

1 STEPHEN P. BERZON (SBN 46540)  
 SCOTT A. KRONLAND (SBN 171693)  
 2 JONATHAN WEISSGLASS (SBN 185008)  
 ERIC P. BROWN (SBN 284245)  
 3 Altshuler Berzon LLP  
 4 177 Post Street, Suite 300  
 San Francisco, CA 94108  
 5 Tel: (415) 421-7151  
 Fax: (415) 362-8064  
 6 E-mail: sberzon@altber.com  
 skronland@altber.com  
 7 jweissglass@altber.com  
 8 ebrown@altber.com

9 Attorneys for Defendants *City of Richmond* and  
 10 *Mortgage Resolution Partners LLC*

11 BRUCE REED GOODMILLER (SBN 121491) City Attorney  
 12 CARLOS A. PRIVAT (SBN 197534) Assistant City Attorney  
 13 CITY OF RICHMOND  
 450 Civic Center Plaza  
 14 Richmond, CA 94804  
 15 Telephone: (510) 620-6509  
 Facsimile: (510) 620-6518  
 16 E-mail: bruce\_goodmiller@ci.richmond.ca.us  
 carlos\_privat@ci.richmond.ca.us

WILLIAM A. FALIK (SBN 53499)  
 100 Tunnel Rd.  
 Berkeley, CA 94705  
 Tel: (510) 540-5960  
 Fax: (510) 704-8803  
 E-mail: billfalik@gmail.com

Attorney for Defendant  
*Mortgage Resolution Partners LLC*

17 Attorneys for Defendant *City of Richmond*

18  
 19 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 20 **SAN FRANCISCO DIVISION**

21 WELLS FARGO BANK, NATIONAL  
 ASSOCIATION, as Trustee, *et al.*,  
 22  
 23 Plaintiffs,  
 24 v.  
 25 CITY OF RICHMOND, CALIFORNIA, a  
 municipality, and MORTGAGE  
 26 RESOLUTION PARTNERS LLC,  
 27 Defendants.

Case No. CV-13-3663-CRB  
**DEFENDANTS' REPLY MEMORANDUM  
 IN SUPPORT OF MOTION TO DISMISS  
 FOR LACK OF SUBJECT MATTER  
 JURISDICTION**



1 *id.* at 482; *see also id.* at 481 (“If an ordinance be passed . . . the jurisdiction of the courts *may then*  
2 be invoked.” (emphasis supplied)).<sup>1</sup>

3 B. Not surprisingly, the bright line drawn in *New Orleans* separates all the cases the  
4 Banks rely upon in their Opposition from this case, and the Banks are glossing over the distinction.  
5 In the cases the Banks cite in which federal courts reviewed government action, the necessary  
6 legislative action had occurred, and the federal courts were engaged in their proper role of judicial  
7 review. In this case, the necessary legislative authorization has not occurred.

8 As already demonstrated, in the *Regional Railroad Reorganization Act Cases*, 419 U.S. 102  
9 (1974) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the necessary legislative  
10 authorization for the compelled transfer of property already existed, *i.e.* the Rail Act and the  
11 Hawaii Land Reform Act of 1967. Mot. at 4-5. The Banks rely on the cases (Opp. at ii, 3-4) but  
12 do not address the dispositive distinction between those cases and this one.<sup>2</sup>

13 Similarly, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (Opp. at 9), the Supreme  
14 Court considered a challenge to the Coal Industry Retiree Health Benefit Act of 1992. The Coal  
15 Act was not just a bill that Congress was contemplating, so that case is not analogous to this one.

16 In *Chertkof v. Mayor & City Council of Baltimore*, 497 F. Supp. 1252 (D. Md. 1980) (Opp.  
17 at 3-4), the city council had passed an ordinance designating the plaintiffs’ property as part of the  
18 urban renewal zone *and* “direct[ing] the Real Estate Acquisition Division to acquire plaintiff’s

---

19 <sup>1</sup> Other cases make the same point. *See, e.g., McChord v. Cincinnati, N.O. & Tex. P. Ry. Co.*, 183  
20 U.S. 483, 496-97 (1902) (federal courts lack jurisdiction before the legislative action has occurred;  
21 “[t]he fact that the legislative action threatened may be in disregard of constitutional constraints . . .  
22 does not affect the question” (citation, internal quotation marks omitted)); *Associated Gen.*  
23 *Contractors of Am. v. City of Columbus*, 172 F.3d 411, 415 (6th Cir. 1999) (“The *New Orleans*  
24 Court made clear that the role of the court is to intervene, if at all, only after a legislative enactment  
has been passed.”); *FrontierVision Operating Partners, L.P. v. Town of Naples, Maine*, No. 01-16-  
P-DMC, 2001 WL 220192, at \*7 (D. Me. Mar. 7, 2001) (“Unless and until the defendant enacts an  
ordinance . . . this court may not consider an application for injunctive relief . . . concerning such  
an ordinance.”).

25 <sup>2</sup> The Banks quote selectively from the *Regional Railroad Reorganization Cases* to make it appear  
26 that further legislative action was necessary to authorize the forced conveyance of property. Opp.  
27 at 3. To the contrary, under the Rail Act, a conveyance plan went into effect unless legislative  
28 action was taken to reject the plan, 419 U.S. at 112-14 & n.10, so no further legislative action was  
necessary. *See id.* at 140 (“[T]he implementation of the Rail Act will now lead inexorably to the  
final conveyance . . .”).

1 property by having the City Solicitor institute a condemnation suit if plaintiff will not sell.” *Id.* at  
2 1256. By contrast, in this case the City Council has not authorized the use of eminent domain  
3 authority if negotiations fail. Authority to use eminent domain would require the future adoption  
4 of a resolution of necessity.

5 In *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D.  
6 Cal. 2001) (Opp. at ii, 2-3), the defendant public agency had passed two resolutions of necessity  
7 authorizing condemnation of the property, *id.* at 1126-27. The issue in *99 Cents Only* was not  
8 ripeness but mootness, because the resolutions were rescinded in response to litigation. *Id.* at 1127.  
9 The district court reasoned that a defendant arguing mootness must demonstrate that “the allegedly  
10 wrongful behavior cannot reasonably be expected to recur,” *id.* (quoting *FTC v. Affordable Media*  
11 *LLC*, 179 F.3d 1228, 1238 (9th Cir. 1999)), and thus repeal of a law does not necessarily render a  
12 pending challenge to the law moot, *id.* at 1128. In this case, by contrast, no resolution of necessity  
13 ever has been adopted, or may ever be adopted, and thus the question is not whether “allegedly  
14 wrongful behavior” will recur because no “allegedly wrongful behavior” occurred in the first  
15 place.<sup>3</sup>

16 Indeed, when the Ninth Circuit reviewed the *99 Cents Only* case on appeal, it recognized  
17 that the case was ripe precisely because a resolution of necessity had been passed. 60 Fed. App’x  
18 123, 124 (9th Cir. 2003) (“At the time that [plaintiff] filed its complaint in district court, the  
19 controversy was ripe. Once [the agency] passed [its resolution of necessity], [plaintiff] faced ‘a  
20 realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement.’”  
21 (quoting *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1170 (9th Cir. 2001))). In *99 Cents Only*,  
22 moreover, the district court was reviewing an actual condemnation plan – the one initially  
23 authorized by the agency – while in this case there is none, because no resolution of necessity has  
24 been adopted.

25  
26 <sup>3</sup> The mootness inquiry is very different from the standing/ripeness inquiry because  
27 standing/ripeness are assessed at the outset of the case and, once a court has jurisdiction, a  
28 defendant ordinarily cannot moot the case by voluntary cessation of its actions. *City of Mesquite*  
*v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 288-89 (1982).

1 C. Although no authority supports the Banks’ position, they nonetheless insist that the  
2 Court has jurisdiction now because the City has a “pre-determined plan” to proceed with a “Loan  
3 Seizure Program” and has taken “substantial steps” to implement this “plan,” and “Plaintiffs need  
4 not wait until Defendants complete every step in their Loan Seizure Program before seeking  
5 injunctive relief in this Court.” Opp. at i, 4, 6. This contention is wrong. When one of the  
6 necessary “steps” that stands between a plaintiff and alleged harm is future legislative action, there  
7 is no such thing as a “pre-determined plan,” and the plaintiff does have to wait for that “step” to  
8 occur to invoke the federal courts’ jurisdiction. The reasons that the plaintiff has to wait are  
9 twofold.

10 *First*, Article III’s limitations on jurisdiction are not based merely on a policy interest in  
11 avoiding potentially unnecessary work for the federal courts – such that the courts might make  
12 occasional exceptions and review the constitutionality of proposals that seem very likely to become  
13 law. Rather, limitations on jurisdiction also “define the role assigned to the judiciary in a tripartite  
14 allocation of power to assure that the federal courts will not intrude into areas committed to the  
15 other branches of government.” *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The federal courts  
16 cannot treat the legislative process as a meaningless formality. Rather, the courts must respect the  
17 legislative process as likely to separate good proposals from bad proposals and legal proposals  
18 from illegal proposals. Judicial review by unelected judges is a last resort that may occur only  
19 when a proposal becomes law. Otherwise, “the courts will pass that line which separates judicial  
20 from legislative authority.” *New Orleans*, 164 U.S. at 481; *see also Flast v. Cohen*, 392 U.S. at 96  
21 (when government action is involved “the rule against advisory opinions implements the separation  
22 of powers prescribed by the Constitution and confines federal courts to the role assigned them by  
23 Article III”).

24 *Second*, apart from the separation-of-powers issue, the outcome of a legislative process is  
25 always “speculative” and “conjectural.” In this case, for example, the Banks certainly have not  
26 established that the City Council’s adoption of a resolution of necessity, by supermajority vote,  
27 after a noticed public hearing, is a foregone conclusion.

28

1 The only action by the City Council itself that the Banks point to is the City Council's  
2 approval of an Advisory Services Agreement. The Agreement does not authorize the use of  
3 eminent domain authority, and it requires subsequent City Council approval before mortgage loans  
4 can be acquired, whether through eminent domain or otherwise. Declaration of John C. Ertman,  
5 Exh. I, Advisory Services Agreement at sec. 2, para. 2 (Doc. 9-9). Authority to use eminent  
6 domain might not be given.<sup>4</sup>

7 The Banks ask the Court to glean from emails and website printouts that an effort is afoot to  
8 present a proposed plan to the City Council. Opp. at 4-6. So what? Not every plan presented to a  
9 legislative body is approved – or is approved in the same form in which it is presented. The City  
10 also has received considerable information since the City Manager's offer letters were sent, in the  
11 form of the Banks' own submissions to this Court, and would receive more information at a public  
12 hearing. Many plans are revised and refined (or abandoned) in response to criticism.

13 The Banks point to the City Manager's offer letters (Opp. at 5-6), but those letters, and their  
14 accompanying informational pamphlet, are explicit that the decision whether to exercise eminent  
15 domain authority has *not* been made. Lindsay Dec., Exh. A (Doc. 33-1). The City Manager also  
16 says this under oath in his declaration. Lindsay Dec. ¶23 (Doc. 33).

17 The Banks are therefore left to rely on the Mayor's recent press statements that *she* favors  
18 the use of eminent domain authority and "is not backing down" in the face of Wall Street bullying.  
19 Ertman Reply Dec., ¶¶22-28 & Exhs. R-V (Docs. 49, 49-18 to 49-22). But President Obama has  
20 said many times that *he* supports immigration reform legislation; he and his Administration are  
21 "not backing down" either. The outcome of the legislative debate on that issue is not a foregone  
22 conclusion.

23  
24 \_\_\_\_\_  
25 <sup>4</sup> At various points in their Opposition, the Banks misleadingly refer to the City Council's approval  
26 of the Advisory Services Agreement as if it were a "Plan" that the Banks are challenging. Opp. at  
27 4-5. The Banks' Complaint does not allege that it is illegal for a city council to obtain advice  
28 about the potential use of eminent domain authority, or for city staff to prepare a proposal for a  
city council's agenda, or for a city council to consider and debate the issue of exercising eminent  
domain authority. Rather, the Banks' Complaint alleges that the exercise of eminent domain  
authority would be illegal. Complaint ¶¶96-147.

1 D. There are difficult cases about ripeness/standing when a law exists but it is not clear  
2 whether the law ever would be applied to the plaintiff. *See, e.g., Thomas v. Anchorage Equal*  
3 *Rights Comm’n*, 220 F.3d 1134 (9th Cir. 2000) (en banc) (dismissing case for lack of jurisdiction).  
4 Where, as here, the necessary legislative action has not occurred, and therefore cannot possibly be  
5 implemented, the issue of subject matter jurisdiction is easy; there is none.

6 **II. The Banks’ Claims Do Not Meet Prudential Justiciability Requirements**

7 The Banks also have no persuasive response to defendants’ argument that, even if the Court  
8 had Article III jurisdiction, the Banks’ claims are not “fit for judicial decision,” as required to  
9 satisfy prudential ripeness concerns. Mot. at 6. The Banks refer to a “Loan Seizure Program,” but  
10 merely capitalizing the phrase “Loan Seizure Program” and using it repeatedly is not an adequate  
11 substitute for an approved resolution of necessity for the Court to review.

12 The Banks cannot tell the Court what mortgage loans are part of their hypothetical “Seizure  
13 Program.” They allege in their Complaint that the City made offers to buy both performing and  
14 non-performing loans, and that it is “unclear whether Richmond intends to seize the nonperforming  
15 loans.” Complaint ¶66. They also allege that the City may “attempt to acquire or seize *other*  
16 loans.” *Id.* (emphasis supplied). The Banks’ expert witness declares that the City Manager  
17 incorrectly identified many of the loans in his offer letters as “underwater,” *see* Burnaman Dec.  
18 ¶¶4-5 (Doc. 48), which suggests that those loans may *not* be part of a hypothetical “Seizure  
19 Program.” The City Manager himself has stated under oath that the City has not decided whether  
20 to exercise eminent domain authority or what loans might be included. Lindsay Dec. ¶¶22-23  
21 (Doc. 33). Would the particular loans in which these Banks claim an interest even be part of their  
22 hypothetical “Seizure Program”?

23 The Banks do not explain how this Court would review whether the exercise of eminent  
24 domain authority is for public use and would serve legitimate local interests when the City Council  
25 never approved the use of eminent domain authority or made any findings on this issue. The Banks  
26 refer the Court to – in their attorney’s words – a “document entitled ‘Public Purpose’ that appears  
27 to be a draft ‘resolution on necessity’ for San Bernardino County.” Ertman Reply Dec. ¶6 & Exh.  
28 D (Docs. 49, 49-4). They also refer the Court to various emails and “marketing materials”

1 discussing the issue. *Id.* ¶¶5-19. Are these the “Seizure Program” the Court is supposed to  
2 review?

3 The Banks predicate many of their merits arguments on what they contend are problems  
4 with the details of their hypothetical “Seizure Program,” including how loans would be identified  
5 and how investors would be compensated. Complaint ¶¶36-52. Yet the City has not yet  
6 determined what loans might be included in an eminent domain plan and is not committed to  
7 working with particular investors. Lindsay Dec. ¶¶22-23 (Doc. 33). Might not the legislative  
8 process refine the details of any eminent domain plan and might not such a plan be revised in  
9 response to exactly this type of criticism? Indeed, might not a deal for the voluntary acquisition of  
10 some mortgage loans still be reached, at least for loans that already are “non-performing,” and for  
11 acquisition of other loans as they go into default?

12 The Banks do not explain how the trial of the merits of their case will proceed. Will the  
13 seven City Council members be called to testify so this Court can make factual findings about what  
14 “Seizure Program” (if any) would have been approved by a supermajority of City Council  
15 members, after a public hearing, had the Banks’ lawsuit not interfered with the legislative process?  
16 The absurdity of such a trial makes clear that the Banks’ claims are not “fit for judicial decision”  
17 on the merits now and, therefore, that their claims are not prudentially ripe.

18 B. Exercising jurisdiction now also would be contrary to strong policy interest in avoiding  
19 unnecessary decisions about federal constitutional issues if a case can be resolved on state-law  
20 grounds. “[A] federal court should not decide federal constitutional questions where a dispositive  
21 nonconstitutional ground is available.” *Hagans v. Lavine*, 415 U.S. 528, 547 (1974). If a resolution  
22 of necessity were adopted (after a noticed public hearing, by supermajority vote), that hypothetical  
23 resolution of necessity would in all likelihood be challenged on state-law grounds. Those state-law  
24 issues should be resolved first, which is another prudential reason why this case is not ripe.

### 25 **III. The Banks’ Claims Would Not Evade Judicial Review**

26 When a federal court lacks subject matter jurisdiction, it “cannot proceed at all” except for  
27 “announcing the fact and dismissing the cause.” *Steel Co. v. Citizens for a Better Environment*,  
28 523 U.S. 83, 94 (1998) (citations, internal quotation marks omitted). Nonetheless, it seems

1 necessary to respond to the Banks’ hysterical arguments that they need injunctive relief now  
2 because, if a resolution of necessity were adopted, it would be too late.

3       A. The Banks’ argue that, if a resolution of necessity were adopted, the property at issue  
4 would be taken and destroyed without adequate judicial review. The argument is absurd because  
5 the adoption of a resolution of necessity does not result in the taking of property. A resolution of  
6 necessity does not regulate primary conduct at all. A resolution of necessity just provides the  
7 necessary legislative predicate that permits a public agency to file a subsequent eminent domain  
8 lawsuit. Only a court order can compel the transfer of property. The property owner is named as a  
9 defendant in an eminent domain lawsuit and gets to litigate every issue regarding the legality of the  
10 taking before a court order issues. *See* Defs. Opp. to PI at 4 (Doc. 32) (summary of Eminent  
11 Domain Law). Thus, it is not possible that the taking and destruction of property could occur  
12 without judicial review because an eminent domain lawsuit is a judicial process.

13       Nor is it true that there would be no opportunity for *federal* court review if the Banks  
14 contend that state court procedures are inadequate. Opp. at ii, 8-9. Even if one imagines the  
15 Banks’ “nightmare scenario” – the City Council gives (at least 15 days) notice to property owners  
16 of a public hearing on a proposed resolution of necessity, holds a public hearing, and adopts a  
17 resolution of necessity by supermajority vote, and the City promptly files an eminent domain  
18 lawsuit in state court – it still would be at least *several months* before the state court issued an order  
19 requiring the transfer of property. Even the procedure for “possession prior to judgment” – the so-  
20 called quick-take procedure that the Banks egregiously misrepresent – requires a motion with at  
21 least 60 days advance notice to the property owner. Cal. Code Civ. Proc. §1255.410(b); *see also*  
22 Defs. Opp. to PI at 4 (Doc. 32).

23       As such, there would be ample time *after* adoption of a hypothetical resolution of necessity  
24 for the Banks to file suit in federal court and to seek injunctive relief before any state court order  
25 issued to require the transfer of property. The Banks could argue in that federal lawsuit that the  
26 state court procedures are inadequate.<sup>5</sup> If the federal courts decide to abstain – having concluded

27 \_\_\_\_\_  
28 <sup>5</sup> The Banks’ argument regarding the constitutionality of the California procedure for “possession  
prior to judgment” appears to be as follows: Although the California law requires the trial court  
(continued)

1 that the state courts provide an adequate (and, indeed, superior) forum for resolving all the Banks’  
2 arguments – the Banks will have had their federal court review.

3         What is particularly absurd about the Banks’ argument about the need for judicial review  
4 now is that there are many situations in which a proposed statute or ordinance *would* directly  
5 regulate primary conduct in a way that arguably violates the Constitution. For example, a proposed  
6 statute or ordinance might prohibit free speech or restrict abortions. Yet, *even in those cases*, the  
7 federal courts have no subject matter jurisdiction to entertain a lawsuit until the statute or ordinance  
8 actually passes. If there is no jurisdiction in those cases – in which the statute or ordinance would  
9 directly regulate primary conduct – there cannot be jurisdiction in this one.

10         B. The Banks also contend the Court must act now because the adoption of a resolution of  
11 necessity would affect the “value of [the Trust] certificates, traded in federally-regulated national  
12 securities markets.” Opp. at ii, 9. That argument is absurd because it proves too much. The  
13 introduction of a bill in Congress can affect stock prices. Public statements about the possible  
14 introduction of a bill in Congress can affect stock prices. Speculators are always speculating about  
15 the possible impact of possible future government action on their investments. The federal courts  
16 do not have jurisdiction to issue advisory rulings in these circumstances to assist investors.

17         The salient point here is that a resolution of necessity would not take property. Only a  
18 subsequent court order in a subsequent eminent domain lawsuit could take property, and there  
19 would be ample opportunity for judicial review – in state and federal court – before such an order  
20 issued. If the Banks are correct, moreover, that their legal claims are strong, then presumably  
21 speculators already have factored this into their calculations.

---

22  
23 (continued)  
24 to balance the hardship caused to the property owner if possession is granted against the hardship  
25 caused to the public entity if it is denied, *see* Defs. Opp. to PI at 4 (Doc. 32), the Banks will suffer  
26 irreparable harm because the state trial court would improperly balance the hardships, and the  
27 state appellate courts and U.S. Supreme Court would not intervene. Moreover, the state courts  
28 also would not be competent to consider the Banks’ challenge to the constitutionality of this  
procedure as applied to them. While these arguments appear to be foreclosed by precedent, *see*  
*id.* at 13, they are not ripe now, because no resolution of necessity has been adopted, so no  
eminent domain lawsuit can be filed, so no motion for “possession prior to judgment” can be  
made.

1 **IV. This Case is a SLAPP Suit**

2 The term Strategic Lawsuit Against Public Participation or “SLAPP” suit is used to  
3 describe lawsuits that are filed during the consideration of public issues not because the lawsuit has  
4 any likelihood of success but because a well-funded plaintiff can achieve its goals by distracting,  
5 intimidating, and wasting the resources of its adversary. *See generally U.S. ex rel. Newsham v.*  
6 *Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970-72 (9th Cir. 1999). This case qualifies as  
7 a SLAPP suit. The Banks’ argument for subject matter jurisdiction is objectively frivolous. The  
8 Banks are unable to offer any authority for the proposition that the federal courts have jurisdiction  
9 to review, or to enjoin the implementation of, a legislative decision that has not been made. *See*  
10 *Fed. R. Civ. P. 11(b)(1), (2)*. The Court should dismiss the case promptly so it does not further  
11 distract City staff or interfere with public debate about an important issue.

12 **CONCLUSION**

13 The Court should dismiss this case for lack of jurisdiction.

14 Dated: September 4, 2013

Respectfully submitted,

15 /s/ Scott A. Kronland  
16 Scott A. Kronland

17 Stephen P. Berzon  
18 Scott A. Kronland  
19 Jonathan Weissglass  
Eric P. Brown  
Altshuler Berzon LLP

20 Attorneys for Defendants  
21 *City of Richmond* and  
22 *Mortgage Resolution Partners LLC*

23 Bruce Reed Goodmiller  
24 Carlos A. Privat  
City of Richmond

25 Attorneys for Defendant *City of Richmond*

26 William A. Falik

27 Attorney for Defendant  
28 *Mortgage Resolution Partners LLC*