v. Whitley*, 114 Ga. App. 153, 156 (1966) (U.S. and Georgia constitutions' contract clauses "are restricted to the protection of vested rights"), *FDIC v. Beasley*, 193 Ga. 727, 734–35 (1942) (forbidding only *retrospective* application of the "contract impairment clause[s]" of the U.S. and Georgia constitutions); but *cf. Guardian Life Ins. Co. of Am. v. Laird*, 181 Ga. 416 (1935) ("[The confirmation statute] is not applicable to a note and security deed executed prior to the passage of the [confirmation statute]," under the Georgia Constitution's requirement that "no bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grant of special privileges or immunities, shall be passed….").

the confirmation statute by roughly 74 years, neither substantive due process nor the U.S. or Georgia contract-impairment-clauses apply to them.[28] Also, it is well settled that the petitioners, as guarantors, enjoy the same legal protections under the confirmation statute that debtors are afforded.[29] Therefore, the laws that control the petitioners' contracts include those that are codified at O.C.G.A. §§ 1-3-7 and 13-8-2.

O.C.G.A. § 1-3-7 states that a law "made for the preservation of public order or good morals," cannot be "dispensed with or abrogated by any agreement…."[30] On the flip side, O.C.G.A. § 1-3-7 authorizes a contracting party to "waive or renounce what the law has established in his favor *when he does not thereby injure others or affect the public interest*."[31] Overlapping somewhat with O.C.G.A. § 1-3-7 is O.C.G.A. § 13-8-2. It states in part that "[a] contract that is against the policy

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[28] *Webb*, 114 Ga. App. at 156.

[29] See, e.g., *Ameribank v. Quattlebaum*, 269 Ga. 857, 858 (1998) (guarantor afforded protection of the confirmation statute); *U.S. v. Dismuke*, 616 F.2d 755, 759 ([Former] 5th Cir. 1980) (deficiency action for the balance remaining on a note following a foreclosure sale against a guarantor rather than the primary debtor is still an action for a deficiency judgment ... and is barred if no confirmation was obtained), citing *First National Bank & Trust Co. v. Kunes*, 230 Ga. 888, 889 (1973).

[30] O.C.G.A. § 1-3-7.

[31] Id. (emphasis supplied).

of the law cannot be enforced." It goes on to list examples of types of contracts that are "deemed contrary to public policy…."[32] Notably these types of contracts do not include foreclosure protection statutes. However, the list is set forth in disjunctive fashion ("…but are not limited to…"), meaning that the legislature intended to authorize courts to identify and declare other types of contracts that are "contrary to public policy." In deciding whether a contract is contrary to public policy, this Court has held that where one party to a contract has a "greater responsibility than that required of the ordinary person … a provision avoiding liability is peculiarly obnoxious."[33] Thus, where the public interest can be negatively impacted by an exculpatory provision in a contract of which a person endowed with "greater responsibility" is a party — such as a dental clinic — freedom of contract must take a back seat to the public interest.[34]

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[32] "(a) A contract that is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to: (1) Contracts tending to corrupt legislation or the judiciary; (2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter; (3) Contracts to evade or oppose the revenue laws of another country; (4) Wagering contracts; or (5) Contracts of maintenance or champerty." O.C.G.A. § 13-8-2.

[33] *Emory v. Porubiansky*, 248 Ga. 391, 394 (1981), citing 15 Williston, CONTRACTS 1751 (3d ed. 1972). (Internal quotations omitted.)

[34] See *Porubiansky*, 248 Ga. at 394 (declaring as unenforceable contractual clause relieving dental clinic of its duty to exercise appropriate standard of care).

The legislature has declared that a party's freedom of contract must cede to the public interest where that party's contractual waiver of existing statutory protections is "contrary to public policy,"[35] could "injure others" or "affect the public interest."[36] Freedom of contract, therefore, is no more "sacrosanct" than any other extraconstitutional statute when the contract in question may be "in contravention of public policy," and especially when one of the contracting parties has a "greater responsibility" to the public. Freedom of contract is in pari materia with statutes that limit a party's right to enter into contracts or to contractually waive legal protections that can negatively affect the public interest.

III. The Court of Appeals has upset the existing equilibrium between consumer-protection statutes that protect the public interest and parties' traditional freedom to contract.

The decisions of the Court of Appeals in this case and in *HWA Properties* upset the equilibrium that previously existed between: *on one hand*, the interest the public has in the protection of debtors (who are often in unequal bargaining positions with their lenders) and what this Court has described as other "individuals, families, neighborhoods, and society in general"[37] (who can fall

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[35] O.C.G.A. § 13-8-2.

[36] O.C.G.A. § 1-3-7.

[37] *You*, 293 Ga. at 70.

victim to the sometimes grave consequences of artificially depressed property values), and, *on the other hand*, freedom of contract. Before *HWA Properties* and this case were decided, this Court tacitly recognized this equilibrium in *You v. JP Morgan Chase Bank*, where it described Georgia's foreclosure legislation as "scant statutory law … [that] has evolved as a means of providing limited consumer protection while preserving in large measure the traditional freedom of the contracting parties to negotiate the terms of their arrangement."[38]

But, in the aftermath of this opinion and *HWA Properties,* consumer protections (in a market in which there is a gross disparity in negotiating leverage between economic players) can now be contractually waived in the fine print of mortgage-industry-standard contracts of adhesion. In the aftermath of the 2009 financial meltdown, due in large part to the sequellae of subprime mortgage lending abuses, who can say that mortgage lenders do *not* have (to use the descriptive phrase in *Emory v. Porubiansky*) a "greater responsibility than that required of the ordinary person"? That there now appears to be no limitation on what could become industry-wide and adhesive waivers of the legislative protections afforded debtors and neighborhoods is not hyperbole.

In this case the Court of Appeals did not weigh *any* public-policy issues in its

[38] 293 Ga. at 70 (cits. omitted).

written opinion. Nor did it give the parties the opportunity to brief the issue before issuing an opinion that built on (the intervening) *HWA Properties* opinion. To apply a freedom-of-contract analysis to this case the Court of Appeals should have engaged in a proper O.C.G.A. §§ 1-3-7 and 13-8-2 analysis. It should have remanded this case to the trial court to hear evidence on the counter-balancing public-policy implications of its decision — including whether the lender bore a greater responsibility than that required of the ordinary person.[39] And, it should have allowed the parties to fully brief the issue.[40]

In light of the publication of the Court of Appeals' opinions in this case in July of 2014, and in *HWA Properties* in July of 2013, can this Court still say (as it did in *You v. JP Morgan* in May of 2013) that the legislature's "limited consumer protection" has been preserved? The Court of Appeals' decision to elevate

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[39] See, e.g., *MacDonald v. Harris*, 266 Ga. App. 287, 288 (2004) (remand for trial court findings on award of attorney's fees); *L & L Elec. Serv., Inc. v. L.K. Comstock & Co*., 168 Ga. App. 780, 780 (1983) (remand for mandatory findings of fact and conclusions of law); *Liberty Mut. Ins. Co. v. Alsco Const. Co.*, 139 Ga. App. 786 (1976) (remand for findings of fact and judgment to conform to parties' stipulations of fact).

[40] The Court of Appeals could also have affirmed the trial court by recognizing and applying the longstanding rule that the petitioners advanced below, i.e., that confirmation is a "condition precedent to suits for deficiencies," that is not subject to waiver. See *First Nat'l Bank & Trust Co. v. Kunes*, 230 Ga. 888 (1973).

freedom of contract over Georgia's consumer-protection statutes without considering the public impact alone suggests that the answer is "*No*." If this Court does not declare some minimum protection for debtors — such as the protections established by the legislature which have stood for 79 years — then there is in effect no minimum protection for debtors. As such, this case presents an issue "of great concern, gravity, or importance to the public." And, it warrants this Court's review and reversal.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted this 21st day of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that, prior to filing, I have caused a true and correct copy of the above and foregoing **Brief of Amici Curiae Georgia Watch, Inc. and the National Association of Consumer Advocates In Support of the Petition for Certiorari** to be served on the counsel of record listed below by placing the same in the United States Mail with sufficient first-class postage affixed thereon to ensure delivery, properly addressed as follows:

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