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19 **UNITED STATES DISTRICT COURT**
 20 **NORTHERN DISTRICT OF CALIFORNIA**
 21 **SAN FRANCISCO DIVISION**

22 WELLS FARGO BANK, NATIONAL
 23 ASSOCIATION, as Trustee, *et al.*,

24 Plaintiffs,

25 v.

26 CITY OF RICHMOND, CALIFORNIA, a
 27 municipality, and MORTGAGE
 RESOLUTION PARTNERS LLC,
 28

Defendants.

Case No. CV-13-3663-CRB

**DEFENDANTS' OPPOSITION TO
 MOTION FOR PRELIMINARY
 INJUNCTION**

Date: September 13, 2013
 Time: 10:00 a.m.
 Judge: Honorable Charles R. Breyer
 Courtroom 6, 17th Floor

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SUMMARY OF ARGUMENT

1
2 The collapse in housing prices brought on by the 2008 financial crisis devastated the City of
3 Richmond (the “City”). Homes are worth less than half of their peak value and, in large areas of
4 the City, more than half of “homeowners” are left with mortgage debt that far exceeds the value of
5 the home. Although some other parts of the country and Bay Area have experienced a substantial
6 recovery in housing prices, no recovery sufficient to resolve the “underwater” mortgage loan
7 problem is on the horizon in the City. The underwater mortgage loans have led to a cycle of
8 economic contraction, defaults, foreclosures, abandoned properties, vandalism, increased criminal
9 activity, a drop in City property tax revenues, a decline in City services, and the deterioration of
10 neighborhoods. Like other cities in a similar position, the City is exploring potential solutions.

11 One potential solution is for the City itself to purchase underwater mortgage loans for their
12 fair market value, using eminent domain powers if necessary, and then reduce the principal
13 balances, keeping the current homeowners in their homes for the benefit of neighborhoods and the
14 City as a whole. Policy experts have been urging this type of “principal reduction” solution for
15 years as the most viable option to save some cities from more years of stagnation and
16 deterioration.¹ Not surprisingly, some financial-industry interests are vehemently opposed to the
17 idea, even though the government would have to pay just compensation. They have mounted an
18 aggressive campaign to discredit the idea and everyone associated with it. This lawsuit is part of
19 that campaign, intended to intimidate officials and community groups in the City and other
20 localities considering similar proposals for addressing the underwater mortgage crisis.

21 The Richmond City Council has not adopted a resolution of necessity to authorize the use
22 of eminent domain authority to acquire mortgage loans. The City Manager is still exploring the
23 possibility of acquiring loans through negotiations. Under California law, “a public entity may not
24 commence an eminent domain proceeding until its governing body has adopted a resolution of
25 necessity.” Cal. Code Civ. Proc. §1245.220. A resolution of necessity is a legislative act that must

26
27 ¹ See, e.g., Robert Hockett, “Paying Paul and Robbing No One: An Eminent Domain
28 Solution for Underwater Mortgage Debt,” *Fed. Reserve Bank of N.Y.: Current Issues in Economics
and Finance*, Vol. 19, Number 5 (2013), available at:
http://www.newyorkfed.org/research/current_issues/ci19-5.pdf.

1 be adopted by a supermajority vote, after advance notice to property owners and a public hearing,
2 and findings about the “public interest and necessity” for using eminent domain authority. *Id.*
3 §§1245.230, 1245.235, 1245.240.

4 Nonetheless, Plaintiffs Wells Fargo Bank, National Association; Deutsche Bank National
5 Trust Company; and Deutsche Bank Trust Company Americas (collectively, the “Banks”) filed this
6 lawsuit against the City and its advisor, Mortgage Resolution Partners LLC (“MRP”), seeking
7 declaratory and injunctive relief to prevent the City from exercising eminent domain authority to
8 condemn mortgage loans and demanding attorney’s fees under 42 U.S.C. §1988. The Banks
9 immediately moved for a preliminary injunction and refused to take their motion off calendar when
10 the City pointed out that its City Council had not adopted a resolution of necessity or even put one
11 on its agenda.

12 That being so, this case is just harassment. The Banks’ claims are not ripe, and none of the
13 preliminary injunction factors are met, so the Banks’ motion should be denied.

14 1. As a threshold matter, the jurisdiction of the federal courts is limited to deciding actual
15 cases and controversies. “A claim is not ripe for adjudication if it rests upon contingent future
16 events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*,
17 523 U.S. 296, 300 (1998) (internal quotation marks omitted). The City Council has not adopted a
18 resolution of necessity and may never do so, so this case is not ripe. The Supreme Court
19 specifically held long ago in *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471
20 (1896), a case that remains good law, that federal courts may not interfere “by any order, or in any
21 mode” with a city council’s authority to exercise its legislative powers *before* those powers have
22 been exercised, *id.* at 481. Because the Court lacks subject matter jurisdiction, it cannot issue a
23 preliminary injunction.

24 2. Even if the Court had subject matter jurisdiction, the Banks cannot establish any of
25 the four criteria for obtaining a preliminary injunction.

26 *First*, the Banks do not have a probability of prevailing on claims that are not justiciable.

27 *Second*, the Banks cannot show a likelihood of irreparable harm if a preliminary injunction
28 is denied. They would not be obligated to participate in a City Council hearing on a (hypothetical)

1 proposed resolution of necessity; nor is participating in public debate irreparable harm. Even if the
2 City Council adopted a resolution of necessity, and the City immediately filed an eminent domain
3 lawsuit, the Banks would not suffer irreparable harm. The Banks could raise in that lawsuit every
4 legal argument they seek to raise prematurely here. The Supreme Court has rejected the contention
5 that the state courts will not adequately protect constitutional rights. *Middlesex Cnty. Ethics*
6 *Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). The Ninth Circuit has applied that
7 holding specifically to California eminent domain proceedings. *M&A Gabaee v. Cmty.*
8 *Redevelopment Agency*, 419 F.3d 1036, 1039-41 (9th Cir. 2005). Indeed, the many state-law issues
9 the Banks raise in their complaint would be better addressed in state court and, if the Banks were
10 correct in their legal analysis, would mean the federal constitutional issues never would be reached.

11 The Banks protest that California has a “quick-take” procedure. But the procedure for
12 “possession prior to judgment” requires a motion on at least 60 days notice, allows for opposition,
13 and requires the state court to find that “[t]he plaintiff is entitled to take the property by eminent
14 domain.” Cal. Code Civ. Proc. §1255.410. The state court must also find that the plaintiff has
15 deposited the full amount of probable just compensation and that the balance of hardships favors
16 provisional relief. *Id.* Those are the issues the Banks wish to contest, and they could do so in state
17 court. The Banks’ irreparable harm argument reduces to two propositions – both rejected by the
18 Supreme Court – that it is irreparable harm to (1) have to raise defenses in state court and (2)
19 receive just compensation in accordance with the U.S. and California constitutions.

20 In this regard, it cannot be gainsaid that, even if the Banks’ defenses, including their
21 constitutional objections, to eminent domain were rejected, the Banks still would not suffer any
22 cognizable injury. Investors do not have sentimental attachment to mortgage loans such that their
23 loss cannot be compensated in money. They are just an investment. There is a market that sets a
24 market price, and the property owner in an eminent domain lawsuit is entitled by law to receive the
25 full fair market value of the property. It cannot be irreparable harm for a plaintiff to receive
26 everything to which the plaintiff is entitled.

27 *Third*, by contrast to the Banks, which are at no risk of irreparable harm, the people of the
28 City of Richmond would suffer irreparable harm to their First Amendment rights, and their right to

1 self-government, if the Court intervened now at the Banks' request. The City is attempting to deal
2 with a major problem that is causing deteriorating neighborhoods and a declining tax base. If this
3 Court grants a preliminary injunction, the City would be forced to defend a hypothetical plan its
4 City Council never adopted, based on the Banks' mischaracterizations of that non-existent plan,
5 rather than conducting a duly noticed public hearing to build the legislative record to consider and
6 ultimately support a potential future resolution of necessity.

7 *Fourth*, a preliminary injunction unquestionably would harm the public interest by
8 enmeshing the federal courts in local, municipal legislative decisions, contrary to the clear
9 instructions of the Supreme Court. *See New Orleans Water Works Co.*, 164 U.S. at 481 (“[T]he
10 courts will pass the line that separates judicial from legislative authority if by any order, or in any
11 mode, they assume to control the discretion with which municipal assemblies are invested when
12 deliberating upon . . . ordinances proposed for their adoption.”).

13 3. Even if the Court could reach the merits of the Banks' substantive legal claims, the
14 Banks would not have any probability of success. The Banks are mistaken about the law on each
15 of the four issues they raise.

16 The City certainly could exercise eminent domain authority to condemn loans when the
17 debtor and security property are located within the city. There is no “extraterritoriality” problem.
18 *See, e.g., Harris v. Balk*, 198 U.S. 215, 221-24 (1905) (upholding garnishment of a debt owed to a
19 non-resident creditor and explaining that “[t]he obligation of the debtor to pay his debt clings to
20 and accompanies him”); *Brown v. Kennedy*, 82 U.S. 591 (1872) (upholding condemnation of a debt
21 and mortgage interest at the site of the debtor and security property even though the creditor, the
22 bond and the mortgage instrument were located outside the jurisdiction); *Offield v. New York, New*
23 *Haven & Hartford R.R. Co.*, 203 U.S. 372 (1906) (upholding use of eminent domain to condemn
24 stock issued by a domestic corporation even though the owners of the shares were located
25 elsewhere).

26 The hypothetical use of eminent domain to condemn mortgage loans as part of a public
27 program to reduce principal balances, avoid foreclosures, and stabilize neighborhoods would easily
28 satisfy the “public use” test. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984)

1 (“where the exercise of the eminent domain power is rationally related to a conceivable public
2 purpose, the Court has *never* held a compensated taking to be proscribed by the Public Use Clause”
3 (emphasis added)).

4 There is no serious Dormant Commerce Clause issue here because the hypothetical exercise
5 of eminent domain authority would not involve any regulation of commerce. Nor would it
6 discriminate against out-of-state investors; every investor would receive full fair market value, and
7 some investors would be Californians. The case the Banks rely upon involved the attempted
8 condemnation of a sports franchise that was participating in an interstate football league that
9 functioned as a joint venture among the sports teams. *See City of Oakland v. Oakland Raiders*, 174
10 Cal.App.3d 414 (1985). That fact pattern has no similarity whatsoever to mortgage loans.

11 Finally, the Supreme Court already has rejected the argument that the use of eminent
12 domain violates the Contract Clause, ruling unanimously that the Contract Clause argument has
13 “no merit” because the “Clause has never been thought to protect against the exercise of the power
14 of eminent domain.” *Midkiff*, 467 U.S. at 243 n.6.

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BACKGROUND

A. The Underwater Mortgage Crisis in the City

The City, a diverse, working-class city on the San Francisco bay, has been hit harder by the recent housing crisis than most other cities in the nation. The median sale price of homes has declined from a peak of about \$450,000 in January 2006 to about \$220,000 today. Declaration of City Manager William Lindsay (“Lindsay Dec.”) ¶6. As a result, many homeowners are now seriously “underwater” on their mortgages, meaning they owe banks or other financial institutions holding their mortgages much more than their homes are worth (which is also known as having “negative equity”). The City has one of the worst such situations in the country, with about 51% of homeowners underwater on their mortgages and the average underwater homeowner owing about 45% more than the home is worth. *Id.* ¶¶7-8.

This situation has resulted in a large number of foreclosures – approximately 2,000 in the past three years. *Id.* ¶9. About 16% of homeowners with a mortgage in the City have suffered a foreclosure. *Id.* The City’s research shows that a high percentage of underwater mortgages, particularly those in Private Label Securitization (“PLS”) trusts, ultimately will wind up in foreclosure. *Id.*; *see also* Declaration of Robert Hockett (“Hockett Dec.”) ¶16.²

The high concentration of underwater mortgage loans is holding down property values, which results in reduced property tax revenues, which results in reduced city services. Lindsay Dec. ¶¶11-13; *see also* Hockett Dec. ¶6; Declaration of Peter Dreier (“Dreier Dec.”) ¶8; Declaration of Reverend Marvin Webb (“Webb Dec.”) ¶3. Between 2007 and 2012, the City’s property tax revenue declined by more than 14.5%. In the fiscal year ending June 30, 2009, the City had about 950 people on staff; for the current fiscal year that number has declined to 786. Lindsay Dec. ¶¶12-13.

Foreclosures have also led to problems associated with vacant homes, including neighborhood blight and illegal garbage dumping, crime, and the diversion of City resources. *Id.*

² The term Private Label Securitization means that there is no backing from a government agency, like Ginnie Mae. The term Residential Mortgage-Backed Securities (“RMBS”) means that the securitization trust holds residential mortgage loans, as opposed to other assets. Declaration of Robert Hockett (“Hockett Dec.”) ¶9 n.1.

¶14. For example, in 2010 the City had to haul 295 tons of trash off of private property, a large portion of which was from vacant homes, and police and fire services have been forced to dedicate additional resources to neighborhoods that have suffered higher vacancy rates. Lindsay Dec. ¶16. The blight caused by vacancies demoralizes communities and discourages prospective homebuyers from moving into the City, which keeps property values down. *Id.* ¶14. The negative equity situation is also a drag on economic recovery. Hockett Dec. ¶5. The City's unemployment rate was about 11.9% in June 2013, considerably higher than the statewide unemployment rate. Lindsay Dec. ¶5.

B. The City's Search for Solutions

Like other similarly-situated cities, Richmond has been searching for local solutions to the local problems caused by a high concentration of underwater mortgage loans. *Id.* ¶¶4, 17. The federal government bailed out the big banks after the 2008 financial crisis, but not communities suffering from concentrated negative equity like the City. Community groups, labor unions, and faith-based organizations are part of this effort to find solutions.³ One of the options that the City is considering is purchasing underwater mortgage loans so that the City can reduce principal, keep homeowners in their homes, and thereby protect neighborhoods and the City as a whole. Lindsay Dec. ¶18. The idea of using such a program to address the underwater mortgage crisis did not originate with City. It has been discussed in academic and public policy circles for years. Hockett Dec. ¶¶3, 15; Dreier Dec. ¶9

The City is focusing in particular on acquiring the most risky and toxic loans originated during the credit bubble, those originated for inclusion in private label securitization trusts, which have exacerbated the crisis because they are especially likely to end up in foreclosure. Dreier Dec. ¶9; Hockett Dec. ¶12. As compared to the 51% of all Richmond mortgages that are underwater, 67% of PLS trust loans from zip codes that include the City are underwater. Lindsay Dec. ¶7.

³ Community groups working with City officials on plans to address the underwater mortgage crisis include the Contra Costa Interfaith Community Supporting Organization, Communities for a Better Environment, United Food and Commercial Workers Local 5, Urban Tilth, Asian Pacific Environmental Network, Black Mobilization Organization, Education Richmond, Urban Habitat, Richmond Progressive Alliance, SEIU Local 1021, and the Alliance of Californians for Community Empowerment. Webb Dec. ¶5.

1 Attempts to reduce mortgage principal balances have not succeeded for loans held in PLS trusts
2 because of the way the PLS trusts were structured. Hockett Dec. ¶¶11-14.

3 In July 2013, the City Manager sent letters to the trustees and servicers of many PLS trusts
4 holding underwater mortgage loans in the City, seeking to initiate negotiations over the potential
5 purchase of these loans by the City. Lindsay Dec. ¶19 & Exh. A. These letters offered to purchase
6 each loan for its individual fair market value as determined in an independent appraisal, subject to
7 approval by the Richmond City Council. *Id.* Exh. A. In addition, the letters asked the recipient to
8 identify the party that it believed had authority to sell the loans if it did not believe itself to have
9 such authority. *Id.* The offer letters state that, “if for any reason you are not satisfied with this
10 offer of just compensation, and have relevant information you would like the City to consider,
11 please contact the undersigned.” *Id.* The offer letters also state that “in the event that negotiations
12 fail to result in agreement, and the City decides to proceed with the acquisition of the Loans
13 through eminent domain, you would have the right to have the amount of just compensation to be
14 paid by the City for the Loans fixed by a court of law.” *Id.*

15 The offer letters were accompanied by an informational pamphlet describing the eminent
16 domain process in California, the inclusion of which is provided for by California law. Cal. Gov’t
17 Code §7267.2(a)(2). The informational pamphlet explains that “[t]he City of Richmond, to the
18 greatest extent practicable, will make every reasonable effort to acquire your property by
19 negotiated purchase” and that, if negotiations fail, the City may decide to exercise its eminent
20 domain authority “or it may decide to abandon its intention to acquire the property.” Lindsay Dec.
21 Exh. B, at 5. The pamphlet also explains that the exercise of eminent domain authority would
22 require the adoption of a resolution of necessity by the City Council and that property owners
23 would receive advance notice and an opportunity to object to the adoption of such a resolution. *Id.*

24 Right now, the City is looking for a counterparty with which to negotiate about the
25 purchase of underwater mortgage loans and is willing to negotiate about price and other terms.
26 Lindsay Dec. ¶20. The City has not made a decision whether to use eminent domain authority if
27 negotiations fail or about what loans should be included if eminent domain authority is exercised.
28 *Id.* ¶¶4, 22.

1 **C. California’s Eminent Domain Law**

2 “Except as otherwise specifically provided by statute, the power of eminent domain [in
3 California] may be exercised only as provided in [the State’s Eminent Domain Law].” Cal. Code
4 Civ. Proc. §1230.020. Under the Eminent Domain Law, “a public entity may not commence an
5 eminent domain proceeding until its governing body has adopted a resolution of necessity.” *Id.*
6 §1245.220. The adoption of a resolution of necessity requires advance notice to property owners,
7 who have the opportunity to object at a public hearing; specific findings of public interest and
8 necessity; and a two-thirds vote by the governing body. *Id.* §§1245.230,1245.235, 1245.240.

9 If a public entity’s governing board has adopted a resolution of necessity, the public entity
10 may commence an eminent domain proceeding by filing suit against the property owner. *Id.*
11 §1245.220. The property owner may defend the lawsuit by contesting the public entity’s right to
12 take the property on any ground. *Id.* §1250.360(h). The property owner is entitled to receive just
13 compensation in exchange for the property; the Eminent Domain Law provides for a jury trial if
14 there are disputes about the calculation of just compensation; and eminent domain proceedings
15 “take precedence over all other civil actions in the matter of setting the same for hearing or trial in
16 order that such proceedings shall be quickly heard and determined.” *Id.* §1260.010; *see also id.* at
17 §1263.010-§1265.420. “Just compensation” is defined generally to mean “the fair market value of
18 the property taken.” *Id.* §1263.310.

19 The Eminent Domain Law also has a procedure for “possession prior to judgment,” which
20 requires a noticed motion by the plaintiff that the property owner may oppose. *Id.* §1255.410.
21 The motion may be granted only if the trial court finds that “[t]he plaintiff is entitled to take the
22 property by eminent domain.” *Id.* §1255.410(d)(2)(A). The trial court also must find that the
23 plaintiff has deposited with the court the full amount of probable just compensation and that “the
24 hardship that the plaintiff will suffer if possession is denied . . . outweighs any hardship on the
25 defendant . . . that would be caused by the granting of the order of possession.” *Id.*
26 §1255.410(d)(2)(B),(C),(D).

1 exercise that power unless its seven-member City Council adopts, by supermajority vote, a
2 resolution of necessity making certain statutorily required findings. *See supra* at 4. A resolution
3 of necessity might never be proposed; or it might not cover the particular loans at issue here; or
4 might be rejected by the City Council; or the City Council might send the whole idea back to staff
5 for further study and it might re-emerge in substantially different form. Therefore, the case is not
6 ripe. *See, e.g., Wendy's Int'l, Inc. v. City of Birmingham*, 868 F.2d 433, 436 (11th Cir. 1989) (no
7 subject matter jurisdiction to issue a declaratory judgment about constitutionality of a taking that
8 might never occur; “appellants’ suit necessarily is based upon the possibility of an occurrence
9 which may never come to pass . . . there is as yet no controversy here ripe for adjudication”).

10 Moreover, under California law, “the resolution of necessity is a legislative act.” *Santa*
11 *Cruz Cnty. Redevelopment Agency v. Izant*, 37 Cal.App.4th 141, 150 (1995). The Supreme Court
12 held in *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471 (1896), that the
13 federal courts may not interfere “by any order, or in any mode” with a city council’s authority to
14 exercise its legislative powers *before* those legislative powers have been exercised, repeating that
15 admonition several times in its decision. *See, e.g., id.* at 481 (“[A] court of equity cannot properly
16 interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise
17 of powers that are legislative in their character.”); *id.* at 482 (“[w]e repeat that when the city
18 council shall pass an ordinance that infringes the rights of the plaintiff . . . it will be time enough
19 for equity to interfere”).

20 B. The facts the Banks relied on in their opposition to the application to take the
21 preliminary injunction off calendar (Doc. 27) do not change the obvious conclusion that the Banks’
22 claims are not ripe.

23 Statements by the City’s Mayor about an intent to exercise eminent domain authority in the
24 future are not a legal substitute for a resolution of necessity. The Mayor, moreover, is just one vote
25 on the City Council, and the City Council would be required to hold a public hearing to consider
26 opposing viewpoints before voting on a resolution of necessity. An assumption that the process is
27 meaningless would involve a lack of respect for the roles of other government officials.

28

1 The City Council's approval of an advisory agreement with MRP for advice regarding
2 various methods of dealing with underwater mortgage loans in the City also does not substitute for
3 the adoption of a resolution of necessity. The agreement does not require the City to exercise
4 eminent domain authority, and the agreement prohibits MRP from implementing any programs
5 without the City's advance approval. *See* Declaration of John C. Ertman, Exh. I, Advisory
6 Services Agreement at sec. 2, para. 2 (Doc. 9-9).

7 Nor do the City Manager's offer letters seeking to purchase the mortgage loans make the
8 case ripe. The letters make plain that the City has *not* made a decision whether to exercise eminent
9 domain authority if the offer is refused. They state that, "in the event that negotiations fail to result
10 in agreement, and the City *decides to* proceed with the acquisition of the Loans through eminent
11 domain, you would have the right to have the amount of just compensation . . . fixed by a court of
12 law." Lindsay Dec. Exh. A (emphasis supplied). The City Manager, moreover, does not have
13 authority to commence an eminent domain action on his own initiative.

14 Nor are the Banks correct that the City Manager's decision to send the offer letters in the
15 first place must mean the City already has decided to exercise eminent domain authority because
16 the Banks (in their view) lack authority to sell mortgage loans. The offer letters were sent to
17 multiple trustees/servicers, cover both performing and non-performing loans, and ask the recipients
18 to notify the City if a different party has authority to negotiate. Lindsay Dec. ¶19 & Exh. A. The
19 City is willing to negotiate on price and other terms. *Id.* ¶20. Were the City ultimately to decide to
20 proceed with an eminent domain action, California law unquestionably would require that decision
21 to be made by the City Council through adoption of a formal resolution of necessity, after a public
22 hearing. *See supra* at 4.

23 C. A brief review of the cases the Banks rely on in their opposition to the application
24 to take the preliminary injunction off calendar (Doc. 27) confirms that the cases do not remotely
25 support the proposition that a federal court may consider a challenge to the legality of a taking
26 before the relevant government agency ever has authorized the taking of the plaintiff's property.
27 Nor do they address the fundamental separation-of-powers problem in a federal court considering
28 the legality of a legislative act before the relevant legislative act has occurred.

1 In the *Regional Railroad Reorganization Act Cases*, 419 U.S. 102 (1974), Congress
2 had adopted a statute, the Rail Act, that required conveyance of property, and the only uncertainty
3 was when -- not whether, as here -- the challenged conveyance would occur. The Supreme Court
4 emphasized this repeatedly in explaining why the case was ripe. *See id.* at 140 (“implementation of
5 the Rail Act will now lead inexorably to the final conveyance”); *id.* at 141 (“the Special Court is
6 mandated to order the conveyance . . . and is granted no discretion not to order the transfer”); *id.* at
7 143 (“occurrence of the conveyance . . . is in no way hypothetical or speculative”); *id.* (“injury is
8 certainly impending”) (internal quotation marks omitted).

9 In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), Hawaii had passed a statute
10 authorizing the taking at issue, and the public agency “made the statutorily required finding that
11 acquisition of appellees’ lands would effectuate the public purposes of the Act” and “subsequently
12 ordered appellees to submit to compulsory arbitration.” *Id.* at 234. Here the City Council has not
13 made the “statutorily required finding[s]” necessary to exercise eminent domain authority, and the
14 Banks have not been ordered to do anything.

15 In *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203
16 (C.D. Cal. 2002), the plaintiff did not seek an injunction against a condemnation until after the
17 relevant governing board had adopted a resolution of necessity. The plaintiff had already sued the
18 government to challenge a prior land-use permitting decision and amended its complaint after the
19 adoption of the resolution of necessity to challenge the legality of the proposed taking. *See* 218 F.
20 Supp. 2d at 1214-15.

21 In *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996), the plaintiffs alleged that the
22 government’s over-enforcement of its housing code, closure of their properties, and revocation of
23 their certificates of occupancy amounted to an unconstitutional taking of their property, so the
24 alleged taking already had occurred.

25 Finally, *Employers Ins. of Wausau v. Fox Entm’t Grp., Inc.*, 522 F.3d 271 (2d Cir. 2008),
26 had nothing to do with eminent domain or a challenge to government action. It involved a dispute
27 about coverage under an insurance policy that already existed. The Second Circuit’s reference to
28 the likelihood that certain “contingencies” would occur was not an invitation for the federal courts

1 to make predictions about the likely outcomes of legislative processes and, on that basis, opine on
2 the legality of bills not yet proposed, let alone passed.

3 D. Even if this case were ripe in the Article III sense (which it obviously is not), the
4 case still would fail the “prudential” component of the ripeness doctrine, which is guided by two
5 overarching considerations: “the fitness of the issues for judicial decision and the hardship to the
6 parties of withholding court consideration.” *Thomas*, 220 F.3d at 1141 (quoting *Abbott*
7 *Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v.*
8 *Sanders*, 430 U.S. 99, 105 (1977)).

9 Part of the very purpose of a formal resolution of necessity is make the issue whether
10 eminent domain is lawful “fit[] for judicial decision,” by identifying the exact property at issue,
11 and setting out what the governing body has found to be the “public interest and necessity” for
12 exercising eminent domain authority. *See* Cal. Code Civ. Proc. §1245.255 (resolution of necessity
13 is subject to judicial review). Absent a resolution of necessity, a court could not even determine
14 whether the particular loans in which the Banks assert an interest would be covered by an exercise
15 of eminent domain authority; even if the City decided to exercise such authority, it might proceed
16 in phases, and these loans might not be covered. Nor could a court assess whether the use of
17 eminent domain authority meets the “public use” test without the City Council’s own findings as to
18 the purpose of the taking. Hearing a legal challenge now could embroil the federal courts and the
19 City in speculative litigation about the legality of a plan the City Council never adopted, with much
20 of that litigation devoted to disputes about the contents of the unapproved “plan” and the Banks’
21 mischaracterizations of the non-existent “plan.”

22 Likewise, there is no “hardship to the parties of withholding court consideration” because,
23 unless and until a resolution of necessity is adopted, no eminent domain action can be commenced.
24 Judicial review can take place at that point, whether in federal or state court, and all the legal issues
25 can be decided on a full record. *See New Orleans Water Works Co. v. City of New Orleans*, 164
26 U.S. at 482 (“[w]e repeat that when the city council shall pass an ordinance that infringes the rights
27 of the plaintiff . . . it will be time enough for equity to interfere”).

28

1 E. The fundamental jurisdictional problem with the Banks' lawsuit can also be viewed
2 as a lack of Article III standing. *See Thomas*, 220 F.3d at 1138 (explaining the close relationship
3 between standing and ripeness). To establish standing, the "plaintiff must show that he 'has
4 sustained or is immediately in danger of sustaining some direct injury' as the result of the
5 challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not
6 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *see also*
7 *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (at the preliminary injunction stage, a
8 plaintiff must establish an injury that is "actual or imminent, not conjectural or hypothetical"
9 (citation, internal quotation marks omitted)).

10 The Banks contend they will be injured because their property will be taken in violation of
11 the Constitution, but no taking can occur unless a resolution of necessity is adopted. Whether to
12 adopt such a resolution would be a legislative decision made by a supermajority of the City
13 Council, following a public hearing. As such, the constitutional injury the Banks claim is
14 "conjectural" and "hypothetical."

15 The Banks protest that the City has taken "substantial steps" to implement what they call a
16 "Seizure Program." Doc. 27 at 3. But, by the same logic, the federal government had taken
17 "substantial steps" to implement a national health care "Program" long before Congress eventually
18 passed legislation, including multiple town hall meetings, economic analyses, blue-ribbon
19 commissions, etc., over the course of many years. President Obama had even promised such a
20 "Program" would come to fruition if he were elected. Yet before Congress actually adopted (and
21 the President signed) the necessary legislation, no one would have standing to challenge it because
22 implementation was still "conjectural" and "hypothetical."

23 To the extent the Banks may be claiming they suffer an "injury in fact" from the City
24 Manager's offer letter, which they characterize as "coercive" (Pls. PI Mot. (Doc. 8) at iii), the claim
25 is meritless. The City Manager's offer letter does not require the Banks to take any action, does
26 not state that the City has decided to exercise eminent domain authority, and includes an
27 informational pamphlet that explains that the City Manager would need permission from the City
28 Council, through the adoption of a resolution of necessity, before initiating an eminent domain

1 action. *See supra* at 3. The Banks, moreover, contend they have no authority to sell the loans (Pls.
2 PI Mot. (Doc. 8) at 3), so the offer letter could not be coercing the Banks to sell the loans or to sell
3 at a lower price. The Banks suffer no more harm than any other property owner that receives such
4 an offer letter, and they have no greater right than other property owners to advisory opinions from
5 the federal courts about the legality of hypothetical takings.

6 **II. The Banks Have Not Satisfied Any Of The Criteria For Obtaining A Preliminary 7 Injunction**

8 Even if the Court does not dismiss this entire case now for lack of subject matter
9 jurisdiction, the Banks certainly are not entitled to a preliminary injunction. A preliminary
10 injunction is an “extraordinary and drastic remedy” that is never awarded as of right. *Munaf v.*
11 *Geran*, 553 U.S. 674, 688-90 (2008) (citations and internal quotation marks omitted). “A plaintiff
12 seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2]
13 that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance
14 of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. Natural*
15 *Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The Banks have not established any of
16 these four mandatory criteria for obtaining a preliminary injunction.

17 **A. The Banks lack a probability of prevailing on claims that are not justiciable**

18 As an initial matter, the Banks cannot establish a likelihood of success on their claims for
19 the threshold reason that they have not shown that the Court has jurisdiction to hear those claims.
20 *See supra* at 5-11. We demonstrate below that the Banks’ substantive defenses to a hypothetical
21 lawsuit to implement a hypothetical resolution of necessity are meritless, *see infra* at 17-27, but
22 this Court would never reach those issues because the Banks’ claims are not justiciable.

23 **B. The Banks have not established irreparable harm**

24 The Banks also are not entitled to a preliminary injunction because, “[u]nder *Winter*,
25 plaintiffs must establish that irreparable harm is *likely*, not just possible, in order to obtain a
26 preliminary injunction.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.
27 2011) (emphasis in original) (explaining that *Winter* rejected the Ninth Circuit’s prior practice of
28 allowing preliminary injunctions based on the mere “possibility” of irreparable harm). The Banks
fail to establish that they will likely suffer irreparable harm absent a preliminary injunction.

1 1. As an initial matter, the Banks cannot establish that the City Council will even
2 consider a resolution of necessity that addresses the mortgage loans at issue. No proposed
3 resolution is on the City Council’s agenda. As the Banks concede, three other jurisdictions spent
4 months reviewing the possibility of purchasing loans, including potentially by eminent domain, and
5 ultimately decided not to proceed at the present time. Complaint ¶62. The Banks’ proof of
6 “likely” injury therefore fails at the outset.

7 A notice that the City Council intends to consider a proposed resolution of necessity,
8 moreover, would not cause the Banks any cognizable harm. Under California law, a property
9 owner is given the opportunity to make objections to a proposed resolution of necessity, but the
10 property owner is not required to take any action or to attend or participate in the City Council
11 proceeding. *See* Cal. Code Civ. Proc. §1245.235(b)(2), (3). The City Council’s public debate
12 about the possible use of eminent domain authority would be a normal part of our democracy, not a
13 constitutional “injury.”

14 2. The Banks apparently contend that they are threatened with irreparable harm in the
15 absence of an injunction because the City might adopt a resolution of necessity and then might
16 immediately file an eminent domain lawsuit. But, if that occurred, the Banks could raise, as a
17 defense to that lawsuit, *every* legal argument they seek to raise prematurely here. *See, e.g.*, Cal.
18 Code Civ. Proc. §1250.360(h) (allowing the property owner to contest the right to take on any
19 ground provided by law); *see also M&A Gabaee v. Cmty. Redevelopment Agency of City of Los*
20 *Angeles*, 419 F.3d 1036, 1039 n.2 (9th Cir. 2005) (“M&A will have an opportunity to litigate its
21 constitutional claims in state court. California law permits M&A to challenge the taking based not
22 only on California state standards, but also on ‘[a]ny other ground provided by law.’ Cal. Code
23 Civ. P. §1250.360(h).”).

24 The Supreme Court already emphatically rejected the argument that having to litigate
25 federal issues in state court is irreparable harm. *Middlesex Cnty. Ethics Comm. v. Garden State*
26 *Bar Ass’n*, 457 U.S. 423, 431 (1982) (“Minimal respect for the state processes, of course, precludes
27 any *presumption* that the state courts will not safeguard federal constitutional rights.”) (emphasis in
28 original). In *M&A Gabaee*, the Ninth Circuit held that the federal courts should abstain from

1 interfering with a California state court eminent domain proceeding because the state court would
2 be able to fully protect the plaintiffs' asserted federal constitutional rights. 419 F.3d at 1039-41.

3 Not only would it be insulting to the state courts and contrary to Supreme Court precedent
4 to hold that the Banks would suffer irreparable harm if required to litigate the very same claims in
5 state court, but the state courts would be the much better forum for the Banks' claims. The Banks'
6 Complaint asserts that a hypothetical resolution of necessity would violate multiple provisions of
7 California state law and the State Constitution. Complaint ¶¶103, 112, 133, 137, 141 (alleging
8 violations of article I, §§1, 7, and 19 of the California Constitution and California Code of Civil
9 Procedure §§1240.050, 1250.020, and 1263.320). The state courts would be in the best position to
10 address those claims and, if the Banks prevailed, the federal constitutional issues would never be
11 reached.

12 3. The Banks protest that California has a "quick-take" procedure that threatens their
13 rights. But the California procedure for "possession prior to judgment" requires the plaintiff in an
14 eminent domain action to file a motion with 60 days notice to the property owner, which the
15 property owner may contest. *See* Cal. Code Civ. Proc. §1255.410. The state court cannot grant the
16 motion unless it finds that "[t]he plaintiff *is entitled to take the property by eminent domain.*" *Id.*
17 §1255.410(d)(2)(A) (emphasis supplied); *see also Montara Water & Sanitary Dist. v. Cnty. of San*
18 *Mateo*, 598 F. Supp. 2d 1070, 1077 (N.D. Cal. 2009) (explaining that the California Legislature
19 recently revised the state law to require the trial court to adjudicate "any defenses to an eminent
20 domain action" before a motion for possession prior to judgment may be granted). Thus, the
21 Banks' claim that this procedure would result in an unconstitutional taking of their property
22 depends entirely on the presumption that the state court would decide the right-to-take issues
23 incorrectly. That is the presumption the U.S. Supreme Court rejected in *Middlesex* (among many
24 other cases). In the unlikely event that occurred, moreover, the Banks would have the opportunity
25 for redress in the state appellate courts and to seek review in the U.S. Supreme Court.

26 The "possession prior to judgment" procedure also requires the state court to find that the
27 plaintiff has deposited with the court the full amount of probable just compensation and, even then,
28 to consider whether "the hardship that the plaintiff will suffer if possession is denied . . . outweighs

1 any hardship on the defendant . . . that would be caused by the granting of the order of possession.”
2 Cal. Code Civ. Proc. §1255.410(d)(2)(B), (C), (D). Again the Banks’ claim of irreparable harm
3 rests upon the presumption that the state courts would be inadequate to the task.

4 Equally to the point, *if* the City gave notice its City Council intended to consider a proposed
5 resolution of necessity, and *if* the City Council adopted such a resolution after a duly noticed public
6 hearing in which the Banks could participate, and *if* the City then filed an eminent domain lawsuit,
7 and *if* the City then filed a motion for “possession prior to judgment” rather than wait to deal with
8 the issues at trial, the Banks could *at that time* file a lawsuit in federal court and seek an injunction.
9 There are exceptions to the Anti-Injunction Act and to abstention doctrines if a plaintiff can show
10 that the state courts will fail to protect the plaintiff’s constitutional rights. The Banks would never
11 prevail in such a federal suit, but that is because the California state courts are adequate guardians
12 of constitutional rights, not because the Banks would be precluded from even filing such a lawsuit
13 when it was actually ripe and seeking federal intervention at that time.

14 4. Finally, the Banks appear to argue that they would suffer irreparable harm because
15 they would be *undercompensated* in an eminent domain proceeding. They allege that the City’s
16 plan to restructure mortgage loans depends upon undercompensating them. But that cannot be
17 right because the California eminent domain procedures ensure that the property owner *will* receive
18 “just compensation” within the meaning of the U.S. and California constitutions, including
19 discovery and a jury trial if necessary to resolve disputed issues of fact, and protection against a
20 grant of immediate possession if the court finds that the balance of the equities favors denying
21 immediate possession (*e.g.*, for the purported credit risk reasons of which the Banks complain).
22 Cal. Code Civ. Proc. §1255.410 & §1263.010 *et seq.* The Banks will receive the adjudicated fair
23 market value of their mortgage loans. The Banks’ argument concerning the alleged irreparable
24 harm of receiving just compensation is essentially an argument that the U.S. and California
25 constitutions’ measure of just compensation is unconstitutional, which is a legal non sequitur.

26 It bears emphasis that the Banks do not claim to have any sentimental attachment to the
27 mortgage loans at issue such that their loss cannot be compensated with money. They are purely
28 financial assets. The trusts for which the Banks serve as trustees receive cash in exchange for a

1 loan in the event of a foreclosure (most loans in California are non-recourse loans) or a short-sale.
2 A taking by eminent domain would be no different. Mortgage loans have a market value and,
3 indeed, are much easier to value than many other assets. *See* Hockett Dec. ¶¶8, 18; Dreier Dec.
4 ¶¶10-12.

5 Contrary to the Banks' contention, a public program to purchase and restructure mortgage
6 loans to reduce principal balances would *not* require shortchanging the trusts that hold the
7 mortgage loans. Hockett Dec. ¶18; Dreier Dec. ¶¶12-14. If that were the basis for a program, then
8 the program would never move forward, because the U.S. and California constitutions, and the
9 California Eminent Domain Law, guarantee that the property owner must receive just
10 compensation in the event of a taking. Thus, if the City were to exercise its eminent domain
11 authority, the owners of mortgage loans definitely will receive the loans' full fair market value.
12 Having received the full measure of just compensation, the Banks will have no injury.

13 For this reason, it makes no sense for the Banks to criticize the City's offer to purchase the
14 mortgage loans as too low. In an eminent domain proceeding, the City could not unilaterally
15 determine fair market value. The City's offer also was based on an independent appraisal, and the
16 City invited the Banks to submit additional information for the appraiser to consider and to discuss
17 arrangements for a new appraisal if the Banks were not satisfied. Lindsay Dec. ¶21 & Exh. A. The
18 Banks are refusing to negotiate, not the City.

19 **C. The people of the City of Richmond would suffer irreparable harm if the Court**
20 **granted an injunction**

21 In weighing whether to grant a preliminary injunction, a court must also consider the
22 potential harm to the defendant. *Winter*, 555 U.S. at 26. Here the Banks ask the Court to preclude
23 the City of Richmond from taking any further action to even consider purchasing mortgage loans
24 by eminent domain. That injunction would prevent the City from ever developing the legislative
25 record that might (or might not) support the exercise of eminent domain authority in the future and
26 the City Council from considering a resolution of necessity at a public hearing to gain input from
27 all interested parties. Such an injunction would be a direct infringement on the First Amendment
28

1 rights of City residents to petition their municipal government and the rights of City residents to
2 conduct their own affairs.

3 A preliminary injunction from this Court also would halt the efforts of City leaders and
4 community groups to find a solution to the real and serious problems the City and its residents are
5 experiencing due to the large concentration of underwater mortgage loans. Those problems include
6 deteriorating neighborhoods, depressed property values, loss of property tax revenues, reductions
7 in city services, vacant houses, foreclosures, increased crime, etc. *See supra* at 1-2.

8 The City's efforts to solve a serious problem would be delayed and redirected from normal
9 process of developing public policy to litigation in the federal courts, with the City forced to spend
10 its time and resources defending a "Seizure Program" (as pejoratively characterized by the Banks)
11 that the City Council has not even considered or adopted. In the meanwhile, the City would be
12 denied the ability to consider the whole matter fully, with input from the public, determine which if
13 any program to adopt and then, if its City Council adopts a program, to defend the actual program
14 in court if necessary. All of the continuing and ongoing harms from the underwater mortgage
15 crisis during this delay would be irreparable.

16 **D. The public interest would be harmed if the Court stifled public debate and**
17 **interfered with the operations of municipal government**

18 Finally, the court must consider the public interest in deciding whether to grant injunctive
19 relief. The judgment made about the public interest in limiting the federal courts to deciding actual
20 "cases and controversies," rather than issuing advisory opinions, was that the potential benefits of
21 advisory opinions would be outweighed by the harm caused by enmeshing the federal judiciary in
22 the operations of the political branches. The very type of premature injunction against future city
23 council action that is sought by the Banks in this action was rejected by the Supreme Court in *New*
24 *Orleans Water Works Co.* as not consistent with the proper role of the courts:

25 [T]he courts will pass the line that separates judicial from legislative authority if by
26 any order, or in any mode, they assume to control the discretion with which
27 municipal assemblies are invested when deliberating upon the adoption or rejection
28 of ordinances proposed for their adoption. The passage of ordinances by such
bodies are legislative acts, which a court of equity will not enjoin. If an ordinance
be passed, and is invalid, the jurisdiction of the courts may then be invoked

164 U.S. at 481 (citations omitted). *See also id.* at 482 ("The mischievous consequences that may

1 result from the attempt of courts of equity to control the proceedings of municipal bodies when
2 engaged in the consideration of matters entirely legislative in their character, are too apparent to
3 permit such judicial action”).

4 Here, there can be no question that it is in the public interest to allow the City to explore
5 possible solutions to a critical problem, to allow its governing body to decide whether to take
6 legislative action to address that problem, and then allow the City to defend in court if necessary
7 whatever solution the City actually adopts.

8 **E. The Banks lack a probability of prevailing on the merits of their substantive**
9 **legal arguments**

10 Although the Court need not address the Banks’ substantive legal claims on the merits to
11 deny the preliminary injunction, we briefly address why the Banks have not established a
12 probability of success on their hypothetical defenses to a hypothetical lawsuit to implement a
13 hypothetical resolution of necessity.

14 **1. The loans are located within the City’s jurisdiction for purposes of the**
15 **City’s eminent domain power**

16 The Banks’ threshold argument that the loans at issue are outside of the City’s jurisdiction
17 for purposes of the City’s eminent domain power relies on inapposite authorities about escheat and
18 taxation while failing to acknowledge the relevant line of cases. For purposes of condemnation
19 authority under both California law and the U.S. Constitution, the loans at issue here are located
20 with the debtor and the security property.

21 The California Supreme Court has explained: “An intangible, unlike real or tangible
22 personal property, has no physical characteristics that would serve as a basis for assigning it to a
23 particular locality. The location assigned to it depends on what action is to be taken with reference
24 to it.” *Estate of Waits*, 23 Cal.2d 676, 680 (1944). Therefore, the situs of the same type of
25 intangible property may be different for different legal purposes. *See, e.g., Waite v. Waite*, 6
26 Cal.3d 461, 467 (1972) (for certain taxation purposes intangible property located with owner),
27 *disapproved on other grounds by In re Marriage of Brown*, 15 Cal.3d 838, 851 n.14 (1976); *Waits*,
28 23 Cal.2d at 680 (for purpose of probate administration of a wrongful death claim, “a debt has its
situs as the domicile of the debtor”); *Pac. Decision Sciences Corp. v. Superior Court*, 121

1 Cal.App.4th 1100, 1108 (2004) (for purpose of attaching money, “the debt or claim is usually
2 regarded as having a situs in any state in which personal jurisdiction of *the debtor* can be obtained”
3 (internal quotation marks omitted)). Federal law takes a similar approach. *See Office Depot Inc. v.*
4 *Zuccarini*, 596 F.3d 696, 702 (9th Cir. 2010) (“[T]he location of intangible property varies
5 depending on the purpose to be served.”).

6 In *City of Oakland v. Oakland Raiders*, 31 Cal.3d 656 (1982), the California Supreme Court
7 considered the situs of an intangible asset – an NFL franchise – for the purpose of exercise of a
8 city’s eminent domain authority. The court applied a totality-of-the-circumstances test,
9 considering all of the contacts and relationships of the intangible property with a physical location.
10 It determined that the trial court erred in concluding that the franchise was not subject to the city’s
11 eminent domain authority, and found that the city had made a prima facie showing that the
12 franchise was located within its jurisdiction. *Id.* at 675. Noting that its list of factors was not
13 exhaustive, the court explained: “Oakland is the principal place of business of the partnership. It is
14 the designated NFL-authorized site for the team’s ‘home games.’ It is the primary locale of the
15 team’s tangible personalty.” *Id.* at 674.

16 Although a sports franchise presents a different range of considerations, the same totality-
17 of-the-circumstances analysis would apply here for purposes of California law. A wide variety of
18 factors indicate that the location of a mortgage loan on an owner occupied residence for
19 condemnation purposes is the same as the location of the debtor and the security property. In
20 particular: (1) the debtor is domiciled in the same location as the security (*i.e.* the home); (2) the
21 loans are secured by real property with a physical location, and the security interest would be
22 condemned with the loan;⁴ (3) the security interests are recorded where the property is located; (4)
23 the creditor’s remedies are based on the location of the real property; (5) the basis for the public
24 purpose for which the loans would be condemned is assisting residents in the condemnor’s

25 _____
26 ⁴ Under federal and California law, the two components of a mortgage loan are inextricably
27 linked, and the transfer of the mortgage loan carries with it the security interest in the property. *See*
28 Cal. Civ. Code. §2936 (“The assignment of a debt secured by mortgage carries with it the
security.”); *Carpenter v. Longan*, 83 U.S. 271, 274 (1872) (“The note and mortgage are
inseparable.”); *Hyde v. Mangan*, 88 Cal. 319, 327 (1891) (“The debt and security are inseparable;
the mortgage alone is not a subject of transfer.”).

1 jurisdiction; and (6) the information necessary to value the loans concerns the debtor and the
2 security property, not the creditor.

3 This conclusion is also controlled by federal court decisions about the government seizure
4 of intangible property, in which courts have consistently found that the jurisdiction in which the
5 issuer or debtor is located has authority to seize stock or a debt obligation. Indeed, the U.S.
6 Supreme Court has held that a state has authority to use eminent domain power to condemn
7 corporate stock – an intangible asset akin to the loans at issue here – of a company incorporated in
8 that state. *See Offield v. New York, New Haven & Hartford R.R. Co.*, 203 U.S. 372 (1906). The
9 Supreme Court’s decision in *Brown v. Kennedy*, 82 U.S. 591 (1872), is particularly on point
10 because it concerned the condemnation of a secured debt and the related mortgage interest. The
11 Court held that confiscation of the credit (*i.e.*, the debt claim) and the mortgage interest securing
12 that credit at the place of the debtor and the security property was valid even though the creditor,
13 the bond evidencing the debt, and the mortgage instrument were located out of the jurisdiction.
14 The Court explained that “attachment or seizure could be made without manual caption of the
15 visible evidence of the credit,” and concluded “the debt was effectively confiscated.” *Id.* at 599
16 (confiscation of assets of Confederate supporter);⁵ *see also Cities Service Co. v. McGrath*, 342 U.S.
17 330 (1952) (holding that pursuant to the Trading With the Enemy Act the United States could seize
18 debts owed by an obligor within the United States even though they were evidenced by bearer
19 bonds outside of the United States); *Silesian Am. Corp. v. Clark*, 332 U.S. 469 (1947) (holding that
20 the United States could seize shares of stock held by an enemy alien in a domestic corporation even
21 though the stock certificates and owner were outside the jurisdiction); *Miller v. United States*, 78
22 U.S. 268, 294-98 (1870) (upholding the confiscation of a Confederate supporter’s shares of stock
23 by seizure at the corporation’s domicile, effected by notice to the corporate officer, even though the
24 shareholder was a non-resident).

25
26 _____
27 ⁵ The situs of a debt does not follow the promissory note because such instruments evidence
28 the borrower’s obligation; they are not themselves the obligation. *See Johnston v. Wolf*, 118
Cal.App. 388, 391 (1931) (noting the “well-recognized principle of law that a person does not lose
his right to a debt by losing the instrument containing the statement of his right”).

1 The conclusion is also controlled by federal and state authorities on garnishment, another
2 action in the nature of a proceeding *in rem*. As with the condemnation of a loan, garnishment
3 involves a jurisdiction’s assertion of authority to order a debt obligation to be paid to a third party
4 rather than the creditor. The Supreme Court has referred to garnishment as a form of
5 “condemnation.” *Harris v. Balk*, 198 U.S. 215, 221-24 (1905), *overruled on other grounds by*
6 *Shaffer v. Heitner*, 433 U.S. 186 (1977). It is well established that the jurisdiction in which a
7 debtor is located has authority to garnish the debt, even if the creditor is located outside the
8 jurisdiction. *See, e.g., id.* at 222 (upholding the garnishment of a debt owed to a non-resident
9 creditor and explaining “[t]he obligation of the debtor to pay his debt clings to and accompanies
10 him”); *Chicago, Rock Isl. & Pac. Ry. Co. v. Sturm*, 174 U.S. 710, 716 (1899) (“[W]hatever of
11 substance there is must be with the debtor. He, and he only, has something in his hands. That
12 something is the *res*, and gives character to the action, as one in the nature of a proceeding *in*
13 *rem*”); *Waite*, 6 Cal.3d at 467-68 (“When, however, the issue . . . involves jurisdiction to compel
14 the obligor to pay one claimant and not a competing claimant, the debt or claim is usually regarded
15 as having a situs in any state in which personal jurisdiction of the debtor can be obtained.” (internal
16 quotation marks omitted)).

17 Accordingly, the California Supreme Court’s analysis in the eminent domain context, and
18 that developed by federal courts with respect to similar exercises of government authority over
19 intangible property, lead to the same conclusion: The mortgage loans incurred by Richmond
20 residents, and secured by real property in Richmond, are within the City’s jurisdiction for purposes
21 of the City’s eminent domain authority.

22 The escheat and taxation cases the Banks cite have no bearing here; they involve rules
23 adopted for reasons of administration, not the sovereign authority of the government to condemn
24 property. In the escheat cases, *Delaware v. New York*, 507 U.S. 490 (1993), and *Texas v. New*
25 *Jersey*, 379 U.S. 674 (1965), the Supreme Court considered a situation in which several states had
26 competing claims to the same property and an administrative rule was necessary to fairly spread
27 unclaimed intangible property among the States. In *Texas*, the Court acknowledged, “this case
28 could have been resolved otherwise, for the issue here is not controlled by statutory or

1 constitutional provisions or by past decisions, nor is it entirely one of logic. It is fundamentally a
2 question of ease of administration and of equity.” 379 U.S. at 683. These decisions did not purport
3 to set forth a general rule for determining the situs of debt obligations outside of the escheat
4 context. *See Menendez v. Faber, Coe & Gregg, Inc.*, 345 F.Supp. 527, 538 (S.D.N.Y. 1972) (“It is
5 clear . . . that the Court [in *Texas v. New Jersey*] did not lay down a general rule as to the situs of
6 debts and that the opinion rested on special considerations primarily applicable to escheat.”).
7 Condemnation of these mortgage loans is different because it does not involve competing
8 jurisdictional claims to the same property, there is longstanding authority recognizing the right to
9 condemn such property at the place of the debtor and security property, and payment of “just
10 compensation” will satisfy the interests of the property owner.

11 The tax cases are also not on point because they too involve rules of administrability. In
12 *Baldwin v. Missouri*, 281 U.S. 586 (1930), the Court explained that its holding as to the situs of the
13 debt was limited to the taxation context and that the debt may be deemed to be located elsewhere
14 for other purposes. *Id.* at 592 (“That debt, although a species of intangible property, may, for
15 purposes of taxation, *if not for all others*, be regarded as situated at the domicile of the creditor.”
16 (quoting *Kirtland v. Hotchkiss*, 100 U.S. 491, 498 (1879)) (emphasis added) (internal quotation
17 mark omitted)). Moreover, as the Banks acknowledge, although only in a footnote, the very
18 proposition for which they cite *Baldwin* – that only the creditor’s jurisdiction has the power to tax
19 intangible property – has been rejected by the Supreme Court. *See Curry v. McCanless*, 307 U.S.
20 357, 368 (1939) (“there are many circumstances in which more than one state may have
21 jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles”). *City and*
22 *County of San Francisco v. Lux*, 64 Cal. 481 (1884), cited by the Banks, also limits its statement on
23 this issue to the taxation context. *Id.* at 484.

24 2. Condemnation of mortgage loans would be for public use

25 The City has yet to adopt a resolution of necessity, which is required to include a statement
26 of the “public use for which the property is to be taken” and a declaration of the “public interest
27 and necessity” that require the condemnation. Cal. Code Civ. Proc. §1245.230. Nonetheless, the
28 Banks argue that any hypothetical condemnation of mortgage loans would not have a public

1 purpose. Their position appears to be that the City should not be permitted to even attempt to
2 articulate the public purpose for any condemnation because there is no conceivable public purpose
3 that would meet constitutional requirements. This argument is meritless.

4 Both the United States and California Constitutions provide that private property may be
5 taken for a “public use.” U.S. Const., amend. V; Cal. Const. art. I, § 19. In *Kelo v. City of New*
6 *London*, 545 U.S. 469 (2005), the Supreme Court explained: “Without exception, our cases have
7 defined [“public use”] broadly, reflecting our longstanding policy of deference to legislative
8 judgment in this field.” *Id.* at 480. The Court has also observed that, “where the exercise of the
9 eminent domain power is rationally related to a conceivable public purpose, the Court has *never*
10 held a compensated taking to be proscribed by the Public Use Clause.” *Midkiff*, 467 U.S. at 241
11 (emphasis added); *see also Berman v. Parker*, 348 U.S. 26, 32 (1954) (“Subject to constitutional
12 limitations, when the legislature has spoken, the public interest has been declared in terms well-
13 nigh conclusive.”).⁶

14 Although the Banks argue that the City Council would be making a bad policy decision if it
15 decided to condemn mortgage loans, the courts do not second-guess the wisdom of specific
16 takings. *See Kelo*, 545 U.S. at 487-88 (rejecting argument that there should be a “reasonable
17 certainty” that the expected public benefit from the taking will occur); *Midkiff*, 467 U.S. at 242
18 (that taking “may not be successful in achieving its intended goals” is irrelevant to the takings
19 analysis; question is solely whether the public entity “rationally could have believed that the
20 [taking] would promote its objective”).

21 Likewise, although plaintiffs argue that the hypothetical condemnation at issue here would
22 benefit private parties (with rhetoric concerning MRP that is a complete distortion of the facts), this

23 _____
24 ⁶ In determining whether a proposed condemnation satisfies the public use requirement,
25 California courts look to both California and federal cases. *See County of Ventura v. Channel*
26 *Islands Marina, Inc.*, 159 Cal.App.4th 615, 624 (2008). California’s eminent domain statute also
27 includes provisions establishing the broad scope of legislative discretion in this area. Except in the
28 case of gross abuse of discretion, which would not apply to the carefully considered actions of a
city, a resolution of necessity is conclusive as to the public interest requiring the condemnation.
See Cal Code Civ. Proc. §1245.250(a) (“Except as otherwise provided by statute, a resolution of
necessity adopted by the governing body of the public entity pursuant to this article conclusively
establishes the matters referred to in Section 1240.030.”), §1245.255(b) (gross abuse of discretion
exception), §1240.030(a) (prerequisite that “[t]he public interest . . . require[s] the project”).

1 is no obstacle to the exercise of eminent domain power as long as a public interest also is served.
2 In *Kelo*, the Supreme Court explained that “the government’s pursuit of a public purpose will often
3 benefit private parties,” 545 U.S. at 485, and acknowledged that a taking may be constitutional
4 even if the “most direct beneficiaries” of the taking are private parties, *id.* (quoting *Ruckelshaus v.*
5 *Monsanto Co.*, 467 U.S. 986, 1014 (1984)). This is so because “[t]he public end may be as well or
6 better served through an agency of private enterprise than through a department of government – or
7 so the Congress might conclude.” *Id.* at 486 (internal quotation marks omitted). Moreover,
8 California law specifies that housing is a vital public interest and both encourages and directs the
9 public and private sectors to cooperate in pursuing that interest, validating any public/private
10 venture that the City might choose to utilize. *See* Cal. Health & Safety Code §50002.

11 The Banks also cannot possibly show that the reasons for the taking are just a pretext,
12 considering that the City Council has not yet articulated them. The City also is not seeking to
13 benefit specific homeowners and has not committed to working with any specific group of
14 investors to refinance the loans. Lindsay Dec. ¶23. The City would consider financing proposals
15 from any source, including from the investors in PLS trusts. *Id.*; *cf.* Hockett Dec. ¶15 (explaining
16 why the investors in PLS trusts would benefit from participating in an eminent domain plan).

17 Although any consideration of “public use” now is pure speculation, because the City
18 Council has not authorized the use of eminent domain and articulated the justification, there are
19 many legitimate public purposes that may be served by the exercise of eminent domain with
20 respect to underwater mortgage loans. First, there is a recognized public interest in eliminating and
21 preventing blight. *See Berman*, 348 U.S. at 32-36. Given the harm that the City has already
22 suffered as a result of the mortgage crisis, *see, e.g.*, Lindsay Dec. ¶¶10-16, the City may determine
23 that acquiring underwater mortgage loans and reducing principal balances is necessary to stabilize
24 neighborhoods, prevent the abandonment of homes and resulting criminal activity, address the
25 collateral consequences of foreclosure for the City’s property tax base and City services, and
26 prevent further deterioration of homes and neighborhoods.

27 There also is a public interest in eliminating the many dislocations in the local housing and
28 housing finance markets resulting from negative equity, including limitations on the ability to sell

1 and move and the inability to refinance at lower current interest rates. *See Midkiff*, 467 U.S. at 232
2 (finding that condemnation of landlords' interest in real property and conveyance of property to
3 tenants to "reduce the concentration of ownership of fees simple in the State" is a legitimate public
4 purpose).

5 These are only some examples of the public purposes that might be served by the use of
6 eminent domain, and other governmental entities and community groups are purchasing
7 underwater loans to reduce principal to achieve precisely these public purposes. Hockett Dec. ¶8.
8 The City Council may determine that there are other public purposes served by condemnation of
9 the loans at issue here, or that no such condemnation should occur. The Court should not interfere
10 with the City's democratic deliberative process.

11 **3. Condemnation of mortgage loans would not violate the Dormant 12 Commerce Clause**

13 As with the Banks' other arguments, the Court cannot fairly assess whether any
14 condemnation of mortgage loans would violate the Dormant Commerce Clause until the City
15 defines the scope of any such condemnation and articulates its purpose. Nonetheless, it is apparent
16 that any taking of mortgage loans by the City would not "discriminate against" interstate commerce
17 or "favor[] in-state economic interests over out-of-state interests," which are the primary concerns
18 of the Dormant Commerce Clause. *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638 (9th
19 Cir. 1993) (citing *Healy v. Beer Inst.*, 491 U.S. 324, 337 n.14 (1989)); *see also Nat'l Ass'n of*
20 *Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012), *cert. denied*, 133 S.Ct.
21 1241 (2013) (rejecting Dormant Commerce Clause argument).

22 The City would have to treat all owners of the loans in the same fashion and all would
23 receive just compensation for their property. Some investors in the trusts would be located in
24 California, and in-state and out-of-state investors would be treated alike. The hypothetical
25 condemnation plan therefore would not discriminate against out-of-state interests either "facially,"
26 "purposefully," or "in practical effect." *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567
27 F.3d 521, 525 (9th Cir. 2009); *see also C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390
28 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal

1 laws whose object is local economic protectionism, laws that would excite those jealousies and
2 retaliatory measures the Constitution was designed to prevent.”).

3 Nor would the hypothetical exercise of eminent domain authority “directly regulate”
4 interstate commerce. *Nat’l Collegiate Athletic Ass’n*, 10 F.3d at 638. As explained above, the situs
5 of the loans for purposes of condemnation is the City. Thus, condemnation would not “transfer . . .
6 thousands of loans across state lines,” Pls. PI Motion (Doc. 8) at 13, or constitute a reach by the
7 City “outside of its geographic boundaries,” *id.* at 15. Indeed, the hypothetical condemnation of
8 mortgage loans would not “regulate” anything. No municipality exercising eminent domain power
9 purports to lay down rules with which market participants must comply. Rather, through eminent
10 domain power, a municipality acquires property of a private party by paying “just compensation.”

11 The one case the Banks cite in which an attempt to condemn property was found to
12 constitute impermissible regulation of interstate commerce presented very different circumstances
13 than those here. In *City of Oakland v. Oakland Raiders*, 174 Cal.App.3d 414 (1985), the court’s
14 decision turned entirely on the unique nature of the property at issue – an NFL franchise playing in
15 an inter-state national football league. The court found that the NFL required nationally uniform
16 regulation and that each of the league members was interdependent to the point that they all
17 constituted a joint venture. *Id.* at 420. Individual mortgage loans are a very different form of
18 property. They are not an element in a nationwide joint venture, and none of the other unique
19 factors applicable to an NFL franchise are relevant. Nor does it matter that the loans are held
20 within PLS trusts; those loans are deliberately diversified, so payments on one do not affect
21 payments on another; the investors in the trusts are scattered around the world and do not operate a
22 single venture like the NFL.

23 Even if the City’s hypothetical use of the eminent domain power were found to constitute
24 regulation, moreover, government regulation does not violate the Commerce Clause unless “the
25 burden imposed on [interstate] commerce is clearly excessive in relation to the putative local
26 benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This analysis considers “the
27 nature of the local interest involved, and . . . whether it could be promoted as well with a lesser
28 impact on interstate activities.” *Id.*; see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S.

1 456, 471 (1981) (same). Here, the City has yet to articulate the nature of the public interest that
2 would be served by condemnation of mortgage loans, so the analysis must be based on speculation.
3 But the City has very significant local interests in protecting neighbors of underwater borrowers
4 within its jurisdiction and the community generally, protecting property values and its own tax
5 base, and addressing the blight caused by the underwater mortgage crisis and its collateral effects.
6 *See Lindsay Dec.* ¶¶10-16. An eminent domain plan would not place a “burden” on interstate
7 commerce, like a local requirement for particular mud flaps on trucks. PLS trusts receive cash in
8 exchange for loans in the event of foreclosures and short sales; an acquisition through eminent
9 domain would be no different. *Hockett Dec.* ¶18. To the extent that the Banks’ Dormant
10 Commerce Clause argument depends upon the premise that an eminent domain proceeding would
11 under-compensate the trusts for the mortgage loans, the premise is entirely wrong for the reasons
12 previously stated. *See supra* at 14.

13 The parade of horrors the Banks invoke is unfounded. To the extent it is not based on the
14 false premise that trusts would be undercompensated, it is based on the false assumption that state
15 and local government involvement in housing markets is unusual. Housing and housing finance
16 are predominantly governed by state and local law, and loan securitization risk disclosures inform
17 investors that returns from mortgage loans will depend on widely varying state and local laws. For
18 example, the prospectus supplement of one trust involved in this litigation informed investors that
19 "state and local laws regulate the . . . collection of the mortgage loans," and that "[i]n addition to
20 laws limiting or prohibiting deficiency judgments, numerous other . . . state statutory provisions,
21 including . . . state laws affording relief to debtors, may interfere with or affect the ability of the
22 secured mortgage lender to realize upon collateral or enforce a deficiency judgment."⁷ The
23 agreements governing loan securitizations typically include provisions governing the handling of
24 state and local condemnation proceedings, indicating that the central role of the states in dealing
25 with real property and mortgage loans, rather than the federal government, has long been

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27 ⁷ *See* Prospectus Supplement dated Oct. 24, 2004 for Merrill Lynch Mortgage Investors Trust, Series 2004-WMC5,
28 page S-20, and Prospectus included therein, page 64, available at:
<http://www.sec.gov/Archives/edgar/data/809940/000095012304012610/y67949e424b5.txt>.

1 understood in the securitization industry.⁸ Indeed, the use of local eminent domain to take real
 2 property is commonplace and, when real property securing a loan in a trust is condemned, the trust
 3 loses its security interest in the real property and receives just compensation. Pooled investment
 4 vehicles hold many types of assets that have been subject to eminent domain condemnation in the
 5 past, including corporate stocks (in fixed investment trusts) and real property (in real estate
 6 investment trusts). The sky will not fall.

7 **4. Condemnation would not violate the Contract Clause**

8 The Banks' argument that the Contract Clause bars the potential condemnation at issue here
 9 is no more likely to succeed than their other arguments. The Contract Clause simply does not limit
 10 the power of eminent domain. In *City of Cincinnati v. Louisville & Nashville Railroad Co.*, 223
 11 U.S. 390 (1912), the Supreme Court explained:

12 The constitutional inhibition upon any state law impairing the obligation of
 13 contracts is not a limitation upon the power of eminent domain. The obligation of a
 14 contract is not impaired when it is appropriated to a public use and compensation
 15 made therefor. Such an exertion of power neither challenges its validity nor impairs
 16 its obligation. Both are recognized, for it is appropriated as an existing, enforceable
 17 contract. It is a taking, not an impairment of its obligation. If compensation be
 18 made, no constitutional right is violated. All of this has been so long settled as to
 19 need only the citation of some of the many cases. [*Id.* at 400.]

20 The Court has reaffirmed the principle. *See, e.g., Midkiff*, 467 U.S. at 243 n.6 (the Contract
 21 Clause argument has “no merit” because the “Clause has never been thought to protect against the
 22 exercise of the power of eminent domain.”); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 29
 23 n.27 (1977) (“The States remain free to exercise their powers of eminent domain to abrogate
 24 [creditors’] contractual rights, upon payment of just compensation.”). The Court has even
 25 observed that circumstances may require the use of eminent domain power for “the taking of
 26 property of individual mortgagees in order to relieve the necessities of individual mortgagors.”
 27 *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935).

28 **CONCLUSION**

For the foregoing reasons, the motion for a preliminary injunction should be denied.

⁸ *E.g.*, Pooling and Servicing Agreement, Oct. 1, 2004, Merrill Lynch Mortgage Investors Trust, Series 2004-WMC5, pp. 25, 31 & 64, at: <http://www.sec.gov/Archives/edgar/data/1307262/000095012304013631/y68850exv4w1.txt>.

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Respectfully submitted,

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