May 13, 2014

VIA EMAIL TO: william.breetz@law.uconn.edu

Mr. William Breetz, Chairman
Uniform Law Commission Drafting Committee on a Home Foreclosure Procedures Act
Connecticut Urban Legal Initiative, Inc.
University of Connecticut School of Law
35 Elizabeth St, Hartford, CT 06105

RE: Draft Home Foreclosure Procedures Act
Section 106 - Application of Local Regulations

Chairman Breetz:

The undersigned national bankers association and six state bankers associations (the "Commenting Bankers Associations") appreciate the opportunity to comment on the intrastate legislative preemption aspect of the draft Home Foreclosure Procedures Act (HFPA). Additional information regarding these associations is included at the end of this letter at Attachment A.

The Commenting Bankers Associations appreciate the work of the HFPA Drafting Committee in undertaking the difficult task of drafting model state legislation that would bring uniformity to the residential mortgage loan foreclosure process. We recognize that state foreclosure laws vary greatly. A number of multi-state member banks may favor legislation that would standardize foreclosure processes across the country, however, that position is not unanimously held by member banks or state bankers associations. Thus, we, reserve comments on the HFPA drafting project and other sections of the draft act, and submit this joint comment letter specifically with regard to Section 106 of the draft act, Application of Local Regulations.

We support the HFPA Drafting Committee's efforts to include language in the draft HFPA that provides certainty that statutes passed by a legislature preempt municipal, county or other political subdivision ordinances or regulations addressing foreclosure practice. The Commenting Bankers Associations urge the HFPA Drafting Committee to provide the strongest protections against political subdivisions regulating residential mortgage foreclosure. We write to express the concerns of our members that it is detrimental to banking if cities and towns are permitted to circumvent preemption and write their own foreclosure regulations.

Allowing political subdivisions to write regulations that deviate from, contradict or even replicate what has already been said by the state Legislature is troublesome, because banks and secondary mortgage market interests would still need to conduct a complete due diligence of those local ordinances or regulations to ensure strict compliance with the state act and determine if any new or additional procedural requirements must be followed. Moreover, allowing cities and towns to write regulations that layer additional regulations in the area of residential mortgage

foreclosure would defeat the purpose to create a uniform law in this area and would be unduly burdensome to banks.

Preemption at the federal or the intrastate level can arise from three sources. Per se preemption occurs when a legislature acts to bar particular exercises of delegated or general political subdivision authority and reserves that authority to the legislature alone. Conflict preemption occurs where two acts or regulations are in material conflict and one must give way to the other. Field preemption occurs when regulation of a substantive area of the law by one entity entirely occupies that field of the law, leaving no room for any other entity to act or regulate in that area. As to mortgage foreclosure practice, there simply is no reasonable room for political subdivisions to take on the task of creating foreclosure regulation or enforcing it. Political subdivision attempts to regulate mortgage foreclosure practice must give way to the legislatures of their states, all of which have long had primary authority to regulate foreclosure.

Our Participation in HFPA Project

The Commenting Bankers Associations, primarily through efforts led by the American Bankers Association (the "ABA"), have actively engaged in monitoring the work of the HFPA Drafting Committee. ABA representatives correspond with you and with the American Bar Association Advisor Barry Nekritz frequently by telephone and by email. The ABA hosts a bank lawyer and government relations staff task force on the HFPA Project that has grown to 54 participants -- 35 bank attorneys and 17 state bankers association professionals. The state bankers associations joining in this letter have participated in some degree on that task force. The work of the task force also benefits from the expertise of ABA colleagues from three different departments. The task force has convened eight conference calls in the last 13 months. You and Mr. Nekritz had an opportunity to address the task force directly in June 2013.

On October 10, 2013, the ABA was delighted to host a 90-minute panel session for you, Mr. Nekritz and FHFA's General Counsel Alfred Pollard to directly address more than 125 government relations and lobbying professionals from our member banks and state bankers associations. In early January 2014, the ABA facilitated a conference call between HFPA Drafting Committee members and representatives from three large member banks. The Commenting Bankers Associations, and the ABA in particular, have and continue to encourage member banks and other state bankers association to participate in monitoring the HFPA drafting project, attending meetings and commenting on HFPA discussion drafts.

State Preemption of Political Subdivision Actions

Importantly, the notion of state legislatures preempting municipalities' attempts at regulating mortgage-related practices is not new or novel. Several states in recent years have embraced clear intrastate preemption statutes. Pennsylvania precluded the ability of political subdivisions to act relative to banks' financial or lending activities when the Pennsylvania Legislature adopted its anti-predatory lending statute. Section 6152 of the Pennsylvania Banking

Code and Section 506 of the Pennsylvania Department of Banking and Securities Code are included as Attachment B to this letter.

In 2002, Florida enacted a general preemption of municipal lending regulation in Florida's Fair Lending Act. The General Rule included in Section 494.00797 reads, "[a]ll counties and municipalities of this state are prohibited from enacting and enforcing ordinances, resolutions, and rules regulating financial or lending activities, including ordinances, resolutions, and rules disqualifying persons from doing business with a city, county, or municipality based upon lending interest rates or imposing reporting requirements or any other obligations upon persons regarding financial services or lending practices …" In April 2014, similar language was amended into Florida Senate Bill 1012, Section 2, which would amend the Florida Banking Code, F.S. Section 655.017, to preempt local regulation. The bill passed both houses, and the Governor is expected to sign the bill into law. Florida Statute 494.00797 and 2014 Senate Bill 1012, Section 2, are included as Attachment C.

In 2013, Missouri and Wisconsin both enacted statutes that preempt local law in the area of foreclosure specifically. Missouri House Bills 446 and 211 added Section 443.454 to Missouri Revised Statutes in order to reserve the enforcement and regulation of servicing of real estate loans secured by mortgage or deed of trust or other security instrument to the Legislature. The bills also prohibited all local law or ordinances with respect to enforcement, rights and obligations related to any loan agreement, security instruments, mortgages or deeds of trust. The legislation was largely in response to local municipal mandatory pre-foreclosure mediation ordinances passed in St. Louis County in the fall of 2012 and the City of St. Louis in the spring of 2013. The Missouri Bankers Association and representative banks also filed separate legal actions against each ordinance, and the litigation resulted in the ordinances being preempted and nullified. The new Missouri statute expressly prohibits local ordinances like those enacted by St. Louis County and the City of St. Louis and became effective August 28, 2013. Section 443.454 RSMo is included as Attachment D.

Wisconsin's new preemption provision was part of its budget bill passed last year. Section 1896s of the 2013 budget bill created a new code Sec. 138.052(13) under the Residential Mortgage Loans subtitle of the Wisconsin Statutes. Sec. 138.052(13) prohibits a city, village, town, or county, or any other local governmental unit from enacting an ordinance or adopting a resolution that taxes, delays, affects, or regulates a bank, credit union, savings bank, savings and loan association, mortgage banker, or any other lender that receives an application for, services, or enforces the terms of a loan. The new statute, however, does not apply to a "1st class city" as defined under Wisconsin law. Wisconsin Statutes Section 138.052(13) is included as Attachment E.

Most recently, Nebraska enacted LB 788, which was signed by the Governor on April 22, 2014. The slip law copy is included as Attachment F. The law prohibits local ordinances or resolutions directly or indirectly from adding to, changing, or interfering with any rights or obligations of, or imposing or requiring payment of fees or taxes of any kind relating to or delaying or affecting the enforcement and servicing of any real estate loan agreement or any mortgage, deed of trust, or other security instrument by which the loan is secured.

The Commenting Bankers Associations' Position

Our member banks and financial institutions are obligated to comply with numerous and exacting state and federal laws, rules and regulations, and case law that relates to mortgage and foreclosure practices. State codes have long regulated and controlled foreclosure in every state. In addition, the federal Consumer Financial Protection Agency's Mortgage Servicing Final Rules, which were issued in 2013 amending regulations authorized by the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) already provide significant governance in this area. In addition, the five leading bank mortgage servicers are bound to the terms of the National Mortgage Settlement, which included mandatory nationwide reforms to mortgage servicing practices. The National Mortgage Settlement was finalized in April, 2012 among 49 states and the District of Columbia, the federal government, and five banks and mortgage servicers (Ally/GMAC, Bank of America, Citi, JPMorgan Chase and Wells Fargo). Permitting political subdivisions to lay on more regulations or limitations would not enhance the standardization of practice and would further confuse the legal landscape.

On April 16, 2014, the ABA submitted an amicus brief in *Easthampton Savings Bank, et al v. City of Springfield*, Massachusetts Supreme Judicial Court, Case No. SJC-11612. The case involves two municipal ordinances passed by the City of Springfield in 2011 that purport to regulate mortgage foreclosures. The ABA frequently appears in litigation, either as a party or amicus curiae, in order to protect and promote the interests of the banking industry and its members. The ABA's amicus brief contends that the local ordinances are preempted by existing state legislation. A copy of ABA's amicus brief is included as Attachment G. The brief concludes:

> ABA members are already subject to the numerous and varied state foreclosure laws throughout the United States. Local foreclosure regulations, such as the proposed Springfield ordinances, would further complicate the foreclosure regulatory framework under which banks must operate.
>
> The Legislature promulgated the foreclosure statutes with the intent of overseeing the entire Commonwealth. Allowing the City's Foreclosure and Mediation Ordinances to stand would contradict the Legislature's intent and be unduly burdensome to banks. It would be detrimental to banking if cities and towns are permitted to circumvent preemption and write their own foreclosure regulations. Therefore, the ABA respectfully requests that the Court inform the First Circuit that Massachusetts law preempts the City's Foreclosure and Mediation Ordinances and that they are invalid ab initio.

The amicus brief is the ABA's most recent and public position on this critical issue of taking political subdivisions out of the business of regulating foreclosure.

The Massachusetts Bankers Association also submitted an amicus brief in *Easthampton Savings Bank, et al v. City of Springfield* while the case was before the U.S. Court of Appeals for the First Circuit. The brief argued that the Massachusetts Legislature has enacted comprehensive legislation and occupies the field of regulation of the foreclosure process and its effects to the exclusion of all local powers. The Massachusetts Bankers Association's amicus brief was filed on June 4, 2013, and is included as Attachment H.

The Commenting Bankers Associations urge the HFPA Drafting Committee to include a strong and unequivocal preemption provision that precludes political subdivisions from acting with respect to foreclosure. Foreclosure regulation should remain a matter of law passed by the legislatures and applicable federal regulations.

Thank you for this opportunity to outline our point of view on what we believe to be the critical importance of a strong statement of intrastate preemption to the HFPA drafting project. If you have any questions or would like any clarification concerning the matters addressed in this letter, do not hesitate to contact one of the undersigned representatives of the bankers associations.

American Bankers Association

Mathew Street
Deputy General Counsel
mstreet@aba.com
202-663-5031

Megan C. Michiels
Senior Counsel
mmichiels@aba.com
202-663-5030

Florida Bankers Association

Anthony DiMarco, Esq.
Executive Vice President of
Government Relations
adimarco@floridabankers.com
850-224-2265

Illinois Bankers Association

Bruce Jay Baker
Executive Vice President &
General Counsel
bbaker@ilbanker.com
312-347-3400 (Chicago)

Maine Bankers Association

Chris Pinkham
President
cpinkham@mainebankers.com
207-791-8401

Massachusetts Bankers Association

Daniel J. Forte
President
dforte@massbankers.org
617-523-7595

Missouri Bankers Association

Keith Thornburg
Vice President & General Counsel
kthornburg@mobankers.com
573-636-8151

Pennsylvania Bankers Association

Louise Rynd
General Counsel
lrynd@pabanker.com
717-255-6900

ATTACHMENT A

Information Regarding the Participating Organizations

American Bankers Association

The American Bankers Association (ABA) is the principal national trade association of America's $14 trillion banking industry. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional, and money center banks. ABA also represents savings associations, trust companies and savings banks. ABA members hold an overwhelming majority—approximately 95%—of the domestic assets of the U.S. banking industry.

Florida Bankers Association

The Florida Bankers Association (FBA) was established in 1888 to advocate on behalf of Florida banks and promote the banking industry in the state. Composed of more than 230 institutions, the FBA proudly represents banks of all sizes and focuses. From the smallest community bank in the state to the largest national bank in the country, the FBA strives to provide each and every member the opportunity to thrive in today's economic environment.

Illinois Bankers Association

The Illinois Bankers Association was founded in 1891, and brings together state and national banks of all sizes in Illinois. Collectively, the IBA represents nearly 90 percent of the assets of the Illinois banking industry, which employs more than 100,000 men and women in more than 5,000 offices across the state.

Maine Bankers Association

The Maine Bankers Association (MBA) is the sole trade association for Maine's $28 billion banking industry. MBA provides Maine banks with a forum to exchange valuable industry information; gain maximum representation in state and federal legislative and regulatory matters; received training and staff certification; and wield greater collective purchasing power.

Massachusetts Bankers Association

The Massachusetts Bankers Association was founded in 1905 and represents approximately 175 commercial, savings and co-operative banks and savings and loan institutions in Massachusetts and elsewhere in New England.

Missouri Bankers Association

The Missouri Bankers Association was founded in August of 1891, and our membership includes commercial banks and savings and loan associations. The MBA represents over 2,000 banking locations and over 30,000 bank employees in the state of Missouri. The MBA is the principal advocate for the Missouri banking industry and is dedicated to providing products and services that bring benefits to its members.

Pennsylvania Bankers Association

The Pennsylvania Bankers Association has been representing the banking industry across the Keystone State at the state and federal level since 1895. The PBA represents over 150 financial institutions in the Commonwealth of Pennsylvania, and is the voice for the banking industry in Pennsylvania. PBA represents the industry before the Pennsylvania Legislature, Governor's Office and various state departments and agencies, as well as on the national level before Congress and the federal regulatory agencies.

ATTACHMENT B

Pennsylvania Statutes Annotated: Section 6152 of the PA Banking Code and Section 506 of the Pennsylvania Dept. of Banking and Securities Code

§ 6152. Relationship to other laws.

The following apply:

(1) A political subdivision may not enact or enforce any ordinance, resolution or regulation pertaining to the financial or lending activities of a person that:

(i) is subject to the jurisdiction of the department, including activities subject to this chapter;

(ii) is subject to the jurisdiction or regulatory supervision of the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, the Federal Deposit Insurance Corporation, the Federal Trade Commission or the United States Department of Housing and Urban Development; or

(iii) originates, purchases, sells, assigns, securitizes or services any property interest or obligation created by a financial transaction or loan made, executed or originated by a person referred to in subparagraph (i) or (ii) or assists or facilitates such a transaction or loan.

(2) This section applies to any ordinance, resolution or regulation pertaining to financial or lending activity, including any ordinance, resolution or regulation:

(i) disqualifying a person from doing business with a political subdivision based upon financial or lending activity; or

(ii) imposing reporting requirements or any other obligations upon a person regarding financial or lending activity.

Section 506. Implementation of the Consumer Financial Protection Act of 2010.

A. This section applies to matters relating to institutions, credit unions, licensees, national banks, Federal savings associations, foreign financial institutions and other persons subject to the jurisdiction of the bureau doing business in this Commonwealth.

B. The Attorney General is authorized to initiate proceedings before courts of competent jurisdiction to enforce requirements of the Consumer Financial Protection Act or regulations adopted by the bureau to the extent authorized to do so by sections 1042(a) and 1047 of the Consumer Financial Protection Act (12 U.S.C. §§ 5552(a) and 25b(i)) except that with respect to institutions, credit unions, licensees, foreign financial institutions, national banks, Federal savings associations or their subsidiaries, the Attorney General may initiate proceedings only upon the request of, or with the approval of, the department. If the Attorney General refuses to bring a civil action at the request of the department, the Office of General Counsel may initiate the action on behalf of the Commonwealth.

C. The department is authorized to receive reports of examinations by the bureau as authorized under section 1022(c)(6)(C) of the Consumer Financial Protection Act (12 U.S.C. § 5512(c)(6)(C)) and to enter into agreements with the bureau regarding the coordination of examinations as authorized under section 1025(e)(2) of the Consumer Financial Protection Act (12 U.S.C. § 5515(e)(2)). The reports shall be subject to the requirements of section 302, except that the department may disclose, to the extent permitted by the bureau, the contents of the reports relating to allegations of criminal conduct to the Attorney General.

D. No agency of this Commonwealth, nor political subdivision, may engage in the exercise of visitorial powers with respect to a national bank or Federal savings association, except in a manner consistent with Federal law, including section 1047 of the Consumer Financial Protection Act (12 U.S.C. § 25b(i)), and upon the request of, or as expressly and on a case-by-case basis, authorized by the Office of the Comptroller of the Currency.

E. The department, to the extent otherwise authorized by the laws of this Commonwealth, may engage in the exercise of visitorial powers with respect to institutions, credit unions, licensees, foreign financial institutions or their subsidiaries, or with respect to the subsidiaries of national banks or Federal savings associations.

F. Nothing in this section may prevent an agency of this Commonwealth, or political subdivision, from engaging in a civil investigation, administrative enforcement action, examination, information collection or any other administrative proceeding or commencing civil proceedings before a court of competent jurisdiction to determine compliance with or enforce a statute of this Commonwealth, a regulation or order of a Commonwealth agency, an ordinance or resolution of a political subdivision or a Federal law or regulation, to the extent authorized by Federal law, not relating to or incidental to the banking or financial activities, operations or condition of an institution, credit union, licensee, national bank, Federal savings association or foreign financial institution and not otherwise preempted by Federal law, but prior to doing so, the agency or political subdivision shall give notice and consult with the department. To the extent the department determines that such actions may affect the banking or financial activities, operations or condition, including safety and soundness, of any institution, credit union, licensee, national bank, Federal savings association, foreign financial institution or a subsidiary

of the foregoing; or interfere with the regulation of such entities by the department, Federal regulatory agencies or regulatory agencies of other states, the department shall have sole and exclusive jurisdiction to initiate or participate in administrative proceedings, or to request that the Attorney General initiate or participate in judicial proceedings, to enforce such laws or to determine that such proceedings are not in the public interest.

G. Powers and responsibilities granted to the department by this section may not be exercised by any other agency of the Commonwealth, or political subdivision, except upon the request of the department, or as expressly authorized by the department on a case-by-case basis.

H. Nothing in this section may limit or restrict the power of the Attorney General or law enforcement agencies of municipalities to commence criminal proceedings.

I. Consumer financial laws of this Commonwealth not preempted by Federal law pursuant to section 1044 or 1046 of the Consumer Financial Protection Act (12 U.S.C. §§ 256 and 1461) or other provision of Federal law, including statutes, regulations adopted by Commonwealth agencies, orders issued by Commonwealth agencies, ordinances or resolutions enacted by political subdivisions or orders issued by political subdivisions, shall apply to national banks, Federal savings associations and their subsidiaries, only to the extent those laws apply to State-chartered banks and savings associations and their subsidiaries.

J. Consumer financial laws of this Commonwealth applicable to the activities of foreign financial institutions and their subsidiaries, including statutes, regulations adopted by Commonwealth agencies, orders issued by Commonwealth agencies, ordinances or resolutions enacted by political subdivisions or orders issued by political subdivisions, shall apply to foreign financial institutions and their subsidiaries, only to the extent those laws apply to State-chartered banks and savings associations and their subsidiaries.

K. The following terms shall be construed in this section to have the following meanings, except in those instances where the context clearly indicates otherwise:
"Bureau." The Federal Bureau of Consumer Financial Protection.
"Consumer Financial Protection Act." Title X of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (Public Law 111-203, 12 U.S.C. § 5301 et seq.) or the Consumer Financial Protection Act of 2010.
"Foreign financial institution." A person licensed, registered or regulated by a state other than the Commonwealth or a foreign country that provides financial services to or for the benefit of persons in this Commonwealth.
"State." Any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa or the United States Virgin Islands or any federally recognized Indian tribe as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1994 (Public Law 103-454, 25 U.S.C. § 479a-1(a)).
"Visitorial powers." The conduct of a civil investigation, administrative enforcement action, examination or any other administrative proceeding, or a request for a report or information, to determine compliance with or enforce a statute of this Commonwealth, a regulation or order of a Commonwealth agency, an ordinance or resolution of a political subdivision or a Federal law or

regulation relating or incidental to the banking or the financial activities, operation or condition of an institution, credit union, licensee, national bank, Federal savings association or foreign financial institution.

ARTICLE VI
TAKING OF POSSESSION BY SECRETARY AS RECEIVER AND SURRENDER THEREOF

Section 601. Taking Over Possession by Secretary as Receiver.

Whenever the department takes possession of the business and property of an institution, including a foreign bank office licensed by the department, the secretary shall, by operation of law, simultaneously take over such possession from the department and become receiver of such institution, subject to the provisions of this act. His official title, when thus in possession of the business and property of an institution, shall be receiver of such institution. The secretary may act as receiver without bond.

Section 602. Posting of Notice of Possession.

The secretary, upon taking possession of the business and property of an institution as receiver, shall post notice of such fact on the front door of the institution.

Section 603. Notice to Insurance Commissioner.

Whenever the secretary shall become receiver of an institution which engages in the business of insuring titles or guaranteeing bonds secured by mortgages, or which transacts any other business which is subject to the supervision of the Insurance Department, he shall inform the Insurance Department that he has taken possession of the business and property of such institution.

Section 604. Certificates of Possession; Filing; Title To and Liens Against Real Property; Supplements to Certificate of Possession to Surrender or Transfer Receivership.

A. The secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of the department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the secretary, pursuant to the provisions of this act, appoints to take charge of the affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the secretary does not appoint a deputy receiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an additional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession.

B. The secretary shall file the original certificate of possession and the original of any supplement thereto in his office in Harrisburg, and the duplicate certificate of possession and the duplicate of any supplement thereto in the office of the prothonotary. The certificate of possession filed in the prothonotary's office, and any supplement thereto, shall be listed in the judgment index in the name of the institution as defendant and of the secretary as plaintiff.

ATTACHMENT C

Florida Statute 494.00797 and 2014 Senate Bill 1012, Section 2

The 2013 Florida Statutes

494.00797 General rule.—All counties and municipalities of this state are prohibited from enacting and enforcing ordinances, resolutions, and rules regulating financial or lending activities, including ordinances, resolutions, and rules disqualifying persons from doing business with a city, county, or municipality based upon lending interest rates or imposing reporting requirements or any other obligations upon persons regarding financial services or lending practices of persons or entities, and any subsidiaries or affiliates thereof, who:

(1) Are subject to the jurisdiction of the office, including for activities subject to this chapter, except entities licensed under s. 537.004;

(2) Are subject to the jurisdiction of the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the National Credit Union Administration, the Federal Deposit Insurance Corporation, the Federal Trade Commission, or the United States Department of Housing and Urban Development;

(3) Originate, purchase, sell, assign, secure, or service property interests or obligations created by financial transactions or loans made, executed, or originated by persons referred to in subsection (1) or subsection (2) to assist or facilitate such transactions;

(4) Are chartered by the United States Congress to engage in secondary market mortgage transactions; or

(5) Are created by the Florida Housing Finance Corporation.

Proof of noncompliance with this act can be used by a city, county, or municipality of this state to disqualify a vendor or contractor from doing business with a city, county, or municipality of this state.

History.—s. 9, ch. 2002-57; s. 549, ch. 2003-261.

c. Separate persons borrow from a financial institution to acquire a business enterprise such that those borrowers will own more than 50 percent of the voting securities or voting interests of the enterprise, in which case a common enterprise is deemed to exist between the borrowers for purposes of combining the acquisition loans; or

d. The office determines, based upon an evaluation of the facts and circumstances of particular transactions, that a common enterprise exists.

Section 2. Section 655.017, Florida Statutes, is created to read:

655.017 Local regulation preempted.—

(1) A county or municipality may not enact or enforce a resolution, ordinance, or rule that regulates financial or lending activities, including a resolution, ordinance, or rule that disqualifies persons from doing business with a county or municipality based on lending interest rates, or that imposes reporting requirements or other obligations regarding the financial services or lending practices of persons or entities, and subsidiaries or affiliates thereof which:

(a) Are subject to the jurisdiction of the office pursuant to the financial institutions codes;

(b) Are subject to the jurisdiction of the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the National Credit Union Administration, the Federal Deposit Insurance Corporation, the Federal Trade Commission, or the United States Department of Housing and Urban Development;

(c) Originate, purchase, sell, assign, secure, or service

property interests or obligations created by financial transactions or loans made, executed, or originated by persons referred to in paragraph (a) or paragraph (b) which assist or facilitate such transactions;

(d) Are chartered by the United States Congress to engage in secondary market mortgage transactions; or

(e) Are acting on behalf of the Florida Housing Finance Corporation.

(2) This section does not prevent a county or municipality from engaging in a civil investigation, initiating an administrative proceeding, or commencing a civil proceeding to determine compliance with or to enforce a state law, a rule or order of a state agency, or an ordinance or rule of a county or municipality which is not preempted pursuant to this section.

(3) Notwithstanding subsection (2), a financial institution shall notify the office of any civil investigation or administrative or civil proceeding initiated by a county or municipality in accordance with s. 655.948. The office shall have sole and exclusive jurisdiction to initiate appropriate administrative or civil proceedings to enforce such laws, rules, or orders if the office determines that such investigation or proceeding:

(a) Is based on a local resolution, ordinance, or rule that is preempted pursuant to subsection (1); or

(b) Directly and specifically regulates the manner, content, or terms and conditions of a financial transaction or account related thereto, that a financial institution is authorized to engage in, or prevents, significantly interferes with, or alters the exercise of powers granted to a financial

institution under the financial institutions codes or any applicable federal law or regulation.

(4) This section does not limit or restrict the powers of the Department of Legal Affairs or the law enforcement agencies of this state to commence a civil or criminal action, as applicable.

Section 3. Section 655.0322, Florida Statutes, is amended to read:

655.0322 Prohibited acts and practices; criminal penalties.—

(1) As used in this section, the term "financial institution" means a financial institution as defined in s. 655.005 ~~s. 655.50 which includes a state trust company, state or national bank, state or federal association, state or federal savings bank, state or federal credit union, Edge Act or agreement corporation, international bank agency, international branch, representative office or administrative office~~ or other business entity as defined by the commission by rule, whether organized under the laws of this state, the laws of another state, or the laws of the United States, which ~~institution~~ is located in this state.

(2) A ~~It is unlawful for any~~ financial institution-affiliated party may not ~~to~~ ask for, or willfully and knowingly receive or consent to receive for himself or herself or any related interest, a ~~any~~ commission, emolument, gratuity, money, property, or thing of value for:

(a) Procuring, or endeavoring to procure, for any person a loan or extension of credit from such financial institution, affiliate, subsidiary, or service corporation; or

ATTACHMENT D

Missouri Revised Statutes Section 443.454

Missouri Revised Statutes

Chapter 443
Mortgages, Deeds of Trust and Mortgage Brokers
Section *443.454*

August 28, 2013

Enforcement and servicing of real estate loans, federal and state law preemption.

443.454. The enforcement and servicing of real estate loans secured by mortgage or deed of trust or other security instrument shall be pursuant only to state and federal law and no local law or ordinance may add to, change, delay enforcement, or interfere with any loan agreement, security instrument, mortgage or deed of trust. No local law or ordinance may add, change, or delay any rights or obligations or impose fees or taxes of any kind or require payment of fees to any government contractor related to any real estate loan agreement, mortgage or deed of trust, other security instrument, or affect the enforcement and servicing thereof.

(L. 2013 H.B. 446 & 211)

ATTACHMENT E

Wisconsin Statutes Annotated Section 138.052

3. Made within 2 years after November 1, 1981, pursuant to a loan commitment made on or after April 6, 1980 and prior to November 1, 1981.

(2) A loan may be prepaid by the borrower at any time in whole or in part without premium or penalty. Upon prepayment of a loan in full by cash, renewal or refinancing, the borrower is entitled to a refund of unearned interest charged determined as follows:

(a) On a loan which is repayable in substantially equal, successive installments at approximately equal intervals of time and the face amount of which includes predetermined interest charges, the amount of such refund shall be as great a proportion of the total interest charged as the sum of the balances scheduled to be outstanding during the full installment periods commencing with the installment date nearest the date of prepayment bears to the sum of the balances scheduled to be outstanding for all installment periods of the loan.

(b) On any other loan, the amount of the refund shall not be less than the difference between the interest charged and interest, at the rate contracted for, computed upon the unpaid principal balance of the loan from time to time outstanding prior to prepayment in full.

(3) For purposes of computing a refund under sub. (2), interest does not include:

(a) Identifiable and separately itemized charges for services incident to the loan if they are bona fide and paid to 3rd parties unrelated to the lender;

(b) Fees, discounts or other sums actually imposed by government national mortgage association, federal national mortgage association, federal home loan mortgage corporation or any other governmentally sponsored or private secondary mortgage market purchaser of a loan from the original lender; and

(c) A loan administration fee charged by a lender, not to exceed 2% of the principal amount of any construction loan and one percent of the principal amount of any other loan.

(4) For the purpose of calculating the rate of interest on a loan scheduled to be paid in installments under sub. (2), the parties may agree that any installment paid within 30 days prior to or after the scheduled due date will be considered to have been paid on the due date.

(5) A bank, credit union or savings bank which originates a loan and which requires an escrow to assure the payment of taxes or insurance shall pay interest on the outstanding principal balance of the escrow of not less than 5.25% per year. This subsection applies to any refinancing, renewal, extension or modification of the loan on or after November 1, 1981.

(6) Delinquency charges on a loan shall not exceed an amount determined by application of the contract rate to the unpaid amount, including interest accrued and unpaid, until paid or maturity of the obligation, whether by acceleration or otherwise, whichever first occurs. Interest imposed after maturity may not exceed the contract rate applied to the amount due on the date of maturity.

(7) This section does not apply to a loan insured, or committed to be insured, or secured by mortgage or trust deed insured by the U.S. secretary of housing and urban development, insured, guaranteed or committed to be insured or guaranteed under 38 USC 1801 to 1827 or insured or committed to be insured under 7 USC 1921 to 1995.

(8) The contract rate is not subject to rate limitations imposed under this chapter or ss. 218.0101 to 218.0163 or under s. 422.201.

History: 1979 c. 168; 1981 c. 45; 1991 a. 221; 1999 a. 31.

138.052 Residential mortgage loans. (1) In this section:

(a) "Contract rate" means the rate contracted to be paid from time to time on the principal of a loan.

(b) "Loan" means a loan secured by a first lien real estate mortgage on, or an equivalent security interest in, a one−family to 4−family dwelling which the borrower uses as his or her principal place of residence and which is made, refinanced, renewed, extended or modified on or after November 1, 1981, but does not include a manufactured home transaction as defined in s. 138.056 (1) (bg).

(c) "Loan administration" means a lender's processing of a loan and includes review, underwriting and evaluation of the loan application, document processing and preparation and administration of the loan closing, but does not include appraisals, inspections, surveys, credit reports or other activities incidental to loan origination and normally taking place outside the office of the lender or performed by 3rd persons.

(d) "Person related to" has the meaning given under s. 421.301 (32) and (33).

(2) (a) 1. A loan may be prepaid by the borrower at any time in whole or in part.

2. Except as provided in s. 428.207, the parties may agree that if a prepayment is made within 5 years of the date of the loan, then the lender shall receive an amount not exceeding 60 days' interest at the contract rate on the amount by which the aggregate principal prepayments for a 12−month period exceeds 20% of the original amount of the loan.

3. If a prepayment is made 5 or more years from the date the loan is made, no premium or penalty may be received by the lender. This subdivision applies notwithstanding any refinancing, renewal, extension or modification of the loan.

(b) Upon prepayment of a loan in full by cash, renewal or refinancing, the borrower is entitled to a refund of unearned interest paid. Unearned interest is that portion of any prepaid charge, excluding amounts permitted under sub. (3), multiplied by the number of unexpired payment periods as of the date of prepayment and divided by the total number of payment periods, plus, at the option of the lender, either:

1. The portion of interest which is allocable to all unexpired payment periods as scheduled. Except as otherwise agreed by the parties under sub. (4), a payment period is unexpired if prepayment is made within 15 days after the payment's due date. The unearned interest is the interest which, assuming all payments are made as scheduled, would be earned for each unexpired payment period by applying to unpaid balances of principal, according to the actuarial method, the contract rate on the date of prepayment. The creditor may decrease the annual interest rate to the next multiple of 0.25%.

2. The total interest charge less all prepaid interest charges and the amount determined by applying the contract rate, according to the actuarial method, to the unpaid balances for the actual time those balances were unpaid up to the date of prepayment.

(3) For purposes of computing a refund under sub. (2) (b), interest does not include any of the following:

(a) Identifiable and separately itemized charges for services incident to the loan if they are bona fide and paid to 3rd parties.

(b) Fees, discounts or other sums actually imposed by the government national mortgage association, the federal national mortgage association, the federal home loan mortgage corporation or other governmentally sponsored secondary mortgage market purchaser of the loan or any private secondary mortgage market purchaser of the loan who is not a person related to the original lender.

(c) A loan administration fee charged by a lender, including fees paid to 3rd parties for loan administration services, not exceeding 2% of the principal amount of any construction loan and 2% of the principal amount of any other loan.

(d) The amount of any prepayment charge authorized under sub. (2) (a) 2. and received.

(e) Loan commitment fees.

(f) Amounts paid to the lender by any person other than the borrower.

(4) For the purpose of calculating the rate of interest under sub. (2) (b), the parties may agree that any installment paid within 30 days prior to or after the scheduled due date is paid on the due date.

(5) (a) Except as provided in pars. (am) and (b), a bank, credit union, savings bank, savings and loan association or mortgage banker which originates a loan after January 31, 1983, and before January 1, 1994, and which requires an escrow to assure the payment of taxes or insurance shall pay interest on the outstanding principal balance of the escrow of not less than 5.25% per year, unless the escrow funds are held by a 3rd party in a noninterest−bearing account.

(am) 1. Except as provided in par. (b) and unless the escrow funds are held by a 3rd party in a noninterest−bearing account, a bank, credit union, savings bank, savings and loan association or mortgage banker which originates a loan on or after January 1, 1994, or a loan subject to subd. 3. and which requires an escrow to assure the payment of taxes or insurance shall pay interest on the outstanding principal balance of the escrow at the variable interest rate established under subd. 2.

2. a. Annually, the division of banking for banks, savings and loan associations, and savings banks, and the office of credit unions for credit unions, shall determine the interest rate that is the average of the interest rates paid, rounded to the nearest one−hundredth of a percent, on regular passbook deposit accounts by institutions under the division's or office's jurisdiction at the close of the last quarterly reporting period that ended at least 30 days before the determination is made.

b. Within 5 days after the date on which the determination is made, the division of banking shall calculate the average, rounded to the nearest one−hundredth of a percent, of the rates determined by the division of banking and the office of credit unions and report that interest rate to the legislative reference bureau within 5 days after the date on which the determination is made.

c. The legislative reference bureau shall publish the average rate in the next publication of the Wisconsin administrative register. The published interest rate shall take effect on the first day of the first month following its publication and shall be the interest rate used to calculate interest on escrow accounts that are subject to this subdivision until the next year's interest rate is published under this subd. 2. c.

3. The interest rate published under subd. 2. c. also applies to loans originated after January 31, 1983, and before January 1, 1994, if an interest rate is not specified in the loan agreement.

(b) The parties may agree to waive payment of all or part of the interest required under par. (a) or (am) if more than 75% of the lender's interest in the loan is sold to a 3rd party who is not a person related to the lender and the escrow funds are held by the 3rd party.

(5m) (a) In this subsection, "escrow agent" means a person who receives escrow payments on behalf of itself or another person.

(b) 1. Except as provided in par. (e), if an escrow is required to assure the payment of property taxes, a bank, credit union, savings bank, savings and loan association or mortgage banker which originates a loan on or after July 1, 1988, shall, before the loan closing, provide the borrower with a written notice clearly stating that the borrower may require the escrow agent to make payments in any manner specified in subd. 3. from the amount escrowed to pay property taxes and the responsibilities of the borrower and escrow agent as provided in subds. 4. and 5.

2. Except as provided in par. (e), if an escrow is required to assure the payment of property taxes for a loan originated before July 1, 1988, the escrow agent shall send, by November 15, 1988, written notice to the borrower clearly stating that the borrower may require the escrow agent to make payments in any manner specified in subd. 3. from the amount escrowed to pay property taxes and the responsibilities of the borrower and escrow agent as provided in subds. 4. and 5.

3. Except as provided in par. (e), a borrower may require an escrow agent who receives escrow payments to assure the payment of the borrower's property taxes to do any of the following, if the borrower notifies the escrow agent as provided in subd. 4. and if the borrower is current in his or her loan payments:

a. Except as provided in subd. 3m., by December 20, send to the borrower a check in the amount of the funds held in escrow for the payment of property taxes, made payable to the borrower and the town, city or village treasurer authorized to collect the tax.

b. Pay the property taxes by December 31, if the escrow agent has received a tax statement for that property by December 20.

c. Pay the property taxes when due.

3m. In its sole discretion, an escrow agent may send a check under subd. 3. a. that is made payable only to the borrower.

4. To require the escrow agent to make payments in any of the manners specified in subd. 3., the borrower shall send, by November 1, written notice to the escrow agent specifying the manner, from the 3 choices under subd. 3., that the borrower wants the escrow agent to make payments. Except as provided in subd. 5. b., once notified, the escrow agent shall annually make payments in that manner unless the borrower is not current in his or her loan payments or unless otherwise notified in writing by the borrower by November 1.

5. a. If the borrower chooses to receive payments as provided in subd. 3. a. or receives payment under subd. 3m., the borrower shall annually, by March 31, send to the person to whom the borrower makes his or her loan payments a copy of the receipt for paid property taxes.

b. If the borrower fails to comply with subd. 5. a., the borrower loses the option of receiving payments that year in the manner specified in subd. 3. a. During the next year, the borrower may again receive payments under subd. 3. a. if the borrower renotifies the escrow agent by sending written notice to the escrow agent by November 1 of the next year and if the borrower is current in his or her loan payments.

6. If the borrower sends the check received under subd. 3. a. to the town, city or village treasurer after the county has assumed responsibility for collecting property taxes, the town, city or village treasurer shall accept the check and pay over to the county treasurer the amount of the check. If the amount of the check sent by the borrower to the town, city or village treasurer exceeds the amount of property taxes owed by the borrower, the town, city or village treasurer shall refund the excess amount to the borrower and, if the county has assumed responsibility for collecting property taxes, pay over to the county treasurer the remaining amount of the check.

(c) A borrower may establish an escrow account required for the payment of taxes and insurance in a financial institution, as defined in s. 710.05 (1) (c), of the borrower's choice if the escrow agent fails to comply with par. (b) 3., unless the lender or person to whom the loan is sold or released demonstrates that the financial institution is incapable of servicing the escrow account.

(d) If a borrower establishes an escrow account under par. (c), the borrower shall annually, by March 31, send to the person to whom the borrower makes his or her loan payments verification of the amounts which the borrower deposited in the escrow account during the previous 12 months and copies of receipts for taxes and insurance paid during the previous 12 months.

(e) Paragraphs (b) to (d) do not apply to an escrow required in connection with a loan to assure the payment of property taxes, whether the loan is originated before, on or after May 3, 1988, if it is the practice of the escrow agent to, by December 20, pay to the borrower the amount held in escrow for the payment of property taxes or to send the borrower a check in the amount of the funds held in escrow for the payment of property taxes, made payable to the borrower and the treasurer authorized to collect the tax. If the escrow agent in any year chooses not to make the payment by December 20 for any reason other than because the borrower is not current in his or her loan payments, the escrow agent shall

send, by October 15 of that year, written notice to the borrower clearly stating that the borrower may require the escrow agent to make payments in any manner specified in par. (b) 3. from the amount escrowed to pay property taxes and the responsibilities of the borrower and escrow agent as provided in par. (b) 4. and 5.

(6) The parties may agree to imposition of a late payment charge not exceeding 5% of the unpaid amount of any installment not paid on or before the 15th day after its due date. For purposes of this subsection, payments are applied first to current installments and then to delinquent installments. A delinquency charge may be imposed only once on any installment.

(7) Interest imposed on the amount due after acceleration or maturity of a loan may not exceed the contract rate.

(7e) A bank, credit union, savings bank, savings and loan association, mortgage banker or any other lender which receives an application for a loan after November 1, 1988, shall do all of the following:

(a) If an application receives adverse action, provide a written statement of the reasons for the action when the action is communicated to the applicant, except that delivery of a notice of adverse action conforming to the requirements of 15 USC 1601 to 1693r and the regulations adopted under that law satisfies the requirements of this paragraph.

(b) Before accepting an application or fee in connection with a loan, deliver to the potential loan applicant a written disclosure which clearly states all of the following:

1. Whether an application fee or other charge paid by an applicant in connection with a loan application is refundable in whole or in part if the application is denied or the loan is not closed.

2. Whether the terms of the agreement to make the loan, including but not limited to the interest rate and any fees charged in connection with the loan, are fixed through the date of the loan closing.

3. If the lender may change the terms of the agreement to make the loan if the loan is not closed on or before the date agreed upon, the specific terms which the lender may change.

(7m) (a) A lender shall notify the borrower as provided in par. (b) if on or after May 3, 1988, the payment, collection or other loan or escrow services related to the loan are sold or released.

(b) The notice required under par. (a) shall be in writing and shall include the name, address and telephone number of the party to whom servicing of the loan is sold or released. The lender shall deliver the notice to the borrower by mail or personal service within 15 working days after servicing of the loan is sold or released.

(7s) A person who receives loan or escrow payments on behalf of itself or another person shall do all of the following:

(a) Respond to a borrower's inquiry within 15 days after receiving the inquiry.

(b) Consider that a loan payment by check, or other negotiable or transferable instrument, is made on the date on which the check or instrument is physically received, except that the person may charge back an uncollected loan payment.

(8) This section does not apply to a loan insured, or committed to be insured, or secured by mortgage or trust deed insured by the U.S. secretary of housing and urban development, insured, guaranteed or committed to be insured or guaranteed under 38 USC 3701 to 3727 or insured or committed to be insured under 7 USC 1921 to 1995.

(9) Chapters 421 to 427 and subch. I of ch. 428 do not apply to the refinancing, modification, extension, renewal or assumption of a loan which had an original principal balance in excess of $25,000 if the unpaid principal balance of the loan has been reduced to $25,000 or less.

(10) This section does not apply to any of the following:

(a) A loan to a corporation or a limited liability company.

(b) A loan that is primarily for a business purpose or for an agricultural purpose, as defined in s. 421.301 (4).

(11) The contract rate is not subject to rate limitations imposed under this chapter or ss. 218.0101 to 218.0163 or under s. 422.201.

(12) (a) Any lender violating sub. (2) (b), (5), (5m) (b) 1., (6), (7), (7e), (7m) or (7s), or an escrow agent, as defined in sub. (5m) (a), violating sub. (5m) (b) 2., is liable to the borrower for $500 plus actual damages, costs and reasonable attorney fees.

(b) Paragraph (a) does not apply to an unintentional mistake corrected by the lender on demand.

(13) (a) In this subsection:

1. "Financial institution" means a bank, credit union, savings bank, savings and loan association, mortgage banker, or any other lender that receives an application for, services, or enforces the terms of a loan.

2. "Local governmental unit" means a city, village, town, or county, or any other local governmental unit, as defined in s. 66.0131 (1) (a), but does not include a 1st class city.

(b) A local governmental unit may not enact an ordinance or adopt a resolution that does any of the following:

1. Imposes any fee or tax on any financial institution in connection with servicing, or enforcing the terms of, a loan.

2. Delays any financial institution in enforcing the terms of a loan.

3. Affects any financial institution's servicing, or enforcement of the terms of, a loan.

4. Regulates any financial institution with respect to the lending practices or financial services of the financial institution as it relates to loans.

(c) If a local governmental unit has in effect on July 2, 2013, an ordinance or resolution that is inconsistent with par. (b), the ordinance or resolution does not apply and may not be enforced.

(d) Except in a 1st class city, the servicing of loans and enforcement of loan terms are matters of statewide concern for which uniformity in regulation is necessary and are subject only to applicable state and federal laws and not to local regulation.

History: 1981 c. 45, 100, 314; 1987 a. 359, 360, 403; 1989 a. 31, 56; 1991 a. 90, 92; 1993 a. 68, 112; 1995 a. 27, 336; 1999 a. 9, 31; 2003 a. 33, 257; 2007 a. 11, 20, 97; 2013 a. 20.

Federal law preemption of this section as applied to federally chartered savings institutions regulated by the federal home loan bank board is discussed. Wisconsin League of Financial Inst. v. Galecki, 707 F Supp. 401 (W.D. Wis. 1989).

138.053 Regulation of interest adjustment provisions.

(1) REQUIRED CONTRACT PROVISIONS. No contract between a borrower and a lender secured by a first lien real estate mortgage on, or an equivalent security interest in, an owner−occupied residential property containing not more than 4 dwelling units may authorize the lender to increase the borrower's contractual rate of interest unless the contract provides that:

(a) No increase may occur until 3 years after the date of the contract;

(b) No increase may occur unless the borrower is given at least 4 months' written notice of the lender's intent to increase the rate of interest, during which notice period the borrower may repay his or her obligation without penalty;

(c) The amount of the initial interest rate increase may not exceed $1 per $100 for one year computed upon the declining principal balance;

(d) The amount of any subsequent interest rate increase may not exceed $1 per $200 for one year computed upon the declining principal balance;

(e) The interest rate may not be increased more than one time in any 12−month period; and

(f) The loan may be prepaid without penalty at any time at which the interest rate in effect exceeds the originally stated interest rate by more than $2 per $100 for one year computed upon the declining principal balance.

(2) DISCLOSURES REQUIRED. No lender may make a loan secured by a first lien real estate mortgage on, or an equivalent security interest in, an owner−occupied residential property containing not more than 4 dwelling units providing for prospective

ATTACHMENT F

Nebraska 2014 LB 788

LEGISLATIVE BILL 788

Approved by the Governor April 22, 2014

Introduced by Schumacher, 22.

FOR AN ACT relating to law; to amend sections 8-162.02, 8-1401, 8-1402, 8-1403, 27-803, and 76-238.01, Reissue Revised Statutes of Nebraska, and sections 30-2201 and 76-1002, Revised Statutes Cumulative Supplement, 2012; to change provisions relating to the enforcement and servicing of real estate loans, fiduciary accounts controlled by trust departments, disclosure of confidential information pertaining to property of a decedent, hearsay exception for certain business information, and securing future advances under a mortgage or trust deed; to provide for access to a decedent's safe deposit box as prescribed; to provide a duty for the Revisor of Statutes; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. (1) The enforcement and servicing of any real estate loan agreement or any mortgage, deed of trust, or other security instrument by which the loan is secured shall be pursuant only to state and federal law. No local ordinance or resolution may add to, change, interfere with any rights or obligations of, impose upon, or require payment of fees or taxes of any kind by, a lender, mortgagee, beneficiary, or trustee in a trust deed or servicer relating to, or delay or affect the enforcement and servicing of, any real estate loan agreement or any mortgage, deed of trust, or other security instrument by which the loan is secured.

(2) Subsection (1) of this section shall not apply to any ordinance or resolution adopted pursuant to the Community Development Law.

Sec. 2. Section 8-162.02, Reissue Revised Statutes of Nebraska, is amended to read:

8-162.02 (1) A state-chartered bank may deposit or have on deposit funds of a fiduciary account controlled by the bank's trust department unless prohibited by applicable law.

(2) To the extent that the funds are awaiting investment or distribution and are not insured or guaranteed by the Federal Deposit Insurance Corporation, a state-chartered bank shall set aside collateral as security under the control of appropriate fiduciary officers and bank employees. The bank shall place pledged assets of fiduciary accounts in the joint custody or control of not fewer than two of the fiduciary officers or employees of the bank designated for that purpose by the board of directors. The bank may maintain the investments of a fiduciary account off-premises if consistent with applicable law and if the bank maintains adequate safeguards and controls. The market value of the collateral shall at all times equal or exceed the amount of the uninsured or unguaranteed fiduciary funds awaiting investment or distribution.

(3) A state-chartered bank may satisfy the collateral requirements of this section with any of the following: (a) Direct obligations of the United States or other obligations fully guaranteed by the United States as to principal and interest; (b) readily marketable securities of the classes in which banks, trust companies, or other corporations exercising fiduciary powers are permitted to invest fiduciary funds under applicable state law; and (c) surety bonds, to the extent the surety bonds provide adequate security, unless prohibited by applicable law.

(4) A state-chartered bank, acting in its fiduciary capacity, may deposit funds of a fiduciary account that are awaiting investment or distribution with an affiliated insured depository institution unless prohibited by applicable law. The bank may set aside collateral as security for a deposit by or with an affiliate of fiduciary funds awaiting investment or distribution, as it would if the deposit was made at the bank, unless such action is prohibited by applicable law.

(5) Public funds deposited in and held by a state-chartered bank are not subject to this section.

(6) This section does not apply to a fiduciary account in which, pursuant to the terms of the governing instrument, full investment authority is retained by the grantor or is vested in persons or entities other than the state-chartered bank and the bank, acting in its fiduciary capacity, does not have the power to exert any influence over investment decisions.

Sec. 3. Section 8-1401, Reissue Revised Statutes of Nebraska, is amended to read:

8-1401 (1) No person organized under the Business Corporation Act,

the Credit Union Act, the Nebraska Banking Act, the Nebraska Industrial Development Corporation Act, the Nebraska Nonprofit Corporation Act, the Nebraska Professional Corporation Act, the Nebraska Trust Company Act, or Chapter 8, article 3, or otherwise authorized to conduct business in Nebraska or organized under the laws of the United States, shall be required to disclose any records or information, financial or otherwise, that it deems confidential concerning its affairs or the affairs of any person with which it is doing business to any person, party, agency, or organization, unless:

(a) The disclosure relates to a lawyers trust account and is required to be made to the Counsel for Discipline of the Nebraska Supreme Court pursuant to a rule adopted by the Nebraska Supreme Court;

(b) The disclosure is governed by rules for discovery promulgated pursuant to section 25-1273.01;

(c) The disclosure is made pursuant to section 5 of this act;

~~(c)~~ (d) The request for disclosure is made by a law enforcement agency regarding a crime, a fraud, or any other unlawful activity in which the person to whom the request for disclosure is made is or may be a victim of such crime, fraud, or unlawful activity;

~~(d)~~ (e) The request for disclosure is made by a governmental agency which is a duly constituted supervisory regulatory agency of the person to whom the request for disclosure is made and the disclosure relates to examinations, audits, investigations, or inquiries of such persons;

~~(e)~~ (f) The request for disclosure is made pursuant to subpoena issued under the laws of this state by a governmental agency exercising investigatory or adjudicative functions with respect to a matter within the agency's jurisdiction;

~~(f)~~ (g) The production of records is pursuant to a written demand of the Tax Commissioner under section 77-375;

~~(g)~~ (h) There is first presented to such person a subpoena, summons, or warrant issued by a court of competent jurisdiction;

~~(h)~~ (i) A statute by its terms or rules and regulations adopted and promulgated thereunder requires the disclosure, other than by subpoena, summons, warrant, or court order;

~~(i)~~ (j) There is presented to such person an order of a court of competent jurisdiction setting forth the exact nature and limits of such required disclosure and a showing that all persons to be affected by such order have had reasonable notice and an opportunity to be heard upon the merits of such order;

~~(j)~~ (k) The request for disclosure relates to information or records regarding the balance due, monthly payments due, payoff amounts, payment history, interest rates, due dates, or similar information for indebtedness owed by a deceased person when the request is made by a person having an ownership interest in real estate or personal property which secures such indebtedness owed to the person to whom the request for disclosure is made; or

~~(k)~~ (l) There is first presented to such person the written permission of the person about whom records or information is being sought authorizing the release of the requested records or information.

(2) Any person who makes a disclosure of records or information as required by this section shall not be held civilly or criminally liable for such disclosure in the absence of malice, bad faith, intent to deceive, or gross negligence.

Sec. 4. Section 8-1402, Reissue Revised Statutes of Nebraska, is amended to read:

8-1402 (1) Any person, party, agency, or organization requesting disclosure of records or information pursuant to section 8-1401 shall pay the costs of providing such records or information, unless:

(a) The request for disclosure is made pursuant to subdivision (1)(a) of section 8-1401 and a Nebraska Supreme Court rule provides for the method of payment;

(b) The request is made pursuant to subdivision (1)(b) of section 8-1401 and the rules for discovery provide for the method of payment;

(c) The request for disclosure is made pursuant to subdivision ~~(1)(c) or (1)(d)~~ (1)(d) or (1)(e) of section 8-1401;

(d) Otherwise ordered by a court of competent jurisdiction; or

(e) The person making the disclosure waives any or all of the costs.

(2) The requesting person, party, agency, or organization shall pay five dollars per hour per person for the time actually spent on the service or, if such person can show that its actual expense in providing the records or information was greater than five dollars per hour per person, it shall be paid the actual cost of providing the records or information.

(3) No person authorized to receive payment pursuant to subsection (1) of this section has an obligation to provide any records or information

pursuant to section 8-1401 until assurances are received that the costs due under this section will be paid, except for requests made pursuant to subdivisions ~~(1)(c),~~ ~~(1)(d),~~ ~~(1)(e),~~ ~~and~~ ~~(1)(f)~~ (1)(d), (1)(e), (1)(f), and (1)(g) of section 8-1401.

Sec. 5. (1) This section does not apply to:

(a) Real property owned by a decedent; or

(b) The contents of a safe deposit box rented by a decedent from a state-chartered or federally chartered bank, savings bank, building and loan association, savings and loan association, or credit union.

(2) After the death of a decedent, a person (a) indebted to the decedent or (b) having possession of (i) personal property, (ii) an instrument evidencing a debt, (iii) an obligation, (iv) a chose in action, (v) a life insurance policy, (vi) a bank account, (vii) a certificate of deposit, or (viii) intangible property, including annuities, fixed income investments, mutual funds, cash, money market accounts, or stocks, belonging to the decedent, shall furnish the value of the indebtedness or property on the date of death and the names of the known or designated beneficiaries of property described in this subsection to a person who is (A) an heir at law of the decedent, (B) a devisee of the decedent or a person nominated as a personal representative in a will of the decedent, or (C) an agent or attorney authorized in writing by any such person described in subdivision (A) or (B) of this subdivision, with a copy of such authorization attached to the affidavit, and who also presents an affidavit containing the information required by subsection (3) of this section.

(3) An affidavit presented under subsection (2) of this section shall state:

(a) The name, address, social security number if available, and date of death of the decedent;

(b) The name and address of the affiant and that the affiant is (i) an heir at law of the decedent, (ii) a devisee of the decedent or a person nominated as a personal representative in a will of the decedent, or (iii) an agent or attorney authorized in writing by any such person described in subdivision (i) or (ii) of this subdivision;

(c) That the disclosure of the value on the date of death is necessary to determine whether the decedent's estate can be administered under the summary procedures set forth in section 30-24,125, to assist in the determination of the inheritance tax in an estate that is not subject to probate, or to assist a conservator or guardian in the preparation of a final accounting subsequent to the death of the decedent;

(d) That the affiant is answerable and accountable for the information received to the decedent's personal representative, if any, or to any other person having a superior right to the property or indebtedness;

(e) That the affiant swears or affirms that all statements in the affidavit are true and material and further acknowledges that any false statement may subject the person to penalties relating to perjury under section 28-915; and

(f) That no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction.

(4) A person presented with an affidavit under subsection (2) of this section shall provide the requested information within five business days after being presented with the affidavit.

(5) A person who acts in good faith reliance on an affidavit presented under subsection (2) of this section is immune from liability for the disclosure of the requested information.

Sec. 6. Section 8-1403, Reissue Revised Statutes of Nebraska, is amended to read:

8-1403 For purposes of sections 8-1401 and 8-1402 and section 5 of this act:

(1) Governmental agency means any agency, department, or commission of this state or any authorized officer, employee, or agent of such agency, department, or commission;

(2) Law enforcement agency means an agency or department of this state or of any political subdivision of this state that obtains, serves, and enforces arrest warrants or that conducts or engages in prosecutions for violations of the law; and

(3) Person means any individual, corporation, partnership, limited liability company, association, joint stock association, trust, unincorporated organization, and any other legal entity.

Sec. 7. Section 27-803, Reissue Revised Statutes of Nebraska, is amended to read:

27-803 Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule, even though the declarant is available

as a witness:

(1) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;

(2) A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will;

(3) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

(4) A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him or her to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his or her memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party;

(5)(a) A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events, or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, as shown by the testimony of the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. The circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight.~~;~~

(b) A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, that was received or acquired in the regular course of business by an entity from another entity and has been incorporated into and kept in the regular course of business of the receiving or acquiring entity; that the receiving or acquiring entity typically relies upon the accuracy of the contents of the memorandum, report, record, or data compilation; and that the circumstances otherwise indicate the trustworthiness of the memorandum, report, record, or data compilation, as shown by the testimony of the custodian or other qualified witness. Subdivision (5)(b) of this section shall not apply in any criminal proceeding;

(6) Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subdivision (5) of this section to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate a lack of trustworthiness;

(7) Upon reasonable notice to the opposing party prior to trial, records, reports, statements, or data compilations made by a public official or agency of facts required to be observed and recorded pursuant to a duty imposed by law, unless the sources of information or the method or circumstances of the investigation are shown by the opposing party to indicate a lack of trustworthiness;

(8) Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law;

(9) To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with section 27-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation or entry;

(10) Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization;

(11) Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by

a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter;

(12) Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like;

(13) The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office;

(14) A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document;

(15) Statements in a document in existence thirty years or more whose authenticity is established;

(16) Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations;

(17) Statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination. If admitted, the statements may be read into evidence but may not be received as exhibits;

(18) Reputation among members of his or her family by blood, adoption, or marriage, or among his or her associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his or her personal or family history;

(19) Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located;

(20) Reputation of a person's character among his or her associates or in the community;

(21) Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against a person other than the accused. The pendency of an appeal may be shown but does not affect admissibility;

(22) Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation; and

(23) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his or her intention to offer the statement and the particulars of it, including the name and address of the declarant.

Sec. 8. Section 30-2201, Revised Statutes Cumulative Supplement, 2012, is amended to read:

30-2201 Sections 30-2201 to 30-2902, 30-3901 to 30-3923, and 30-4001 to 30-4045 and section 9 of this act shall be known and may be cited as the Nebraska Probate Code.

Sec. 9. (1) For purposes of this section:

(a) Custodian means a bank, savings and loan association, credit

union, or other institution acting as a lessor of a safe deposit box; and

(b) Representative of a custodian means an authorized officer or employee of a custodian.

(2)(a) If a decedent at the time of his or her death was a sole or last surviving joint lessee of a safe deposit box, the custodian shall, prior to notice that a personal representative or special administrator has been appointed for such decedent's estate, allow access to the safe deposit box to determine whether the safe deposit box contains an instrument that appears to be an original will of the decedent, a deed to a burial plot, or burial instructions. The following persons may have such access:

(i) A person who presents an affidavit described in subsection (4) of this section that affiant reasonably believes that he or she is either (A) an heir at law of the decedent, (B) a devisee of the decedent or a person nominated as a personal representative as shown in a photocopy of a will which is attached to such affidavit, or (C) the agent or attorney specifically authorized in writing by a person described in subdivision (2)(a)(i)(A) or (B) of this section; or

(ii) A person who, under the terms of the safe deposit box lease or a power of attorney at the time of the decedent's death, was legally permitted to enter the safe deposit box, unless otherwise provided by the lease or the power of attorney.

(b) If a person described in subdivision (2)(a) of this section desires access to a safe deposit box but does not possess a key to the box, the custodian may open the safe deposit box by any means necessary at the person's request and expense or the custodian may require the person to obtain a court order for the custodian to open the safe deposit box at the requesting person's expense. The custodian shall retain, in a secure location at such person's expense, the contents of the box other than a purported will, deed to a burial plot, and burial instructions. A custodian shall deliver a purported will as described in subdivision (5)(b) of this section. A person described in subdivision (2)(a)(i) of this section may remove a deed to a burial plot and burial instructions that are not part of a purported will pursuant to subdivision (5)(d) of this section, and the custodian shall not prevent the removal. Expenses incurred by a custodian or by the person seeking the documents pursuant to this section shall be considered an estate administration expense.

(3) A representative of the custodian shall be present during the entry of a safe deposit box pursuant to this section.

(4) The affidavit referred to in subdivision (2)(a)(i) of this section shall state:

(a) That the sole or last surviving lessor of a safe deposit box has died and the date of his or her death, and a copy of the death certificate shall be attached;

(b) If the person submitting the affidavit is an attorney or agent of the affiant, that such appointment is for the purpose of accompanying the opening of the safe deposit box. In lieu of this statement, the appointment shall accompany the affidavit; and

(c) That the affiant:

(i)(A) Is an heir at law of the deceased lessor and a description of such person's relationship to the deceased lessor;

(B) Is reasonably thought to be a devisee of the decedent based on the provisions of a will, a photocopy of which is submitted with the affidavit; or

(C) Is reasonably thought to be nominated as personal representative pursuant to the terms of a will, a photocopy of which is submitted with the affidavit;

(ii) Swears or affirms that all statements in the affidavit are true and material and further acknowledges that any false statement may subject the person to penalties relating to perjury under section 28-915; and

(iii) Has no knowledge of an application or petition for the appointment of a personal representative pending or granted in any jurisdiction.

(5)(a) If an instrument purporting to be a will is found in a safe deposit box as the result of an entry pursuant to subsection (2) of this section, the representative of the custodian shall remove the purported will.

(b) The custodian shall mail the purported will by registered or certified mail or deliver the purported will in person to the clerk of the county court of the county in which the decedent was a resident. If the custodian is unable to determine the county of residence of the decedent, the custodian shall mail the purported will by registered or certified mail or deliver the purported will in person to the office of the clerk of the county court of the county in which the safe deposit box is located.

(c) At the request of the person or persons authorized to have access to the safe deposit box under subsection (2) of this section, the representative of the custodian shall copy each purported will of the decedent, at the expense of the requesting person, and shall deliver the copy of each purported will to the person, or if directed by the person, to the person's agent or attorney. In copying any purported will, the representative of the custodian shall not remove any staples or other fastening devices or disassemble the purported will in any way.

(d) If the safe deposit box contains a deed to a burial plot or burial instructions that are not a part of a purported will, the person or persons authorized to have access to the safe deposit box under subsection (2) of this section may remove these instruments or request that the representative of the custodian copy the deed to the burial plot or burial instructions at the expense of the requesting person.

(6) This section does not limit the right of a personal representative or a special administrator for the decedent, or a successor of the decedent pursuant to section 30-24,125, to have access to the safe deposit box as otherwise provided by law.

(7) Unless limited by the safe deposit box lease, a surviving co-lessee of the safe deposit box may continue to enter the safe deposit box notwithstanding the death of the decedent.

(8) A custodian shall not be liable to a person for an action taken pursuant to this section or for a failure to act in accordance with the requirements of this section unless the action or failure to act is shown to have resulted from the custodian's bad faith, gross negligence, or intentional misconduct.

Sec. 10. Section 76-238.01, Reissue Revised Statutes of Nebraska, is amended to read:

76-238.01 (1) Any interest in real property capable of being transferred may be mortgaged to secure (a) existing debts or obligations, ~~to secure~~ (b) debts or obligations created simultaneously with the execution of the mortgage, ~~to secure~~ (c) future advances necessary to protect the security, ~~and to secure~~ even though such future advances cause the total indebtedness to exceed the maximum amount stated in the mortgage, or (d) any future advances to be made at the option of the parties in any amount unless, except as otherwise provided under subsection (2) or (3) of this section, a maximum amount of total indebtedness to be secured is stated in the mortgage. ~~At no time shall the secured principal future advances, not including sums advanced to protect the security, exceed a total amount or percentage of a total amount stated in the mortgage. If the mortgage authorizes advances by a percentage of the mortgage amount, such advances shall not exceed that authorized percentage. All such debts, obligations, and future advances shall, from the time the mortgage is filed for record as provided by law, be secured by such mortgage equally with and have the same priority over the rights of all persons who subsequent to the recording of such mortgage acquire any rights in or liens upon the mortgaged real estate as the debts and obligations secured thereby at the time of the filing of the mortgage for record, except that (a) the mortgagor or his or her successor in title is hereby authorized to file for record, and the same shall be recorded, a notice limiting the amount of optional future advances secured by such mortgage to not less than the amount advanced actually at the time of such filing, and a copy of such filing shall be filed with the mortgagee, and (b) if any optional future advance shall be made by the mortgagee to the mortgagor or his or her successor in title after written notice of any mortgage, lien, or claim against such real property, or after written notice of labor commenced or material furnished or contracted to be commenced or furnished on such real property which is junior to such mortgage, then the amount of such advance shall be junior to such mortgage, lien, or claim, including a claim for materials delivered or labor performed which is ultimately filed as a construction lien and of which such written notice was given.~~

(2) Future advances necessary to protect the security shall include, but not be limited to, advances for payment of real property taxes, special assessments, prior liens, hazard insurance premiums, maintenance charges imposed under a condominium declaration or other covenant, and costs of repair, maintenance, or improvements. Future advances necessary to protect the security are secured by the mortgage and have the priority specified in subsection (3) of this section.

(3)(a) Except as provided in subdivision (b) of this subsection, all items identified in subsection (1) of this section are equally secured by the mortgage from the time of filing the mortgage as provided by law and have the same priority as the mortgage over the rights of all other persons who acquire any rights in or liens upon the mortgaged real property subsequent to the time

the mortgage was filed.

(b)(i) The mortgagor or his or her successor in title may limit the amount of optional future advances secured by the mortgage under subdivision (1)(d) of this section by filing a notice for record in the office of the register of deeds of each county in which the mortgaged real property or some part thereof is situated. A copy of such notice shall be sent by certified mail to the mortgagee at the address of the mortgagee set forth in the mortgage or, if the mortgage has been assigned, to the address of the most recent assignee reflected in a recorded assignment of the mortgage. The amount of such secured optional future advances shall be limited to not less than the amount actually advanced at the time of receipt of such notice by the mortgagee.

(ii) If any optional future advance is made by the mortgagee to the mortgagor or his or her successor in title after receiving written notice of the filing for record of any trust deed, mortgage, lien, or claim against such mortgaged real property, then the amount of such optional future advance shall be junior to such trust deed, mortgage, lien, or claim. The notice under this subdivision shall be sent by certified mail to the mortgagee at the address of the mortgagee set forth in the mortgage or, if the mortgage has been assigned, to the address of the most recent assignee reflected in a recorded assignment of the mortgage.

(iii) Subdivisions (b)(i) and (ii) of this subsection shall not limit or determine the priority of optional future advances as against construction liens governed by section 52-139.

~~(2)~~ (4) The reduction to zero or elimination of the debt evidenced by the instruments authorized in this section shall not invalidate the operation of this section as to any future advances unless a notice or release to the contrary is filed for record as provided by law.

Sec. 11. Section 76-1002, Revised Statutes Cumulative Supplement, 2012, is amended to read:

76-1002 (1) Transfers in trust of real property may be made to secure (a) existing debts or obligations, (b) debts or obligations created simultaneously with the execution of the trust deed, ~~(b)~~ (c) future advances necessary to protect the security, ~~(c)~~ even though such future advances cause the total indebtedness to exceed the maximum amount stated in the trust deed, (d) any future advances to be made at the option of the parties~~,~~ in any amount unless, except as otherwise provided under subsection (2) or (3) of this section, a maximum amount of total indebtedness to be secured is stated in the trust deed, or ~~(d)~~ (e) the performance of an obligation of any other person named in the trust deed to a beneficiary.

(2) Future advances necessary to protect the security shall include, but not be limited to, advances for payment of real property taxes, special assessments, prior liens, hazard insurance premiums, maintenance charges imposed under a condominium declaration or other covenant, and costs of repair, maintenance, or improvements. Future advances necessary to protect the security are secured by the trust deed and shall have the priority specified in subsection (3) of this section.

(3)(a) Except as provided in subdivision (b) of this subsection, all items identified in subsection (1) of this section are equally secured by the trust deed from the time of filing the trust deed as provided by law and have the same priority as the trust deed over the rights of all other persons who acquire any rights in or liens upon the trust property subsequent to the time the trust deed was filed.

(b)(i) The trustor or his or her successor in title may limit the amount of optional future advances secured by the trust deed under subdivision ~~(1)(c)~~ (1)(d) of this section by filing a notice for record in the office of the register of deeds of each county in which the trust property or some part thereof is situated. A copy of such notice shall be sent by certified mail to the beneficiary at the address of the beneficiary set forth in the trust deed or, if the trust deed has been assigned, to the address of the most recent assignee reflected in a recorded assignment of the trust deed. The amount of such secured optional future advances shall be limited to not less than the amount actually advanced at the time of receipt of such notice by the beneficiary.

(ii) If any optional future advance is made by the beneficiary to the trustor or his or her successor in title after receiving written notice of the filing for record of any trust deed, mortgage, lien, or claim against such trust property, then the amount of such optional future advance shall be junior to such trust deed, mortgage, lien, or claim. The notice under this subdivision shall be sent by certified mail to the beneficiary at the address of the beneficiary set forth in the trust deed or, if the trust deed has been assigned, to the address of the most recent assignee reflected in a recorded

assignment of the trust deed.

(iii) Subdivisions (b)(i) and (ii) of this subsection shall not limit or determine the priority of optional future advances as against construction liens governed by section 52-139.

(4) The reduction to zero or elimination of the obligation evidenced by any of the transfers in trust authorized by this section shall not invalidate the operation of this section as to any future advances unless a notice or release to the contrary is filed for record as provided by law. All right, title, interest, and claim in and to the trust property acquired by the trustor or his or her successors in interest subsequent to the execution of the trust deed shall inure to the trustee as security for the obligation or obligations for which the trust property is conveyed in like manner as if acquired before execution of the trust deed.

Sec. 12. The Revisor of Statutes shall assign section 9 of this act within Chapter 30, article 24, part 1.

Sec. 13. Original sections 8-162.02, 8-1401, 8-1402, 8-1403, 27-803, and 76-238.01, Reissue Revised Statutes of Nebraska, and sections 30-2201 and 76-1002, Revised Statutes Cumulative Supplement, 2012, are repealed.

ATTACHMENT G

Brief for the American Bankers Association as Amicus Curiae, *Easthampton Savings Bank, et al v. City of Springfield*, Massachusetts Supreme Judicial Court, Case No. SJC-11612, Filed April 16, 2014.

COMMONWEALTH OF MASSACHUSETTS SUPREME JUDICIAL COURT

No. SJC-11612

EASTHAMPTON SAVINGS BANK, ET AL.,

v.

CITY OF SPRINGFIELD,

On an Amicus Filings Request of the Supreme Judicial Court for Certified Questions from the United States Court of Appeals for the First Circuit

BRIEF OF AMERICAN BANKERS ASSOCIATION, INC. AS AMICUS CURIAE

Robert G. Rowe, III (BBO# 431740)
Counsel of Record
American Bankers Association
1120 Connecticut Ave NW
Washington, DC 20036
Tel. (202) 663-5029
Fax (202) 828-5052

Counsel for Amicus Curiae

Dated: April 16, 2014

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ISSUE DISCUSSED

Does the City of Springfield's municipal ordinances Chapter 285, Article II, "Vacant or Foreclosing Residential Property" or Chapter 182, Article I, "Mediation of Foreclosures of Owner-Occupied Residential Properties" add an extra layer of local regulation for banks that is preempted by Massachusetts state law?

INTEREST OF AMICUS CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional, and money center banks. ABA also represents savings associations, trust companies, and savings banks. ABA members hold an overwhelming majority—approximately 95%—of the domestic assets of the U.S. banking industry.

ABA frequently appears in litigation, either as a party or amicus curiae, in order to protect and promote the interests of the banking industry and its members. ABA members are already subject to the numerous and varied state foreclosure laws throughout the United States. Local foreclosure regulations, such as the proposed Springfield ordinances, would further complicate the foreclosure regulatory framework under which banks must operate.

STATEMENT OF THE CASE

This appeal involves several municipal ordinances passed by the City of Springfield ("City") in 2011. Chapter 285 of Article II of the City's ordinances, "Vacant or Foreclosing Residential Property" ("Foreclosure Ordinance") requires any owner of a foreclosing property to remove hazardous materials, provide twenty-four-hour security personnel, post "No Trespassing" signs, maintain the property free of debris and overgrowth, drain all plumbing, and

ensure that it is up to the state sanitary and building codes. § 285-10(A)(3)–(8). The Foreclosure Ordinance defines the "owner" of the foreclosing property as one who "has legal title to any real property," but it then obfuscates the mortgagor-mortgagee relationship by making the mortgagee the owner. Id. § 285-9. The mortgagee is also required to post a cash bond of at least $10,000 to the City Commissioner to secure maintenance of the property and for City inspection costs. Id. § 285-10(A)(11). Violators may be fined $300 per day. Id. § 285-17.

The City also passed Chapter 182 of Article I, "Mediation of Foreclosures of Owner-Occupied Residential Properties" ("Mediation Ordinance"). This ordinance requires all mortgage foreclosures of residential properties that are owner occupied "to go through a City-approved mediation program as set out in this article, and obtain a certificate verifying the mortgagee's good faith participation in foreclosure mediation." Id. § 182-3. The mandatory mediation consists of the mortgagor, the mortgagee, and "City-approved mediation program managers and mediators . . . ." Id. § 182-4. The mortgagee must pay at least 85% of the mediation registration fee. Id. § 182-9.

On December 8, 2011, six local banks ("Banks") filed a Complaint for Declaratory Judgment and Equitable Relief against the City in Hampden County Superior Court seeking a declaratory judgment that state law preempted the two ordinances, that the ordinances violated the Contracts Clause under the U.S. Constitution, and/or the mandatory bond constituted an illegal tax. The City removed the case to the United States District Court, District of Massachusetts and on July 3, 2012, the District Court entered a judgment in the City's favor. The Banks subsequently appealed that judgment to United States Court of Appeals for the First

Circuit, which then certified two questions on the issues to the Massachusetts Supreme Judicial Court.[1]

ARGUMENT

I. The Ordinances Conflict with Massachusetts' Comprehensive Foreclosure Regulations.

The Legislature signals its intent to wholly occupy the field and prevent inconsistent local ordinances by comprehensively passing legislation and delegating its authority to a state agency or board, as it has done here with foreclosure regulation. Town of Dartmouth v. Greater New Bedford Reg'l Vocational Technical High Sch. Dist., 461 Mass. 366, 375 (2012); Bloom v. City of Worcester, 363 Mass. 136, 155 (1973); see also St. George Greek Orthodox Cathedral v. Fire Dep't of Springfield, 462 Mass. 120, 128 n.13 (2012) (noting that "[t]he sheer comprehensiveness of the code itself demonstrates the Legislature's intention to foreclose inconsistent local enactments.").

In Massachusetts, the Legislature has clearly enacted foreclosure statutes for the purpose of having a consistent, statewide standard for the foreclosure process. In Mass. Gen. Laws, ch. 167, § 1A "Supervision of Banks," the Legislature delegated financial regulatory authority to the Commissioner of the Massachusetts Division of Banks ("DOB"). Even the DOB's mission, as stated on its website, reiterates its authority over the entire Commonwealth: "To ensure a sound, competitive, and accessible financial services environment *throughout the Commonwealth.*" Mass. Div. of Banks, *Mission and Goals*, http://www.mass.gov/ocabr/utility/division-of-banks-mission-and-goals.html (emphasis added).

[1] The ABA will only comment on the first question certified by the First Circuit regarding the Foreclosure and Mediation Ordinances being preempted by Massachusetts state law.

Here, the City is not entering an area of regulation that the Legislature has never explored at the state level. The Legislature has delegated regulatory authority over financial services to the DOB and created an elaborate and extensive statutory structure for foreclosures when it enacted Mass. Gen. Laws ch. 244 "Foreclosure and Redemption of Mortgages." This expansive statute, with over 40 sections, details the procedures for foreclosures, requires explicitly that the Commissioner of the DOB both maintain a foreclosure database and make an annual report tracking mortgage foreclosure developments throughout Massachusetts. Mass. Gen. Laws ch. 244, § 14A. Such supervision by the DOB of foreclosures statewide demonstrates that the Legislature did not intend for cities and towns to add to the complexity of regulations for mortgagees.

While the City's Foreclosure Ordinance seeks to impose the added responsibility of making a bank the owner of a foreclosing property, the Mediation Ordinance requires a bank to pay at least 85% of the mandatory mediation fee. These additional responsibilities unduly burden banks with significant compliance costs that were never required by the Legislature. The ordinance significantly alters the mortgagor-mortgagee relationship by converting banks into property managers that must also foreclose on the property. This may confuse homeowners and banks, resulting in the disruption of local housing markets.

II. The City's Enactment of the Ordinances Creates a Conflicting Intrastate Matrix of Foreclosure Laws which Are Preempted at the State Level.

Foreclosure regulation should remain a matter of state law and applicable federal regulations. See 12 C.F.R. §§ 1002, 1024, 1026. When municipalities insert themselves into this regulatory framework, both state chartered and national banks will devote more resources to complying with the confusing patchwork of additional regulations of each town.

In Massachusetts, the powers delegated to cities and towns, except those expressly given by the Commonwealth, "are granted to them by their charters or by general or special law . . . ." Id. Mass. Gen. Laws ch. 40, § 1. However, the Home Rule Procedures Act states that the power to enact ordinances cannot be inconsistent with the laws of the Legislature:

> "Any city or town may, by the adoption, amendment or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court . . . ."

Id. Mass. Gen. Laws ch. 43B, § 13.

When the Legislature's intent is clear, a state law preempts a local ordinance. Bloom v. Worcester, 363 Mass 136, 155 (1973). Legislative intent can either be express or inferred. St. George Greek Orthodox Cathedral v. Fire Dep't of Springfield, 462 Mass. 120, 126 (2012).

State laws also preempt local actions by inference where the purpose of the legislation is frustrated by a local ordinance. Wendell v. Att'y Gen., 394 Mass. 518, 524 (1985). In some circumstances, it can be inferred that the Legislature intended to preempt the field by passing such comprehensive legislation that any local enactment would frustrate the statute's purpose. Boston Gas Co. v. City of Somerville, 420 Mass. 702, 704 (1995); Wendell, 394 Mass. at 527–28.

Here, the City exceeded its authority and is frustrating the purpose of the foreclosure statutes and the authority of the DOB. The Legislature has given no express authority to the City to act as a regulator of mortgage foreclosures, and the City has failed to cite any mandate in its charter granting it these regulatory powers. See Mass. Gen. Laws ch. 43B, § 13. Therefore, the Foreclosure and Mediation Ordinances, adds an unnecessary layer of banking regulation that conflicts with state law.

If the City's ordinances are allowed to stand, cities and towns throughout the country may propose similar ordinances that unduly burden banks. Two municipalities in California and one in Florida have already enacted similar ordinances that make foreclosures more cumbersome to banks. See Chula Vista, Cal., Mun. Code ch. 15, § 15.60; Oakland, Cal., Mun. Code ch. 8.54; Oakland Park, Fla., Code ch. 8, art. VII, § 8-125.[2] The resources that federal and state regulators have at their disposal place them in the best informed position to balance the interests of lenders and borrowers and administer comprehensive and uniform foreclosure regulations.

CONCLUSION

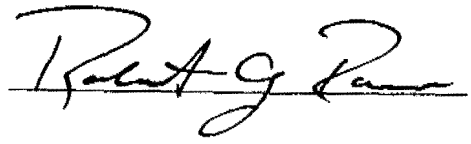
The Legislature promulgated the foreclosure statutes with the intent of overseeing the entire Commonwealth. Allowing the City's Foreclosure and Mediation Ordinances to stand would contradict the Legislature's intent and be unduly burdensome to banks. It would be detrimental to banking if cities and towns are permitted to circumvent preemption and write their own foreclosure regulations. Therefore, the ABA respectfully requests that the Court inform the First Circuit that Massachusetts law preempts the City's Foreclosure and Mediation Ordinances and that they are invalid ab initio.

[2] All three municipalities have similar ordinances which impose registration fees, maintenance costs, and security costs upon mortgagees for a foreclosing real property, in addition to fines for violators.

Respectfully submitted,

THE AMERICAN BANKERS
ASSOCIATION AS AMICUS CURIAE

By its attorney,



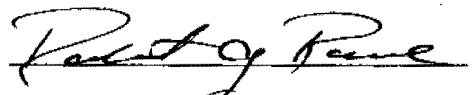
Robert G. Rowe, III (BBO# 431740)
American Bankers Association
1120 Connecticut Ave NW
Washington, DC 20036
Tel. (202) 663-5029
Fax (202) 828-5052

Jameson W. Crockett (VA Bar# 85469)
American Bankers Association
1120 Connecticut Ave NW
Washington, DC 20036
Tel. (202) 663-5586
Fax (202) 663-7524

Dated: April 16, 2014

MASS. R.A.P. 16(k) COMPLIANCE CERTIFICATION

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I, Robert G. Rowe, III, hereby certify that the foregoing Brief of the American Bankers Association, Inc. as Amicus Curiae complies with the rules of court that pertain to the filing of briefs.



Robert G. Rowe, III
(BBO# 431740)

CERTIFICATE OF SERVICE

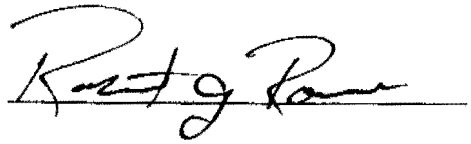
I, Robert G. Rowe, III, hereby certify that on April 16, 2014, pursuant to Rule 13(d) of the Massachusetts Rules of Appellate Procedure, caused two copies of the foregoing Brief of the American Bankers Association, Inc. as Amicus Curiae to be delivered via first-class US. Mail, postage prepaid, to counsel for each of the parties identified below:

Tani E. Sapirstein, Esq.
Sapirstein & Saperstein PC
1350 Main St.
12th Floor
Springfield, MA 01103-0000
tani@sandslaw.com

Attorney for
the Plaintiffs-Appellants

Thomas D. Moore, Ass't City Solicitor
City of Springfield Law Department
36 Court St.
Springfield, MA 01103-0000
tmoore@springfieldcityhall.com

Attorney for
the Defendant-Appellee



Robert G. Rowe, III
(BBO# 431740)

ATTACHMENT H

Brief for the Massachusetts Bankers Association as Amicus Curiae, *Easthampton Savings Bank, et al v. City of Springfield*, U.S. District Court of Appeals for the First Circuit, Case No. 12-1917, Filed June 4, 2013.

No. 12-1917

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

EASTHAMPTON SAVINGS BANK; CHICOPEE SAVINGS BANK; HAMPDEN BANK; UNITED BANK; MONSON SAVINGS BANK; COUNTRY BANK FOR SAVINGS,

Plaintiffs-Appellants,

v.

CITY OF SPRINGFIELD,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Massachusetts
Civil Action No. 11-30280
(Hon. Michael A. Ponsor)

BRIEF OF MASSACHUSETTS BANKERS ASSOCIATION, INC. AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL

Brenda R. Sharton (1st Cir. #59154)
GOODWIN PROCTER LLP
Exchange Place
Boston, Massachusetts 02109
Tel. (617) 570-1000
Fax (617) 523-1231

Thomas M. Hefferon (1st Cir. #6509)
William F. Sheehan (1st Cir. #57442)
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, DC 20001
Tel. (202) 346-4000
Fax (202) 204-7242

Counsel for Amicus Curiae

June 4, 2013

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Massachusetts Bankers Association, Inc. is a Massachusetts not-for-profit corporation that has no shareholders, nor is there any publicly-held corporation that owns 10% or more of its stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Massachusetts Bankers Association, Inc. (the "MBA") is a banking trade group that represents over 180 banking institutions throughout the Commonwealth, including commercial, savings, and cooperative banks, savings and loan institutions, and trust companies. Its members extend consumer credit in the form of home mortgage loans, automobile credit, and consumer loans.

The MBA was founded in 1905 to promote the general welfare and usefulness of banks and banking institutions; to secure uniformity of action; and to encourage the proper consideration of questions regarding the financial and commercial usages, customs and laws that affect banking. Believing that an educated customer is a better customer, the MBA and its member banks seek to advise and inform customers on how best to manage their financial affairs.

The MBA appears from time to time as *amicus curiae* in litigation involving issues of importance to its members. Many of its member banks or their affiliates have extended home loans to customers in the City of Springfield (the "City") and therefore will be subject to the ordinances at issue (the "Ordinances") in this case. In addition, at least four other cities in Massachusetts have recently passed or are actively considering foreclosure-related ordinances that are in some respects

[1] No party's counsel authored this brief in whole or in part, and no party, counsel to a party, or any other person other than the *Amicus* and its members contributed money that was intended to fund preparing or submitting the brief.

similar to the Springfield Ordinances, and those ordinances also affect the MBA's members. Accordingly, the Court's resolution of this appeal will have a significant effect on the MBA's members.

All parties have consented to the filing of this brief.

STATEMENT

This appeal involves two municipal ordinances passed by the City in 2011 that regulate mortgage foreclosures in a fashion that adds to, and conflicts with, Massachusetts' comprehensive, pre-existing statutory provisions in this area. The plaintiff banks assert that the Ordinances are preempted by state law and otherwise are unconstitutional and invalid. The City advised the District Court that it "does not expect to implement the subject Ordinances until this litigation is resolved."[2]

A. The Ordinances At Issue.

Article II of Chapter 285 of the City of Springfield's Ordinances (enacted as chapter 7.50[3], "Regulating the Maintenance of Vacant and/or Foreclosing Residential Properties and Foreclosures of Owner Occupied Residential Properties") (the "Foreclosure Ordinance"), dramatically alters the relationship among lenders, property owners, and the government. Whereas property owners

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[2] Affidavit of Geraldine McCafferty ¶ 8, D. Mass., Civ. Action No. 11-30280, Dkt. No. 21-2 (accompanying the City's Opposition to Plaintiffs' Motion for Judgment on the Pleadings). *Id.* ¶ 1.

[3] As Appellants do, the MBA refers to the Ordinances as they appear in Springfield's municipal code. *See* Appellants' Addendum at 29-34.

have always been understood as having responsibility for maintaining and securing their property, the Foreclosure Ordinance shifts much of that responsibility – and its attendant financial and practical burdens – onto mortgagees prior to foreclosure, by defining the lender as an "owner" of a property once the foreclosure process begins. As the District Court noted, lenders that initiate the foreclosure process but are not in possession of the property are now charged with:

> maintaining the property in accordance with all relevant state and local laws, removing hazardous material from the property, posting no-trespassing signs, securing all windows and doors, ensuring that the property is free from overflow trash, debris, and pools of stagnant water, and maintaining liability insurance on the property.

Appellants' Addendum at 3-4 (referring to § 285-10(A)(3)-(6), (8)). The lender must also give the City's Building Commissioner notice of all properties that become subject to the statute, provide "twenty-four (24) hour on-site security" in some instances, ensure that the structures are maintained in a structurally sound condition, drain all plumbing water and turn off electricity in vacant houses, and provide to the Commissioner and post on the property the name of an emergency contact. *See* § 285-10(A)(1), (4), (6)-(7), (9).

These requirements are imposed regardless of the condition of the property when the lender becomes responsible for upkeep, and they apply to lenders *regardless of whether they are in possession of or have any legal right to enter* on

the property at issue. Criminal penalties of $300.00 a day are provided for noncompliance. *See id.* § 285-17.

Under the Foreclosure Ordinance, the lender is also liable to the City for any costs incurred by the City for securing such property, removing rubbish and overgrowth, or abating stagnant pools of water. *See id.* § 285-13. The statute requires the lender to post a cash bond of *at least* $10,000 for each property in foreclosure, "a portion" of which "shall be retained by the city as an administrative fee to fund an account for expenses incurred in inspecting, securing, and marking said building and other such buildings that are not in compliance with this Section." *Id.* § 285-10(A)(11).

Chapter 182 of the City of Springfield's Ordinances (enacted as chapter 7.60, "Facilitating Mediation of Mortgage Foreclosures of Owner Occupied Residential Properties") (the "Mediation Ordinance"), requires mediation before foreclosure for most 1-4 family residential properties. The mediation is to be conducted "by a city-approved mediation program," part of which involves "a city-approved loan counselor" supplied to the borrower. *See* §§ 182-3, 182-8. The parties are required during the mediation to make a "good faith effort to negotiate and agree upon a commercially reasonable alternative to foreclosure." *See id.* § 182-7. If the process is unsuccessful, a City-appointed "Mediation Program

Manager" is directed to issue a certificate certifying to the parties' good faith inability to agree to renegotiate the terms of the loan. *See id.* § 182-8(F).

The City will charge the parties a "mediation registration fee" for "the services attendant to administering the mediation program," presumably including the costs of the Mediation Program Manager and the borrower's loan counselor; the lender will bear *at least* 85% of the fee. *See id.* § 182-9. The lender's (but not the borrower's) failure to comply with any provision of the Mediation Ordinance is punishable by a fine of $300 for every day until the end of the right to cure period. *See id.* § 182-10.[4]

[4] The City said below that the Ordinances were passed in response to "the foreclosure crisis which has plagued our country's economy," and noted that "the foreclosure crisis has had negative consequences" for the City and for the health and education of children in families facing foreclosure. Defendant City of Springfield's Memorandum Of Law In Reply And Opposition to Plaintiffs' Motion For Judgment On The Pleadings, etc., at 3, D. Mass. Civ. Action No. 11-30280, Dkt. No. 21-1 ("City's Memorandum"). The implicit suggestion that banks and other mortgage lenders are at fault for having caused a "foreclosure crisis" does not grasp that foreclosure proceedings are a last resort for lenders, which typically incur significant losses in connection with a foreclosure. *See* Congressional Budget Office, *Policy Options for the Housing and Financial Markets*, at 17 (April 2008) ("Estimates of the losses [to mortgage lenders] when a house is repossessed range from 30 percent to 60 percent of the value of the loan."); Community Affairs Department, Office of the Comptroller of the Currency, *Foreclosure Prevention: Improving Contact with Borrowers*, Community Developments, at 3 (June 2007) ("General estimates of losses to lenders on a foreclosure range from 20 to 60 cents on the dollar."); Karen M. Pence, Board of Governors of the Federal Reserve System, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, at 1 (May 13, 2003) (lenders lose from "30 percent to 60 percent of outstanding loan balances").

These two Ordinances (and others in other municipalities) have been enacted against the backdrop of comprehensive foreclosure laws and regulations already imposed by the Commonwealth.

B. Massachusetts Has a Comprehensive Regulatory Scheme Governing Lending and Foreclosures.

Massachusetts currently has an extensive statutory structure in place for the regulation of virtually all operations of banks and other entities that engage in residential mortgage lending activities in the Commonwealth.[5] Of particular relevance to this case, Mass. Gen. Laws ch. 244, "Foreclosure and Redemption of Mortgages," contains over 40 separate sections governing the foreclosure process itself. Those provisions define three forms of foreclosure (by entry, by power of sale, and by judicial action), establish the different procedures by which each is accomplished, provide for the mortgagor's right of redemption, require the Massachusetts Division of Banks (the "DOB") to maintain a foreclosure database,

[5] *See, e.g.*, Mass. Gen. Laws, ch. 140D (Consumer Credit Cost Disclosure); ch. 167 (Supervision of Banks); ch. 167E (Mortgages and Loans); ch. 170 (Co-operative Banks); ch. 171 (Credit Unions); ch. 172 (Trust Companies); ch. 172A (Banking Companies); ch. 183 (Alienation of Land); ch. 183A (Condominiums); ch. 183C (Predatory Home Practices); ch. 184 (General Provisions Relative to Real Property); ch. 186A (Tenant Protections in Foreclosed Properties); ch. 188 (Homesteads); ch. 236 (Levy of Executions on Land); ch. 239 (Summary Process for Possession of Land); ch. 240 (Proceedings for Settlement of Title to Land); ch. 244 (Foreclosure and Redemption of Mortgages); ch. 246 (Trustee Process); ch. 254 (Liens on Buildings and Land); ch. 255E (Licensing of Certain Mortgage Lenders and Brokers); ch. 255F (Licensing of Mortgage Loan Originators).

provide for an accounting, establish a limitations period, and address costs, venue, interest, necessary parties, and many other subjects.

In addition to these comprehensive statutes, foreclosures and foreclosure avoidance have been the subject of close attention in recent years from both the General Court (hereinafter, "the Legislature") and the DOB. The DOB wields significant authority to implement bank and consumer protection legislation by appropriate regulation, *see, e.g.*, Mass. Gen. Laws ch. 167 § 1A; Mass. Gen. Laws ch. 255E § 2, and to use its supervision and regulatory powers to "ensure[] consumer protection while promoting a competitive industry" and "[i]mplement[ing] and enforc[ing] consumer protection laws and regulations while providing consumers the information they need to know their rights and make informed financial decisions." Mass. Div. of Banks, *Mission and Goals*, http://www.mass.gov/ocabr/utility/division-of-banks-mission-and-goals.html.

The DOB "has been actively managing the increase in foreclosures in the Commonwealth since 2006" and publicly touts its "comprehensive and multi-faceted" response to the rise in foreclosures. *See* Mass. Div. of Banks, *Compendium of Actions Taken Relative to Foreclosures and the Mortgage Industry* 1 (2009). Since 2006, the DOB has sought to implement "broad policy directives designed to directly impact the Massachusetts mortgage market, strengthen the regulatory structure for the mortgage industry, and provide assistance for

homeowners." *Id.* at 2; *see also* Mass. Div. of Banks Home Page, http://www.mass.gov/dob.

In November 2006, the DOB organized an industry-wide Mortgage Summit with the goal of developing a "statewide foreclosure prevention strategy." Mass. Div. of Banks, *Compendium* 2. The Commonwealth's Mortgage Summit Working Groups emerged from this conference with a written recommendation for legislative action. *See* Report of the Mortgage Summit Working Groups, *Recommended Solutions to Prevent Foreclosures and to Ensure Massachusetts Consumers Maintain the Dream of Homeownership* (2007).

Since then the Legislature has passed three comprehensive amendments to the foreclosure laws – of striking breadth and detail – that are directly addressed to the process and the effect of foreclosures. First, in 2007, the majority of the recommendations of the DOB's Mortgage Summit Working Groups were enacted as Chapter 206 of the Acts of 2007, An Act Protecting and Preserving Home Ownership (the "2007 Act"). *See* 2007 Mass. Acts 719. The 2007 Act established, *inter alia*, a 90-day statutory right to cure a loan default on a 1-4 family, owner-occupied residential property and required the lender to include certain information in a notice of right to cure; imposed additional restrictions on adjustable rate subprime mortgage loans; amended the tenancy-at-will statute; required that the DOB maintain a database of foreclosure activity by mortgage lenders, holders,

servicers, and brokers; instituted a pilot program for foreclosure prevention for at-risk homeowners and in-person counseling for approved counseling programs; created a new statutory framework for licensing, examination, and supervision of mortgage loan originators (under the supervision of the DOB); and increased penalties for violations of certain statutes by mortgage lenders and brokers.

Three years later, the Legislature passed Chapter 258 of the Acts of 2010, An Act Relative to Mortgage Foreclosures (the "2010 Act"). *See* 2010 Mass. Acts 1321. The 2010 Act, *inter alia*, extended (in many circumstances until 2016) the right to cure from 90 days to 150 days unless the lender certifies that it has engaged in a good faith effort to resolve with the homeowner the amounts due; established new protections for tenants in foreclosed properties; required that, after a foreclosure sale, the lender assume the lease of any tenant whose lease is subsidized under state or federal law; established a new crime of mortgage fraud; and enacted a property tax exemption for real estate acquired through foreclosure and owned or held in trust by a charitable organization for creating community housing.

Two years later, the Legislature passed Chapter 194 of the Acts of 2012, An Act Preventing Unnecessary and Unlawful Foreclosures (the "2012 Act"). *See* 2012 Mass. Acts 1149. The 2012 Act further extends homeowner rights by establishing a new right to request a loan modification for "certain mortgage

loans," which generally contain higher risk loan characteristics.[6] Lenders are also required to take reasonable steps and make good faith efforts to avoid foreclosure for these loans, which must include consideration of the borrower's ability to make an affordable monthly payment. The DOB is now finalizing regulations to enforce this requirement and to track the results of the modification process.

These three statutes, together with the extensive existing laws governing foreclosures and redemptions (and associated consumer protections) already found in Massachusetts law, demonstrate that the Commonwealth has given close, comprehensive, and detailed attention to the issue of mortgage foreclosures, carefully balancing the rights and responsibilities of lenders and borrowers alike.[7]

C. The Legislature Is Now Considering Further Regulation of the Foreclosure Process.

The 2012 Act also created a thirteen-member task force to investigate how Massachusetts might prevent unnecessary vacancies following foreclosures; it includes representatives from the Attorney General's Office, consumer or

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[6] A "certain mortgage loan" does not require full documentation of the borrower's income or assets, and/or has: (a) an introductory interest rate for three years or less which is 2% lower than the fully indexed rate; (b) interest-only payments for any period of time (other than HELOC or construction loans); (c) a payment option of less than principal and interest fully amortized over the life of the loan; (d) prepayment penalties exceeding Massachusetts or federal law; (e) been underwritten at or above 90% loan-to-value with a 38% debt-to-income ratio; or (f) been underwritten at or above 95% loan-to-value. *See* Mass. Gen. Laws ch. 244 § 35B(a).

[7] In the 2011-2012 Legislative Session, the Legislature considered 55 separate mortgage lending and foreclosure bills.

homeowner organizations, and the MBA. The task force is required to consider the feasibility of allowing homeowners to occupy a property in foreclosure until a binding agreement has been executed with a purchaser who intends to make the property his or her principal residence. It is also required to evaluate the effectiveness of existing mediation programs in preventing foreclosure and the potential for a state-wide mediation program.[8] The task force's report to the Legislature is due on December 31, 2013.[9] *See* 2012 Mass. Acts 1149, 1159 (2012 Act, § 4).

D. Like Springfield, Several Other Municipalities Are Considering or Passing Foreclosure Ordinances.

Notwithstanding the comprehensive state scheme, municipal ordinances regulating the foreclosure processes have been proliferating across the

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[8] The Legislature expressly considered a state-wide mediation provision in the 2012 Act. The Senate's version of the bill contained such a provision, *see* Mass. S.B. 2298, § 2 (2012), but it was eliminated by the Conference Committee. *See* Mass. H.B. 4323 (2012), which was enacted as the 2012 Act.

[9] The foreclosure policies and practices of the MBA's members are also subject to supervision by their federal regulators: the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Consumer Financial Protection Bureau, which recently issued new mortgage servicing rules, including post-default management. *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,695 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024); Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10,901 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1026). The Servicemembers Civil Relief Act also regulates foreclosure on loans made to active duty servicemembers. *See*, *e.g.*, 50 U.S.C. app. § 521.

Commonwealth, including in Boston, Lynn, Lawrence, and Worcester. *See, e.g.*, Boston, Mass., Mun. Code ch. XVI, § 16-52 ("Boston Ord."); Lynn, Mass., Ordinance to Establish a Bill of Rights for Homeowners in the City of Lynn (May 14, 2013) ("Lynn Ord."); Worcester, Mass., Rev. Ordinances ch. 9, §14 ("Worcester Ord."); Lawrence, Mass., Rev. Ordinances chs. 8.28, 8.30 ("Lawrence Ord.").[10] Many contain mediation programs and property preservation requirements, but they are all different. *See, e.g.*, Boston Ord. § 16-52.4(c) (requiring vacant buildings to "be closed and secured to prevent entry by unauthorized persons in a manner not inconsistent with rules and regulations issued by the Inspectional Services Department"); Worcester Ord. § 14(c)(11) (requiring a $5,000 cash bond for each "vacant and/or foreclosing property"); Lawrence Ord. § 8.30.070 (requiring a copy of notices of right to cure to be filed with the city). Some contain extraordinary new requirements; for example, the City of Lynn's ordinance prohibits the lender from taking immediate possession of the property after foreclosure if the foreclosed owner wants to remain in the house, and would never allow that person to be evicted if the new owner does not intend to occupy the property as his or her principal residence. *See* Lynn Ord. § 14.00.

[10] A complete listing of these and similar ordinances appears at http://www2.safeguardproperties.com/.

ARGUMENT

THE ORDINANCES ARE PREEMPTED BY STATE LAW

Under the Home Rule Amendment to the Massachusetts Constitution, cities or towns may exercise only those powers which are "*not inconsistent* with the constitution or the laws enacted by the general court." Mass. Const. amend. art. 89, § 6 (emphasis added). *See also Boston Gas Co. v. City of Somerville*, 420 Mass. 702, 703, 652 N.E.2d 132, 133 (1995) ("Municipalities may not adopt by-laws or ordinances that are inconsistent with the State's laws.")

We show below that the District Court failed to give due weight to the breadth and detail of the Commonwealth's scheme for regulating the foreclosure process, and hence the extent to which the Commonwealth has already occupied the field of foreclosure regulation. We also show that the trial court further erred in misapprehending the effect of the Ordinances: they significantly alter the lender-borrower relationship, and they are irreconcilably inconsistent with state law and hence are preempted.

A. Massachusetts' Statutory Foreclosure Laws Provide Appropriate Protections and Occupy the Field.

State laws preempt local action where the "Legislature has made an explicit indication of its intention in this respect," or "the purpose of State legislation would be frustrated [by local action] so as to warrant an inference that the Legislature intended to preempt the field." *Wendell v. Att'y Gen.*, 394 Mass. 518,

524, 476 N.E.2d 585, 589 (1985). Thus, even without a clear statement of preemptive intent, legislation on a subject may be "so comprehensive that an inference would be justified that the Legislature intended to preempt the field." *Id.; accord Boston Gas Co.*, 420 Mass. at 704, 652 N.E.2d at 133 ("[I]n some circumstances we can infer that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose.").

As shown above, Mass. Gen. Laws ch. 244, "Foreclosure and Redemption of Mortgages," regulates the foreclosure process in extensive detail. On top of that, the Commonwealth has three times in recent years taken up the issue of foreclosures in response to the current economic environment and the efforts of the DOB. The 2007 Act addressed the right to cure period, subprime mortgages, a database of foreclosure activity, counseling for at-risk homeowners, the supervision of mortgage loan originators, and penalties for certain statutory violations. *See supra* pp. 8-9. The 2010 Act further extended the right to cure period, as well as protections for tenants in foreclosed properties, lender assumptions of the lease of tenants with subsidized leases, criminal mortgage fraud, and a tax exemption for real estate acquired through foreclosure held by a charitable organization for community housing. *See supra* p. 9. And finally, the 2012 Act established a right for borrowers to request a loan modification of

"higher-risk" mortgage loans, required lenders to make good faith efforts to avoid foreclosure, and charged the DOB with adopting implementing regulations to aid in enforcement of this requirement and to track the results of the modification process. *See supra* pp. 9-10.

This detailed attention to the issue of mortgage foreclosures, both in the original statutory provisions and in three statutes passed within a 6-year period, compels an inference that the Legislature intended to occupy the field of regulation of the foreclosure process and its effects and did not contemplate that cities and towns throughout the Commonwealth would be free to add their own crazy quilt layers of additional requirements on mortgagees. "'Where legislation deals with a subject comprehensively, it may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated.'" *St. George Greek Orthodox Cathedral v. Fire Dep't of Springfield*, 462 Mass. 120, 128 n.13, 967 N.E.2d 127, 134 n.13 (2012) (*quoting Dartmouth v. Greater Bedford Reg'l Vocational Technical High Sch. Dist.*, 461 Mass. 366, 375, 961 N.E.2d 83, 92 (2012)); *see also Boston Gas Co.*, 420 Mass. at 704, 652 N.E.2d at 134 ("Given the comprehensive nature of this statute, we conclude that the Legislature intended to preempt local entities from enacting legislation in this area.").

The Ordinances go beyond the Legislature's carefully drawn provisions, impose additional requirements on lenders that the Legislature could have enacted but did not, and second-guess and frustrate the Legislature's considered intent to balance the rights and responsibilities of lenders and borrowers. So, for example, the Legislature, with obvious deliberation, tread carefully in imposing a duty to try to work out a defaulted loan. In 2010, it created a right to cure period whose length depended on whether efforts were made to resolve a default, and then in 2012 required lenders to make a "good faith effort" to avoid foreclosure but limited that duty only to higher-risk, "certain mortgage loans." Ordinances such as Springfield's that create *for all loans* a broad duty to make a "good faith effort to negotiate and agree upon a commercially reasonable alternative to foreclosure" (§ 182-7), dispense with these careful judgments and so seek to expand the Legislature's requirements beyond their scope. In this and other ways, "the local government created an additional layer of regulation imposing requirements beyond those contemplated" by the Legislature (*St. George*, 462 Mass. at 128, 967 N.E.2d at 134), and those additional requirements are accordingly preempted. *See Boston Gas Co.*, 420 Mass. at 705, 652 N.E.2d at 134 (preempting local enactment adding to existing state duties on public utilities when excavating streets); *Wendell*, 394 Mass. at 528-29, 476 N.E.2d at 592 (preempting local enactment that imposed conditions beyond those established by statute).

The District Court erred in failing to recognize that the Commonwealth has occupied the field. Given all of the Legislature's recent legislation in this area, as well as its creation of a task force designed to advise it about further statewide legislation, the regulation of foreclosures and their effects is not a matter for any other governmental body to address.

It is not surprising for at least two reasons that the Legislature has occupied the field in this area. First, having a patchwork of non-uniform rules and regulations in cities and towns within the Commonwealth about management of defaulted loans would be unnecessarily burdensome. In *St. George*, the court held that the state Building Code preempted a Springfield ordinance regulating the types of automatic fire alarm systems that property owners could install. The court supported its ruling with the observation that, "[i]f all municipalities in the Commonwealth were to enact similarly restrictive ordinances and bylaws, a patchwork of building regulations would ensue," "sanctioning the development of different applicable building codes in each of the Commonwealth's 351 cities and towns." 462 Mass. at 130, 967 N.E.2d at 135.

That observation applies with equal force here. Allowing local governments to add idiosyncratic requirements throughout the Commonwealth on lenders would impose additional financial and administrative burdens on Massachusetts banks that the Legislature, in carefully balancing the interests of borrowers and lenders,

has pointedly refused to impose. If upheld, the Ordinances will require banks to go into the property management business, the security business, and the hazardous waste removal business. They will require these institutions to post five-figure bonds that in some cases will be larger than the debt or the value of any work at the property – essentially, a penalty levied on lenders for enforcing their contractual rights. Other municipalities already have sought to impose other requirements, some worse, some not as onerous, all as part of a well-meaning effort to address a public issue. Like the fire alarm ordinance struck down in *St. George*, however, the Ordinances are inconsistent with the Commonwealth's existing comprehensive and well-considered system of statewide regulation.

Second, the Ordinances are preempted because the regulation of the foreclosure process has historically been undertaken at the state government rather than on a local level. Both federal and state courts have recognized the importance of the historic source of legislation in a particular area. Thus, in *Nat'l City Bank of Indiana v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005), the court rejected Maryland's effort to regulate national banks' subsidiaries, noting that "states have never regulated national banks." *Id.* at 816 n.14. Similarly, in *American Financial Services Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 104 P.3d 813 (2005), the court held that a municipal ordinance regulating predatory lending was preempted by a state statute on the same subject, noting that "the Legislature was not suddenly

entering an area previously governed by municipalities and unexplored at a statewide level. To the contrary, as the City acknowledges, regulation of mortgage lenders has historically occurred at the state, not the municipal, level." *Id.* at 1255, 104 P.3d at 822; *see also Deutsche Bank Nat'l Trust Co. v. City of Providence*, P.C. No. 10-1240, 2010 R.I. Super. LEXIS 81, *14 (May 17, 2010) (city ordinance regulating the recording or mortgages was preempted: "[a]llowing towns and municipalities to enact their own recording laws would create conflicting obligations that might confuse individuals who seek to adhere to the accepted requirements.").

Accordingly, because the Legislature in Mass. Gen. Laws ch. 244 and the 2007, 2010, and 2012 Acts has occupied the field, municipal efforts like the Ordinances, which will create a "patchwork" of additional layers to the existing, comprehensive, statutory scheme and frustrate the Legislature's intent, are preempted and hence invalid.

B. The Ordinances Are Inconsistent with State Laws.

A city ordinance is preempted not only when the Legislature has occupied the field, but also when "the ordinance is inconsistent with particular provisions of the [relevant] statute." *Boston Gas Co.*, 420 Mass. at 704, 652 N.E.2d at 134; *see also Bloom v. City of Worcester*, 363 Mass. 136, 154, 293 N.E.2d 268, 279 (1973)

"[L]ocal regulations running directly contrary to the provisions of a state statute have not been able to survive the test of 'repugnancy.'").

The Ordinances fail this test as well. Among other conflicts, the Foreclosure Ordinance's definition of a property "owner" for purposes of maintenance and security responsibilities is fundamentally inconsistent with the definition in at least two state statutes; the Mediation Ordinance conflicts with the 2012 Act; and the Foreclosure Ordinance conflicts with the Commonwealth's trespass law.

1. The Foreclosure Ordinance Conflicts with the State Sanitary Code.

Mortgagees in Massachusetts may foreclose in one of three ways. They can enter the property (peaceably or by court order) and take and remain in possession for three years, after which foreclosure will have been accomplished (Mass. Gen. Laws ch. 244, § 1); they can foreclose after appropriate notice "under power of sale" (*id.* § 14); or they can foreclose through judicial action, though that is rarely done (*id.* § 1). Under the second, far most common procedure, the mortgagee is not entitled to enter and is not in possession of the property until the process is completed by the sheriff's sale. *See Negron v. Gordon*, 373 Mass. 199, 206, 366 N.E.2d 241, 245 (1977).

The state Sanitary Code and its implementing regulations impose maintenance responsibilities and liability for a city's costs in repairing dwellings or demolishing those that have become unfit for human habitation. *See generally*

Mass. Gen. Laws ch. 111; 105 Mass. Code Regs. 410.000. Reflecting the understanding that mortgagees are not owners with maintenance responsibilities, the Sanitary Code regulations include in the definition of an owner only "a mortgagee in possession" of the subject property. 105 Mass. Code Regs. 410.020. Hence mortgagees *not* in possession of the property are not owners and have no maintenance responsibilities under the Sanitary Code.

The Foreclosure Ordinance, however, defines an "Owner" to include "a mortgagee of any such property who has initiated the foreclosure process." § 285-9. As shown above, a mortgagee that initiates the foreclosure process "under power of sale" does not take possession of the property. Hence this Ordinance, in imposing maintenance duties on mortgagees that are not in possession of the property, imposes duties beyond those required by the Sanitation Code and is preempted.

The District Court erred in concluding that the Foreclosure Ordinance imposes only "relatively modest duties on mortgagees" and does not "significantly alter[]" the "general relationship between mortgagee and mortgagor." Appellants' Addendum at 8-9. The duties the Foreclosure Ordinance imposes are not in all instances "relatively modest." As noted above, the Ordinance requires lenders to become property managers of properties they do not possess or own. Moreover, the Ordinance creates substantial financial requirements: someone has to pay for

the required entry and work, and the City apparently believes by the size of the required $10,000 bond that the costs could be substantial. Hence the Ordinance transfers wholesale what could be extensive and expensive maintenance and repair duties from the borrower to the lender, in direct contravention of the scheme established by the Sanitary Code. The Ordinance also places the lender at risk by requiring it to enter on occupied property and perform work while a potentially-uncooperative occupant is present. These considerations do significantly alter the legal relationships and the lender's rights and risks.

The District Court further erred in ruling that the Foreclosure Ordinance is saved from preemption because lenders "can simultaneously comply with all of the requirements of the state laws and the Foreclosure Ordinance." *Id.* at 11. The lender's ability to do what the City commands does not make the Ordinance consistent with the Legislature's decision not to command the same action. In *Boston Gas Co.*, an ordinance which required public utilities excavating streets to do more than the applicable state statute required was struck down as preempted because "the ordinance is inconsistent with particular provisions of the statute." 420 Mass. at 704, 652 N.E.2d at 134. The court relied on *Wendell*, describing it as "holding [a] by-law inconsistent [and therefore preempted] because [it] imposed conditions beyond those established by statute." *Id*. at 705, 652 N.E.2d at 134 (*citing Wendell*, 394 Mass. at 528, 476 N.E.2d at 591).

Here the Foreclosure Ordinance is preempted as inconsistent even though a lender can comply with both it and the existing Sanitary Code. The state regulations reflect a conscious choice to apply the Sanitary Code to *some lenders* – those that are "mortgagees in possession." *See* 105 Mass. Code Regs. 410.020. Springfield has decided the Sanitary Code should apply to *all lenders* who might someday become a mortgagee in possession. That inconsistency dooms the Foreclosure Ordinance.

2. The Foreclosure Ordinance Conflicts with the Hazardous Materials Statutes.

The Foreclosure Ordinance requires an "owner" to "remove from the property, to the satisfaction of the Fire Commissioner, hazardous material as that term is defined in" Mass. Gen. Laws ch. 21K. § 285-10(A)(3). Chapter 21K is entitled "Mitigation of Hazardous Materials." It makes an owner of property liable for the cleanup of hazardous materials released from the property regardless of fault. Mass. Gen. Laws ch. 21K, § 5. "Owner" is defined by reference to § 2 of Chapter 21E, the Massachusetts Oil and Hazardous Material Release Prevention and Response Act. Mass. Gen. Laws ch. 21E, § 2. Section 2 of that Act defines an "owner" as, "in the case of a site, any person owning" the site. With respect to lenders, it has no provision treating mere secured parties as "owners" and even has a safe harbor for secured lenders not in possession, generally excluding them from the definition of "owner." *See id.* § 2(c).

The Foreclosure Ordinance imposes hazardous removal duties on mortgagees not in possession of the property, in direct contravention of the Legislature's decision to relieve those mortgagees of responsibilities and liabilities under the hazardous materials statutes just described.

In the District Court, the City acknowledged the inconsistency between the statutes and the Ordinances, but argued that the Ordinances are not preempted because the lender's conduct as hazardous waste manager need only be "to the satisfaction of the Fire Commissioner." City's Memorandum at 27. According to the City, harmony is achieved because its Fire Commissioner would not order a mortgagee that was an "owner" under the Foreclosure Ordinance to remove hazardous materials unless the mortgagee was also an "owner" under the Hazardous Material statutes. *Id.* That argument should be rejected, for two reasons.

First, the phrase "to the satisfaction of the Fire Commissioner" should be given its plain meaning, namely, as giving the Commissioner the authority to say whether the lender's effort at removal of on-site hazardous materials is sufficient. If the Fire Commissioner is not satisfied with the efforts, the lender cannot get a "Certificate of Compliance," *see* § 285-9, leaving it vulnerable to liability to the City for cleanup costs, loss of its bond, and daily fines. *See id.* §§ 285-12, -13, -17. The discretionary "satisfaction" standard entrusted to the Fire Commissioner

directs him to determine the mortgagee-cum-owner's compliance, not whether the mortgagee is required to remove the hazardous materials in the first place.

Second, the City cannot save the Foreclosure Ordinance from inconsistency with the Hazardous Materials statutes by promising that City officials will not enforce the Ordinance according to its plain terms but instead will ignore its commands as a matter of discretion on a case-by-case basis when necessary to avoid inconsistency.[11] The way to avoid preemption is to draft ordinances that do not conflict with existing State laws, not to draft ordinances that conflict and then offer assurances that officials will exercise their discretion to refuse to enforce the Ordinances in some future cases. Further, promises by the current City administration about its present intentions cannot suffice to save a law that will remain on the books until repealed.

In sum, the Foreclosure Ordinance defines a mortgagee as an "owner" in a way that directly conflicts with the Sanitation Code and the Hazardous Materials statutes, imposing duties on mortgagees that contravene the decisions reached by the Legislature. Hence the Foreclosure Ordinance is preempted both because the

[11] *See* Defendant City of Springfield's Sur-Reply at 8, D. Mass., Civ. Action No. 11-30280, Dkt. No. 24 ("[T]he requirements for compliance with the Ordinances largely rest on case-by-case determinations from the Building and Fire Commissioners.").

Legislature has occupied the field and because it imposes duties beyond those imposed on owners by existing state laws.

3. The Mediation Ordinance Conflicts with the 2012 Act.

The Mediation Ordinance's requirement of mediation (§ 285-12) is inconsistent with and imposes requirements well beyond those of Mass. Gen. Laws. ch. 244, including the 2012 Act. Supplementing Mass. Gen. Laws. ch. 244 with § 35B, the 2012 Act now requires mortgagees to make a good faith effort to avoid foreclosure by trying to modify "certain mortgage loans." *See* Mass. Gen. Laws ch. 244, § 35B(b). When a borrower with a loan subject to the 2012 Act requests a modification, the mortgagee must prepare: (a) a written assessment of the borrower's ability to make a monthly payment (including a statement of the borrower's income, debts, and obligations); (b) a net present value analysis of a modified mortgage loan; (c) the mortgagee's anticipated net recovery at foreclosure; (d) a statement of the mortgagee's interest; and (e) an offer or notice of determination not to offer a modified mortgage loan. *See id.* §35B(c). Mortgagees are required to report to the DOB semi-annually on the outcome of all such efforts and are presumed to have acted in good faith with respect to such loans where the net present value of a modified mortgage exceeds the anticipated net recovery at foreclosure only if the mortgagee offers a modification. *See id.* §35B(b)(2).

That carefully drawn state scheme does *not* require that effort as to all mortgage loans, does *not* include the additional interposition of a mediator, and does *not* impose significant costs on the mediation process. And we know that the Legislature *expressly considered the matter and decided not to require mediation* when drafting the 2012 Act and instead created a task force to consider the matter. *See supra* pp. 10-11 & n.8.

The Mediation Ordinance is hopelessly inconsistent with state law because it requires mortgagees to participate in and pay for a process that the Legislature has considered and not adopted in a field that it has previously occupied, and imposes requirements as to many loans that the Legislature specifically did not impose. These conflicts between this Ordinance and state law require that the Mediation Ordinance be struck down.

4. The Foreclosure Ordinance Conflicts with State Trespass Law.

In addition to conferring significant new responsibilities on mortgagees before a foreclosure sale, the Foreclosure Ordinance requires them to enter properties to perform maintenance and repair before they have a legal right to do so. Thus, section 285-10 of the Foreclosure Ordinance requires lenders, within 15 days of initiating the foreclosure process or within 30 days of a property becoming "vacant," to remove hazardous material from the property, secure the building from any entry, maintain the property free of overgrowth trash and debris and

pools of stagnant water, and ensure that structures are "maintained in a structurally sound condition."

In addition, the Foreclosure Ordinance in some circumstances requires mortgagees to provide the City Building Commissioner information about the contents of the property and space utilization floor plans for the property (*see* § 285-10(A)(1)-(2)) – information that is typically unavailable to a lender before a foreclosure sale and may require that mortgagees commit a trespass to obtain. All of these actions would require the lender to enter the property before a foreclosure sale.

Massachusetts imposes criminal penalties on "[w]hoever, without right enters or remains in or upon the dwelling house, buildings . . . improved or enclosed land . . . after having been forbidden so to do by the person who has lawful control of said premises, whether directly or by notice posted thereon . . . ." Mass. Gen. Laws ch. 266, § 120. The action of trespass requires: (1) actual possession by the plaintiff; and (2) intentional and illegal entry by the defendant. *McCarty v. Verizon New England, Inc.*, 731 F. Supp. 2d 123, 132 (D. Mass. 2010) (citations omitted). Since the Foreclosure Ordinance requirements apply regardless of whether the property is vacant, and properties in foreclosure often remain occupied, those requirements could subject mortgagees to civil and criminal liability. An ordinance having this effect should be held preempted by the

civil and criminal laws that would be violated by compliance with its commands. *See Roche v. Dir. of Div. of Marine Fisheries*, 76 Mass. App. Ct. 733, 737, 926 N.E.2d 559, 564 (2010) ("Preemption may be implied where it is 'impossible for a private party to comply with both state and federal requirements") (citation omitted).

The MBA acknowledges that some lenders might be granted access by the owner or tenant to discharge their duties under the Foreclosure Ordinance. And, some mortgages in Springfield allow the lender to enter upon property to secure it or otherwise take reasonable actions to preserve the lender's secured interest.[12] *See, e.g.*, Fannie Mae/Freddie Mac, Uniform Instrument, Form 3022, Massachusetts—Single Family, *available at* https://www.fanniemae.com/singlefamily/security-instruments. But the validity of the Ordinances cannot rise and fall on whether in particular instances the inconsistency will be avoided. The legal question is whether a City-imposed duty to enter on property one does not own or possess is inconsistent with the law of trespass. Merely stating the proposition demonstrates why the trial court erred in allowing the Foreclosure Ordinance to stand.

[12] To the MBA's knowledge, those types of rights to enter do not come close to mirroring in scope the duties to enter imposed by the Ordinances. They do not allow lenders to exercise all incidents of ownership of the type the Ordinances impose.

CONCLUSION

The Court should reverse the judgment below.[13]

Respectfully submitted,

/s/ Brenda R. Sharton
Brenda R. Sharton (1st Cir. #59154)
GOODWIN PROCTER LLP
Exchange Place
Boston, Massachusetts 02109
Tel. (617) 570-1000
Fax (617) 523-1231

Thomas M. Hefferon (1st Cir. #6509)
William F. Sheehan (1st Cir. #57442)
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, DC 20001
Tel. (202) 346-4000
Fax (202) 204-7242

Counsel for *Amicus Curiae*
Massachusetts Bankers Association, Inc.

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[13] Alternatively, the Court may wish to exercise its discretion to certify the preemption question to the Massachusetts Supreme Judicial Court, which by rule will receive certified questions in cases where a court "finds no controlling precedent and where the questions may be determinative of the pending cause of action." Mass. S.J.C. R. 1:03. *See In re Hundley*, 603 F.3d 95, 98 (1st Cir. 2010) (noting that, "[a]t its discretion, a federal court of appeals may certify questions of state law to the state's highest court" and certifying several questions to the Massachusetts Supreme Judicial Court).

Certificate of Compliance With Rule 32(a)
Type-Volume Limitation, Typeface Requirements,
And Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 SP2 in fourteen-point Times New Roman type.

/s/ Brenda R. Sharton

CERTIFICATE OF SERVICE

I, Brenda R. Sharton, hereby certify that on June 4, 2013, I caused the foregoing "Brief of Massachusetts Bankers Association, Inc. as *Amicus Curiae* Supporting Appellants and Urging Reversal" in the above-captioned matter to be transmitted to the Clerk of the United States Court of Appeals for the First Circuit through the Court's CM/ECF filing system. Also on that date, I certify that I served the counsel listed below, who are Filing Users, through the CM/ECF system.

/s/ Brenda R. Sharton

Thomas David Moore
Edward M. Pikula
City of Springfield Law Department
36 Court St
Springfield, MA 01103-0000
tmoore@springfieldcityhall.com
epikula@springfieldcityhall.com

Lisa Caryl deSousa
City of Springfield Law Department
95 State Street, 6th Floor
Springfield, MA 01103-0000
ldesousa@springfieldcityhall.com

Tani E. Sapirstein
Sapirstein & Saperstein PC
1350 Main St.
12th Floor
Springfield, MA 01103-0000
tani@sandslaw.com