UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK BANKERS ASSOCIATION, INC.,

Plaintiff,

– against –

THE CITY OF NEW YORK, THE NEW YORK DEPARTMENT OF FINANCE, and THE COMMUNITY INVESTMENT ADVISORY BOARD,

Defendants.

15 Civ. 4001 (KPF)

MEMORANDUM OF LAW OF AMICI CURIAE THE ASSOCIATION FOR NEIGHBORHOOD AND HOUSING DEVELOPMENT, LEGAL SERVICES – NYC, NEW ECONOMY PROJECT, AND THE NATIONAL COMMUNITY REINVESTMENT COALITION, IN SUPPORT OF DEFENDANT THE CITY OF NEW YORK

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PRELIMINARY STATEMENT

Amici curiae the Association for Neighborhood and Housing Development (ANHD), Legal Services NYC, the New Economy Project, and the National Community Reinvestment Coalition (NCRC), submit this Memorandum of Law in support of the efforts of Defendant, the City of New York, to defend the Responsible Banking Act ("RBA"), Local Law 38 of 2012, against the challenge brought by Plaintiff the New York Bankers Association.

As set forth herein, the RBA creates an information-gathering mechanism essential to the City's promotion of the economic and social health of its neighborhoods and individual citizens. Such information gathering, which solicits but does not compel the cooperation of Plaintiff's members, as well as interested members of the public, does not constitute regulatory activity that would be preempted by federal or state law.

Because the RBA does not in any way direct or limit the discretion of the Banking Commission to designate or not designate depository banks, the statute does not constitute regulation of Plaintiff's members, and does not in itself represent the exercise of the City's prerogatives as a market participant. To the extent, however, that the information collected pursuant to the RBA might motivate the City Banking Commission to choose depository banks from among those that better promote the health of the City's neighborhoods, the statute represents the legitimate exercise of the City's proprietary contracting powers.

In seeking judicial annulment of the RBA, Plaintiff stakes out the radical position that any action by the City to assess the financial services needs of its citizens and neighborhoods or to formulate a list of banking practices that might be beneficial to the City would constitute an impermissible attempt to "pressure" and "shame" its sensitive and vulnerable members into improving their banking practices. *See*, Complaint ¶ 2. Plaintiff suggests that any attempt by the

City to criticize the conduct of the financial institutions that operate in its neighborhoods, or even to humbly and politely request, on a voluntary basis, improvements in the banks' practices in traditionally under-served communities, would run afoul of State and federal preemption. Plaintiff's arguments thus go far beyond traditional preemption arguments to challenge the basic processes of free speech and debate that lie at the core of this or any City's fundamental ability to govern itself in a democratic manner.

The *amici* therefore support the City's motion to dismiss the complaint and urge the Court to deny Plaintiff's motion for summary judgment or for a preliminary injunction.

INTEREST OF AMICI CURIAE

Founded in 1974, the Association for Neighborhood and Housing Development (ANHD) is a nonprofit organization that has grown into a consortium of over 100 non-profit housing and economic development organizations serving low- and moderate-income New Yorkers. ANHD is dedicated to policy research, advocacy, strategic communications, and leadership development to support these members and to ensure flourishing neighborhoods and decent, affordable housing for all New Yorkers. ANHD and its members closely monitor the availability of credit in the communities they serve, and the catastrophic effect of questionable banking practices on low- and moderate-income communities during the ongoing economic crisis. ANHD has also studied carefully the experiences of other cities in the U.S. – particularly Cleveland and Philadelphia – that have accumulated substantial experience administering statues similar to the Responsible Banking Act, with consequent benefit to their communities and negligible adverse impact on their financial sectors.

Legal Services NYC is the largest provider of free civil legal services for low income people in the United States. It has 18 community-based offices and numerous outreach sites located throughout the five boroughs of New York City. Legal Services NYC originated one of the first legal foreclosure prevention projects in the U.S., and is familiar with the effects of irresponsible banking practices on low income homeowners as well as on low income tenants in overleveraged multifamily properties.

New Economy Project (formerly NEDAP) works with community groups in New York City to promote economic justice and to eliminate discriminatory economic practices that harm low-income communities and communities of color. New Economy Project also convenes New Yorkers for Responsible Lending, a statewide coalition of 167 non-profit organizations that advocate for economic justice. New Economy Project has authored numerous studies on mortgage lending patterns in NYC neighborhoods and access to credit in communities of color; provides legal services to low income New Yorkers harmed by abusive financial practices; and trains advocates and regulators around the state and country about lending discrimination, community reinvestment, and bank accountability.

The National Community Reinvestment Coalition (NCRC) is an association of more than 600 community-based organizations that promotes access to basic banking services including credit and savings, and to increase the flow of private capital into traditionally underserved communities to create and sustain affordable housing and job development. NCRC's membership includes community reinvestment organizations, community development corporations; local and state government agencies; faith-based institutions; community organizing and civil rights groups; minority and women-owned business associations as well as local and social service providers from across the nation. NCRC provides technical assistance,

and expert analysis on topics including the Community Reinvestment Act (CRA), fair lending laws, fair housing and foreclosure prevention. NCRC, in coalition with its members, has been the driving force behind the passage of Responsible Banking Ordinances around the country.

The *amici* are intimately familiar with the legal and policy issues in this case, and hope that this Memorandum will prove helpful to the court in its deliberations.

STATEMENT OF THE CASE

I. The Enactment of Local Law 38

Banks have historically under-served or failed to serve lower income communities and communities of color in cities throughout the country, to the serious economic detriment of the cities as a whole. The conditions in under-served communities in New York City were exacerbated by the abusive financial practices leading up to the financial crisis, and the recession which followed. New York's neighborhoods have been severely affected by irresponsible and discriminatory mortgage lending practices that have led to astronomical rates of foreclosure, and a lack of small business lending and community development lending.[1] Similarly, many New York City communities have little access to basic banking services, as there continues to be a stark disparity between the number of physical bank branches in white, more affluent communities and the number of branches in communities of color and lower income communities. New Economy Project, *Testimony of the Assessment of Banking Services Needs in New York City*, Map 2 (2015).[2]

[1] For example, in New York City and other major urban areas, black and Latino borrowers continue to be far less likely to get conventional home purchase and refinance loans than white borrowers. California Reinvestment Coalition et al., Paying More for the American Dream IV-VI (2010-2012), *available at* http://calreinvest.org/system/resources/W1siZiIsIjIwMTEvMDQvMTgvMTdfNTRfNTVfNzc3X0FtZXJpY2FuX0RyZWFtX0lWLnBkZiJdXQ/American_Dream_IV.pdf.

[2] http://www.neweconomynyc.org/wp-content/uploads/2015/05/RBA-Testimony-Final.pdf.

Cleveland, Philadelphia, and other U.S. cities have responded to these kinds of challenges by passing Responsible Banking Ordinances. These common sense measures improve the availability of information that banks provide cities about their activities, and allow the cities to consider the information when choosing the banks to which they give lucrative business. The ordinances in Cleveland and Philadelphia have provided a strong economic benefit to those struggling cities; and cities throughout the country have either recently passed or are considering passage of similar laws. Given the crisis in mortgage and small business lending, the effects of the foreclosure crisis on neighborhoods, the lack of affordable housing, and the desperate need for community development lending by banks, New York, like its sister cities, has a legitimate proprietary interest, when choosing depository banks, to choose those institutions that best serve the needs of communities throughout the City— particularly distressed communities that have been traditionally under-served by banks.

In June 2012, the City Council enacted Local Law 38, the Responsible Banking Act, which established a Community Investment Advisory Board ("CIAB") within the New York City Department of Finance. *See*, New York City Charter ("Charter") § 1524-A. The law directs the CIAB to assess on a biennial basis "the credit, financial and banking services needs throughout the City with a particular emphasis on low and moderate income individuals and communities," and to establish "benchmarks, best practices, and recommendations for meeting the needs identified in such needs assessment . . . ." Charter § 1524-A(1)(a). The CIAB is entrusted with the issuance of an annual report which "*may* be considered by the banking commission in reviewing a bank's application for designation or redesignation as a deposit bank." *Id.* at § 1524-A(1)(b) (emphasis added).

The law states that the CIAB "shall seek to collect and consider" certain information "relating to the credit, financial and banking services needs throughout the City and the extent to which such needs are being met." *Id.* § 1524-A(3). Such information may be collected from any available sources, including but not limited to the banks themselves. Such information may include banks' plans for responding to the banking needs of the city, its philanthropic work and its efforts to address the banking needs of small businesses and to conduct consumer outreach relating to mortgage assistance and foreclosure prevention. *Id.* § 1524-A(3). Although the statute entrusts the collection of this information to a newly created CIAB, this type of information gathering was always within the power of the City Council and the Executive Branch, and does not represent any assertion of new authority on the part of the City.

Local Law 38 does not require any bank to supply any information to the CIAB or to the Banking Commission, nor does it include any sanctions for a bank's decision not to provide information. The law does not require the Banking Commission to give any consideration to the reports of the CIAB, much less does it mandate or even recommend that the Commission revoke the depository designation of banks that are unfavorably mentioned in the CIAB's reports, or which decline to provide the CIAB with information.

Notably, although Plaintiff implies that the Banking Commission may not constitutionally consider the economic welfare of the City in choosing depositories, the Banking Commission's rules have long authorized it to consider factors unrelated to the specific terms of City deposit contracts, such as bank CRA ratings, banks' compliance with equal credit opportunity requirements, and the number and distribution of bank branches. *See* 22 R.C.N.Y. § 1-03. The current rules already mandate that community service ratings "shall be used by City agencies in their process of selecting banking service providers." *Id.* at § 1-03(c)(2)(4).

II. The Experience of Cleveland and Philadelphia

Municipal banking ordinances are not a new invention. Cities across the United States have adopted Responsible Banking Ordinances (RBOs) similar to Local Law 38. Cleveland adopted such an ordinance in 1991, providing for qualification of depository banks through an RFP process that includes an evaluation of financial institutions' reinvestment commitment in Cleveland. Cleveland Admin. Code, Ch. 178. Annually, each eligible depository has to submit to the city residential and commercial lending data (broken down by Statistical Planning Area, a Cleveland-specific designation), as well as a plan describing current and proposed initiatives to address the credit and banking needs of local communities. No bank will be considered an eligible depository unless it develops a Community Reinvestment Initiative (plan for lending and investing). The City of Cleveland Community Development Department evaluates the data and ranks each bank based on its performance. The Department makes a recommendation to the City of Cleveland Reinvestment Review Committee, which then makes a final recommendation to the Director of Finance. All of this information, including the data provided by the banks, is available to the public. *Id.*

Cleveland's banking procedures correlate with higher levels of private investment in urban development activities, including over $10 billion in lending commitments and investments through the city's Neighborhood Reinvestment Program. *See* ANHD & NCRC, *Keeping Banks Accountable to our Communities: Report from a Convening on Local Responsible Banking Ordinances* 31 (Nov. 2011).[3] Cleveland depositories include nationally known institutions such as Key Bank, National City Bank, Huntington National Bank, US Bank, Fifth Third Bank, FirstMerit Bank, and Charter One Bank, none of which appear to have

[3] http://www.ncrc.org/images/stories/pdf/research/anhd_2011craconveningreport_7.13.2012.pdf.

complained of any harm from the Cleveland ordinance, or to have commenced litigation to annul it.

Philadelphia adopted its Responsible Banking ordinance in 2002. Phila. Code, Ch. 19-200. Unlike the New York ordinance, Philadelphia's law prohibits the City Treasurer from depositing funds in banks and institutions that have failed to submit required statements of community reinvestment goals for low and moderate income neighborhoods. Philadelphia has seen significant improvements in lending practices by city depositories since the enactment of the ordinance. For example, city depositories are more likely to originate home purchase loans to African American borrowers than lenders as a whole and are more likely to lend in low and moderate-income communities. Lee Huang & Maria Frizelle Roberts, Office of the City Treasurer of the City of Philadelphia, *Examining the Lending Practices of Authorized Depositories for the City of Philadelphia – Calendar Year 2013* 12 (2015).[4] Further, city depositors are more likely than non-depositories to originate prime home loans instead of subprime loans. *Id.* at 11. While City depositories did not outperform all banks in every category studied, the ordinance serves as a critical tool for City legislators and communities to evaluate how banks are performing and to work collectively to identify better practices. Like Cleveland, Philadelphia counts numerous nationally prominent banks among its depositories, including Bank of America, Citibank, BNY Mellon, PNC Bank, Republic First Bank, TD Bank and Wells Fargo. None of these institutions appear to have complained of any harm from the Philadelphia ordinance, and none have commenced litigation to annul it.

Following the economic crisis in 2008, numerous other cities adopted Responsible Banking Ordinances: San Jose in 2010; Pittsburgh, Los Angeles, San Diego, Portland, Oregon,

[4]http://www.phila.gov/Treasurer/pdfs/CY%202013%20Authorized%20Depositories%20Report%20FINAL%20REPORT%20May%202015.pdf

and Kansas City, Missouri, in 2012; and Boston, Minneapolis and Seattle in 2013. Other cities, such as San Francisco and Oakland, have required banks to provide community investment data as part of Requests for Proposals for municipal banking services. Because these laws were so recently enacted, there is little available data indicating the benefits of these laws to municipalities. However, banks have already begun providing detailed data to these municipalities.

III. Banks Are Already Providing Similar Data Under Other Laws, and It Has Not Proved to Be Unduly Burdensome

Plaintiff asserts that complying with the RBA would be onerous, costly and burdensome, but in other contexts NYBA member banks and other banks are already gathering and reporting similar information to that sought by the RBA.

For example, in Minneapolis, nine banks, including NYC-designated depositories U.S. Bank and Wells Fargo, have submitted detailed data concerning mortgage lending, foreclosure prevention, loan modifications, bank branch locations, and small business lending, along with an annual Community Reinvestment Plan. This information is publicly available on the City of Minneapolis' website. Minneapolis Dept. of Finance, Disclosure Form Responses.[5]

Similarly, in Los Angeles, commercial banks accepting city deposits must annually submit information, broken down by census tract, on small business loans, home mortgages, community development loans and investments within Los Angeles. L.A. Admin. Code § 20.95.1. In 2014, seven banks, including NYC depositories Wells Fargo, Citibank and U.S. Bank, submitted annual statements, and five banks have submitted information so far in 2015.

[5] http://www.ci.minneapolis.mn.us/finance/WCMS1P-127566 (last visited July 2, 2015).

Responsible Banking Investment Monitoring Program, L.A. Office of Finance.[6] The submissions from banks, including some NYC depositories, include census-tract-level data on information such as small business loans issued and home mortgage loans modified through federal programs such as the Home Affordable Modification Program and California programs such as the Unemployment Mortgage Assistance Program. *Id.* This information must also be made publicly available, and is found on the Department of Finance's website. *Id.*; L.A. Admin. Code § 20.95.1.

San Francisco has implemented similar community benefit and disclosure requirements as part of the procurement process for banking services. For example, two San Francisco Request for Proposals, including one for depository services, required applicant banks to disclose small business loans, home loan foreclosures, and modifications within the city by census tract. S.F. Treasurer, Request for Proposal for Banking & Payment Services 78-83 (2012);[7] S.F. Treasurer, Request for Proposal for Cardholder Present Merchant Cards Processing 32-37 (2012).[8] The RFPs also required disclosure of detailed information about contracting with local businesses and consumer lending. *Id.* Bank of America, which won the contract to provide the merchant bank services to the city, included as part of its submissions information on both foreclosed loans and loans that participated in federal and proprietary modification programs, broken down by census tract, race and ethnicity. Bank of America Request for Proposal for

[6] http://finance.lacity.org/content/Responsible%20Banking%20Investment%20Monitoring%20Program.htm (last visited on July 2, 2015).
[7]http://sftreasurer.org/sites/sftreasurer.org/files/migrated/ftp/uploadedfiles/RFP/CCSF%20Banking%20%20Payments%20RFP.pdf.
[8]http://sftreasurer.org/sites/sftreasurer.org/files/migrated/ftp/uploadedfiles/RFP/CCSF%20Cardholder%20Present%20Merchant%20Card%20Processing%20RFP.pdf.

Cardholder Present Merchant Cards Processing Response (2012).[9] Pursuant to state law, this information is publicly available. *See Michaelis, Montanari & Johnson v. Superior Court*, 136 P.3d 194 (Cal. 2006).

Contrary to Plaintiff's assertions in its brief, there are many other examples of banks already reporting information at the census tract level. This level of reporting is routine for the banks in many contexts, and has not proved to be unduly burdensome. For example, under the federal Home Mortgage Disclosure Act, banks systematically report detailed data about mortgage loan originations and denials at the census tract level.[10] This information is then made available to the public. Under the Community Reinvestment Act, banks already report small business lending at the census tract level, 12 C.F.R. § 25.42(b)(1), and must be prepared to provide bank examiners with loan-level information about community development lending.[11] Banks also track mortgage and consumer lending at the loan level for CRA purposes.[12] With regard to mortgage servicing, banks participating in the Home Affordable Modification Program must report detailed, loan-level information concerning loan modifications.[13]

IV. The Implementation of The RBA

In January 2015, the CIAB held its first "kick off" meeting and began the process of conducting its first Needs Assessment, which it published on May 1, 2015. Community

[9]http://www.calreinvest.org/system/resources/W1siZiIsIjIwMTQvMDYvMDYvMjNfMTFfMThfNTcwX0FwcGVuZGl4X0RfQkFNU19SZXNwb25zZV90b19FeGhpYml0X1YucGRmIl1d/Appendix%20D%20-%20BAMS%20Response%20to%20Exhibit%20V.pdf.

[10] Federal Financial Institutions Examination Council, A Guide to HMDA Reporting Getting It Right!, at 1 (2013), *available at* http://www.ffiec.gov/hmda/pdf/2013guide.pdf.

[11] Federal Financial Institutions Examination Council, A Guide to CRA Data Collection and Reporting, at 9 (2015), *available at* https://www.ffiec.gov/cra/pdf/2015_CRA_Guide.pdf.

[12] *Id.* at 10, 15.

[13] Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages Version 4.0 130 (2012), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_45.pdf.

Investment Advisory Board, *2015 Needs Assessment: A Biennial Report Assessing the Credit, Financial and Banking Services Needs in New York City* (2015).[14] The Needs Assessment was based on publicly available data as well as public comments, which were solicited in writing and orally at a series of public hearings, as well as via an internet survey. The CIAB held five hearings, one in each borough, over the span of two weeks in February 2015 (February 9th in Brooklyn; 10th in Staten Island; 12th in the Bronx; 17th in Queens and 18th in Manhattan). Econsult Solutions, a consultant, analyzed public bank data from four main sources: HMDA for home lending data; FFIEC for small business lending data; FDIC for bank branch locations; and DFS for the location of alternative financial services such as check cashers. Econsult compared this information to the demographics of the city with regards to income, race, ethnicity, and presence of small businesses.

The Needs Assessment is a powerful document that illustrates a number of important shortcomings in financial services in low income and immigrant communities and communities of color in New York City. Specifically, the data showed that neighborhoods in which racial and ethnic minorities represented more than 50% of the population had a lower share of home and small business lending, higher denial rates, higher proportions of sub-prime lending, and fewer bank branches than neighborhoods in which racial and ethnic minorities represented less than 50% of the population. *Id*. The hearing testimony and survey responses pointed to similar gaps. Low-income New Yorkers find that basic banking services are too expensive and difficult to access; as a result they rely on high-priced alternative financial services such as check cashers and money transfers. *Id.* at 63-64, 71. The problem is particularly acute in immigrant communities. *Id.* at 64. The Needs Assessment also highlighted the huge toll of the foreclosure

[14] http://www1.nyc.gov/assets/finance/downloads/pdf/ciab/2015/ciab-needs-assessment-report.pdf.

crisis on communities of color, which were disproportionally targeted for high cost, predatory loans and continue to struggle to receive loan modifications to prevent foreclosure. *Id.* at 65-66, 71. Finally, the Needs Assessment identified a need for more financial investment in low-income communities and communities of color, in the form of lending to small businesses and community development financial institutions (which themselves provide financial services to small businesses), as well as charitable contributions to neighborhood-based nonprofit organizations. *Id.* at 67. The Needs Assessment does not discuss the considerable financial cost to the City of such disinvestment, but this information is available from other sources, as discussed *infra* in Section III.

The Needs Assessment provides an important baseline from which the City can act to spur greater bank investment and better access to mainstream financial services in low-income communities and communities of color, and it highlights gaps where banks can develop products that are tailored to the needs and desires of the residents of these neighborhoods. But it is also limited by the absence of any information provided by the banks themselves. The Needs Assessment and subsequent Annual Reports will be still more useful to the City—and its recommendations more useful to banks—if it incorporates data maintained by banks that is not otherwise in the public domain. For this reason, the statute permits the CIAB to request—but not demand—relevant data directly from the banks themselves.

Plaintiff makes much of its concern about disclosing proprietary or confidential information, but as detailed above, banks have much experience providing detailed information while still protecting confidentiality -- this is certainly not a new or difficult issue for them to work out. In addition, as Plaintiff conveniently ignores in its brief, the CIAB has made clear that it will work with the banks to ensure that no confidential or proprietary information is disclosed

to the public. For example, in a letter to the depository banks dated June 10, 2015, NYC Treasurer Elaine A. Kloss states: "…the Community Investment Advisory Board does not intend to publish on the Department of Finance website any confidential or proprietary information that it may receive. If you believe that any of the information that has been requested or that you plan to submit is confidential or proprietary, please call me so we can discuss any concerns you may have."

V. The Banker's Association Complaint

In October 2013, fifteen months after the enactment of the RBA and shortly before the election of Mayor de Blasio, the New York Bankers Association filed a challenge to the validity of Local Law 38. That lawsuit was dismissed in September 2014 on the grounds that Plaintiff lacked standing at that time. In May 2015, Plaintiff filed the instant action, again claiming that the Responsible Banking Act "impermissibly conflicts with, and is preempted under, the U.S. and New York Constitutions." Complaint ¶ 2. On or about May 18, 2015, Plaintiff moved for summary judgment, seeking a declaration that the RBA is invalid and permanently enjoining its implementation. Plaintiff seeks, in the alternative, a preliminary injunction prohibiting enforcement of the RBA pending a final resolution of this action.

For the reasons that follow, *amici* support the City's contention in its motion to dismiss that Plaintiff has failed to state a cause of action since the RBA does not involve the regulation of banks and thus is not preempted by federal or State law.

ARGUMENT

I. THE INFORMATION-GATHERING PROCESS ESTABLISHED BY THE RBA DOES NOT CONSTITUTE EITHER REGULATION OF BANKS OR AN EXERCISE OF THE CITY'S PROPRIETARY CAPACITY

Plaintiff argues that the RBA seeks to regulate banks by conditioning re-designation on cooperation with the CIAB's requests for information and/or meeting the CIAB's benchmarks and best practices as developed from the biennial needs assessment. This argument fails for two reasons: (1) the RBA provides only that the CIAB report "may be considered by the banking commission in reviewing a bank's application for designation or re-designation as a deposit bank…" (Charter § 1524-A(1)(b)) and (2) the NYC rules governing designation of depository banks, which predate the RBA, already provide the commission with broad authority to request and consider any information it deems necessary when determining where to place the City's funds (see generally 22 R.C.N.Y. § 1-03).

The Banking Commission's consideration of the CIAB's report is purely voluntary. The commission is not mandated to base its decision on whether a depository bank has participated in the request for information or whether the CIAB's evaluation of participating depository banks is consistent with or shows progress toward the CIAB's established benchmarks and best practices. It is within the discretion of the Banking Commission to disregard the CIAB report in its entirety. The mere fact that the Banking Commission is referenced in the RBA is insufficient to support Plaintiff's argument that the statute is regulatory in nature.

Additionally, the Banking Commission already possesses broad authority to gather information from depository banks— information consistent with the issues about which the CIAB seeks to collect and analyze data. For example, the Banking Commission currently may consider a ranking of "the community service of each bank filing for designation" as a

depository bank. 22 R.C.N.Y. § 1-03(c)(4). The basis for the rating are the federal and state Community Reinvestment Act ratings, but the rules are explicit that the Banking Commission may include any other factors it deems relevant and, further, that each bank must provide "any information required by the Commission" to rate its service to the community. *Id*. Depository banks must maintain a satisfactory CRA rating in order to keep their designation. *Id*. at (c)(2)(ii).[15]

The rules governing the Banking Commission, which have been in place for years, also contain extensive provisions regarding depository banks and their provision of banking services, particularly in low income communities. Banks applying for designation as depositories are required to report on: (1) the location of the main office and all branches and processing centers, (2) their efforts to open branches in a geographic location that has a demonstrated need for banking services, (3) their policies regarding the closing of branches — a policy which must include assessing the impact of the closing on the community and plans for continuation of services in that community, (4) any recently closed branches— including the reasons for the closing, financial analyses of deposits for a period of 3 years, and a map of the areas served showing distance to remaining bank facilities in the area. 22 R.C.N.Y. § 1-03(c)(1)(iv)-(v), (xiii), (c)(2)(iii), (c)(3)(i)-(ii). Banks are also required to provide notice to the Banking Commission of branch closings, sales or relocations. *Id*. at (c)(5). Further a bank may not continue or remain as a depository if it fails to open a certain proportion of new branches in low income areas or if it

[15] In fact, at one point in the City's history, from 1989 to the mid-1990's, the Banking Commission required all banks seeking to become depositories to complete a "Community Service Questionnaire," which collected information about banks' lending in low income communities, including the bank's provision of basic banking services, investment in affordable housing, philanthropic giving, and other factors. City Council testimony of Benjamin Dulchin, ANHD, at p.4 (Mar. 7, 2011), available at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=842832&GUID=85888256-843D-4BB1-A8C7-E8A888C1DAE3&Options=Advanced&Search, pp. 41 – 44. No bank could become a city depository without submitting the questionnaire. Id. No bank sued to prevent the Banking Commission from soliciting this information, and there is no indication that banks found completing the questionnaire to be burdensome.

closes more than a certain proportion of branches in low income areas. *Id*. at (e)(1)(iii)-(iv), (e)(2) .

Even in the absence of the information-gathering requests of the CIAB, the Banking Commission itself is already empowered to gather information on the categories enumerated in the RBA. Therefore the RBA does not serve to amplify or affect the Banking Commission's existing authority and the RBA priorities are fully consistent with the proprietary interests expressed in the rules governing designation of depository banks. Simply put, even if the Court were to grant Plaintiff's motion and declare the RBA invalid in its entirety, it would not increase or decrease the Banking Commission's authority to consider any criteria it sees fit in selecting depository banks. Should the Banking Commission in the future decline to designate a bank as a depository for reasons Plaintiff considers improper, Plaintiff or its member banks could file suit at that time. To the extent, however, that Plaintiff seeks to nullify the RBA in order to prevent an alleged potential misuse of the City's authority to designate its own depository banks, its complaint is simply misdirected.

II. THE INFORMATION-GATHERING PROCESS ESTABLISHED BY THE RBA DOES NOT REPRESENT THE EXERCISE OF VISITORIAL POWERS AND THEREFORE IS NOT PREEMPTED BY STATE OR FEDERAL LAW

A. Information-Gathering Serves Important Public Purposes that Have Nothing to Do with 'Regulation' of Banks

Plaintiff cannot dispute the right of the City or any governmental entity to gather information relevant to the welfare of its citizens and the neighborhoods in which they live. The various committees of the NYC Council, for example, regularly hold public hearings on a variety of issues affecting NYC residents; invite individuals and other community stakeholders to give testimony; and issue reports on those hearings with recommendations and proposals to address

the relevant issue. In the first half of this year, the New York City Council has held dozens of hearings on topics ranging from the economic impact of the city's foreclosure crisis, to supporting veteran-owned businesses and promoting veteran entrepreneurship, to whether short-term rentals destabilize neighborhoods. New York City Council Hearings Calendar.[16] As the NYC Council is charged with lawmaking, monitoring city agencies, and approving city budgets, these hearings serve the important function of informing the Council of the needs of constituents and where and how to focus city resources. Similarly, City agencies and other governmental bodies are empowered to gather information in a variety of ways, even in areas that the City does not formally regulate.

The enactment of the RBA is simply a recognition by the City that information regarding how banks are addressing community needs should be gathered on a regular basis. The CIAB serves the same function as Council committee hearings on issues of local concern. The information-gathering process of the RBA provides an opportunity for residents to share information about banking and credit needs, track changes in the banking world and how those changes impact communities, and identify trends in banking across neighborhoods. The City can then use this data —as it does in numerous other contexts— to create new programs or policies or adjust existing programs to respond to concerns raised. In the context of banking, the City might use the data it gathers to advocate at the State or federal level for new or revised regulations, or to engage the financial community, on a voluntary basis, in a discussion of how best to promote the economic health of the City. Such activities would be in no way preempted by federal or State law.

[16] *available at* legistar.council.nyc.gov/Calendar.aspx.

Plaintiff asserts that the public hearings held by the CIAB in each borough "confirmed that the RBA regulates banks" and that because the Needs Assessment report contains words such as "examination," "evaluate," "address," "explore," and "review," it evinces "regulatory objectives." Pl. Br.10. Yet examining, evaluating and exploring social issues are the very essence of what it means to govern. Under Plaintiff's preposterous theory of what constitutes "regulation," no city would be permitted to engage in the normal governing process of examining fundamental problems in its neighborhoods, wherever the problems relate to matters governed by any federal or state law.

B. Provision of Information Pursuant to the RBA Is Purely Voluntary

Plaintiff asserts that because the RBA empowers the CIAB to "seek to collect" certain information about a depository bank's activities in NYC communities, the statute represents an exercise of "visitorial powers" reserved to the Office of the Comptroller of Currency ("OCC") pursuant to the National Banking Act. Regulations promulgated by the OCC prohibit state officials from "inspecting or requiring the production of books or records of national banks." 12 CFR 7.4000(a)(1). However, the RBA does not purport to *require* Plaintiff's members to provide any data whatsoever. While the CIAB may request information from banks, the banks are free to decide how much information, if any, they wish to provide. The RBA imposes no sanction should a bank choose not to provide information. No reasonable reading of the RBA can be said to allow for involuntary inspection or production of a bank's books and records. The very clearly stated goal of the RBA is to "assess the credit, financial and banking services needs throughout the City with a particular emphasis on low and moderate income individuals and communities… and establish benchmarks, best practices, and recommendations for meeting the needs identified…" Charter § 1524-A(a)(1)-(2). Contrary to Plaintiff's assertions, the CIAB is

not empowered to examine, inspect or require production of books and records. Rather, banks are asked to self-report on their efforts in certain key areas to facilitate the assessment of City needs. Charter § 1524-A(a)(3).

In *Cuomo v. Clearing House Association*, 557 U.S. 519, 536 (2009), the Supreme Court found that a State Attorney General's request for information would be considered unlawful "visitorial" action if it was implicitly backed by a threat of compulsion – in that case, "the Attorney General's issuance of subpoena on his own authority under New York Executive Law." The Court reasoned that that "if the threatened action would have been unlawful, the request-cum-threat" would be unlawful as well. *Id*. (emphasis added). In the instant case, however, the CIAB's requests are backed by no threat whatsoever, and therefore do not constitute "visitorial" action under the framework of Cuomo. *Compare, Nat'l City Bank of Ind. v. Turnbaugh*, 463 F.3d 325, 328 n.1 (4th Cir. 2006) ("Maryland law requires the operating subsidiaries to submit to the Commissioner's visitorial powers") (emphasis added); *U.S. Bank Nat. Ass'n v. Schipper*, 812 F. Supp. 2d 963, 966 (S.D. Iowa 2011) (invalidating Iowa law providing that banks "operating under the approval of the [state] administrator shall be subject to examination by the administrator") (emphasis added); *Capital One Bank (USA), N.A. v. McGraw*, 563 F. Supp. 2d 613, 621 (S.D. W.Va. 2008) ("[B]y issuing subpoenas against Capital One Bank and COSI and seeking to enforce these subpoenas, the [W.Va. Attorney General] is exercising visitorial powers").

Although Plaintiff cannot assert that the CIAB's information requests are made compulsory by the threat of subpoenas as in *Cuomo*, Plaintiff suggests that two "threats" establish the RBA's process as compulsory and therefore visitorial—(1) the threat of "public shaming" caused by the CIAB's publishing a factual statement regarding a particular bank's non-

participation in the needs assessment and/or (2) the threat of loss of its status as a depository bank due to its non-participation or failure to perform in a manner consistent with the CIAB's established benchmarks and best practices. Pl. Br. 3-4, 23, 24, 26. As established above, however, the RBA does not serve to supplement or augment in any way the already-existing powers of the Banking Commission, which in its sole discretion may designate or not designate banks based on its consideration of any factors it deems relevant. Charter § 1524(1). Moreover, Plaintiff's concerns regarding "public shaming" are belied both by its aggressive and public campaign against a law that encourages responsible banking practices and by the glut of enforcement actions, sanctions and other negative press currently surrounding banking institutions, as discussed in further detail below. Neither of these concerns even approach the threat of a subpoena in *Cuomo* or the sanctions imposed by the law at issue in *Mayor of N.Y. v. City Council of N.Y.*, Misc. 3d 151, 160-62 (Sup.Ct. N.Y. Co. 2004). In sum, the RBA establishes no penalty, sanction, or other threat for a bank's failure to participate in the CIAB's needs assessment. Therefore, the CIAB's data requests cannot be reasonably construed as compulsory in any way, and therefore do not constitute an exercise of visitorial powers.

C. Plaintiffs' Concerns About Reputational Harm Are Entirely Baseless

In arguing to enjoin implementation of the RBA, NYBA makes much of the harm to its member banks' reputations relating to the alleged "public shaming" that would result from either compliance or non-compliance with the CIAB's information requests. Local Law 38 requires that, should a bank fail to provide information in response to the CIAB's written request, the CIAB must identify this failure in its annual report and on its website. Charter §§ 1524-A(1)(b)(iii), (5). But it does not follow that such identification would result in public shaming, reputational injury, or any kind of injury whatsoever. Since the statute does not mandate that

banks provide information to the CIAB, there is nothing inherently pejorative about a bank's failing to provide information that it need not provide by law. In addition, the public reporting of banks' failure to meet benchmarks in other cities' RBOs has hardly resulted in public shaming for depository banks. For example, in Philadelphia's most recent public report on its RBO, Bank of America and Wells Fargo, among others, are cited as having failed to meet various benchmarks, but those banks would be hard-pressed to cite public shaming or reputational harm that has resulted from the minimal coverage of this fact. *See Examining the Lending Practices of Authorized Depositories for the City of Philadelphia* (2015).

Furthermore, given the historically low reputation already enjoyed by many NYBA member banks, it strains credulity that either a failure to provide a category of information to the CIAB, or alternatively, the inclusion of such information in the CIAB's reports, could somehow subject these banks to additional public shaming. In a significant speech, William Dudley, the President of the New York Federal Reserve Bank, cited an "important problem evident within some large financial institutions – the apparent lack of respect for law, regulation and the public trust." Dudley added, "There is evidence of deep-seated cultural and ethical failures at many large financial institutions." William Dudley, Address at the Federal Reserve Bank of New York, Ending Too Big to Fail: Remarks to the Global Economic Policy Forum (Nov. 7, 2013)[17]; s*ee also,* Peter Eavis, *Steep Penalties Taken in Stride by JPMorgan*, N.Y. Times, Jan. 7, 2014, at A1 ("to settle a barrage of government legal actions over the last year, JPMorgan Chase has agreed to penalties that now total $20 billion, a sum that could cover the annual education budget of New York City …").

[17] http://www.newyorkfed.org/newsevents/speeches/2013/dud131107.html

The brief *amici* submitted in the prior proceeding included the following sample of some of the recent enforcement actions and settlements involving NYBA members that currently hold the bulk of the city's deposits. The subject matter of the enforcement actions ranged from foreclosure abuses, including wrongfully foreclosing on active duty service members, to securities fraud, racial discrimination, manipulation of energy markets, money laundering, illegal payments in bond deals, manipulating currency, and criminal activity involving the Bernard Madoff scam:[18]

- January 2014: JPMorgan Chase -- $2 billion settlement to resolve criminal Bank Secrecy Act allegations for failing to report improprieties in Bernie Madoff scam
- December 2013: Bank of America – $404 million settlement regarding allegations of toxic loans sold to Freddie Mac
- December 2013: Bank of America – $131.8 million settlement with the SEC regarding alleged misleading of investors in the sale of mortgage backed securities by Merrill Lynch
- December 2013: JPMorgan Chase – $108 million settlement with the European Commission for alleged manipulation of Japanese benchmark rate
- December 2013: Citibank – $95 million settlement with the European Commission for alleged manipulation of Japanese benchmark rate
- November 2013: JPMorgan Chase – $13 billion settlement with the U.S. Department of Justice for defrauding investors in the sale of mortgage-backed securities
- October 2013: Wells Fargo – $869 million settlement regarding allegations of toxic loans sold to Freddie Mac
- October 2013: JPMorgan Chase – $5.1 billion settlement regarding allegations of toxic loans sold to Fannie Mae and Freddie Mac
- October 2013: Citibank– $395 million settlement regarding allegations of toxic mortgages sold to Freddie Mac
- September 2013: JPMorgan Chase – $920 million settlement with U.S. and U.K. regulators over alleged securities fraud in the London Whale fiasco
- September 2013: JPMorgan Chase – ordered by federal regulators to refund $309 million to customers and pay $80 million fine for alleged unfair credit card billing practices
- August 2013: Citibank – $730 million settlement for alleged misleading of investors in the sale of collateralized debt obligations backed by toxic mortgages

[18] See Appendix A for all relevant citations to the below settlements and actions.

- July 2013: Citibank – $968 million settlement regarding allegations of toxic mortgages sold to Fannie Mae
- July 2013: JPMorgan Chase – $410 million settlement with Federal Energy Regulatory Commission over alleged manipulation of energy markets
- June 2013: JPMorgan Chase – $1.6 billion settlement with the SEC and local authorities related to alleged illegal payments to win municipal bond business in Jefferson County, AL
- May 2013: Wells Fargo – $203 million class action settlement for charging customers excessive overdraft fees
- January 2013: HSBC – $249 million settlement with federal regulators over alleged foreclosure abuses
- December 2012: HSBC – $1.92 billion settlement with federal authorities to resolve charges that it laundered money for drug cartels and terrorist groups
- July 2012: Wells Fargo – $175 million settlement with the U.S. Department of Justice regarding allegations of discriminatory mortgage lending
- March 2012: Bank of America, Citibank, JPMorgan Chase, and Wells Fargo -- $25 billion settlement with state and federal regulators over alleged mortgage servicing and foreclosure abuses
- December 2011: Bank of America – $335 million settlement with the U.S. Department of Justice regarding allegations of discriminatory mortgage lending
- November 2011: Bank of America – $410 million settlement for allegations of charging customers excessive overdraft fees
- June 2011: Wells Fargo – $32 million settlement for alleged sex discrimination
- May 2011: Bank of America – $20 million settlement for allegations of wrongly foreclosing on families of active-duty military personnel
- April 2011: JPMorgan Chase – $56 million settlement for allegations of wrongly foreclosing on families of active-duty military personnel

Notably, in the months that have followed the submission of the *amici's* previous brief, these same shame-averse NYBA members have been the subject of numerous *additional* enforcement actions by regulators, and have gone on to enter into numerous additional settlements and guilty pleas. The following is just a sample:

- June 2015: JPMorgan Chase, Citibank, and Bank of America settled charges with the U.S. Securities and Exchange Commission related to fraudulent offerings in the municipal bond market

- May 2015: JPMorgan Chase and Citibank – pled guilty to felony charges for manipulating prices in the foreign currency exchange market; along with three other banks, were fined more than $2.5 billion
- March 2015: JPMorgan Chase – $50 million settlement with the Department of Justice U.S. Trustee Program for fraudulent filings in bankruptcy court
- January 2015: JPMorgan Chase and Wells Fargo – $35 million settlement with the U.S. Consumer Financial Protection Bureau for illegal mortgage kickbacks
- August 2014: Bank of America – $16.65 billion settlement with the U.S. Department of Justice for defrauding investors in the sale of mortgage-backed securities
- July 2014: Citibank – $7 billion settlement with the U.S. Department of Justice for defrauding investors in the sale of mortgage-backed securities

In their previous brief, the *amici* cited *American Banker's* 2013 "Survey of Bank Reputations" in which not a single one of the 30 banks in the survey received a score indicating a "strong reputation" (over 70 on a scale of 100), with the average receiving scores placing them in the "weak-to-vulnerable" category. *See* Heather Landy, *American Banker*'s *2013 Survey of Bank Reputations*, American Banker, June 25, 2013.[19] In 2014, the annual survey showed that NYBA's members had failed to improve their dismal public reputation – again not a single bank could boast a "strong reputation" -- and the City's largest depository banks fared particularly poorly. Bank of America, Wells Fargo, HSBC, Citibank, JPMorgan Chase, and Capital One were the bottom six banks ranked in terms of reputation with the public, all with reputational scores in the "weak-to-vulnerable" category. *See* Heather Landy, *American Banker*'s *2014 Survey of Bank Reputations*, American Banker, June 30, 2015.[20]

Similarly, the *2015 Harris Corporate Reputation Survey*, which ranks the reputations of the nation's 100 most visible companies, further demonstrates the poor reputational standing of the largest banks with the public. Bank of America, Citibank, and JPMorgan Chase all ranked in

[19] http://www.americanbanker.com/magazine/123_7/american-bankers-2013-survey-of-bank-reputations-1060105-1.html?zkPrintable=1&nopagination=1
[20] http://www.americanbanker.com/news/community-banking/the-state-of-bank-reputations-our-2014-rankings-1068070-1.html

the bottom 15 of the 100 most visible companies, with a reputational ranking of "Poor." Harris Poll, *2015 Harris Poll RQ Summary Report* (2015).[21]

Given the seemingly endless list of enforcement actions against the NYBA member banks regarding fraudulent, abusive, and dishonest banking practices, and the generally dismal reputational standing of the banks in the eyes of the public, it borders on the absurd for NYBA to claim that its members would be additionally injured by "public shaming" as a result of information requests made by the CIAB.

As explained in Point I, *supra*, moreover, Plaintiff also cannot plausibly claim that a failure to provide requested information increases in any way the likelihood of any bank losing its designation as a depository institution from the Banking Commission, since the RBA in no way limits, directs or shapes the commission's decision making process. Plaintiff therefore cannot establish that the provision of information to the CIAB is anything but voluntary, and its requests for information remain just that – requests – not visitorial demands for documents.

III. TO THE EXTENT THAT THE RBA IMPLICATES THE CITY'S PREROGATIVES AS A MARKET PARTICIPANT, IT IS NOT PREEMPTED BY FEDERAL OR STATE LAW

As argued above, the RBA in itself does not direct or limit the Banking Commission's discretion in designating depository banks, and thus should not be considered an exercise of the City's proprietary interests. However, even if the Banking Commission were someday to rely on the information and reports provided by the CIAB in choosing depository institutions, and even if the current Complaint could properly challenge such hypothetical future action, Plaintiff's preemption claims would still fail because Local Law 38 is a proper exercise of the City's prerogatives as a market participant and consumer of banking services.

[21] http://www.harrisinteractive.com/vault/2015%20RQ%20Media%20Release%20Report_020415.pdf

A city's "marketplace interactions are not regulation and so are not normally subject to preemption analysis at all." *Bldg. Indus. Elec. Contractors Ass'n (BIECA) v. City of N.Y.*, 678 F.3d 184, 188 (2d Cir. 2012). A law is considered proprietary if it manages a governmental entity's relationships with vendors or other contractors, and advances the entity's private or proprietary interests in its own affairs. *Building & Constr. Trades Council of Met. Dist. v. Assoc. Builders & Contr. of Mass./R.I.*, 507 U.S. 218, 228-233 (1992). A state or locality may legitimately use its market power in "response to state procurement constraints or to *local economic needs*." *BIECA*, 678 F.3d at 189 (emphasis added), *citing Wis. Dep't of Indus., Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 291 (1986); *see also Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008). Local procurement requirements may be upheld even if they have "extracontractual effects" on the contractors' relationships with other parties. *Id.* at 189.

In seeking to promote its proprietary interests, a municipality need not restrict its focus to narrow goals such as minimization of costs. *Id.* at 191. Local governments may seek to maximize the collateral benefits of doing business with a particular private actor, for example, by enforcing hiring preferences for municipal residents. *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1029 (9th Cir. 2010), *citing White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 206 (1983). The court in *Rancho Santiago* cautioned against "too narrow an understanding of what counts as an interest in 'efficient procurement' and of how similar a challenged state action must be to private market behavior to qualify as non-preempted market participation." *Rancho Santiago*, 623 F.3d at 1024. The court explained that "'efficient procurement'…does not necessarily mean 'cheap' procurement, but rather 'procurement that serves the state's purposes.'" *Id.* at 1025; *see also BIECA*, 678 F.3d at 192. "Legitimate

proprietary goals" may include "containing costs, optimizing productivity, and *boosting the economy*." *Id.* at 1026 (emphasis added).

Similarly, in *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031 (9th Cir. 2007), the Court held that a unit of government may seek to further environmental, as opposed to narrow budgetary goals, through its participation in the market. 498 F.3d at 1046. "That a state or local governmental entity may have policy goals that it seeks to further through its participation in the market does not preclude the doctrine's application, so long as the action in question is the state's own market participation." *Id.*; *see also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976) (environmental protection is legitimate proprietary purpose).

Like the statutes upheld in the decisions cited above, Local Law 38 was enacted to advance New York City's proprietary interest in fulfilling its "local economic needs." *Gould*, 475 U.S. at 291. As one of the Law's sponsors noted, "The role of banks is not solely to generate tax revenues for our budgets, but . . . also to play the crucial role of supporting economic activity and vitality within our city." Plaintiff's Ex. 8, May 15, 2012 Hr'g Tr. 44:6-10. In hearings, the City Council repeatedly cited the need for the City to find ways to address "the unmet banking and financial needs of many of our neighborhoods," including resolving the foreclosure crisis, promoting access to credit for small businesses, and investing in affordable housing development. Plaintiff's Ex. 1, May 15, 2012 Hr'g Tr. 43:10-12; *see also* Plaintiff's Ex. 8, May 15, 2012 Hr'g Tr. 41, 43-44; Plaintiff's Ex. 10, June 28, 2012 Hr'g Tr. 13:19-26. It is therefore not dispositive of the preemption analysis whether the RBA focuses the CIAB's attention on "the quality or price of Deposit Bank services" for the City *government*, as opposed to the economic harms or benefits to the City as a whole. *See*, Plaintiff's Br. at 14.

The City has a serious and legitimate proprietary interest in selecting depository banks that best meet the needs of its communities. Local Law 38 provides a common sense mechanism to gather information to help the City make proprietary decisions that will save the City money and improve the economic well-being of neighborhoods. For example, the statute authorizes the CIAB to collect information related to the mortgage assistance and foreclosure activities of depository banks. Mortgage delinquency and foreclosure continues to be a serious problem in New York City, at great cost to the City and its neighborhoods. In 2013, banks sent out 69,514 pre-foreclosure notices to New York City residents, with most of the notices heavily concentrated in communities of color and lower income communities. New Economy Project, *Foreclosure Risk in New York State* (2014).[22] In fact, according to the Federal Reserve Bank of NY, as of December 2013 over 11% of homes in some neighborhoods in Queens, the Bronx, and Brooklyn were in foreclosure. Federal Reserve Bank of New York, *Regional Mortgage Conditions*.[23]

The negative impact of foreclosures on municipalities is profound, ranging from indirect costs such as increased crime, reduced school performance, and neighborhood blight, to direct costs such as lost tax revenue, the increased cost of managing vacant properties, policing, fire, and court costs, and increased services to vulnerable residents who are displaced. *See generally* G. Thomas Kingsley, Robin Smith, & David Price, The Urban Institute, *The Impacts of Foreclosures on Families and Communities* (2009)[24]; *see also*, William C. Apgar et al., Homeownership Preservation Foundation, *The Municipal Cost of Foreclosures: A Chicago Case*

[22] http://www.neweconomynyc.org/resource/foreclosure-risk-new-york-state/
[23] http://www.ny.frb.org/regionalmortgageconditions (last visited July 2, 2015).
[24] http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.PDF

Study, 10-11 (Feb. 27, 2005).[25] A recent report by the New York State Legislature examined the 30,000 pre-foreclosure notices sent out in New York City in the first five months of 2014, and found that the foreclosure of those homes would cost the City an estimated $84.3 million in lost property tax revenue alone. Office of Senate Majority Coalition Leader Jeffrey D. Klein and Assemblywoman Helene Weinstein, Assembly Judiciary Committee Chair, *Foreclosure's Persistent Threat to New York City and its Minority Communities* (June 6, 2014).[26] Another recent report estimated that New York City has lost over $1.8 billion in property taxes since the beginning of the foreclosure crisis because of declining property values associated with high foreclosure rates. Mutual Housing Assoc. of N.Y. and N.Y. Communities for Change, *Thousands of Homeowners Still Drowning in Underwater Mortgages* 10-11 (2014).[27]

Mortgage foreclosure also strips wealth from communities – between 2007 and 2011, $1.95 trillion in property value was lost nationally by residents who live in close proximity to foreclosures. Over one half of this spillover loss was associated with communities of color. Debbie Gruenstein Bocian, Peter Smith, & Wei Li, Center for Responsible Lending, *Collateral Damage: the Spillover Costs of Foreclosures* (2012). The same study found that one foreclosure reduced the average property value of each surrounding home by $23,157; in communities of color, foreclosure reduced the average value of each surrounding home by $40,297. *Id.* The 2014 report by the New York State Legislature found that foreclosure on the 30,000 at-risk homes examined in the study could cost New York City families and neighborhoods up to $15.5 billion in lost home equity, with $13 billion of those losses concentrated in communities of color. *Foreclosure's Persistent Threat to New York City and its Minority Communities* 6. It is thus

[25]http://www.issuelab.org/click/kc_download1/municipal_cost_of_foreclosure_a_chicago_case_study/neighborworks

[26] http://www.nysenate.gov/files/pdfs/2014%20Foreclosure%20Final%20Report.pdf.

[27]http://nycommunities.org/sites/default/files/How%20Toxic%20Loans%20Keep%20Fueling%20Foreclosures%20and%20the%20Need%20for%20Eminent%20Domain%20%281%29.pdf

abundantly clear that the City has a direct fiscal interest, for example, in collecting information regarding banks' efforts to reduce foreclosures.

The statute also authorizes the CIAB to collect information on depository banks' efforts to address the credit and financial services needs of small businesses. New York City has a strong economic interest in choosing to deposit its funds in banks that better serve the needs of small businesses, particularly those located in distressed neighborhoods. Small businesses are vital to the local economy – the growth of smaller local businesses raises per capita income and reduces poverty in communities. *See* Anil Rupasingha, Federal Reserve Bank of Atlanta, *Locally Owned: Do Local Business Ownership and Size Matter for Local Economic Well-being?* (2013).[28] However, small business lending has decreased nationally since the 2008 financial crisis. Victoria Williams, U.S. Small Bus. Admin., *Small Business Lending in the United States, 2010-2011* (2012).[29] The problem is particularly acute for minority-owned businesses. A report by the U.S. Department of Commerce found that minority-owned businesses are less likely to receive loans than non-minority owned firms; that they receive loans in lower amounts and at higher interest rates; are more likely to be denied loans; and are more likely to not apply for loans due to rejection fears. Minority Business Development Agency, U.S. Department of Commerce, *Disparities in Access to Capital Between Minority and Non-Minority-Owned Businesses* (2010).[30] The Federal Reserve Bank of New York conducted a survey of small businesses in the New York area in 2012, and found that only 13 percent of small business loan applicants received the full amount of credit they had sought over the previous year. Federal

[28] https://www.frbatlanta.org/commdev/publications/discussionpapers/1301.aspx.
[29] https://www.sba.gov/sites/default/files/sbl_11study%20FINAL.pdf.
[30] http://www.mbda.gov/sites/default/files/DisparitiesinCapitalAccessReport.pdf.

Reserve Bank of New York, *Small Business Credit Survey 2012*.[31] The follow up survey in 2013, while finding a slightly improved lending climate, found that "ability to access capital was among the top growth challenges" for both profitable and unprofitable small businesses. Over half of businesses surveyed in 2013 did not even apply for credit – and 18 percent did not apply because they felt "discouraged" from applying. Federal Reserve Bank of New York, *Small Business Credit Survey 2013*.[32] The latest survey again found that a "tough credit market exists for the smallest firms and startups, with a majority unable to secure any credit." Federal Reserve Bank of New York, *Small Business Credit Survey 2014*.[33]

Pursuant to the RBA, the CIAB may also collect information on lending and investment for "affordable housing and economic development projects in low and moderate income communities." Community development loans provide vital financing to build and preserve affordable housing, create and retain jobs, and improve and revitalize City neighborhoods. Governments, community organizations, nonprofit and for-profit developers need access to affordable credit if they are to build new affordable housing units, preserve existing affordable housing, create opportunities to create and retain quality jobs, and finance myriad other community development projects. ANHD publishes a yearly report analyzing bank reinvestment in New York City that includes 24 banks, including the largest banks in the City. The latest report, *The State of Bank Reinvestment in New York City: 2014*, shows that the percentage of loans and investments to deposits remains quite low. Association of Neighborhood and Housing Development, *The State of Bank Reinvestment in New York City: 2014* (2014).[34] For example, only seven of 24 banks exceeded 5% of local deposits to community reinvestment activity and

[31] http://www.newyorkfed.org/smallbusiness/2012/index.html.
[32] http://www.newyorkfed.org/smallbusiness/Spring2013/index.html
[33] http://www.newyorkfed.org/smallbusiness/SBCS-2014-Report.pdf.
[34] http://www.anhd.org/wp-content/uploads/2011/07/2014-REPORT-Single_Page-NoBleed_FINAL.pdf

nine were below 1%. *Id.* at 29. Also, while loans to nonprofits fluctuated over the years, lending to neighborhood based Community Development Corporations (CDCs) is very low. On average, less than 10% of community development lending dollars went to CDCs in 2013, down from 14.5% in 2012. Given the importance of financing such essential activities, it is critical for the City to understand which banks contribute most to the development of its communities so that it can leverage the benefits of its deposits to promote the economic health of the City.

The Responsible Banking Act appropriately provides an additional mechanism to assist the Banking Commission, when choosing among banks that offer acceptable interest rates on City deposits, to assess whether the banks favored with City business serve the local needs of the City's communities – much as Boston sought contractors who benefit the city's economy by employing its residents, *White,* 460 U.S. 204, or as California sought vendors whose products would benefit the state's environment as a whole, *Engine Mfrs.*, 498 F.3d 1031.[35] The City clearly has a direct fiscal interest – a proprietary interest -- in analyzing key information about depository banks' activities in under-served communities. Plaintiff's preemption challenge to the statute must therefore fail.

[35] As explained supra at 6, the Banking Commission rules have long authorized it to review data related to banks' CRA performance and provision of services in NYC's communities as part of the process of selecting depositories. 22 R.C.N.Y. § 1-03.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to dismiss the complaint and to deny Plaintiff's motion for summary judgment.

Dated: New York, New York
July 2, 2015

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APPENDIX A

1. *The United States Attorney's Office, Manhattan U.S. Attorney and FBI Assistant Director-In-Charge Announce Filing of Criminal Charges Against and Deferred Prosecution Agreement with JPMorgan Chase Bank, N.A., in Connection with Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme*, U.S. Department of Justice (Jan. 8, 2014), http://www.justice.gov/usao/nys/pressreleases/January14/JPMCDPAPR.php.

2. Jonathan Stempel & Tanya Agrawal, *Bank of America to Pay Freddie Mac $404 Million in Mortgage Settlement*, Reuters (Dec. 2, 2013), http://www.reuters.com/article/2013/12/02/us-bankofamerica-claims-idUSBRE9B10E720131202.

3. *SEC Charges Merrill Lynch with Misleading Investors in CDOs*, U.S. Securities and Exchange Commission (Dec. 12, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540492377#.Us2PaPRDviU.

4. Danielle Douglas, *JPMorgan Chase, Citigroup First U.S. banks to be fined in rate-rigging scandal*, The Washington Post (Dec. 4, 2013), http://www.washingtonpost.com/business/economy/eu-fines-first-us-banks-in-rate-rigging- scandal/2013/12/04/828468da-5cf6-11e3-95c2-13623eb2b0e1_story.html.

5. *Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages*, U.S. Department of Justice (Nov. 19, 2013), http://www.justice.gov/opa/pr/2013/November/13-ag-1237.html.

6. *Freddie Mac Announces Settlements Totaling More Than $1.3 Billion With Major Financial Institutions*, Freddie Mac (Oct. 1, 2013), http://freddiemac.mwnewsroom.com/press-releases/freddie-mac-announces-settlements-totaling- more-th-otcqb-fmcc-1055926.

7. *FHFA Announces $5.1 Billion in Settlements with J.P. Morgan Chase & Co.*, Federal Housing Finance Agency (Oct. 25, 2013), http://www.fhfa.gov/webfiles/25649/FHFAJPMorganSettlementAgreement.pdf.

8. *Freddie Mac Announces Settlements Totaling More Than $1.3 Billion With Major Financial Institutions*, Freddie Mac (Oct. 1, 2013), available at http://freddiemac.mwnewsroom.com/press-releases/freddie-mac-announces-settlements-totaling- more-th-otcqb-fmcc-1055926.

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