UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK BANKERS ASSOCIATION, INC., Plaintiff, – against – THE CITY OF NEW YORK, and THE COUNCIL OF THE CITY OF NEW YORK, Defendants.	13 Civ. 7212 (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 COUNCIL OF THE CITY OF NEW YORK

Edward Josephson
Director of Litigation
Legal Services NYC
40 Worth Street, 6th floor
New York, NY 10038
(718) 237-5538
ejosephson@lsny.org

Joshua Zinner, Esq.
Claudia Wilner, Esq.
New Economy Project
176 Grand Street
New York, NY 10013
(212) 680-5100

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PRELIMINARY STATEMENT

Amici curiae The Association for Neighborhood and Housing Development (ANHD), New Economy Project, and the National Community Reinvestment Coalition (NCRC), submit this Memorandum of Law in support of the efforts of defendant, the Council of the City of New York ("City Council"), to defend the Responsible Banking Act, Local Law 38 of 2012, from the constitutional attack brought by Plaintiff the New York Bankers Association.

As set forth herein, the harms conjured by Plaintiff are far too speculative to support standing under Article III of the U.S. Constitution. The hypothetical nature of the injuries feared by Plaintiff is highlighted by the positive experiences in other U.S. cities that have enacted similar laws governing city deposits but have not provoked any legal challenges from banks. *Amici* further explain that Local Law 38 was an appropriate and measured assertion of the City's proprietary interests as a market participant, enacted both to ensure the safety of the City's deposits and to promote the economic health of its neighborhoods. The statute's enactment was motivated by banks' historical failure to meet the needs of New York City communities, particularly lower income communities and communities of color. The effects of these failures by the banks were only exacerbated by the financial abuses leading up to the economic crisis and the recession that followed. The statute establishes an information gathering process that allows the City to make an informed choice of potential depository banks, taking into account those that best serve its communities. Local Law 38 thus enables the City to obtain the maximum economic benefit from its deposits, without imposing requirements or burdens that might lead to preemption under State or federal statutes.

The *amici* therefore support the City Council's motion to dismiss the complaint on grounds of standing and ripeness, and urge the Court to deny Plaintiff's motion for summary judgment on the merits.

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 95 non-profit housing 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 one of the largest law firms for low income people in New York City, with 18 community-based offices and numerous outreach sites located throughout each of the City's five boroughs. 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) is a nationally renowned resource and advocacy center based in New York City, whose mission is to promote community economic justice and to eliminate discriminatory economic practices that harm low-income communities and communities of color. New Economy Project convenes New Yorkers for Responsible Lending, a statewide coalition of 161 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, and has trained 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, 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

A. 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 has followed. New York's neighborhoods have been severely affected by irresponsible 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, *Absence of Bank Branches in Communities of Color New York City, 2012* (2013), *available at* http://www.nedap.org/documents/2012BankBranchesZIPS.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

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[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).

the foreclosure crisis on neighborhoods, the lack of affordable housing, and the decrease in 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 underserved by banks.

In June 2012, the City Council enacted Local Law 38, 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 biannual 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 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 failure to cooperate. 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 debar 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).

B. 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 a lending disclosure, an affidavit of intent, and a Community Reinvestment Initiative plan to the city. The information is used to ensure that the bank is in compliance with its affidavit and helps determine whether it will continue to be considered as an eligible depository. 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 lender 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.

A Brookings Institute study found that Cleveland's banking procedures appeared to 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* William T. Bogart, *Civic Infrastructure and the Financing of Community Development* (The Brookings Institute on Urban and Metropolitan Policy, 2003). 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 complained of any harm from the Cleveland ordinance, or to have commenced litigation to annul it.

Philadelphia adopted its Responsible Banking ordinance in 2002. Philadelphia 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 reports significant improvements citywide in small business lending since 2002; such lending in low and moderate income census tracts increased from an average of 42.2 percent in 1998-2002 to 52.2 percent in 2011. Jonathan A. Saidel, *Small Business Lending in Philadelphia: 1998-2004* (Office of the City Controller of the City of Philadelphia, 2005). Since the passage of the RBO, city depositories made a larger percentage of their total loans to African-American borrowers, and to borrowers in minority and LMI tracts than did lenders as a whole. Stephen P. Mullin & Maria Frizelle Roberts, *Examining the Lending Practices of Authorized Depositories for the City of Philadelphia – Calendar Year 2011* (Office of the City Treasurer of the City of Philadelphia, 2013). Banks in Philadelphia may only be disqualified as city depositories for not providing data. While City depositories did not outperform all banks in every category studied, this 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, Bank of NY 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, or to have commenced litigation to annul it.

Following the economic crisis in 2008, numerous other cities adopted Responsible Banking Ordinances: San Jose in 2010; Seattle in 2011; Pittsburgh, Los Angeles, San Diego, Portland, Oregon, and Kansas City, Missouri, in 2012; and Boston and Minneapolis in 2013. Because these laws were so recently enacted, there is no data yet indicating the effects of these statutes on the municipalities or their financial institutions.

C. The Bankers' Association Complaint

Following the enactment of Local Law 38, Mayor Bloomberg took no steps to effectuate any of its provisions. As Plaintiff acknowledges, "Local Law 38 has not yet been enforced" and the CIAB has not even been convened. Complaint ¶ 30. The City has not requested information from any of Plaintiff's members, much less threatened debarment, or debarred any of its members for any reason.

Yet, after fifteen months of City inaction, the New York Bankers Association abruptly decided to file the instant action challenging the validity of Local Law 38 on the grounds that it "conflicts with, and is preempted by, federal and New York State … laws regulating … deposit banks." Complaint ¶ 3. Plaintiff alleges that Local Law 38 "conflicts with Congress's grant to the Office of the Comptroller of the Currency ('OCC') of sole 'visitorial powers' … over federal depository institutions," *id.* at ¶ 6, and "is separately preempted by New York State law, which occupies the entire field of banking law for State-chartered depository institutions," *id.* at ¶ 7. Plaintiff further alleges preemption by the federal Community Reinvestment Act ("CRA"). *Id.* at ¶¶ 65-73.

For the reasons that follow, *amici* concur with the City Council's assertion that Plaintiff has failed to establish standing to bring this action, and has also failed to set forth sufficient evidence to justify an award of summary judgment on the merits of its claims.

<u>ARGUMENT</u>

I. PLAINTIFF HAS NOT DEMONSTRATED INJURY SUFFICIENT TO CONFER STANDING.

Standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006), *citing Warth v. Seldin*, 422 U.S. 490, 498 (1975). The plaintiff must "have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs must also demonstrate a "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. While a threat of future injury can confer standing, the threatened injury must be "certainly impending," not based on "a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1148 (2013). Moreover, Plaintiff cannot claim standing based on "a governmental policy that does not regulate, constrain, or compel any action on their part." *Id.* at 1153. Finally, "[t]he party invoking federal jurisdiction bears the burden of establishing standing – and, at the summary judgment stage, such a party can no longer rest on mere allegations, but must set forth by affidavit or other evidence specific facts." *Id.* at 1148 (internal quotations and alterations omitted).

Here, Plaintiff has utterly failed to demonstrate that Local Law 38 has injured or could injure its members' interests in any way. Plaintiff articulates three potential sources of injury its members could face from Local Law 38 – expense, debarment, and "public shaming" – but none are convincing. Plaintiff did not provide evidentiary support for any of its arguments, and on this basis alone its motion should be denied. *Clapper,* at 1148.

Plaintiff first argues that its members could be harmed by having to expend resources compiling and presenting data to the CIAB. However, Local Law 38 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. Local Law 38 imposes no sanction should a bank choose not to provide information. Thus any expense a bank may incur would result from the bank's voluntary choice, not from a statutory mandate. Given that Local Law 38 does not "regulate, constrain, or compel any action" on the banks' part, any hypothetical expenditure of resources by Plaintiffs' members cannot confer standing on Plaintiff. *Clapper*, 133 S.Ct at 1153; *see also Hedges v. Obama*, 724 F.3d 170, 201 (2d Cir. 2013) (no standing where statute "at most *authorizes*—but does not *mandate* or *direct*").

Second, Plaintiff's argument that it has standing based on an alleged threat of debarment in Local Law 38 is equally unavailing; Local Law 38 contains no such provision. The City's power to debar banks stems from Section 1524 of the New York City Charter, which provides that the Banking Commission shall "designate the banks or trust companies in which all monies of the city shall be deposited, and may by like notice in writing from time to time change the banks and trust companies so designated." Charter § 1524(1). As part of its consideration whether a bank should be designated or debarred, the Banking Commission already must consider such factors as a bank's federal and state CRA rating, a bank's policies and practices concerning branch closings and their impact on local communities, and the bank's "community service rating" – an independent evaluation that the commission must make based on the bank's CRA ratings and "such other factors as the Banking Commission deems relevant." 22 R.C.N.Y. § 1-03(c)(4); *see also* 22 R.C.N.Y. §§ 1-03(c)(1)(xi), (c)(2)(iii), and (c)(3).

While Local Law 38 provides that the Banking Commission also "may consider" the CIAB's annual report in making its designation and debarment decisions, this provision does not support Plaintiff's claims of potential future injury. First, it is entirely voluntary; the banking commission need not consider the CIAB report at all. Furthermore, even without this provision, the Banking Commission would be free to consider the CIAB report based on its pre-existing authority to consider *any* information it deems relevant to its review. In short, Local Law 38 does not change in any way the banking commission's existing powers and duties to designate and debar banks. For this reason, Plaintiff's fear of potential debarment is not "fairly traceable" to Local Law 38 and cannot confer standing. *See Clapper*, 133 S.Ct at 1152 (explaining that plaintiffs lacked standing because their fears of government surveillance arose out of existing laws that predated the challenged statute).

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.

Similarly, the experiences of Cleveland and Philadelphia suggest that Responsible Banking Ordinances do not in practice impose any substantial burdens on financial institutions, but instead prove beneficial for banks as well as for municipalities in which they do business. Cleveland's statute has been in effect for 22 years, and Philadelphia has accumulated 11 years of experience with its own law. In both cities, the banking statutes appear to have had their desired effect – ensuring that city deposits were placed with banks who would lend those funds to individuals and small businesses located in low and middle income neighborhoods. The provisions of these laws, although in some aspects more stringent than New York's Local Law 38, have not discouraged the participation of the nation's leading banks as city depositories. Nor, to the knowledge of the *amici*, has any lending institution filed suit against these municipalities alleging that it has been damaged in any way by the operation of these ordinances. In light of these experiences, Plaintiff's claim that its members are likely to suffer harm from the implementation of Local Law 38 appears highly speculative.

The third argument raised by Plaintiff in support of its standing rests upon the alleged injury of "public shaming" that may be suffered by its member banks if they are identified on the Department of Finance website as having failed to provide information to the CIAB. NYBA Br. at 4. According to Plaintiff, if the statute were enforced, its members must either incur costs to provide data to the city or be "publicly brand[ed] . . . as noncompliant, thereby threatening the bank's reputation and hence its relationships with customers, counterparties, employees, and local communities." NYBA Br. at 2. Plaintiff's arguments rest on a gross mischaracterization of the statute.

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. In the first place, since the statute does not mandate that banks provide information to the CIAB, a bank cannot be adjudged "noncompliant"—a scofflaw—for failing to do so. The banks would not be labeled as having engaged in misconduct, as in *Gully v. NCUA Bd.*, 341 F.3d 155, 158 (2d Cir. 2003), or as a "hazardous employer," as in *Skilled Craftsmen of Texas, Inc. v. Reynolds*, 158 S.W.3d 89 (Tex. App. 2005), but simply as not having provided information. There is nothing inherently pejorative about a bank's failing to provide information that it need not provide.

Moreover, Plaintiff has utterly failed to provide evidence in support of its wild assertion that the CIAB's public identification of "nonresponsive" banks would cause reputational or financial injury. In *Meese v. Keene*, which Plaintiff cites in support of its argument that a reputational injury is sufficient to confer standing, the Plaintiff "submitted detailed affidavits, including one describing the results of an opinion poll and another containing views of an experienced political analyst" in support of its claims. *Meese v. Keene*, 481 U.S. 465, 473-74 (1987). This factual record, which was uncontroverted, was central to the court's finding of standing. *Id.* at 474. Likewise, in *NCAA v. Governor of N.J.*, the plaintiff provided studies and expert opinions establishing that legalized gambling would damage NCAA's reputation among its fans. *NCAA v. Governor of N.J.*, 730 F.3d 208, 221-22 (3d Cir. 2013).

Given the already low reputation enjoyed by many NYBA member banks, it strains credulity that a failure to provide a category of information to the CIAB could somehow subject these banks to additional public shaming. In a recent 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 (November 7, 2013); s*ee also,* Peter Eavis, *Steep Penalties Taken in Stride by JPMorgan,* N.Y. Times, January 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 …").

Consider 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 ranges 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 Bernie Madoff scam, just to name a few:[2]

- 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 regarding alleged defrauding of 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
- 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

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

- 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

Indeed, *American Banker's* annual "Survey of Bank Reputations" painted a sorry picture of the industry's standing with the American public. 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, http://www.americanbanker.com/magazine/123_7/american-bankers-2013-survey-of-bank-reputations-1060105-1.html?zkPrintable=1&nopagination=1.

Given the seemingly endless list of enforcement actions against the NYBA member banks regarding fraudulent, abusive, and dishonest banking practices, and the general 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" if they were to choose not to provide the CIAB with requested information.

For all the above reasons, this court should find that Plaintiff has failed to meet its burden on summary judgment to establish a threat of harm sufficient to provide it with standing to maintain this proceeding.[3]

II. LOCAL LAW 38 IS AN APPROPRIATE USE OF THE CITY'S PREROGATIVES AS A MARKET PARTICIPANT, AND IS NOT PREEMPTED BY FEDERAL OR STATE LAW.

Plaintiff's preemption claims must fail because Local Law 38 is a proper exercise of the City's prerogatives as a market participant and consumer of banking services. 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.

[3] For the reasons set forth by the City Council, Plaintiff has also failed to establish that its claims are ripe for adjudication.

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. 1, 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. 1, May 15, 2012 Hr'g Tr. 41, 43-44; Plaintiff's Ex. 15, Jun. 28, 2012 Hr'g Tr. 13:19-26.

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 default continues to be a serious problem in New York City, at great cost to the City and its neighborhoods. In 2012, banks sent out 98,076 pre-foreclosure notices to New York City residents, with many of the notices concentrated in communities of color and lower income communities (based on New Economy Project's analysis of 90-day pre-foreclosure notice data provided by the NYS Department of Financial Services). 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, 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). 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 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). 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). 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). 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 Reserve Bank of New

York, *Small Business Credit Survey 2012* (2012). 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* (2013).

The statute also authorizes the CIAB to 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. In the latest report, *The State of Bank Reinvestment in New York City: 2013*, Association of Neighborhood and Housing Development, December 2013, despite a 23% increase in NYC deposits from 2010 to 2011 (at p. 40), these critical loans and investments declined 28%, from $4.93 billion to $3.5 billion. The percentage of loans and investments to deposits is quite low. For example, only three banks exceeded 2% of deposits to community development loans and most were below 1%. (at p. 55). 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.

Local Law 38 simply 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.[4]

Furthermore, as explained in the City Council's Memorandum of Law, Local Law 38 does not represent the exercise of "visitorial powers" in violation of the National Banking Act because implicit in the term "visitorial power" is the element of compulsion. 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 (S.D. Iowa 2011) (invalidating Iowa law providing that banks "operating under

[4] 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 RCNY § 1-03.

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"). Similarly, although the State and federal Community Reinvestment Acts empower agencies to collect certain kinds of information from national banks, it does not prohibit local governments from soliciting similar information on a voluntary, non-visitorial basis. Because Local Law 38 does not compel banks to provide information to the CIAB, it does not represent an attempted exercise of visitorial powers by the City, and therefore does not conflict with federal law.

In addition, for the reasons articulated by the City Council in their Memorandum of Law in Support of Motion to Dismiss, Local Law 38 is not preempted by either the federal Community Reinvestment Act, or by State Banking Law.

CONCLUSION

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

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EDWARD JOSEPHSON
Director of Litigation
Legal Services NYC
40 Worth Street, 6th floor
New York, NY 10038
(718) 237-5538

JOSHUA ZINNER, ESQ.
CLAUDIA WILNER, ESQ.
New Economy Project
176 Grand Street
New York, NY 10013
(212) 680-5100

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