

1 BENJAMIN C. MIZER
 Principal Deputy Assistant Attorney General
 2 JOSEPH H. HUNT
 Director, Federal Programs Branch
 3 JACQUELINE COLEMAN SNEAD
 Assistant Branch Director
 4 JULIA BERMAN, CA. Bar No. 241415
 Trial Attorney
 5 U.S. Department of Justice, Civil Division
 20 Massachusetts Avenue, NW
 6 Washington, D.C. 20001
 Phone: (202) 616-8480; Fax: (202) 616-8470
 7 Email: julia.berman@usdoj.gov
 8 *Attorneys for the United States Postal Service*

9
 10 **IN THE UNITED STATES DISTRICT COURT**
 11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

)	
UNITED STATES POSTAL SERVICE,)	Case No. 16-cv-4815-WHA
)	
Plaintiff,)	
)	
v.)	
)	
CITY OF BERKELEY)	PLAINTIFF’S OPPOSITION
)	TO DEFENDANT’S
Defendant.)	MOTION TO DISMISS
)	
)	Date: Dec. 22, 2016
)	Time: 8:00 am
)	Courtroom 8, 19th Floor
)	Hon. William Alsup

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION 1

BACKGROUND 2

 A. The Berkeley City Council Resolves to Oppose the Sale of the Property..... 2

 B. The Berkeley City Council Appeals the Decision to Sell the Property. 3

 C. The Berkeley City Council Passes the Zoning Ordinance to Prevent the Sale
of the Property and Also Files Suit to Enjoin the Sale. 4

ARGUMENT 7

 I. Defendant’s Motion Should Be Denied Because This Action Is Ripe. 8

 A. The Zoning Ordinance Works a Definite and Concrete Injury to the Postal
Service by Usurping and Attempting to Prohibit a Federal Function..... 8

 B. The Court Should Exercise its Jurisdiction Now Because the Issues Presented
are Primarily Legal, and the Postal Service Continues to Suffer Harm While the
Zoning Ordinance Remains in Effect. 12

 II. California Government Code Section 65009 Presents No Bar to this Action. 15

 III. The Complaint States a Claim Upon Which Relief Can Be Granted Because
the Supremacy Clause Bars the Regulation of a Federal Function or Interference
with a Federal Function, Whether that Regulation or Interference Occurs Directly
or Through a Third Party. 16

 A. The Complaint States a Claim for Violation of the Supremacy Clause..... 17

 B. The Complaint States a Claim for Preemption by Federal Law. 21

CONCLUSION..... 24

TABLE OF AUTHORITIES

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967)..... 8, 12

AES Sparrows Point LNG, LLC v. Smith,
470 F. Supp. 2d 586 (D. Md. 2007) 14

Arizona v. United States,
132 S. Ct. 2492 (2012)..... 13, 21

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..... 16

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007)..... 16

Boeing v. Movassaghi,
768 F.3d 832 (9th Cir. 2014) 13, 17, 18

Breeze v. Town of Bethlehem,
151 Misc. 2d 230 (N.Y. Sup. 1991)..... 22, 23

California Ins. Guar. Ass’n v. Burwell,
170 F. Supp. 3d 1270 (C.D. Cal. 2016) 15

City of Berkeley v. USPS,
Civ. No. 3:14-cv-04916, 2015 WL 1737523 (Apr. 14, 2015) 6, 7, 11, 20

Clean Air Mkts. Grp. v. Pataki,
338 F.3d 82 (2d Cir. 2003)..... 23

Duke Power Co. v. Carolina Env’tl. Study Grp., Inc.,
438 U.S. 59 (1978)..... 12

Flamingo Indus. Ltd. (USA) v. U.S. Postal Serv.,
302 F.3d 985 (9th Cir. 2002) 21

Hawaii Newspaper Agency v. Bronster,
103 F.3d 742 (9th Cir. 1996) 8

Hines v. Davidowitz,
312 U.S. 52 (1941)..... 21, 22

1 *In re Nat’l Sec. Agency Telecomms. Records Litig.*,
633 F. Supp. 2d 892 (N.D. Cal. 2007) 20

2

3 *Johnson v. Lucent Techs., Inc.*,
653 F.3d 1000 (9th Cir. 2011) 16

4

5 *Johnson v. Maryland*,
254 U.S. 51 (1920)..... 17

6

7 *Leslie Miller, Inc. v. Arkansas*,
352 U.S. 187 (1956)..... 18

8

9 *M’Culloch v. Maryland*,
17 U.S. 316 (1819)..... 1, 17

10

11 *Maryland v. Louisiana*,
451 U.S. 725 (1981)..... 10, 13

12

13 *Mayo v. United States*,
319 U.S. 441 (1943)..... 1, 17

14

15 *North Dakota v. United States*,
495 U.S. 423 (1990)..... 20

16

17 *Novato Fire Prot. Dist. v. United States*,
181 F.3d 1135 (9th Cir. 1999) 15

18

19 *Ogden Env’tl. Servs. v. City of San Diego*,
687 F. Supp. 1436 (S.D. Cal. 1988)..... 15

20

21 *Pacific Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*,
461 U.S. 190 (1983)..... 12, 13

22

23 *Penn Dairies v. Milk Control Comm’n of Pa.*,
318 U.S. 261 (1943)..... 20

24

25 *Perez v. Campbell*,
402 U.S. 637 (1971)..... 21–22

26

27 *Poe v. Ullman*,
367 U.S. 497 (1961)..... 8

28

Shaw v. Reno,
509 U.S. 630 (1993)..... 20

Thomas v. Anchorage Equal Rights Comm’n,
220 F.3d 1134 (9th Cir.2000) 8

1 *Township of Middletown v. N/E Reg'l Office, US Postal Serv.*,
601 F. Supp. 125 (D.N.J. 1985) 17

2

3 *Twitter, Inc. v. Holder*,
--- F. Supp. 3d ---, 2016 WL 1729999 (N.D. Cal. May 2, 2016)..... 16

4 *U.S. Postal Serv. v. City of Hollywood*,
5 974 F. Supp. 1459 (S.D. Fl. 1997) 18, 22, 23

6 *U.S. Postal Serv. v. Town of Greenwich*,
7 901 F. Supp. 500 (D. Conn. 1995)..... 17, 22

8 *United States v. Alaska Pub. Utils. Comm'n*,
23 F.3d 257 (9th Cir. 1994) 1, 17

9 *United States v. City of Pittsburg*,
10 467 F. Supp. 1080 (N.D. Cal. 1979) 9

11 *United States v. City of Pittsburg*,
12 661 F.2d 783 (9th Cir. 1981) 9, 10, 17, 21

13 *United States v. City of Pittsburgh*,
14 757 F.2d 43 (3d Cir. 1985)..... 9

15 *United States v. Dos Cabezas Corp.*,
995 F.2d 1486 (9th Cir. 1993) 16

16 *United States v. State Corp. Comm'n of Commonwealth*,
17 345 F. Supp. 843 (E.D. Va. 1972) 20

18 *United States v. Summerlin*,
19 310 U.S. 414 (1940)..... 15, 16

20 *United States v. Supreme Court of New Mexico*,
21 839 F.3d (10th Cir. 2016) 12, 13

22 *US West Commc'ns v. MFS Intelenet, Inc.*,
193 F.3d 1112 (9th Cir. 1999) 12

23 *Wolfson v. Brammer*,
24 616 F.3d 1045 (9th Cir. 2010) 8, 12

25

26

27

28

Statutes

1

2 16 U.S.C. § 470f 11

3 28 U.S.C. § 1658..... 15

4 39 U.S.C. § 101..... 2, 18, 19

5 39 U.S.C. § 401..... *passim*

6 39 U.S.C. § 403..... 7, 14, 18, 19

7 39 U.S.C. § 404..... 7, 14, 18, 19

8 42 U.S.C. § 4332..... 11

9

10 Cal. Gov’t Code § 65009 15

Rules

11

12 Federal Rule of Civil Procedure 12(b)(6) 16

13

Constitution

14

15 U.S. Const. art. I..... 18

16 U.S. Const. art. IV..... 23

17

18 U.S. Const. art. VI..... 17

19

20

21

22

23

24

25

26

27

28

INTRODUCTION

1
2 The Postal Service respectfully submits this opposition to the Defendant's Motion to
3 Dismiss Plaintiff's Complaint, ECF No. 11 ("Defendant's Motion" or "Def.'s Mot."). The
4 Defendant, the City of Berkeley, enacted a Zoning Ordinance that was intended to and in fact has
5 interfered with the Postal Service's constitutional and statutory authority to dispose of Postal
6 Service property, specifically, the Berkeley Main Post Office. Although such interference is in
7 clear violation of the Supremacy Clause and preemption principles, Defendant seeks to dismiss
8 this action as unripe and for failure to state a claim.

9 As the Postal Service explained in its Complaint, the Zoning Ordinance has so devalued
10 its property that the Postal Service has effectively been prevented from selling the property due
11 to the depressed value. Arguing that the Postal Service has decided not to sell the property,
12 Defendant now asserts that this matter is unripe. But, contrary to Defendant's argument, the
13 Postal Service has not rescinded the decision to sell the property; rather, the Defendant, through
14 the Zoning Ordinance, has attempted to force that determination onto the Postal Service. Thus
15 far, Defendant has succeeded in doing so. It is for this very reason that the Postal Service now
16 seeks the intervention of this Court.

17 Defendant also points to cases where regulations imposed incidental burdens on the
18 Federal Government and argues that the Complaint fails to state a claim upon which relief can be
19 granted because the effect of the Zoning Ordinance is "only" indirect. As explained below, those
20 cases bear little resemblance to the situation here. The Zoning Ordinance is not a law of general
21 applicability that happens to burden Government functions. Rather, as alleged in the Complaint,
22 the Defendant enacted the Zoning Ordinance primarily to prevent the Postal Service from selling
23 its property. The Constitution does not permit such usurpation of a federal function. It is black
24 letter law that, under the Supremacy Clause, "the activities of the Federal Government are free
25 from regulation by any state." *United States v. Alaska Pub. Utils. Comm'n*, 23 F.3d 257, 260–61
26 (9th Cir. 1994) (quoting *Mayo v. United States*, 319 U.S. 441, 445 (1943) and citing *M'Culloch*
27 *v. Maryland*, 17 U.S. 316 (1819)). And, as explained below, those principles apply whether the
28 unlawful regulation is attempted directly, or through a third party.

1 Nor, as explained below, is this action time barred as Defendant contends, because the
2 Federal Government is not bound by state statutes of limitations unless it has given its consent to
3 be bound. For all of these reasons, the Postal Service respectfully requests that the Court deny
4 the Defendant's Motion.

5 BACKGROUND

6 The Postal Service has determined that, in light of its financial difficulties, it should sell
7 its underutilized properties to ensure that it can continue to provide effective and affordable
8 postal services to the public, in compliance with its universal service obligation set forth in 39
9 U.S.C. § 101. Compl. ¶¶ 12, 26, ECF No. 1. In 2012, the Postal Service concluded that the
10 Berkeley Post Office at 2000 Allston Way, in Berkeley, California ("the Property") should be
11 among those sold because its operations require only about seven percent of the space available
12 in the building. *Id.* ¶¶ 13–14. Following extensive community engagement over several months,
13 in October 2013, the Postal Service's broker began to market the Property. *Id.* ¶¶ 15–16.
14 Reflecting regulatory requirements and the Postal Service's efforts to honor the community's
15 concerns, the marketing materials for the Property discussed restrictions to preserve the Berkeley
16 Main Post Office's historic features, and the Postal Service's interest in leasing back 3,500
17 square feet of the Property for its retail operations. *Id.*

18 In the same time period, the Defendant began efforts to prevent the sale of the Property.
19 Those efforts included the following:

20 **A. The Berkeley City Council Resolves to Oppose the Sale of the Property.**

21 On March 5, 2013, the Berkeley City Council adopted Resolution 66,025-N.S.,
22 announcing that "the City of Berkeley formally opposes the sale of the Historic Berkeley Main
23 Post Office building." *Id.* ¶ 17. The City Council also resolved "that the USPS suspend, for one
24 year, efforts to sell the Berkeley Main Post Office building and work with the City of Berkeley
25 with the goal of continuing the USPS's ownership of the building" and "request[ed] that USPS
26 immediately impose a moratorium on all sales of Post Office Buildings nationwide." *Id.* The
27
28

1 resolution further provided that “the City of Berkeley [would] reach out to other cities affected
2 by the sale of postal facilities to develop a collective response.” *Id.*¹

3 **B. The Berkeley City Council Appeals the Decision to Sell the Property.**

4 On April 30, 2013, the Berkeley City Council sent a letter to the Postal Service appealing
5 the decision to relocate retail services stating, additionally, that “the Berkeley City Council
6 continues to be united and passionate in its opposition to the sale of this property.” *Id.* ¶ 18. The
7 Postal Service considered this appeal as well as others, but ultimately upheld the determination
8 that retail services should be relocated from the Property. The Postal Service announced that
9 decision in a letter that explained that the Postal Service would try to accommodate the
10 community’s concerns, including by potentially pursuing a sale that would include a lease-back
11 provision to allow retail services to continue at the Berkeley Main Post Office. *Id.* The Postal
12 Service emphasized that “dire circumstances force[d] [it] to pursue every opportunity to reduce
13 costs and generate revenue,” and that “[t]he Postal Service must, in order to be self-sustaining,
14 make decisions that ensure it provides adequate and affordable postal services in a manner that is
15 as efficient and economical as possible.” *Id.*

16 City Mayor Tom Bates then appealed the Postal Service’s decision to sell the Property
17 and relocate services to the Postal Regulatory Commission (“PRC”), the Postal Service’s
18 independent regulator. *Id.* ¶ 19. The Mayor argued that the Postal Service failed to observe
19 required procedure in deciding to close the Berkeley Main Post Office and that the decision was
20 not supported by substantial evidence. *Id.* The PRC dismissed the appeal, finding that the Postal
21 Service’s actions concerning the Berkeley Main Post Office were “insufficient to trigger an
22 appeal at [that] time.” *Id.* ¶ 20. The PRC held that the appeal would not be ripe until it was
23

24 ¹ On June 20, 2015, the City of Berkeley reaffirmed its intention to dictate the activities
25 of the Postal Service with respect to the Property in Resolution No. 67,128-N.S., entitled “To
26 Preserve and Best Utilize the Downtown Berkeley Main Post Office Building.” *See* Compl. ¶ 41
27 (discussing ECF 1-3). The Resolution reaffirms the Council’s March 7, 2013 resolution “in
28 opposition to the sale of the downtown Berkeley Post Office” and expresses plans to discuss “the
future of the downtown Berkeley Post Office with the appropriate United States Postal Service
officials,” including, *inter alia*, what services should be offered at that location, and “[p]otential
best uses of space inside the building that is not needed for Postal Services.” *Id.*

1 known “when the Berkeley [Main Post Office] [would] close, and where and when the
2 replacement facility [would] begin operations as a post office.” *Id.*

3 **C. The Berkeley City Council Passes the Zoning Ordinance to Prevent the Sale of**
4 **the Property and Also Files Suit to Enjoin the Sale.**

5 In the summer of 2013, the members of the Berkeley City Council began discussing a
6 zoning overlay that would restrict the Property to civic and nonprofit uses as a means of
7 preventing the sale of the Property. *Id.* ¶ 27. By letter dated July 8, 2013, City Councilmember
8 Jesse Arreguín advised the Postal Service that the City Council was considering changes to the
9 zoning in the area where the Property is located. *Id.* ¶ 28. Councilmember Arreguín concluded
10 his letter:

11 Given that USPS is in the process of considering the potential sale of the Berkeley
12 Main Post Office Building, I wanted to bring this to your attention, since the
13 proposal would change the allowable zoning for the property, and would affect
14 what a buyer could do with the property if the building was sold. I also want to
15 take this opportunity to reiterate the Berkeley City Council’s strong opposition to
16 the sale of the Berkeley Main Post Office.

17 *See id.* (quoting ECF 1-2).

18 Other City officials’ discussion of the proposed zoning change likewise reflected that the
19 purpose of the ordinance would be to regulate—and prevent—the Postal Service’s sale of the
20 Property. At a November 6, 2013 regular meeting of the Berkeley Planning Commission,
21 Commissioner Harry Pollack “expressed his opinion that the overlay was not an appropriate tool
22 for the preservation of the Post Office and urged the Council to buy the Post Office building.”
23 *Id.* ¶ 29. At a January 28, 2014 public meeting of the City Council, Councilmember Susan
24 Wengraf stated, in support of the Ordinance, “I think you all know that I am very much in favor
25 of saving the Post Office.” *Id.* ¶ 30. Councilmember Max Anderson similarly commented on
26 the effort to “defend . . . that building and the purposes for which it was originally designed,”
27 arguing that for the City Council “to not go ahead and pursue this overlay . . . would be
28 disarming ourselves in the middle of a battle.” *Id.* Indeed, Berkeley Mayor Bates expressed a
similar view of the zoning overlay to a local online newspaper when he said: “There is general
agreement on the council that we would like to save the Post Office, and this is a good way to do

1 it . . . The civic center overlay portion of the initiative . . . can be easily described as ‘help save
2 the post office.’” *Id.* ¶ 31.

3 On September 9, 2014, the Berkeley City Council passed Berkeley Municipal Code
4 Chapter 23E.98, Civic Center District Overlay (“the Zoning Ordinance”), restricting nine parcels
5 in downtown Berkeley, including the Property, to civic or nonprofit uses. *Id.* ¶ 32. The Zoning
6 Ordinance eliminated virtually all commercially viable uses of the Property. *Id.* Prior to the
7 passage of the Zoning Ordinance, allowable uses of those properties were the same as those in
8 the surrounding downtown Berkeley area and included commercial and residential uses. *Id.*
9 Under the Zoning Ordinance, however, the Property’s only allowable uses include: libraries,
10 judicial courts, museums, parks and playgrounds, public safety and emergency services,
11 government agencies and institutions, public schools/educational facilities, non-profit cultural,
12 arts, environmental, community service and historic organizations, live performance theatre, and
13 a public market. *Id.*

14 The Berkeley City Council cherry-picked properties to be subject to the Zoning
15 Ordinance’s restrictions; within a given block, certain buildings are included, while others are
16 not. *Id.* ¶ 33. The result is an irregular 16-sided shape covering two full city blocks and select
17 portions of four additional blocks. *See id.*, Exh. 2 at 7 (showing the shape of the overlay). Of
18 the nine parcels regulated by the Zoning Ordinance, the City of Berkeley (or other local
19 government bodies such as the Berkeley Unified School District) owns seven, and the YMCA
20 and the Postal Service own the remaining two. *Id.* ¶ 33. Additionally, the City permitted its
21 lessees in City-owned parcels within the Civic Center District Overlay to conduct commercial
22 activity inconsistent with the Zoning Ordinance. *Id.* Thus, the practical effects of the Zoning
23 Ordinance have fallen only on the Berkeley Main Post Office property, while commercial
24 activity under then-existing leases was allowed to continue in and around other parcels subject to
25 the Zoning Ordinance. *Id.* ¶ 34.

26 On September 22, 2014, the Postal Service entered into an agreement for sale of the
27 Property with developer Hudson McDonald LLC, which submitted a bid on the Property that
28 was in the best interests of the Postal Service to accept. *Id.* ¶ 35. Under that agreement, the sale
United States Postal Service v. City of Berkeley, Case No. 16-cv-4815
Plaintiff’s Opposition to
Defendant’s Motion to Dismiss

1 was to close by December 22, 2014. *Id.* That developer, however—like other potential
 2 commercial purchasers with whom the Postal Service communicated regarding the Property—
 3 expressed concerns regarding the City’s opposition to the sale, and, in particular, the potential
 4 zoning overlay. *Id.*

5 According to the Defendant’s Motion, the Zoning Ordinance went into effect on October
 6 30, 2014, thirty days after its second reading, which occurred on September 30, 2014. Def.’s
 7 Mot. at 3 n.5.² The developer attempted to negotiate relief from the Zoning Ordinance with City
 8 officials, but was unable to do so within the timeframe provided by the sale agreement. Compl. ¶
 9 37.

10 On November 5, 2014, the City filed a lawsuit against the Postal Service in the Northern
 11 District of California, seeking to prevent the then-pending sale of the Property. *See id.* ¶ 38
 12 (discussing Compl. for Declaratory & Injunctive Relief, *City of Berkeley v. USPS*, Civ. No. 3:14-
 13 cv-04916, ECF No. 1).³ After the developer terminated the sales agreement on December 3,
 14 2014, the City filed an Amended Complaint seeking declaratory and injunctive relief “to prevent
 15 and enjoin [the Postal Service] from implementing [its] decision . . . to relocate and sell the
 16 Berkeley Main Post Office . . . until and unless USPS complies with its obligations under the
 17 National Environmental Protection Act (NEPA) and National Historic Preservation Act
 18 (NHPA).” *See id.* ¶ 39 n.2 (discussing First Am. Compl. for Declaratory & Injunctive Relief,
 19 Civ. No. 3:14-cv-04916 ¶ 1 (Dec. 30, 2014)). After the Postal Service notified the Court that the
 20 Postal Service had rescinded its July 18, 2013 Final Determination to relocate retail services
 21 from the Property (by deciding, in September 2014, to retain retail services at that location), the
 22 Court dismissed the action as moot, but required that the Postal Service provide the City forty-
 23 two days advance notice of the closing of any future sale of the Property or any final

24 _____
 25 ² The Complaint had listed September 30, 2014 as the date on which the Zoning
 26 Ordinance took effect, Compl. ¶ 36, but the Defendant clarified that the Zoning Ordinance did
 not go into effect until thirty days after its second reading. *See* Def.’s Mot. at 3 n.5.

27 ³ The Court has related that case to the instant action. *See* Order Relating Case, ECF No.
 28 8.

1 was enacted primarily to prevent the sale of the Property, usurping a decision that Congress
2 entrusted to the Postal Service—in erroneously contending that the Complaint fails to state a
3 claim. While the Defendant downplays the undisputed “indirect” effect of the Zoning
4 Ordinance, the law makes no such distinction; under the case law addressing both Supremacy
5 Clause claims and conflict preemption, the Postal Service’s allegations are sufficient to state a
6 claim for relief. Defendant’s motion therefore should be denied.

7 **I. Defendant’s Motion Should Be Denied Because This Action Is Ripe.**

8 “The ripeness doctrine precludes federal courts from exercising their jurisdiction over an
9 action that is filed before a real dispute exists between the parties.” *Hawaii Newspaper Agency*
10 *v. Bronster*, 103 F.3d 742, 746 (9th Cir. 1996) (citing *Poe v. Ullman*, 367 U.S. 497, 507 (1961)).
11 “Ripeness has both constitutional and prudential components.” *Wolfson v. Brammer*, 616 F.3d
12 1045, 1058 (9th Cir. 2010) (citation omitted). “The constitutional component of ripeness
13 overlaps with the ‘injury in fact’ analysis for Article III standing.” *Id.* (citing *Thomas v.*
14 *Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138–39 (9th Cir.2000) (en banc)). “Whether
15 framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues
16 presented are ‘definite and concrete, not hypothetical or abstract.’” *Id.* at 1060 (quoting *Thomas*,
17 220 F.3d at 1139 (internal quotation marks omitted)). “To evaluate the prudential component of
18 ripeness, [courts] weigh two considerations: ‘the fitness of the issues for judicial decision and the
19 hardship to the parties of withholding court consideration.’” *Id.* (quoting *Abbott Labs. v.*
20 *Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430
21 U.S. 99 (1977)). Based on such considerations, this action is ripe.

22 **A. The Zoning Ordinance Works a Definite and Concrete Injury to the Postal**
23 **Service by Usurping and Attempting to Prohibit a Federal Function.**

24 Defendant contends that there has been no injury to the Postal Service because “the
25 predicate to this action’s ripeness is a decision to sell the Property,” and, according to the
26 Defendant, the Postal Service has “repudiated its decision.” Def.’s Mot. at 2, 5. Defendant
27 further suggests the Postal Service would sustain an injury only if the Zoning Ordinance were to
28 prove “an insurmountable barrier to a sale” once the Postal Service otherwise reached an

1 agreement to sell the Property. *Id.* at 8. Defendant is mistaken in both respects. As an initial
2 matter, the premise of Defendant’s argument is false; the Postal Service has not repudiated its
3 decision to sell the Property. Defendant’s contrary understanding appears to be based on the
4 Notice of the Status of the United States Postal Service’s 2013 Final Determination filed in the
5 prior related action. *See* Def.’s Mot. at 5. As explained in the Complaint, that Notice merely
6 informed the Court that the Postal Service had rescinded its decision to *relocate retail services at*
7 *this time*, *see* Compl. ¶ 39 n.2. Defendant asserts in a parenthetical, without explanation or
8 citation, that the rescission of that determination “necessarily” included a rescission of the
9 decision to sell the Property. Def.’s Mot. at 6. There is no support for Defendant’s assertion.
10 Indeed, that assertion is undermined by the fact that the Postal Service put the property on the
11 market for sale with a provision for the possible lease back of space for a retail post office, *see*
12 Compl. ¶ 16, as well as the Defendant’s decision subsequent to the filing of that Notice to file an
13 action seeking to enjoin the then-pending sale, *see id.* ¶ 38. The decision not to relocate retail
14 services was not a decision not to sell.

15 Defendant’s further contention that ripeness here turns on injury to an actual pending sale
16 is also erroneous. *See* Def.’s Mot. at 8. In an action such as this—where the Federal
17 Government seeks redress for a municipality’s attempt to regulate a federal function—the injury
18 suffered by the Government is “[the] direct interference with the exercise of the powers of the
19 federal government.” *United States v. City of Pittsburg*, 467 F. Supp. 1080, 1083 (N.D. Cal.
20 1979), *aff’d*, 661 F.2d 783 (9th Cir. 1981).⁴ In *United States v. City of Pittsburg*, the Postal
21 Service brought a Supremacy Clause challenge to a city’s criminal trespass ordinance, under
22 which no postal letter carrier could cross a lawn within the city’s borders without obtaining the
23 prior express consent of the owner. *See* 467 F. Supp. at 1083. The court in that case held that

24
25
26 ⁴ *Cf. United States v. City of Pittsburgh*, 757 F.2d 43, 45 (3d Cir. 1985) (holding that the
27 United States had standing to challenge a local tax that resulted in an “injury to its sovereign
28 rights,” because “the United States may bring suit to protect its sovereign interests
notwithstanding the lack of any immediate pecuniary interest in the outcome of the litigation”).

1 the action was ripe based on the city’s “interference with the exercise of the powers of the
2 federal government.” *Id.*⁵

3 The Supreme Court’s analysis in *Maryland v. Louisiana*, 451 U.S. 725 (1981) is
4 illustrative. There, several states, joined by the United States, the Federal Energy Regulatory
5 Commission (“FERC”), and several private companies, challenged a Louisiana “first use” tax on
6 natural gas. *See* 451 U.S. at 731, 734. In addition to imposing a tax on private companies that
7 piped natural gas into the state for processing, the Louisiana law specified how the cost of the tax
8 was to be allocated (*i.e.* whether the cost was to be borne by private companies or passed to
9 consumers). *Id.* at 749–50. In assessing whether that aspect of the state law violated the
10 Supremacy Clause by encroaching on the FERC’s authority to allocate costs between companies
11 and consumers, the Supreme Court noted a Special Master’s previous determination that it was
12 not yet clear that there was actually a conflict between how the state law allocated costs, and how
13 the FERC would determine the costs should be allocated. *Id.* at 750–51. The Special Master
14 recommended postponing the adjudication of this issue because additional factual development
15 may be helpful, and “it may be that ‘in the end [the] FERC’s orders can be adjusted so that the
16 laws will mesh without conflict.’” *Id.* at 751 (quoting Special Master). The Supreme Court
17 emphatically disagreed. *Id.* Because federal law vested the FERC with the authority to allocate
18 costs, the issue was ripe for decision without further evidentiary hearings; “[e]ven if the FERC
19 ultimately determined that such expenses should be passed on *in toto*,” rendering the FERC’s
20 judgment consistent with the allocation selected by Louisiana, “this kind of decisionmaking is
21 within the jurisdiction of the FERC . . . and [therefore] the Louisiana statute . . . is inconsistent
22 with the federal scheme and must give way.” *Id.* at 751. Granting judgment on the pleadings for
23 the plaintiffs on this issue, the Supreme Court held that “the State may not trespass on the
24 authority of the federal agency,” *id.*, demonstrating that the injury to the Government in such a
25 situation inheres in the attempt to displace the authority that Congress vested in the federal
26 agency.

27
28 ⁵ The Court of Appeals affirmed the district court’s decision without revisiting the
question of ripeness. *See United States v. City of Pittsburg*, 661 F.2d 783 (9th Cir. 1981).
United States Postal Service v. City of Berkeley, Case No. 16-cv-4815
Plaintiff’s Opposition to
Defendant’s Motion to Dismiss

1 As alleged in the Complaint, the challenged Zoning Ordinance here constitutes such an
2 attempt, specifically to remove the decision of whether to sell the Property from the Postal
3 Service, and instead allow the Defendant to dictate the decision. The Zoning Ordinance has
4 rendered the Property unattractive to commercial developers by prohibiting any economically
5 viable use of the Property, and has so depressed the market price of the Property as to render a
6 sale financially untenable. *See* Compl. ¶ 40. Indeed, this Court previously recognized that the
7 change wrought by the Zoning Ordinance “substantially [shrank] the possible universe of
8 purchasers or alternative users for the building,” rendering it “highly unlikely” that an agreement
9 could be reached to sell the Property “in the foreseeable future.” Order Dismissing Case as Moot
10 at 4, 8. This intentional targeting of and interference with the Postal Service’s decision to sell
11 the Property has deterred the Postal Service from relisting the Property for sale, notwithstanding
12 its determination that a sale remains necessary. That is a cognizable injury that makes the claims
13 here ripe for determination.

14 Nor is that conclusion undermined by this Court’s determination that the prior related
15 action was moot. Defendant argues that “if that case is still moot, then this one is unripe,”
16 suggesting that the same reasoning that led the Court to dismiss the prior related case
17 necessitates dismissal of the instant action. Def.’s Mot at 8. In particular, the Defendant argues
18 that in the absence of an agreement to sell the Property, this action is unripe just as the prior
19 action is moot. *See id.* That argument plainly ignores the differences in the claims at issue in
20 these two cases.

21 Defendant brought the prior action under the National Historic Preservation Act
22 (“NHPA”), 16 U.S.C. § 470f, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. §
23 4332, alleging that the Postal Service had not taken the steps required by those statutes in
24 connection with the then-pending sale of the Property. As this Court noted when dismissing the
25 prior action as moot, “[a]ny injury [the City] could conceivably suffer in the future turns on
26 several unknown contingencies” including “that the terms of [any] future sale and/or relocation,
27 and the actions taken by USPS leading up to them, *actually violate* NEPA and the NHPA.”
28 Order Dismissing Case as Moot at 5 (emphasis added). In other words, any injury in connection

1 with those statutes is conjectural, and depends wholly on, *inter alia*, the steps that would be
2 taken by the Postal Service in connection with any future sale. In this case, on the other hand,
3 the Postal Service’s injury is current and immediate, and continues so long as the Zoning
4 Ordinance impairs the economic viability of the sale of the Property and interferes with the
5 execution of the Postal Service’s responsibilities under federal law in violation of the Supremacy
6 Clause. *See supra* 8–11. Indeed, the gravamen of the Complaint is that the Zoning Ordinance
7 limits the Postal Service in its attempts to properly dispose of the Property. Thus this action is
8 ripe for determination.

9 **B. The Court Should Exercise its Jurisdiction Now Because the Issues Presented**
10 **are Primarily Legal, and the Postal Service Continues to Suffer Harm While**
11 **the Zoning Ordinance Remains in Effect.**

12 Prudential considerations also dictate that this action withstand dismissal on ripeness
13 grounds. In assessing prudential ripeness, this Court should weigh: “the fitness of the issues for
14 judicial decision and the hardship to the parties of withholding court consideration.” *Wolfson*,
15 616 F.3d at 1060 (9th Cir. 2010) (quoting *Abbott Labs.*, 387 U.S. at 149). Both considerations
16 weigh in favor of the Court’s exercise of its jurisdiction in this case. As to the first prong of this
17 test, “[a] claim is fit for decision if the issues raised are primarily legal, [and] do not require
18 further factual development.” *Wolfson*, 616 F.3d at 1058 (quoting *US West Commc’ns v. MFS*
19 *Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)). This test does not require that all the facts
20 related to a given case be fully developed; rather, factual contingencies “would only be relevant
21 if waiting for them to play out would ‘significantly advance [the court’s] ability to deal with the
22 legal issues presented []or aid [the court] in their resolution.’” *United States v. Supreme Court of*
23 *New Mexico*, 839 F.3d 888, 904 (10th Cir. 2016) (quoting *Duke Power Co. v. Carolina Env’tl.*
24 *Study Grp., Inc.*, 438 U.S. 59, 82 (1978)).

25 Actions under the Supremacy Clause, including preemption actions, often do not require
26 further factual development because, as the Supreme Court explained in *Pacific Gas and Elec.*
27 *Co. v. State Energy Res. Conservation & Dev. Comm’n*, “[t]he question of preemption is
28 predominantly legal.” 461 U.S. 190, 201 (1983). Although noting that “it would be useful” to
have certain additional information about the state’s interpretation of the provisions challenged

1 in that case, the Supreme Court ultimately held that “resolution of the preemption issue need not
2 await that development.” *Id.*; see also *Supreme Court of New Mexico*, 839 F.3d at 904 (whether
3 federal law preempted a state professional rule of conduct was a “matter[] of law that [could] be
4 resolved without further factual development”). Indeed, in *Maryland v. Louisiana*, the Supreme
5 Court rejected further evidentiary hearings proposed by the Special Master to determine whether
6 the policy determinations of the FERC would, in the end, differ from those imposed by the
7 challenged Louisiana law. See 451 U.S. at 751. In rejecting the need for the kind of further
8 evidentiary development Defendant here suggests, the Supreme Court held that such an approach
9 would be “as inappropriate as Louisiana’s effort to pre-empt [the FERC’s] decisions by a
10 statute.” *Id.*

11 Under that same rationale, the issues before the Court are ripe for judicial determination.
12 As to the Supremacy Clause claim, the Court would need to examine: 1) whether the sale of the
13 Property is a federal function; 2) whether Congress has authorized the Defendant to regulate this
14 function; and 3) whether the Zoning Ordinance constitutes an interference with that function.
15 See, e.g., *Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014) (assessing whether a
16 statute challenged under the Supremacy Clause amounted to interference with a federal function
17 without Congressional authorization). Only the third of these three elements contains a factual
18 component, and there are no additional facts that need to “play out” to permit the Court’s
19 resolution of the Government’s claim. *Supreme Court of New Mexico*, 839 F.3d at 904. So, too,
20 with the preemption claim, which would require an examination of whether the Zoning
21 Ordinance “stands as an obstacle to the accomplishment and execution of the full purposes and
22 objectives of Congress.” See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012)
23 (citation omitted).

24 This Court also should exercise its jurisdiction based on the second prong of the
25 prudential ripeness inquiry, the hardship to the Plaintiff from withholding judicial review. In a
26 preemption action where a city or state is interfering with the execution of a federal function,
27 delayed resolution risks extending the period during which Congress’ objectives are frustrated.
28 See *Pacific Gas and Elec. Co.*, 461 U.S. at 202 (reasoning that, if the petitioners were correct,

1 then delayed resolution of the preemption claim “would frustrate one of the key purposes of the
2 [federal legislation]” on which petitioners based their preemption claim). Here, the Zoning
3 Ordinance impedes the accomplishment of the full purposes of federal law because it restricts the
4 Postal Service from carrying out the responsibilities assigned to it by Congress in the Postal
5 Reorganization Act. *See supra* Section I.A (describing further the injury to the Postal Service).

6 Additionally, in assessing the hardship to the Postal Service, it is appropriate to consider
7 the broader effects that actions like the Zoning Ordinance can have on the Postal Service’s
8 ability to execute its responsibilities under federal law. *See N. Nat. Gas Co. v. State Corp.*
9 *Comm’n of Kansas*, 372 U.S. 84, 92 (1963) (state’s administrative rules “threatened to seriously
10 impair the Federal Commission’s authority to regulate [an] intricate relationship . . . with respect
11 to which Congress ha[d] given the Federal [] Commission paramount and exclusive authority”);
12 *Ogden Envtl. Servs. v. City of San Diego*, 687 F. Supp. 1436, 1446 (S.D. Cal. 1988) (citation
13 omitted) (“if every locality were able to dodge responsibility for and participation in this
14 program through artfully designed ordinances, the national goal . . . would surely be frustrated”);
15 *see also, e.g., AES Sparrows Point LNG, LLC v. Smith*, 470 F. Supp. 2d 586, 589 (D. Md. 2007)
16 (“A local government may not exercise veto power over this nationwide process by local zoning
17 legislation”). The Zoning Ordinance and its regulation of the Postal Service’s disposition of the
18 Property should be viewed in light of the large network of properties that the Postal Service must
19 manage as part of its operations, *see* Compl. ¶ 7. Especially because the Postal Service has broad
20 responsibilities, nationwide “to establish and maintain postal facilities . . . consistent with
21 reasonable economies of postal operations,” and “to determine the need for post offices . . . and
22 to provide such offices . . . as it determines are needed,” 39 U.S.C. §§ 403(b)(3), 404(a)(3), the
23 Defendant’s usurpation of the Postal Service’s ability to “sell, lease, or otherwise dispose of such
24 property,” *id.* § 401(5), works a hardship on the Postal Service and damages its ability to execute
25 its universal service obligation. The hardship in this situation is particularly acute as the sale
26 with which the Zoning Ordinance has interfered is part of the Postal Service’s efforts to reduce
27 costs and generate revenue to address its dire financial circumstances. *See* Compl. ¶ 18. As
28 explained in the Complaint, such measures are necessary to ensure that the Postal Service

1 remains self-sustaining and provides adequate and affordable postal services in a manner that is
2 as efficient and economical as possible. *See id.*

3 *****

4 For all of these reasons, this action is ripe for judicial decision, and this Court should
5 deny the Defendant's motion to dismiss on that basis.

6 **II. California Government Code Section 65009 Presents No Bar to this Action.**

7 This action clearly is not governed by the 90-day statute of limitations provided by
8 California Government Code Section 65009. *See* Def.'s Mot. at 8–11. It is well established that,
9 unless it has given its consent to be bound, “the United States is not bound by state statutes of
10 limitations period[s] when asserting a federally created right.” *Novato Fire Prot. Dist. v. United*
11 *States*, 181 F.3d 1135, 1141 (9th Cir. 1999) (citing *United States v. Summerlin*, 310 U.S. 414,
12 417–18 (1940)) (rejecting argument that California statute of limitations barred Government's
13 Supremacy Clause claim); *Summerlin*, 310 U.S. at 416 (“[T]he United States is not bound by
14 state statutes of limitations . . . in enforcing its rights.”); *see also, e.g., California Ins. Guarantee*
15 *Ass'n v. Burwell*, 170 F. Supp. 3d 1270, 1274 (C.D. Cal. 2016) (limitation period provided by
16 California statute did not bind the United States Department of Health and Human Services or
17 the Center for Medicare and Medicaid Services). As one court explained, “the familiar rule” that
18 state statutes of limitations do not bind the Government absent its consent “has its origins in the
19 concept of sovereign immunity; just as the states cannot sue the federal government without its
20 consent, the states cannot enact laws that purport to bind the federal government without its
21 consent.” *Id.* (noting that recent cases have described this rule as a “corollary to the Supremacy
22 Clause”).

23 Here, the Postal Service has not consented to be bound by Section 65009, and Defendant
24 does not allege that it has, *see* Def.'s Mot. at 8–11. Accordingly, the limitations period provided
25 therein has no application to the Postal Service's asserted constitutional claims. Nor does a
26 federal statute impose a limitations period on these claims.⁶ In the absence of an applicable

27 _____
28 ⁶ Defendant identifies 28 U.S.C. § 1658(a) as a potentially applicable statute of
limitations, but then explains why it does not apply here. *See* Def.'s Mot. at 8–11.
United States Postal Service v. City of Berkeley, Case No. 16-cv-4815
Plaintiff's Opposition to
Defendant's Motion to Dismiss

1 federal statute of limitations, as here, no statute of limitations applies. *See United States v. Dos*
2 *Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir. 1993) (citing *Summerlin*, 310 U.S. at 416) (“In the
3 absence of a federal statute expressly imposing or adopting one, the United States is not bound
4 by any limitations period.”). Thus, contrary to Defendant’s argument, this action is not time-
5 barred.

6 **III. The Complaint States a Claim Upon Which Relief Can Be Granted Because the**
7 **Supremacy Clause Bars the Regulation of a Federal Function or Interference**
8 **with a Federal Function, Whether that Regulation or Interference Occurs**
9 **Directly or Through a Third Party.**

9 Defendant erroneously grounds its arguments under Federal Rule of Civil Procedure
10 12(b)(6) on the fact that the Zoning Ordinance purports to regulate only the buyers of the
11 Property and therefore, Defendant claims, “has only an indirect effect” on the Postal Service,
12 Def.’s Mot. at 11. “To avoid dismissal under Rule 12(b)(6), a complaint must plead ‘enough
13 facts to state a claim [for] relief that is plausible on its face.’” *Twitter, Inc. v. Holder*, --- F. Supp.
14 3d ---, 2016 WL 1729999, at *2 (N.D. Cal. May 2, 2016) (quoting *Bell Atlantic Corp. v.*
15 *Twombly*, 550 U.S. 544, 570 (2007)). “A claim is plausible on its face ‘when the plaintiff pleads
16 factual content that allows the court to draw the reasonable inference that the defendant is liable
17 for the misconduct alleged.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “All
18 allegations of material fact are taken as true and construed in the light most favorable to the
19 plaintiff.” *Id.* (citing *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011)).

20 Here, the Postal Service has pled that the Zoning Ordinance “was enacted to prevent and
21 has had the effect of preventing” the Postal Service’s execution of a federal function, namely,
22 disposing of its property. Compl. ¶ 43. Indeed, the Defendant acknowledges that the Zoning
23 Ordinance has at least an indirect effect on the Property. Def.’s Mot. at 11. Where a city so
24 targets a federal function, it is of no moment that it interferes with that federal function through a
25 third party; under the case law addressing both Supremacy Clause claims and conflict
26 preemption, these allegations are sufficient to state a claim for relief.

1 **A. The Complaint States a Claim for Violation of the Supremacy Clause.**

2 The Supremacy Clause of the Constitution prohibits state and local regulation of a federal
3 instrumentality, mandating that “the Laws of the United States . . . shall be the supreme Law of
4 the Land, . . . any Thing in the Constitution or Laws of any State to the Contrary
5 notwithstanding.” U.S. Const. art. VI, cl. 2. “A corollary to this principle is that the activities of
6 the Federal Government are free from regulation by any state,” *Alaska Pub. Utils. Comm’n*, 23
7 F.3d at 260–61 (quoting *Mayo*, 319 U.S. at 445 and citing *M’Culloch*, 17 U.S. at 316), “unless
8 Congress provides clear and unambiguous authorization for such regulation,” *Boeing*, 768 F.3d
9 at 840; *see also Johnson v. Maryland*, 254 U.S. 51, 57 (1920) (state cannot apply license
10 requirement to postal employee driving mail truck); *City of Pittsburg*, 661 F.2d at 786 (trespass
11 statute invalidated for interfere with a postal worker “performing duties pursuant to federal
12 law”).

13 Defendant acknowledges that “the Postal Service is not bound to observe [local] land use
14 regulations,” Def.’s Mot. at 12 (quoting *Middletown Twp. v. N/E Reg’l Office, US Postal Serv.*,
15 601 F. Supp. 125, 127 (D.N.J. 1985)), and concedes that the Zoning Ordinance has an effect on
16 the Postal Service’s use of the Property. Def.’s Mot. at 11. Defendant’s further suggestion
17 however, that where a local land use regulation is directed at third parties it cannot interfere with
18 federal authority is mistaken. *See* Def.’s Mot. at 11, 16. The Supremacy Clause prevents a
19 municipality from regulating federal functions, even if the municipality achieves its unlawful
20 purposes indirectly, through regulation of a third party. In *U.S. Postal Serv. v. Town of*
21 *Greenwich*, 901 F. Supp. 500 (D. Conn. 1995), a town in which a contractor was constructing a
22 new postal facility on leased land, the town requested a permit fee and demanded that the
23 contractor implement various design changes to address a town building official’s objections. *Id.*
24 at 502–03. The court held that the legal principle that “the activities of federal installations are
25 shielded by the Supremacy Clause from direct state regulation unless Congress provides clear
26 and unambiguous authorization for such regulation” applied to the Postal Service’s lessors and
27 contractors, *id.* at 504 (citations omitted): “the Town cannot *directly or indirectly* regulate post
28 office buildings owned by the Postal Service, even if on leased land, without specific

1 authorization from Congress.” *Id.* at 507 (emphasis added); *U.S. Postal Serv. v. City of*
 2 *Hollywood*, 974 F. Supp. 1459, 1460, 1465 (S.D. Fla. 1997) (holding that a city’s building code
 3 could not be applied to a private landlord renovating a building leased as a postal facility).⁷

4 Thus, here, the Government has stated a claim of a Supremacy Clause violation because
 5 the allegations in the Complaint, taken as true, establish that: 1) the sale of the Berkeley Main
 6 Post Office is a federal function; 2) Congress has not authorized the City to regulate this
 7 function; and 3) the Zoning Ordinance constitutes an attempt by the City, nonetheless, to regulate
 8 this sale and, indeed, the City has effectively prevented the Postal Service from disposing of its
 9 property. *See, e.g., Boeing*, 768 F.3d at 840 (setting forth the standard for a claim under the
 10 Supremacy Clause). Defendant’s Motion does not dispute that there is no Congressional
 11 authorization for the Zoning Ordinance, and instead focuses on the first and third elements of this
 12 test. *See* Def.’s Mot. 12–16.

13 As to the first element, the Postal Service alleges that the sale and disposition of property
 14 is a federal function vested in the Postal Service by Congress, listed alongside the authority to
 15 establish post offices or postal roads in the Postal Reorganization Act. *See* Compl. ¶¶ 9–11
 16 (discussing 39 USC §§ 401(5), 403(b)(3), 404(a)(3)).⁸ Indeed, as explained in the Complaint,
 17 that function arises from the Constitution itself, which provides that Congress may “establish
 18 Post Offices and post Roads.” *See id.* ¶ 9 (quoting U.S. Const. art. I, § 8, cl. 7). Congress
 19 delegated that authority to the Postal Service in 39 U.S.C. § 101, which codifies the Postal
 20 Service’s universal service obligation:

21 The United States Postal Service shall be operated as a basic and fundamental
 22 service provided to the people by the Government of the United States, authorized

23 ⁷ *See also, e.g., Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (holding that a
 24 Department of Defense contractor was not subject to state licensing requirements); *Boeing*, 768
 25 F.3d at 1–40 (invalidating a state regulation even when the regulation operated on a third party,
 rather than the Federal Government itself, in carrying out a federal function).

26 ⁸ Although Defendant argues that the Zoning Ordinance “does not interfere with the
 27 Postal Service’s ability to establish post offices or post roads, provide postal services to the
 28 community or satisfy its financial obligations to the Department of the Treasury,” there is no
 basis to highlight certain federal functions enumerated in the Postal Reorganization Act, as
 Defendant has done, while excluding others such as the sale of Postal Service property.

1 by the Constitution, created by Act of Congress, and supported by the people. The
2 Postal Service shall have as its basic function the obligation to provide postal
3 services to bind the Nation together through the personal, educational, literary, and
4 business correspondence of the people. It shall provide prompt, reliable, and
5 efficient services to patrons in all areas and shall render postal services to all
6 communities. The costs of establishing and maintaining the Postal Service shall not
7 be apportioned to impair the overall value of such service to the people

8 39 U.S.C. § 101; *see also* Compl. ¶ 9 (citing 39 U.S.C. § 101). The authority provided in
9 39 USC §§ 401(5), 403(b)(3), 404(a)(3), including the ability to “hold, maintain, sell,
10 lease, or otherwise dispose of [its] property or any interest therein,” *id.* § 401(5), is
11 essential in enabling the Postal Service to fulfill that obligation.

12 As to the third element of the Postal Service’s Supremacy Clause claim—the allegation
13 that the Zoning Ordinance constitutes a successful attempt by the Defendant to regulate a federal
14 function—the Complaint alleges facts establishing that the Zoning Ordinance “was enacted to
15 prevent and has had the effect of preventing the Postal Service’s sale of the Berkeley Main Post
16 Office property,” Compl. ¶ 43; *see id.* ¶¶ 27–41. Defendant, however, seeks to skirt that
17 contention by mischaracterizing the Government’s complaint as concerning “the right to secure a
18 commercial buyer for the sale of its properties at whatever price it has in mind.” Def.’s Mot. at
19 12. Defendant dismisses the effect of the Ordinance as merely “incidental” impact, comparable
20 to that which any generally-applicable law might have. *See id.* at 12–16.

21 The Zoning Ordinance, however, was *not* enacted as a general land use regulation, but,
22 instead, was targeted, specifically to prevent the sale of the Property. *See* Compl. ¶¶ 27–41.
23 Then-contemporaneous statements of council members who enacted the law confirm that intent.
24 *See, e.g., id.* ¶ 30 (quoting Councilmember Susan Wengraf as stating, in support of the
25 ordinance, “I think you all know that I am very much in favor of saving the Post Office”); *id.*
26 ¶ 31 (quoting Mayor Tom Bates as stating that “There is general agreement on the council that
27 we would like to save the Post Office, and this is a good way to do it . . . The civic center overlay
28 portion of the initiative . . . can easily be described as ‘help save our post office.’”). So
motivated, the council cherry-picked properties for inclusion and exclusion from the Zoning
Ordinance. The resulting historic overlay is an irregular 16-sided shape covering two full city

1 blocks and select portions of four additional blocks that belies any suggestion of a legitimate
 2 purpose of the Zoning Ordinance. *Cf. Shaw v. Reno*, 509 U.S. 630, 642 (1993) (plaintiffs stated
 3 an equal protection claim where they had identified a voting district with a shape “so extremely
 4 irregular on its face that it rationally [could] be viewed only as” the product of unconstitutional
 5 gerrymandering); *id.* at 647 (“recogniz[ing] that dramatically irregular shapes may have
 6 sufficient probative force to call for an explanation”).

7 For all of these reasons, the cases that Defendant cites where regulations only
 8 “incidentally affect[ed] the federal government” and did not “discriminate against the Federal
 9 Government or those with whom it deals” are inapposite here. Def.’s Mot. at 13–15. The
 10 Zoning Ordinance in this case—targeted specifically at prohibiting a federal function—bears no
 11 resemblance to the state regulations which, for example, increased the price of milk or alcohol
 12 for every consumer of those goods, or adjusted rates charged to the Government to those
 13 available on the market, generally. *See id.* (discussing cases). None of those cases involved an
 14 effort by a municipality to usurp (and effectively prohibit) a function that Congress specifically
 15 reserved to a federal agency. *See, e.g., Penn Dairies v. Milk Control Comm’n of Pa.*, 318 U.S.
 16 261 (1943); *North Dakota v. United States*, 495 U.S. 423 (1990); *United States v. State Corp.*
 17 *Comm’n of Commonwealth*, 345 F. Supp. 843 (E.D. Va. 1972).⁹

18 In sum, that the City is alleged to have selected an indirect instrument to regulate the
 19 Postal Service is of no moment; the Supremacy Clause precludes a municipality from targeting a
 20
 21

22 ⁹ For example, in *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 892
 23 (N.D. Cal. 2007), the applicable laws “regulate[d] equally all public utilities, making no
 24 distinction based on the government’s involvement.” 633 F. Supp. 2d at 904. Indeed, the court
 25 in that case emphasized that states could not “meddl[e] with federal government activities
 26 indirectly by singling out for regulation those who deal with the government.” *Id.* at 903. Yet
 27 that is just what the Defendant has done with the Zoning Ordinance in this case. *See supra* 8–11.
 28 As discussed above, the Defendant targeted the Zoning Ordinance to interfere with the sale of the
 Property by imposing restrictions on potential buyers that would make a sale “highly unlikely.”
 Order Dismissing Case as Moot at 8. In light of that targeted effort, *In re Nat’l Sec. Agency
 Telecomms. Records Litig.*, like the other cases on which Defendant relies, does not support
 Defendant’s position here.

1 federal function by direct or indirect means, and therefore the Government sufficiently has pled a
2 Supremacy Clause violation.

3 **B. The Complaint States a Claim for Preemption by Federal Law.**

4 The Postal Service clearly has also stated a claim that the Postal Reorganization Act
5 preempts the Zoning Ordinance. Under the Supremacy Clause, “state laws are preempted when
6 they conflict with federal law.” *Arizona v. United States*, 132 S. Ct. 2492, 2495 (2012).
7 “Conflict preemption” includes cases in which “the challenged state law ‘stands as an obstacle to
8 the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* at 2501
9 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

10 The Ninth Circuit has found conflict preemption where a state law or local ordinance
11 purported to regulate the Postal Service’s activities undertaken pursuant to the Postal
12 Reorganization Act of 1970. *See Flamingo Indus. Ltd. (USA) v. U.S. Postal Serv.*, 302 F.3d 985,
13 996–97 (9th Cir. 2002), *rev’d on other grounds*, 540 U.S. 736 (2004); *City of Pittsburg*, 661 F.2d
14 at 785. In *Flamingo Industries*, the Court addressed 39 U.S.C. § 401(3), which empowers the
15 Postal Service to “determine the character [of,] and necessity [for,] its expenditures.” *See* 302
16 F.3d at 997. In that case, the company from which the Postal Service previously had acquired its
17 mail sacks challenged the Postal Service’s procurement decisions under a California statute
18 prohibiting, *inter alia*, “any unlawful, unfair or fraudulent business act or practice.” *Id.* at 996.
19 Finding that the federal statute preempted the state law, the Court held that “allowing the
20 requirements of [the California statute] to control the Postal Service’s procurement decisions
21 would impinge upon the Service’s right to control the character and necessity of its purchases
22 free from state constraint.” *Id.* at 997.

23 The Court in *Flamingo Industries* relied on a prior case of conflict preemption where the
24 City of Pittsburg, California, attempted to regulate the Postal Service’s activities through a
25 criminal trespass state. *See id.* (citing *City of Pittsburg*, 661 F.2d at 785–86). “It [was]
26 undisputed that each government [had] acted in an area of its acknowledged power: The City in
27 the area of local property rights and Congress in the area of the postal service.” 661 F.2d at 785.
28 The Court of Appeals noted, however, that “[l]ocal law will be found to be preempted by federal
United States Postal Service v. City of Berkeley, Case No. 16-cv-4815
Plaintiff’s Opposition to
Defendant’s Motion to Dismiss

1 law whenever the ‘challenged state statute ‘stands as an obstacle to the accomplishment and
2 execution of the full purposes and objectives of Congress.’” *Id.* (quoting *Perez v. Campbell*, 402
3 U.S. 637, 649 (1971) (quoting *Hines*, 312 U.S. at 67)). The Court recognized “the Congressional
4 mandate to the Postal Service to provide efficient mail delivery service,” *id.*, and found that
5 “[t]he local ordinance frustrates postal efficiency.” *Id.* at 785–86. On this basis, the Court
6 concluded that the local ordinance was unconstitutional.

7 As with the Supremacy Clause cases discussed above, *see supra* 17–18, courts have
8 applied these preemption principles, not just to situations in which an ordinance purported to
9 regulate the Postal Service directly, but also to situations in which a regulation would operate
10 against a private party engaged by the Postal Service. *See Town of Greenwich*, 901 F. Supp. at
11 507; *U.S. Postal Serv. v. City of Hollywood*, 974 F. Supp. 1459 (S.D. Fl. 1997). In *Town of*
12 *Greenwich*, the court held that “[a]ny regulation of the post office project, whether against the
13 property, the lessor, or the building contractors ‘stands as an obstacle to the accomplishment and
14 execution of the full purposes and objectives of Congress,’” 901 F. Supp. at 507 (quoting *Hines*,
15 312 U.S. at 67), and concluded “the Town cannot *directly or indirectly* regulate post office
16 buildings owned by the Postal Service, even if on leased land, without specific authorization
17 from Congress,” *id.* (emphasis added).

18 Likewise, in *U.S. Postal Serv. v. City of Hollywood*, the court held that a city’s building
19 code could not be applied to a private landlord renovating a building leased as a postal facility.
20 974 F. Supp. at 1460, 1465. The court concluded that the city’s process “directly intrude[d] upon
21 the Postal Service’s ability to construct the postal project at issue,” *id.* at 1463. The court then
22 concluded that, although the building code was being applied to the private landlord, it was
23 preempted in that case because the effect fell on the Postal Service, which was immune from
24 such regulations. Although it was the landlord’s activity that the building code purported to
25 regulate, the court reasoned:

26 to impose the impediment of state and local building regulations would result in a
27 direct and unauthorized intrusion upon the Postal Service’s ability to select the
28 location, design and manner of site acquisition for necessary postal facilities.

1 *Id.* at 1465.¹⁰

2 Here, where market devaluation is a factor of the alleged interference, *Clean Air Markets*
 3 *Group v. Pataki*, 338 F.3d 82 (2d Cir. 2003) is also instructive. There, the federal law that
 4 created a cap and trade system of emission allowances preempted a New York law that penalized
 5 utilities unless their allowances were sold with restrictive covenants prohibiting the transfer of
 6 those allowances to certain states. *Id.* at 88–89. “Although [the law] [did] not technically limit
 7 the authority of New York utilities to transfer their allowances, it clearly interfere[d] with their
 8 ability to effectuate such transfers . . . [b]ecause such a restrictive covenant indisputably
 9 decreases the value of the allowances.” *Id.*

10 In this case, the Postal Service has alleged that the Zoning Ordinance targets the sale of
 11 the Property and interferes with the Postal Service’s ability to execute its responsibilities under
 12 the Postal Reorganization Act and the Property Clause of the Constitution, U.S. Const. art. IV, §
 13 3, cl. 2, which provides that “The Congress shall have Power to dispose of and make all needful
 14 Rules and Regulations respecting the Territory or other Property belonging to the United States.”
 15 *See* Compl. ¶¶ 1, 27–41, 47. The Complaint further alleges that the Zoning Ordinance’s
 16 targeting impedes the accomplishment and execution of the full purposes and objectives of that
 17 federal law. *See id.* ¶ 47. As with the regulations at issue in *City of Hollywood, Town of*
 18

19 ¹⁰ The court in *City of Hollywood* relied on a case presenting a situation close to that
 20 currently facing the Postal Service: in *Breeze v. Town of Bethlehem*, 151 Misc. 2d 230 (N.Y.
 21 Sup. Ct. 1991), the town denied a building permit to a private landowner seeking to build a post
 22 office facility on privately owned land for the Postal Service to lease, because the proposed
 23 project was not a “permitted use” under existing zoning for the site. *See* 974 F. Supp. at 1464.
 24 The state court rejected the argument that the private landowner was not subject to federal
 25 immunity, and held:

26 The Postal Reorganization Act in direct and unmistakable terms gives the Postal
 27 Service discretion to either purchase or lease real property in furtherance of its
 28 mission . . . To impose the impediment of state and local zoning and land use
 regulation upon the Postal Service’s discretion . . . would result in a direct and
 unauthorized intrusion upon the United States Government’s power to select the
 location and manner of site acquisition for necessary postal facilities.

Id. (quoting *Breeze*, 151 Misc. 2d at 233). As reflected above, the court in *City of Hollywood*
 paraphrased this reasoning in its own holding.

1 *Greenwich*, and *Clean Air Markets Group*, this intrusion is sufficient to state a claim for
2 preemption, irrespective of whether the effect on the Postal Service is direct or indirect.

3
4 **CONCLUSION**

5 For all of these reasons, the Postal Service respectfully requests that the Court deny the
6 Defendant's Motion.

7 Dated: December 1, 2016

Respectfully submitted,

8
9 OF COUNSEL:

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

10 JANINE CASTORINA
11 Attorney
12 Appellate and Commercial Litigation
13 United States Postal Service
14 475 L'Enfant Plaza, SW
15 Washington, DC, 20260
16 Phone: (202) 268-3069
17 Fax: (202) 268-2049
18 E-mail: Janine.Castorina@usps.gov

JOSEPH H. HUNT
Branch Director

JACQUELINE COLEMAN SNEAD
Assistant Branch Director

19 /s/ Julia Berman
20 JULIA A. BERMAN, Bar No. 241415
21 United States Department of Justice
22 Civil Division, Federal Programs Branch
23 20 Massachusetts Avenue, N.W.
24 Washington, D.C. 20001
25 Tel: (202) 616-8480
26 Fax: (202) 616-8470
27 Email: julia.berman@usdoj.gov
28 *Counsel for Plaintiff*