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19 **UNITED STATES DISTRICT COURT**

20 **NORTHERN DISTRICT OF CALIFORNIA**

21 **SAN FRANCISCO DIVISION**

22 WELL'S FARGO BANK, NATIONAL  
23 ASSOCIATION, as Trustee, *et al.*,

24 Plaintiffs,

25 v.

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

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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----	--------------------------------	---

### Other Authorities

25	Robert Hockett, "Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt," <i>Fed. Reserve Bank of N.Y.: Current Issues in Economics and Finance</i> , Vol. 19, Number 5 (2013), available at: <a href="http://www.newyorkfed.org/research/current_issues/ci19-5.pdf">http://www.newyorkfed.org/research/current_issues/ci19-5.pdf</a> .....	vii
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## **SUMMARY OF ARGUMENT**

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

<sup>1</sup> See, e.g., Robert Hockett, "Paying Paul and Robbing No One: An Eminent Domain 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](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 Gabae 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

3 The City, a diverse, working-class city on the San Francisco bay, has been hit harder by the  
4 recent housing crisis than most other cities in the nation. The median sale price of homes has  
5 declined from a peak of about \$450,000 in January 2006 to about \$220,000 today. Declaration of  
6 City Manager William Lindsay (“Lindsay Dec.”) ¶6. As a result, many homeowners are now  
7 seriously “underwater” on their mortgages, meaning they owe banks or other financial institutions  
8 holding their mortgages much more than their homes are worth (which is also known as having  
9 “negative equity”). The City has one of the worst such situations in the country, with about 51% of  
10 homeowners underwater on their mortgages and the average underwater homeowner owing about  
11 45% more than the home is worth. *Id.* ¶¶7-8.

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

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

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

<sup>2</sup> 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.

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

9 **B. The City's Search for Solutions**

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

20 The City is focusing in particular on acquiring the most risky and toxic loans originated  
 21 during the credit bubble, those originated for inclusion in private label securitization trusts, which  
 22 have exacerbated the crisis because they are especially likely to end up in foreclosure. Dreier Dec.  
 23 ¶9; Hockett Dec. ¶12. As compared to the 51% of all Richmond mortgages that are underwater,  
 24 67% of PLS trust loans from zip codes that include the City are underwater. Lindsay Dec. ¶7.

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25 <sup>3</sup> Community groups working with City officials on plans to address the underwater  
 26 mortgage crisis include the Contra Costa Interfaith Community Supporting Organization,  
 27 Communities for a Better Environment, United Food and Commercial Workers Local 5, Urban  
 28 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).

27  
 28

#### **D. The Banks' Lawsuit**

The Richmond City Council has not adopted a resolution of necessity to authorize the use of eminent domain authority with respect to mortgage loans, nor is a proposed resolution of necessity even on the City Council's agenda. Lindsay Dec. ¶¶4, 22.

Nonetheless, the Banks filed this action seeking declaratory and injunctive relief to prevent the City from using its eminent domain authority to condemn mortgage loans in which they have an interest and an award of attorney's fees under 42 U.S.C. §1988. The Banks immediately moved for a preliminary injunction. Doc. 8.

## ARGUMENT

## I. The Court Lacks Jurisdiction To Hear The Banks' Claims

Before turning to the Banks' preliminary injunction motion, the Court must address its own subject matter jurisdiction. "Without jurisdiction the court cannot proceed at all . . . [and] the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (citation, internal quotation marks omitted); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). The plaintiff has the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

A. The jurisdiction of the federal courts under Article III is limited to deciding ripe cases and controversies. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). “A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). The Declaratory Judgment Act is not an exemption from Article III’s ripeness limitations. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937).

The Banks' claims are the quintessential example of claims that are not Article III ripe. The Banks ask the Court to decide whether it would be lawful for the City to exercise its eminent domain power to acquire property in which the Banks assert an interest, but the City cannot

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”).

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  
 Injunction**

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

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

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

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

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

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. 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. Cnty. 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  
 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 . . . .

28 164 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  
 with the debtor and the security property.

20 The California Supreme Court has explained: “An intangible, unlike real or tangible  
 21 personal property, has no physical characteristics that would serve as a basis for assigning it to a  
 22 particular locality. The location assigned to it depends on what action is to be taken with reference  
 23 to it.” *Estate of Waits*, 23 Cal.2d 676, 680 (1944). Therefore, the situs of the same type of  
 24 intangible property may be different for different legal purposes. *See, e.g., Waite v. Waite*, 6  
 25 Cal.3d 461, 467 (1972) (for certain taxation purposes intangible property located with owner),  
 26 *disapproved on other grounds by In re Marriage of Brown*, 15 Cal.3d 838, 851 n.14 (1976); *Waits*,  
 27 23 Cal.2d at 680 (for purpose of probate administration of a wrongful death claim, “a debt has its  
 28 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 personality.” *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;<sup>4</sup> (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 <sup>4</sup> 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);<sup>5</sup> *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       <sup>5</sup> 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 *remWaite*, 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.”).<sup>6</sup>

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

<sup>6</sup> In determining whether a proposed condemnation satisfies the public use requirement, California courts look to both California and federal cases. *See County of Ventura v. Channel Islands Marina, Inc.*, 159 Cal.App.4th 615, 624 (2008). California's eminent domain statute also includes provisions establishing the broad scope of legislative discretion in this area. Except in the 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  
 Commerce Clause**

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

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

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 horribles 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.”<sup>7</sup> 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

26  
 27 <sup>7</sup> See Prospectus Supplement dated Oct. 24, 2004 for Merrill Lynch Mortgage Investors Trust, Series 2004-WMC5,  
 page S-20, and Prospectus included therein, page 64, available at:  
<http://www.sec.gov/Archives/edgar/data/809940/000095012304012610/y67949e424b5.txt>.  
 28

1 understood in the securitization industry.<sup>8</sup> 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**

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

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27 <sup>8</sup> E.g., Pooling and Servicing Agreement , Oct. 1, 2004, Merrill Lynch Mortgage Investors Trust, Series 2004-WMC5,  
 28 pp. 25, 31 & 64, at: <http://www.sec.gov/Archives/edgar/data/1307262/000095012304013631/y68850ex4w1.txt>.

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Respectfully submitted,

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