No. 12-1917
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*.	Motion for Leave to File Amicus Curiae Brief in Support of Defendant-Appellee

Pursuant to Federal Rule of Appellate Procedure 29 and Local Rule 29(b), Harvard Legal Aid Bureau, National Consumer Law Center, National Community Reinvestment Coalition, Massachusetts Law Reform Institute, and Massachusetts Alliance Against Predatory Lending ("Amici") respectfully move this Court for leave to file the attached Amicus Curiae brief in support of affirmance of the judgment of the United States District Court for the District of Massachusetts dated July 3, 2012.

Amici have sought the consent of the parties to file this Amicus Curiae brief. The Appellee has assented to Amici's request; Appellants have not.

Pursuant to the requirements of Rule 29(b), Amici aver that they have significant interest in the outcome of this case and that the factual and legal perspective that Amici bring to this case will assist this Court in its resolution of

the issues before it. The "Interests of Amici Curiae" section of the proposed brief attached hereto explains in greater detail the Amici's interests in this case and their relevant expertise, but Amici summarize the same in this Motion:

1. This case involves a challenge to ordinances adopted by the City of Springfield. A decision by this Court reversing the District Court's decision would impose significant harm on countless thousands of clients and constituents of Amici. Such a decision would also deter other cities in Massachusetts and across the United States from adopting rules similar to those at issue in this case, increasing its impact many fold. The total impact of this case upon the clients and constituents of Amici, and accordingly upon the time and financial resources of Amici, is substantial.
2. Amici bring special expertise to the case, including familiarity with the legal issues and knowledge of the struggles facing former, present, and potential mortgagor-homeowners as well as others who are affected by fluctuations in the housing market, including tenants generally. Amici are some of the institutional actors who are and have been most deeply involved in protecting the interests of these parties in Springfield as well as throughout Massachusetts and the rest of the country. Amici are familiar with the laws directly at issue in this case, as well as others mentioned by the parties and amicus Massachusetts Bankers Association. Amici participated in their

drafting, testified before lawmaking bodies regarding the mischiefs that led to their adoption, and litigated under them.

WHEREFORE, Amici respectfully request that this Court grant them leave to participate as amici curiae and accept the proposed brief submitted herewith.

Dated: October 29, 2013

Respectfully submitted,

/s/ Lee D. Goldstein
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No. 12-1917
United States Court of Appeals for the First Circuit.

Easthampton Savings Bank, et al., *Plaintiffs-Appellants*,
v.
City of Springfield, *Defendant-Appellee*.

On Appeal from a Judgment of the United States
District Court for the District of Massachusetts.

Civil Action No. 11-30280 (Hon. Michael A. Ponsor)

Brief of Amici Curiae Harvard Legal Aid Bureau, National Consumer Law Center, National Community Reinvestment Coalition, Massachusetts Law Reform Institute, and Massachusetts Alliance Against Predatory Lending

In Support of Appellee and Urging Affirmance
of the Judgment of the District Court.

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Corporate Disclosure Statement

Each of the amici curiae on behalf of whom this brief is submitted certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Federal Rule of Appellate Procedure 29(c)(5) Statement

1. No counsel for a party authored this brief in whole or in part.
2. No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief.
3. No person other than amici curiae, their members or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

INTERESTS OF AMICI CURIAE

Harvard Legal Aid Bureau

The Harvard Legal Aid Bureau (HLAB), founded in 1913, is the nation's oldest student-run legal services organization and the Greater Boston area's second-largest provider of legal services. HLAB's mission is to help clients obtain equal access to justice and to remove legal barriers to economic opportunity. HLAB's student attorneys, close to 50 in number, represent indigent clients under the Massachusetts Supreme Judicial Court's Rule 3:03 and are supervised by eleven clinical instructors who are all attorneys licensed to practice law in the Commonwealth of Massachusetts.

HLAB has four major practice areas: housing, family, government benefits, and wage and hour. Law students participating in the housing practice defend residents facing summary process actions in Boston Housing Court and elsewhere. HLAB's student attorneys also assist tenants and homeowners at risk of losing their homes because of foreclosure. Since 2008, HLAB has provided legal assistance to hundreds of Boston-area residents living in foreclosed properties.[1]

[1] HLAB submitted briefs to and argued before the Supreme Judicial Court in several recent cases involving foreclosure. *See Bank of N.Y. v. Bailey*, 460 Mass. 327, 951 N.E.2d 331 (2011); *Eaton v. Fed. Nat'l Mortg. Ass'n*, 462 Mass. 569, 969 N.E.2d 1118 (2012); *Fed. Nat'l Mortg. Ass'n v. Hendricks*, 463 Mass. 635, 977 N.E.2d 552 (2012).

HLAB also hosts an annual conference about responses to the foreclosure crisis that is attended by attorneys from across the country.

National Consumer Law Center

Since 1969, the nonprofit National Consumer Law Center (NCLC) has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's activities include policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates.

NCLC's staff has extensive knowledge and experience in the issues relevant to this case, including foreclosure prevention, fair lending practices, and fair debt collection. NCLC staff attorneys write and publish treatises on these topics, including National Consumer Law Center, *Mortgage Lending* (2012) and National Consumer Law Center, *Foreclosures* (4th ed. 2012). NCLC advocates are frequently invited to testify before Congress, state legislatures, and administrative agencies on issues related to foreclosures and mortgage servicing.

In addition to publications and policy analysis, NCLC has also represented borrowers in class action litigation challenging servicers' failure to adhere to requirements of federal loan modification programs, discriminatory pricing practices in the mortgage market, and robo-signing and other improprieties in the foreclosure process. NCLC staff has actively worked with state and local

foreclosure mediation programs around the country. This work has included training mediators and attorneys who participate in the programs. NCLC has published a number of reports on foreclosure mediation, including Geoffry Walsh, National Consumer Law Center, *Rebuilding America, How States Can Save Millions of Homes through Foreclosure Mediation* (2012), *available at* http://www.nclc.org/foreclosures-and-mortgages/rebuilding-america.html.

National Community Reinvestment Coalition

The National Community Reinvestment Coalition (NCRC) is a nonprofit public interest organization founded in 1990. NCRC, both directly and through its network of six hundred community based member organizations — including eleven organizations in the state of Massachusetts — works to increase access to basic banking services including credit and savings, and to create and sustain affordable housing, job development and vibrant communities for America's working families. NCRC's professional staff have testified numerous times before Congress and the banking prudential regulators on numerous topics pertinent to the issues before this court, including solutions to the financial crisis, sustaining homeownership in the face of the foreclosure epidemic, fair and responsible lending and mortgage servicing, and preemption issues. NCRC, through its work as a United States Housing and Urban Development National Housing Counseling Intermediary, counseled over 50,000 families last year to sustain or improve their

housing situations. In addition, NCRC, through its National Neighbors civil rights program, seeks to advance fair lending and open and fair housing practices nationwide and to eliminate discrimination and mitigate the foreclosure crisis, both of which are detrimental to the economic growth of low to moderate income and traditionally underserved communities.

Massachusetts Law Reform Institute

Massachusetts Law Reform Institute (MLRI) is a statewide nonprofit legal services organization that promotes social and economic justice for traditionally underserved and low-income populations in Massachusetts through advocacy, education and legal action. MLRI's advocacy focuses on systemic reforms to policies and practices that harm people living in poverty. Its experienced and well-respected staff publish research papers and legal guides, serve as the central support center for local and regional legal services providers and advocacy organizations across the state, and litigate in trial and appellate courts.

Since 1968, MLRI's Housing Unit has played a critical role in advancing groundbreaking policies that benefit low-income individuals and families. Included among these are leadership in the formulation, passage, and implementation of state and federal laws assisting occupants in foreclosed properties. In 2007, MLRI presented testimony to the Congressional House Financial Services Committee that was instrumental in the passage of the Protecting Tenants at Foreclosure Act of

2009, Pub. L. No. 111-22, §§ 701–704, 123 Stat. 1632 (2009). MLRI has a stake in the outcome of this litigation as it intends to work with other communities for passage of ordinances similar to Springfield's and to help with efforts for statewide legislation to accomplish the same goals.

Massachusetts Alliance Against Predatory Lending

The Massachusetts Alliance Against Predatory Lending (MAAPL) is a coalition of dozens of local and statewide organizations. Among the member organizations are housing counseling agencies, legal services providers, social service agencies, and community-based social action groups. Working from the premise that foreclosures cause harm not just to those whose homes are endangered, but to surrounding neighborhoods, the municipality, and the banks themselves, MAAPL brings these organizations together to empower Massachusetts homeowners, tenants, neighborhoods, and communities to mitigate the ill effects of the foreclosure crisis. MAAPL focuses particularly on eradicating predatory lending practices in the Commonwealth. Its specific efforts include educating and organizing homeowners and advocating for policy reform.

FACTUAL BACKGROUND

In the wake of the subprime mortgage crisis of 2007–2008, a foreclosure crisis seized Boston, the Commonwealth of Massachusetts, and the entire nation. In the past five years, Massachusetts has lost more than 50,000 homes to

foreclosure. *See* Michele Morgan Bolton, *Brockton Pulls $170m Payroll from Bank of America*, Bos. Globe, Aug. 9, 2012, http://www.boston.com/news/local/massachusetts/2012/08/08/city-brockton-pulls-million-payroll-account-from-bank-america/85s5zj82BsTNc3OGHTQ9vJ/story.html (49,264 Massachusetts homeowners lost homes to foreclosure between January 2007 and August 2012). Nationwide, some 4.5 million homes have already been lost to foreclosure, and another million households are currently experiencing it. *See* CoreLogic, *National Foreclosure Report* 2 (2013), *available at* http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-june-2013.pdf. By 2010, the percentage of all mortgage loans in Massachusetts that were foreclosed, in the foreclosure process, or in default topped eight percent, leaps and bounds above the one percent average that were foreclosed or defaulted in Massachusetts in the early 2000s. *See* Tim H. Davis, *3.1 – Special Report: Gauging the Pace toward Full Recovery*, Massachusetts Housing Partnership (Jan. 15, 2013), *available at* http://www.mhp.net/vision/resources.php?page_function=detail&resource_id=524.

Though the rate of foreclosure has descended slightly from its 2010 peak, recent developments indicate that foreclosures in the state are again on the rise. *See* Ibby Caputo, *Mass Foreclosures on the Rise Despite Improving Economy*, WBGH News, Oct. 10, 2013, http://wgbhnews.org/post/mass-foreclosures-rise-despite-improving-economy; Tim H. Davis, *3.4 - Foreclosures still down but new regs*

may spark uptick, Massachusetts Housing Partnership (Aug. 12, 2013), *available at* http://www.mhp.net/vision/resources.php?page_function=detail&resource_id=554 (arguing that new foreclosure regulations will lead lenders to commence foreclosures in greater numbers). Defaults are still occurring at rates three to four times as high as they were in previous decades. *See* Davis, *supra*, *3.1 – Special Report*. Because foreclosures are often far more costly to the owners of loans than modifications, they compromise household stability to no one's benefit. *See* Wei Li & Sonia Garrison, Center for Responsible Lending, *Fix or Evict? Loan Modifications Return More Value than Foreclosures* 2 (2011), *available at* http://policylinkcontent.s3.amazonaws.com/FixOrEvict_CRL_1.pdf (remarking that in "a broad range of [cases], payment-reducing modifications would return more value to the investor than a foreclosure, even at high modification re-default rates"); Dunstan Prial, *Banks Reworking Loans Means Fewer Foreclosures*, Fox Business, Mar. 28, 2013, http://www.foxbusiness.com/economy/2013/03/28/banks-reworking-loans-means-fewer-foreclosures/ (commenting that "keeping people in their homes under revamped payment plans is financially preferable to the often costly and time-consuming foreclosure process").[2]

[2] Although it may be in a bank's best interest not to foreclose, the reasons why they may go ahead with foreclosure regardless are many. *See* Robert Cooter, *The Cost of Coase*, 11 J. Legal Stud. 1, 17–18 (1982) (explaining how parties fail to achieve mutually beneficial bargains due to transaction costs like that of coming to the bargaining table). *See also* discussion *infra* Section III.B.

State and federal government efforts to deter foreclosure have not substantially improved coordination between banks and eligible borrowers, but rather have incentivized short sales and other types of resolution whereby occupants leave their homes rather than retain them. For example, more money from the $25 billion National Mortgage Settlement (reached between the state attorneys general and the five largest mortgage services) was allocated to short sales than to principal reduction on primary mortgages. *See* Office of Mortgage Settlement Oversight, *Fact Sheet: Interim Credit* 3 (Oct. 16, 2013), *available at* https://www.mortgageoversight.com/wp-content/uploads/2013/10/Fact-Sheet_Interim-credit.pdf (noting that roughly $4.1 billion had been credited to participating banks for first lien principal forgiveness, while more than $5.4 billion had been credited to the same banks for short sales); Tim H. Davis, *3.2 – Trouble spots to watch while we recover*, Metropolitan Housing Partnership (Feb. 20, 2013), *available at* http://www.mhp.net/vision/resources.php?page_function=detail&resource_id=535 (stating that in 2012, as many as 65% of defaulting mortgages in Massachusetts resulted in short sales).

In monetary terms, the costs of foreclosure are startling. Foreclosure causes real property to lose up to 28% of its real value. *See* John Campbell, Stefano Giglio, & Parag Pathak, *Forced Sales and House Prices* (Nat'l Bureau of Econ. Research, Working Paper No. 14866, 2009), *available at* http://www.nber.org/

papers/w14866.pdf?new_window=1. For example, one study showed that the average foreclosure in Chicago in the mid-2000s caused a $159,000 drop in value for the affected property. *See* Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 Hous. Pol'y Debate 57, 57 (2006). Moreover, the drop in value of one foreclosed property has spillover effects the vaon its neighbors, causing adjacent homes to lose, on average, $7,200 of their own value. *See* Center for Responsible Lending, *Soaring Spillover: Accelerating Foreclosures to Cost Neighborhoods $502 Billion in 2009 Alone; 69.6 Million Homes Lose $7,200 on Average* 2 (2009); *cf.* Immergluck & Smith, 17 Housing Pol'y Debate at 57.

Perhaps the most substantial costs of foreclosure, however, are to the health and safety of the occupants of foreclosed buildings and the residents of neighborhoods with high foreclosure densities. Foreclosure compromises safety because it is highly correlated with vacancy and crime. *See* Sam Simon, Massachusetts Alliance Against Predatory Lending, *Vacant Spaces: The External Cost of Foreclosure-Related Vacancies in Boston* (2011), *available at* http://www.maapl.info/uploads/VacantSpaces_Final.pdf (determining that the average vacant residential property in Boston generates $29,000 in costs resulting from burglaries, larcenies, and aggravated assaults that occur at the property); Gould Ellen, Lacoe, & Sharygin, *Do Foreclosures Cause Crime?*, 75 J. of Urb.

Econ. 59, 59–70 (2013) (finding a correlation between foreclosure activity and crime, particularly where foreclosure is highly concentrated); Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgages on Neighborhood Crime*, 21 Hous. Studies 851 (2006) , 854–55 (2006) (same). Vacant properties that are not regularly maintained can also become unsanitary, dilapidated, and dangerous, presenting significant public health and safety hazards that sap municipal resources. *See* Binyamin Appelbaum, *City Presses for Upkeep of Foreclosed Properties*, Bos. Globe, Jan. 30, 2008, http://www.boston.com/realestate/news/articles/2008/01/30/city_presses_for_upkeep_of_foreclosed_properties/; Jason Szep, *Some Homes Worth Less than Their Copper Pipes*, Reuters, Apr. 1, 2008, http://www.reuters.com/article/newsOne/idUSN2527885420080401?sp=true; Edward Mason, *Lawmakers*: *Lawrence Nonprofit Has Model Plan to Stave Off Foreclosures*, Eagle-Tribune, Apr. 7, 2008, http://www.eagletribune.com/punews/local_story_098025104.html. Of course, families victimized by crime and cities picking up the bill for law enforcement bear the human and financial brunt of these costs.

In order to protect the health and safety of its residents, the City of Springfield ("Appellees," "Springfield," or the "City") enacted ordinances (the "Foreclosure Ordinance" and the "Mediation Ordinance," and collectively "Springfield Ordinances," as the other briefs have described them), designed to

minimize the number of preventable foreclosures by facilitating coordination between banks and borrowers through mediation. Springfield is not alone in having taken this step. Cities that have passed similar ordinances include Lynn, Massachusetts; Lawrence, Massachusetts; St. Louis, Missouri; and Milwaukee, Wisconsin. *See* Lynn, Mass., Ordinance to Establish a Bill of Rights for Homeowners in the City of Lynn (Apr. 9, 2013); Lawrence, Mass., Rev. Ordinances chs. 8.28, 8.30 (2013); St. Louis, Mo., Ordinance 69428 (Oct. 10, 2012); Milwaukee, Wis., Ordinance 200-22.5 (2009). Many states have enacted similar laws. *See infra* n.7. Moreover, county courts around the country have set up local foreclosure mediation programs, including in Philadelphia, Pittsburgh, Louisville, and Santa Fe. *See* Geoffry Walsh, National Consumer Law Center, *State and Local Foreclosure Mediation Programs: Can They Save Homes?* 4–5 (2009), *available at* http://www.nclc.org/images/pdf/200bforeclosure_mortgage/mediation/report-state-mediation-programs.pdf. The Philadelphia program is widely recognized as being highly effective in minimizing foreclosures and causing no significant interference with the existing foreclosure process. *See e.g.* The Reinvestment Fund, *Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report and Findings* (2011), *available at* http://www.trfund.com/wp-content/uploads/2013/07/Foreclosure_Diversion_Initial_Report.pdf. The District Court affirmed that the City's adoption of the

Ordinances was a valid exercise of its police powers. *Easthampton Sav. Bank v. City of Springfield*, 874 F. Supp. 2d 25, 32 n.4 (2012) (citing "the health and safety of the community").

ARGUMENT

I. The Springfield Ordinances[3] Are Not Preempted by State Law.

The Home Rule Procedures Act empowers Springfield — and all municipalities in Massachusetts — to adopt local ordinances that are "not inconsistent with the constitution or laws enacted by the general court . . . ." Mass. Gen. Laws ch. 43B, § 13. If the state legislature has explicitly forbidden the adoption of local ordinances on a subject, a municipality's ordinance on that subject is preempted. Appellant concedes that no explicit preemption exists here. *See* Appellants' Br. at 7. In the absence of express preemption, local ordinances are presumptively proper. A court may invalidate a local ordinance for preemption only if it is in "sharp conflict" with state law. *Bloom v. City of Worcester*, 363 Mass. 136, 154, 293 N.E.2d 268, 279 (1973). A local ordinance may create a "sharp conflict" in two ways: first, "when . . . the legislative intent to preclude local action is clear" through the comprehensiveness of the state statutory scheme; and second, when "the purpose of the statute cannot be achieved in the face of the

[3] The Appellant has not argued that the Mediation Ordinance is preempted in this appeal, but because the arguments opposing preemption are substantially the same for the Foreclosure and Mediation Ordinances, we address the Mediation Ordinance here as well.

local by-law." *Grace v. Town of Brookline*, 379 Mass. 43, 54, 399 N.E.2d 1038, 1044 (1979). This second form of "sharp conflict" presents an especially high bar. If a state's "legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the state legislation . . . ." *Bloom*, 363 Mass. at 157, 293 N.E.2d at 275. The Springfield Ordinances are not in "sharp conflict" with state law under either analysis.

A. The Springfield Ordinances Do Not Frustrate State Law.

The mere fact that a state has legislated in a given area does not preclude municipalities from also regulating in that area. *Bloom*, 363 Mass. at 157, 293 N.E.2d at 275. Appellants' "frustration" arguments hinge on alleging that Massachusetts law declines to impose certain duties on mortgagees not in possession of a property, and that this lack of an affirmative duty at the state level presents a bar to any such requirements at the local level. Appellants' Br. at 11. Appellants point to three areas of Massachusetts law that they allege decline to impose maintenance requirements on mortgagees not in physical possession: (1) the Foreclosure Statute; (2) the State Sanitary Code; and (3) the Massachusetts Oil and Hazardous Material Release Prevention and Response Act.

None of the state laws identified by Appellants creates the "sharp conflict" required to invalidate the Springfield Ordinances. First, a lack of such affirmative

duties in chapter 244 does not serve as a bar to the Ordinances, as there is no "sharp conflict" between the Ordinances, which apply to mortgagees who have initiated foreclosure, and the provisions contained in the chapter. Second, the plain text of the State Sanitary Code is not limited to mortgagees in possession. In fact, the Code extends responsibilities to all parties with legal title — which in Massachusetts would be the lender and its successors and assigns — and affirmatively authorizes municipalities to impose stricter regulations on property owners. Third, the Ordinances cannot frustrate the purpose of chapter 21E because that law regulates an entirely different set of activities. Because the Springfield Ordinances do not frustrate any state purpose, Appellants' claims of preemption on this basis fail.

1. The Massachusetts Foreclosure Statute.

To show that state law preempts a municipal ordinance, Appellants have the substantial burden of showing that the ordinance is "so repugnant to and inconsistent with a later enactment covering the same subject that both cannot stand." *Golden v. Bd. of Selectmen of Falmouth*, 358 Mass. 519, 524, 265 N.E.2d 573, 576 (1970). No section of chapter 244 would be frustrated by the enactment of the Springfield Ordinances, and therefore chapter 244 does not create a comprehensive scheme that preempts all local regulation concerning the maintenance of foreclosed properties.

Appellants cite *St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Department of Springfield*, 462 Mass. 120, 967 N.E.2d 127 (2012), in arguing that local ordinances imposing additional or more stringent duties on parties regulated by state law are preempted. Appellants' Br. at 8–9. But Appellants misinterpret the Supreme Judicial Court's preemption jurisprudence. Time and again, the Supreme Judicial Court has upheld local ordinances that impose heightened or more stringent requirements than exist under state law. In *Tri-Nel Management, Inc. v. Board of Health of Barnstable*, the Supreme Judicial Court held that municipalities can impose additional regulation on areas already covered by statute, including more stringent restrictions on smoking, because state law established a floor rather than a ceiling. *Tri-Nel Mgmt., Inc.*, 433 Mass. 217, 223–24, 741 N.E.2d 37, 43 (2001); *see also Barlow v. Town of Wareham*, 401 Mass. 408, 414, 517 N.E.2d 146, 149 (1988) (finding that a state shell-fishing license established a "necessary, but not necessarily sufficient" condition that could be supplemented by municipalities). Massachusetts courts have also held that a municipal ordinance can lawfully devise a local regulatory structure that imposes requirements over and above a state regulatory scheme for waste removal service providers, such as requiring that vendors proceed through an additional licensing system after being licensed by the state and that such vendors perform duties not otherwise required by state law. *See Loberto v. Town of Franklin*, 27 Mass. App.

Ct. 797, 798–800, 543 N.E.2d 1157, 1157–59 (1989). Notably, the *Loberto* court deferred to the ordinance's stated purpose of protecting the public health. *Loberto*, 27 Mass. App. Ct. at 801, 543 N.E.2d at 1150.

These principles apply to the relationship between the Springfield Ordinances and Massachusetts General Law chapter 244. While chapter 244 sets out the state's regulatory scheme concerning foreclosure, the Springfield Ordinances independently serve the public health and safety interests of the municipality. Massachusetts case law establishes that municipalities can lawfully impose more stringent or additional regulations — including affirmative duties on regulated parties — in areas already addressed by state law, especially where the municipality seeks to protect public health and safety.

Appellants place significant emphasis on the fact that the Springfield Ordinances impose duties on mortgagees who have initiated foreclosure proceedings but not yet taken possession. Appellants' Br. at 11. However, both Ordinances apply narrowly to mortgagees that have taken action to commence foreclosure proceedings by filing a petition pursuant to the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-597b. *See* Springfield, Mass., Code § 285-9 (2011) (defining the "owner" to whom the maintenance requirements of § 285-10 apply as a mortgagee who initiates foreclosure proceedings, and defining the initiation of foreclosure proceedings as the filing of the Servicemembers Civil

Relief Act petition); Springfield, Mass., Code § 182-4 (2011) (limiting application of mediation program to "the mediation of mortgage foreclosures").

As a result, the District Court was correct to conclude that the duties that the Ordinances impose are "modest" and "fall[] squarely within the City's . . . powers" to protect the health, safety, and well-being of city residents. *Easthampton*, 874 F. Supp. 2d at 30, 32. It is not uncommon for municipalities to adopt local regulations concerned with mitigating the harms associated with foreclosed buildings. That eleven states impose mandatory mediation requirements on mortgagees commencing foreclosure demonstrates that it is common to regulate the conduct of mortgagees not yet in possession. *See infra* n.7. Furthermore, in Massachusetts, the lender rather than the homeowner holds legal title to the property. *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 647, 941 N.E.2d 40 (2011). As title holder, it should reasonably expect to be subject to regulation.

Nothing in chapter 244 prevents regulation of the activities of entities who have legal title to properties of which they do not have possession. For example, landlords have obligations to maintain rental properties in compliance with the Sanitary Code even where they do not have possession of those units. *See, e.g.*, Mass. Gen. Laws c. 186, § 14. Given the general presumption in favor of local ordinances' validity and the lack of an express exemption from local regulation for

mortgagees not in possession under Massachusetts law, the Ordinances produce no conflict at all.

Appellants argue that the requirements to remove waste from the premises and participate in a mediation program, promulgated under Springfield's police power to regulate the health and safety of its citizens, produce a sharp conflict with chapter 244. No sharp conflict exists for several reasons: first, one may comply both with the state law and with the Springfield Ordinances' requirements simultaneously, as there is no express preclusion of regulating mortgagees not yet in possession. Second, the Ordinances explicitly provide that no parties shall be regulated if regulation is barred by Massachusetts law. Third, as the District Court properly found, the Ordinances impose "relatively modest duties" on mortgagees and do not alter the process or timeline of foreclosures as defined by Massachusetts law. *Easthampton Sav. Bank*, 874 F. Supp. 2d at 30.

Even if this Court were to find tension between the Springfield Ordinances and Massachusetts law, the Foreclosure Ordinance explicitly provides that no party need comply if it is "exempt from such actions by Massachusetts General Laws," and the Mediation Ordinance provides that it "shall in no way constitute an extension of the foreclosure process, nor an extension of the right to cure period." Springfield, Mass., Code § 285-10 (2011); Springfield, Mass., Code § 182-7 (2011). Springfield's intent to produce regulations that are entirely consistent with

state law is unambiguous. Any duties required of mortgagees who have begun the foreclosure process but are not in possession are proper because they are not expressly barred by state law. Even if such a bar existed, the Springfield Ordinances impose no regulations on parties exempted from regulation by the state.

Finally, this Court should defer to the District Court's finding that the Foreclosure Ordinance places "modest" duties on all regulated parties. Once again, the imposition of additional duties is acceptable under the Supreme Judicial Court's longstanding precedent on preemption and Home Rule. The City of Springfield is afforded significant powers to police the health and safety of its residents. *See* Mass. Gen. Laws ch. 43B, § 13. Any ordinance enacted under this power is presumptively valid. There is a strong and reasonable connection between the substance of the Ordinances and the health and safety of Springfield residents. *See supra* discussion in Factual Background.

2. The State Sanitary Code.

Appellants allege that the actions required of mortgagees under the Foreclosure Ordinance sharply conflict with provisions of the State Sanitary Code. 105 Mass. Code Regs. 410. Appellants point to the text of the Sanitary Code as explicitly exempting mortgagees not in possession of a property from regulation. Appellants' Br. at 14–17. This construction of the regulations is not borne out by the text of the Code, which explicitly applies to anyone who has "legal title" to a

dwelling, or the text of the Foreclosure Ordinance, which applies only to mortgagees who have initiated foreclosure proceedings. *See* 105 Mass. Code Regs. 410.020. Even if the question were not settled by text alone, the Springfield Ordinances expressly exempt from their scope any mortgagees that would be exempted under state law.

The Sanitary Code provides that the parties who must maintain dwellings in accordance with the Code include anyone who "*has legal title* to any dwelling[;] . . . *has care, charge or control of any dwelling*[;] . . . is a mortgagee in possession of any such property; . . . is an agent, trustee, or other person *appointed by the courts and vested with possession or control of any such property* . . . ." 105 Mass. Code Regs. 410.020 (defining "Owner") (emphasis added). Because Massachusetts is a title theory state, the lender and its successors and assigns — which may include the creditors who initiate foreclosure — fall within the plain language of the Sanitary Code.

Furthermore, terms in the text of the regulation such as "care," "charge," and "control" contemplate placing liability for the maintenance of properties on mortgagees regardless of whether they possess the properties in question. As such, Appellants' position that mortgagees not in possession of foreclosed properties are not subject to the Massachusetts Sanitary Code is unsupported by the text of the

Code.[4] Furthermore, as discussed in Part I.A., *supra*, the Springfield Ordinances do not apply to all mortgagees, but to the subset of mortgagees who have commenced foreclosure proceedings by filing a petition to foreclose under the Servicemembers Civil Relief Act, thus asserting their interests in the properties the Ordinances regulate. *See* 50 U.S.C. App. §§ 501-597b. Therefore, there is no significant distinction between the mortgagees that the Sanitary Code was intended to regulate and the mortgagees to whom the Foreclosure Ordinance applies.

Even if this Court were to find that the Sanitary Code excludes all mortgagees not in physical possession of a property despite their holding legal title, two factors mitigate against a finding of sharp conflict. First, when a state statute provides for municipalities to impose additional regulation on areas covered by the statute, "the statutory language . . . itself defeats an assertion of preemption." *Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable*, 433 Mass. 217, 224, 741 N.E.2d 37 (2001). The State Sanitary Code provides municipalities with broad authority to promulgate stricter regulations in the interest of protecting the health and safety of their citizens. The Code states:

> Unless otherwise *expressly* provided in any other article, the legally designated health authority of any city, town, country, or other legally constituted governmental unit . . . may, as it considers necessary to

[4] Massachusetts courts have not had the opportunity to answer this interpretive question. This Court should hesitate before ruling on such an issue of state law before the Commonwealth's own courts have had the opportunity to provide such a basis for finding that the State Sanitary Code preempts the Foreclosure Ordinance.

> promote and protect the health and well being of the particular locality . . . adopt under its own legal power as exists in the General Laws any rules or regulations containing requirements stricter than those contained in the State Sanitary Code. Nor should the existence of the State Sanitary Code limit or otherwise affect the power of any health authority with respect to any matter for which the State Sanitary Code makes no provision.

105 Mass. Code Regs. 400.015 (emphasis added).

This provision empowers Springfield to regulate mortgagees not in physical possession of property in two ways. First, it authorizes the Springfield Foreclosure Ordinance as a regulation that is "stricter" than those contained in the State Sanitary Code. Second, it authorizes the Springfield Foreclosure Ordinance as a regulation of a "matter for which the State Sanitary Code makes no provision." In other words, the provisions of the Code are meant to be read as baseline regulations that municipalities may elaborate on, make more stringent, or supplement pursuant to their power to regulate health and safety.

Second, the text of the Foreclosure Ordinance specifically avoids imposing duties that are precluded by state law. Section 285-10 of the Ordinance imposes several requirements upon "any owner of a vacant and/or foreclosing property," "*unless exempt from such actions by Massachusetts General Laws*." Springfield, Mass., Code § 285-10 (2011) (emphasis added). The Ordinance thus prohibits the imposition of duties that Massachusetts law affirmatively prohibits. The City of

Springfield could not have crafted a more explicit bar to the imposition of local duties that are preempted by state law.

3. The Massachusetts Oil and Hazardous Material Release Prevention and Response Act.

Appellants allege that the Foreclosure Ordinance sharply conflicts with Massachusetts General Law chapter 21E, which seeks to prevent the emission of oil and other hazardous materials. Appellants' Br. at 17–18. Specifically, Appellants point to the Foreclosure Ordinance's requirement that owners of foreclosed properties remove "hazardous materials." Mass. Gen. Laws ch. 21E, § 2. Appellants' interpretation contorts the statute; there can be no sharp conflict because chapter 21E and the Foreclosure Ordinance regulate entirely different areas.

Furthermore, even if this Court finds that chapter 21E and the Foreclosure Ordinance regulate the same activity, no sharp conflict exists unless chapter 21E explicitly precludes the Ordinance's hazardous materials removal requirement. It does not.

Even if chapter 21E explicitly precluded the removal required by the Ordinance, Section 285-10 of the Foreclosure Ordinance lists the registration and maintenance requirements imposed upon "any owner of a vacant and/or foreclosing property . . . *unless exempt from such actions by Massachusetts General Laws*." Springfield, Mass. Code § 285-10 (2011) (emphasis added). The Ordinance thus provides explicitly that mortgagees not subject to Massachusetts

General Law chapter 21E, or any other state law providing for the maintenance of real estate, are also not subject to the requirements of the Foreclosure Ordinance.

B. Massachusetts Mortgage and Foreclosure Laws Do Not Create a Regulatory Scheme Sufficiently Comprehensive for the Ordinances to Be in "Sharp Conflict" with Them.

Courts have found preemption in circumstances where state laws regulating a subject are so comprehensive that any local regulation on the same subject would interfere with that regulatory scheme. *See Bos. Gas Co. v. City of Newton*, 425 Mass. 697, 682 N.E.2d 1336 (1997). Express statutory requirements that are general and involve subsequent elaboration are not enough to rise to a comprehensive scheme. *See Fafard v. Conservation Comm'n of Constable*, 32 Mass. 194, 204, 733 N.E.2d 66, 75 (2000). The Massachusetts Foreclosure Statute, Mass. Gen. Laws ch. 244, does not regulate the foreclosure process so comprehensively as to preempt municipal regulation of the harms arising from foreclosure. Most notably, chapter 244 contains few provisions regulating the maintenance of, or other ills associated with, foreclosed buildings, despite amendments in 2007, 2010, and 2012.

The 2007 Act Protecting and Preserving Home Ownership, 2007 Mass. Acts 719, was primarily concerned with providing homeowners information and notice. For instance, it contained provisions regarding homeowner counseling; a foreclosure database; and information to be provided in a right to cure notice. *See*

Mass. Gen. Laws ch. 186, § 17B 1/2 (requiring that counseling be provided to first time home buyers purchasing property using subprime loans); Mass. Gen. Laws ch. 244, § 35A (defaulting mortgagors must be given notice of their right to a cure as well as a period of time within which to cure); Mass. Gen. Laws ch. 244, § 14A (database of foreclosure activity). The 2010 Act Relative to Mortgage Foreclosures, 2010 Mass. Acts 1321, provided one substantive right to homeowners to mitigate harms arising from foreclosure by extending the right to cure period from 90 to 150 days. However, the rest of that Act did not significantly address foreclosure alternatives or loss mitigation. Instead, a significant part of the 2010 Act served to provide additional rights to tenants of foreclosed properties. *See* Mass. Gen. Laws ch. 186A, § 2 (stating that a tenant living in a foreclosed building may not be evicted without just cause). The 2010 Act also contained provisions as diverse as one establishing a mortgage fraud crime and another providing a property tax exemption for real estate held by a charitable organization. See Mass. Gen. Laws ch. 266, § 35A; Mass. Gen. Laws ch. 59, § 5(e). However, these diverse provisions formed at best a patchwork rather than a comprehensive regulatory scheme.

The 2012 Act Preventing Unlawful and Unnecessary Foreclosures, 2012 Mass. Acts 194, went further than previous amendments to General Laws chapter 244 in regulating the harms arising from foreclosure, but not far enough to establish a comprehensive scheme that would preempt municipal regulation of the

same. The 2012 Act created General Laws chapter 244, section 35B, which prohibits creditors from publishing notices of foreclosure sales for certain mortgage loans until they have made a "good faith effort" to avoid foreclosure. Mass. Gen. Laws ch. 244, § 35B(b). This "good faith effort" requirement is too nonspecific to suggest that chapter 244 as amended by the 2012 Act was intended to regulate comprehensively the harms associated with foreclosure. In *Fafard v. Conservation Commission of Constable*, the Supreme Judicial Court held that the sections of a statute regulating pier construction were not too comprehensive to preempt a local ordinance because the statute's command that tidelands be "utilized only for water-dependent uses or otherwise serve a proper public purpose" was too general. 432 Mass. 194, 201, 204, 733 N.E.2d 66, 72, 75 (2000). The Court emphasized that such general language at most served to establish minimum statewide standards, and that, in situations like that in *Fafard*, local governments should be free to adopt more stringent controls. *See* 432 Mass. at 201, 733 N.E.2d at 72.

Here, the "good faith effort" requirement in section 35B is analogous to "proper public purpose" language in *Fafard* because it is not precisely defined and is treated as a flexible standard rather than one that must be applied uniformly. The plain language of section 35B contemplates more stringent application of its good faith effort requirement by permitting the Division of Banks to "adopt, amend or repeal regulations to aid in the administration and enforcement of this section, . . .

includ[ing] requirements for reasonable steps and good faith efforts of the creditor to avoid foreclosure and safe harbors for compliance in addition to those under this section." Mass. Gen. Laws ch. 244, § 35B(h). Because the General Court expressly treated the good faith effort requirement as a floor that could be elaborated and extended through subsequent regulation, it did not intend for section 35B to serve as a comprehensive regulatory scheme. *See Fafard*, 432 Mass. at 204, 733 N.E.2d at 75.

Moreover, though section 35B, unlike the Mediation Ordinance, limits the "good faith effort" requirement to "certain mortgage loans" as defined in subsection (a) of the statute, Mass. Gen. Laws ch. 244, § 35B(c), it does not expressly deny municipalities the ability to extend the "good faith effort" requirement to other loans. Even if the statute did not allow for the extension of its good faith effort requirement, the mediation requirement of the Mediation Ordinance is sufficiently distinct that municipalities could require mediation with respect to loans to which section 35B does not apply without concomitantly imposing on creditors section 35B's good faith effort requirement.[5] That the state

[5] One significant difference is that the chapter 35B process begins and concludes before the Servicemembers Civil Relief Act complaint is filed, whereas the Springfield Ordinances would only apply after the mortgagee has asserted its interest in the property by filing the complaint. *Compare* Mass. Gen. Laws ch. 244 § 35B(c) (notice of right to pursue modified mortgage loan must be sent with chapter 35A notice of right to cure 90–150 days before the amount due may be accelerated) *with* Springfield, Mass., Code § 285-9 (2011) (ordinance applies only where foreclosure is initiated by filing of Servicemembers Civil Relief Act

Senate considered a mediation provision that the General Court did not ultimately adopt as part of section 35B does not bespeak a legislative intent to preempt mandatory mediation. On the contrary, since the General Court contemplated mandatory mediation, had it intended to prohibit municipal implementation of mandatory mediation it would have done so expressly rather than remain silent. *See Carnero v. Bos. Scientific Corp.*, 433 F.3d 1, 8, 87 Empl. Prac. Dec. P 42, 193 (1st Cir. 2006).[6]

C. References in the Springfield Ordinances to the Building and Fire Commissioners Further and Do Not Subvert State Law Uniformity, Raising No State Preemption Concerns.

References in the ordinances to the Building and Fire Commissioners promote rather than subvert statewide uniformity. Though the Ordinances

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petition); Springfield, Mass., Code § 182-4 (2011) (mediation only applies to mortgage foreclosures).

[6]The standard is for courts to look to legislative history with a skeptical eye, *Tupper* v. *U.S.*, 134 F.3d 444, 446, 81 A.F.T.R.2d 98–430 (1st Cir. 1998), *cited by Flatley v. Bd. of Motor Vehicles Liab. Policies and Bonds*, 13 Mass. L. Rptr. 432, 2001 WL 914508 (Mass. Super. Ct. 2001), and here there are no legislative comments, conference notes, or other signals offering an affirmative explanation why the General Court ultimately declined to include the mediation provision. Bearing in mind this absence of information, one might surmise that the mandatory mediation provision was simply traded away by legislators for something else as part of a legislative compromise. *See, e.g.*, Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 Chi.-Kent L. Rev. 441, 441 (1990**)** ("People of good will disagree where the common weal lies. An assumption that legislation points toward it is not so much a rule of interpretation as it is wishful thinking coupled with a hope that judges can pick up the torch. Realistic understanding of statutes treats them as compromises.").

contemplate giving the Building and Fire Commissioners some discretion over the applicability of the ordinances, both the Building Commissioner and the Fire Commissioner must make determinations about building and fire safety in accordance with state laws regulating buildings and fires. *See, e.g.*, Mass. Gen. Laws ch. 143 ("Inspection and Regulation of, and Licenses for, Buildings, Elevators and Cinematographs"); 780 Mass. Code Regs. 51.00 *et seq.* (2008) ("State Board of Building Regulations and Standards"); 527 Mass. Code Regs. 1 *et seq.* ("Board of Fire Prevention Regulations"). Therefore, the involvement of the Building and Fire Commissioners ensures that the ordinances will be applied in a manner more, rather than less, consistent with state law. Even if the case-by-case determinations of the Building and Fire Commissioners did not further the uniform application of state law, nonetheless state law would not preempt the Ordinances because municipal governments indisputably have the power to regulate building and fire safety as part of the police powers that the Commonwealth has reposed in them. *See* discussion in Part I.A.1, *supra*; Mass. Gen. Laws ch. 34A, § 16 (stating that municipalities are "the broad repository of local police power in terms of the right and power to legislate for the general health, safety, and welfare of their residents").

II. The Ordinances Do Not Violate the U.S. Constitution's Contract Clause.

A state law "impair[s] the Obligation of Contracts" within the meaning of the Contract Clause, U.S. Const., art. I, § 10, cl. 1, only if it "operate[s] as a substantial impairment of a contractual relationship" and is not "reasonable and necessary to serve an important government purpose." *United Auto., Aerosp., Agric. Implement Workers of Am. Intl'l Union v. Fortuno*, 633 F.3d 37, 41, 190 L.R.R.M. (BNA) 2065 (1st Cir. 2011). It weighs against a finding of substantiality when the "complaining party['s industry] has been regulated in the past," whether in the relevant jurisdiction or in any other. *Energy Reserves Grp., Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411, 413–14, n.15 (1983).

The mortgage industry is regulated in every jurisdiction in the United States. Accordingly, Appellants were on notice both when they entered the industry and when they entered into individual mortgages that states might effectively modify the terms of their mortgage contracts, all the more so where said contracts had terms spanning multiple decades.

Bolstering the District Court's conclusion that the Mediation Ordinance is not a substantial impairment is the fact that banks have been subject to regulations similar to those now imposed by Springfield for years: eleven states and the District of Columbia require foreclosing entities to engage in mandatory mediation

or conferences.[7] No state or federal court has found any of these referenced state statutes to be violative of the Contract Clause. Appellants cannot now reasonably claim surprise at regulations addressing the same topic.

Finally, it is appropriate to take a critical eye to Appellants' emphasis on the Mediation Ordinance's mention of "reduction and forgiveness of the mortgage debt." Springfield, Mass., Code § 182-5 (2011). Although Appellants mention this language several times, *see* Appellants' Br. at 23, 24, 27, at each instance Appellants' themselves admit by their language that the Mediation Ordinance requires no acceptance of any terms at all by the mortgagee, and that it only requires the parties to *consider* these options in order to determine whether the bank wishes to agree to a "commercially reasonable alternative to foreclosure." Springfield, Mass., Code § 182-7 (2011). The ordinance defines "commercial reasonableness" by reference to Massachusetts General Laws chapter 244, section 35A(c), which in turn points to standards that are designed to *maximize* the possible monetary gain of the bank that has initiated foreclosure proceedings. For

[7] Mediation is required both in judicial foreclosure jurisdictions, *see* Connecticut (Conn. Gen. Stat. Ann. § 8-265ee (2008)); Delaware (Del. Code Ann. tit. 10 § 5062C (2012)); Indiana (Ind. Code § 32-30-10.5-8 (2009)); Maine (Me. Rev. Stat. tit. 14 § 6321-A (2009)); New York (N.Y. C.P.L.R. 3408(a) (McKinney 2009)); Vermont (Vt. Stat. Ann. tit. 12 § 4631 *et seq*. (2009)), and in non-judicial foreclosure jurisdictions, *see* Hawaii (Haw. Rev. Stat. § 667-1 (2012)); Maryland (H.D. 472, 2010 Leg., 427th Sess. (Md. 2010)); Nevada (Nev. Rev. Stat. Ann. § 107.086 (2009)); Oregon (S.B. 1552, 76th Leg. Assemb., Reg. Sess. (Or. 2012)); Washington (Wash. Rev. Code § 61.24 (2009), *et seq.*); District of Columbia (D.C. Code § 42-815.02 (2011)).

example, a bank is expected to consider (and still only to *consider*) alternatives to foreclosure where the "value of receiving payments pursuant to a modified mortgage loan [would outweigh the] anticipated net recovery following foreclosure." Mass. Gen. Laws ch. 244, § 35A(c). In this light, the Mediation Ordinance might simply be understood as a salutary measure to bring parties to the table and thus overcome the transaction costs that economists theorize may prevent parties from making choices that are actually in both sides' best interests. *See* Robert Cooter, *The Cost of Coase*, 11 J. Legal Stud. 1, 17–18 (1982) (explaining how parties fail to achieve mutually beneficial bargains due to transaction costs).

III. The Bond System Does Not Impose an Unlawful Tax.

A. The Bond System Provides a Sufficiently Particularized Benefit to Lenders.

"The burden is on the party challenging [a municipality's] fee to prove it is not lawful." *Denver Street LLC v. Town of Saugus*, 462 Mass. 651, 653, 970 N.E.2d 273, 275 (2012); *see also Silva v. City of Attleboro*, 454 Mass. 165, 168, 908 N.E.2d 722, 725 (2009). The parties agree that *Silva*'s three-part test controls. *See* Appellee's Br. at 41; Reply Br. at 10. The first two parts of this test (that "the charge (1) appl[y] to the direct beneficiary of a particular service, [and] (2) [be] allocated directly to defraying the costs of providing the service," *Silva*, 454 Mass. at 172, 908 N.E.2d at 728 (internal quotation marks omitted)) correspond to the first of three factors mentioned in *Emerson College* (that "the services for which

they are imposed are sufficiently particularized as to justify distribution of the costs among a limited group (the . . . beneficiaries[] of the services), rather than the general public," *Emerson Coll. v. City of Bos.*, 391 Mass. 415, 425, 462 N.E.2d 1098, 1106 (1984)).

In *Denver Street*, the Supreme Judicial Court applied the *Emerson College* factors and decided that a charge was a fee and not a tax. The Supreme Judicial Court appeared to accept the lower court's factual finding that the fee "offered as much or greater benefit to the larger community, than was afforded to the [fee payers]." *Denver Street*, 462 Mass. at 657, 970 N.E.2d at 278 (internal quotation marks omitted). Yet the Supreme Judicial Court held that it was improper to "weigh a particularized benefit against a benefit to the public . . . ." *Denver Street*, 462 Mass. at 659, 970 N.E.2d at 279–80. The proper question is instead

> whether the services for which a fee was imposed are sufficiently particularized as to justify distribution of the costs among a limited group . . . rather than the general public. This inquiry does not involve an exact measuring or quantifying of the comparative economic benefits of the limited group and the general public. Instead, the inquiry is whether the limited group is receiving a benefit that is, in fact, sufficiently specific and special to its members. . . . Once a sufficiently particularized benefit is found, then th[is] factor is satisfied.

462 Mass. at 660, 970 N.E.2d at 280 (internal quotation marks and citations omitted). A (if not the) major benefit conferred by the City's expenditure of funds drawn from the bonds is the maintenance and stability of property values. *See*

Reply Br. at 11; Appellee's Br. at 43–44. Yet the Appellants argue that, because others besides the property owner itself benefit from more effective maintenance of the properties they own, the funds not returned to the Appellants "do[] not benefit the lender to any greater degree than the homeowner or the neighbors of the homeowner or the City." Reply Br. at 11.

This argument is misguided. Assuredly, owners of surrounding properties benefit if a given property's value is higher than it would otherwise be. But the fees that Springfield collects facilitate inspection and supervision of *specific* properties facing foreclosure. Only *these* properties receive the direct benefits to their property values that such measures ensure. Accordingly, owners of such properties "receiv[e] a benefit that is, in fact, sufficiently specific and special to [them]." *Denver Street*, 462 Mass. at 660, 970 N.E.2d at 280. These owners may deny that they want the particular benefit, but they do receive it. *See Bos. Gas Co. v. City of Newton*, 425 Mass. 697, 706, 682 N.E.2d 1336, 1343 n.19 (finding that "the element of choice is not a compelling consideration which can be used to invalidate an otherwise legitimate charge"). That the fees may provide some positive externality to owners of nearby properties does not disturb this conclusion.

B. Appellants Have Made No Showing That the Fees Are Disproportionate.

The final *Silva* factor requires that the fee be "reasonably proportionate to the benefit received." *Silva*, 454 Mass. at 172, 908 N.E.2d at 728 (internal quotation marks omitted).[8] This inquiry turns on the relation of the costs of the services provided and the amounts collected from fee-payers. *See Denver Street*, 462 Mass. at 661–66, 970 N.E.2d at 281–84; *Emerson Coll.*, 391 Mass. at 425, 462 N.E.2d at 1105 n.16.[9] But Appellants admit that they do not know how much Springfield will charge them in its administration of the Foreclosure Ordinance. *See* Appellants' Br. at 29, n.8. The City, meanwhile, has presented facts to show that the amounts withheld will be "reasonably proportionate" to the benefit that lenders receive. *See* Appellee's Br. at 44–45. Accordingly, Appellants cannot meet their "burden of proving the invalidity of the exaction." *Silva*, 454 Mass. at 168, 908 N.E.2d at 725.

[8] This requirement corresponds to the third *Emerson* factor: that a fee be "collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." *Emerson*, 381 Mass. at 425, 462 N.E.2d at 1105. In this inquiry, "the critical question is whether the ... charges [are] reasonably designed to compensate [the town] for anticipated expenses" *Denver Street*, 462 Mass. at 661, 970 N.E.2d at 281.

[9] Appellants emphasize the ten thousand dollar amount of the bond. *See* Br. of Appellants at 26, 27. But the bond amount is an entirely separate amount from any fee actually retained by Springfield. The bond, of course, only ensures *a priori* that the City has the money it needs.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court affirm the judgment of the District Court.

Dated: October 29, 2013

Respectfully submitted,

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Certificate of Compliance with Federal Rule of Procedure 32(a)(7)(B)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,233 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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Dated: October 29, 2013

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