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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES POSTAL SERVICE, Plaintiff, v. CITY OF BERKELEY Defendant.	Case No. 16-cv-4815-WHA PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER Date: Sept. 28, 2017 Time: 8:00 a.m. Courtroom 8, 19th Floor Hon. William Alsup

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INTRODUCTION

As alleged in the Complaint, an extensive chain of events—including, but not limited to, statements by City Officials—demonstrates that the City enacted Berkeley Municipal Code Chapter 23E.98, Civic Center District Overlay ("the Overlay") for the purpose of interfering with the Postal Service's execution of its constitutional and statutory responsibility to manage its property. *See, e.g.*, Compl., ECF No. 1, ¶¶ 1, 18–20, 28, 31. In order to adduce additional evidence regarding, *inter alia*, the purpose of the Overlay, consistent with this Court's instruction that "the City Council people should sit for a deposition," Tr. of Proceedings, 44:23–24, ECF No. 65-1, the Postal Service sought to depose the twenty-one current and former City Councilmembers and Planning Commissioners who participated in enacting the Overlay. The prior City Attorney, who has since retired, agreed to the Councilmembers' depositions, and began to work with the Postal Service to select dates on which they could proceed. After a change in representation, the City objected to the requested depositions. The Postal Service offered to narrow its request to depositions of the City Councilmembers only, and to have a representative testify regarding the Planning Commission pursuant to Federal Rule of Civil Procedure 30(b)(6). Thus, rather than twenty-one requested depositions, twelve are now at issue: those of five current Councilmembers and the Mayor; four former Councilmembers and the former Mayor; and one representative of the Planning Commission.[1]

In its Motion for a Protective Order seeking to preclude the requested depositions, *see* ECF No. 67 ("Def's Mot."), the City contends that the law requires the Court to confine its inquiry to the four corners of the Overlay, and to turn a blind eye to the chain of events alleged in the Complaint. On this view, even where members of a legislative body openly profess that they are taking an action for an unlawful purpose, the Court is obligated to exclude evidence of that purpose from its analysis of the constitutionality of that action.

[1] These twelve proposed deponents, collectively, will be referred to herein as "City Officials."

That is not the law, however. The Supreme Court has long recognized that where preemption analysis is concerned, the courts "do not blindly accept the articulated purpose of [a challenged statute]." *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 418 (2d Cir. 2013) (quoting *Greater New York Metropolitan Food Council, Inc. v. Guiliani*, 195 F.3d 100, 108 (2d Cir. 1999) (quoting *Gade v. National Solid Wastes Management Assoc.*, 505 U.S. 88, 106 (1992)), *abrogated on other grounds by Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)). "The question of preemption is defined, in part, by the purpose of the [challenged law], and, in part by the [challenged law's] actual effect." *Entergy Nuclear Vermont Yankee, LLC*, 733 F.3d at 418 (quoting *Vango Media, Inc. v. City of N.Y.*, 34 F.3d 68, 73 (2d Cir. 1994)). Numerous cases discussed herein demonstrate that the intentions of the legislature enacting a challenged law are properly considered in the adjudication of its constitutionality under the Supremacy Clause. These cases also lay to rest the City's objections that the motives of individual legislators are irrelevant to the Court's analysis. Rather, individual legislators' statements of their motivations properly figure into a court's analysis in a federal preemption case.

The City alternatively argues that privilege precludes the requested depositions. But the City ignores that the privileges it purports to invoke are qualified privileges that must yield when, as here, "[the] need for the materials [or information] and the need for accurate fact-finding override the government's interest in non-disclosure." *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (quoting *FTC v. Warner Communications*, 742 F.2d 1156, 1161 (9th Cir. 1984)).

Finally, the City argues that, if the Court accepts the City's argument that information regarding legislative motive is privileged, then depositions regarding the other topics to which City officials could testify would be barred by the apex doctrine. As discussed herein, the City has not established that the apex doctrine would extend to all of the City officials whose depositions have been requested, but, in any event, the apex doctrine—like the privileges that the City purports to invoke—may be overcome under the circumstances presented here, where the

officials to be deposed have "direct personal factual information pertaining to material issues in an action . . . [and] where the information to be gained . . . is not available through any other source." *Green v. Baca*, 226 F.R.D. 624, 648 (C.D. Cal. 2005), *order clarified*, 2005 WL 283361 (C.D. Cal. Jan. 31, 2005). Accordingly, the Court should deny the City's motion and allow the requested depositions to proceed.

BACKGROUND

On August 22, 2016, the Postal Service brought this action under the Supremacy Clause alleging that Defendant "enacted [the Overlay] primarily to prevent the sale of the Berkeley Main Post Office," and that the City has achieved that purpose by "prohibiting any commercially viable uses" of the Property thereby interfering with its planned disposition by the Postal Service. Compl. ¶ 1. As alleged in the Complaint, the chain of events evidencing the City's intent to interfere with the planned disposition of the Property began with a resolution in which the City announced its formal opposition to the sale, and "request[ed] that USPS immediately impose a moratorium on all sales of Post Office Buildings nationwide." Compl. ¶ 17. The City Council then appealed the then-current decision of the Postal Service to relocate retail services, reiterating its "passionate . . . opposition to the sale of this property." *Id.* ¶ 18 (quoting April 30, 2013 Letter to Postal Service). After the Postal Service's regulator dismissed the City's Appeal, *id.* ¶¶ 19–20, then-City Councilmember (now Mayor) Jesse Arreguín sent a letter warning the Postal Service that the Council was considering the Overlay, which "would affect what a buyer could do with the property if the building was sold," and reaffirming "the Berkeley City Council's strong opposition to the sale." *Id.* ¶ 28 (quoting Compl., Ex. 2). The City then rushed the Overlay through its legislative process, *see* Ex. 1, while Councilmembers and Planning Commissioners continued to make public statements evidencing the unlawful purpose of the Ordinance. *See* ECF No. 67-1, Ex. 1.

The City first asserted its argument that the Court should disregard these statements and the evident unlawful purpose of the Overlay in the Reply submitted in support of its Motion to Dismiss the Complaint. *See* ECF No. 4–5. The City argued, as it does now, that "courts 'will

not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive,'" *id.* at 4 (quoting *U.S. v. O'Brien*, 391 U.S. 367, 383 (1968)), and that *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1146, n. 7 (9th Cir. 2004), renders "facts regarding motive . . . 'wholly irrelevant.'" In the Order denying the Motion to Dismiss, the Court rejected these arguments, recognizing that "[t]hese decisions indicate that allegations of legislative motive behind the Overlay's passage would not *suffice* to establish unconstitutionality." ECF No. 43 at 7 (emphasis added). Indeed, at the argument on the Motion to Dismiss, the Court instructed that "the City Council people should sit for a deposition," Tr. of Proceedings, 44:23–24, ECF No. 65-1, and admonished the City that it should not assert a privilege against such depositions. *See id.* at 44:24–25.

In a July 6, 2017 telephone call with undersigned counsel, then-City Attorney Mr. Cowan acknowledged the Court's instruction, and, in a follow-up email exchange agreed to a date-range during which those depositions would occur. *See* Email from Cowan to Berman (July 6, 2017), ECF No. 65-2. The City also consented to the Plaintiff exceeding Fed. R. Civ. P. 30(a)'s ten deposition limit in this case precisely because there were so many Councilmembers to be deposed; and, while noting that he would consider whether Planning Commissioners should be made available for depositions, Mr. Cowan agreed that Councilmembers' depositions would move forward. *Id.* In compliance with Local Civil Rule 30-1, undersigned counsel emailed the City with specific proposed dates for each deponent, in advance of serving deposition notices and subpoenas. *See* Email from Berman to Cowan and Brown (July 13, 2017), submitted with Def.'s Letter, ECF No. 63-1. However, rather than honor the agreement reached with Mr. Cowan—and in circumvention of the Court's directive—new counsel for the City advised that the Defendant would be seeking a protective order from the depositions that the Court already ruled the Councilmembers "should sit for." Tr. of Proceedings, 44:23–24. The City submitted its letter to the Court seeking a protective order on August 4, 2017, *see* ECF No. 63, and the Postal Service responded with a letter submitted on August 14, 2017, *see* ECF No. 65.

The Court then convened a hearing regarding the City's request, requiring the parties to meet and confer once more, prior to their appearance before the Court. *See* ECF No. 64. During that meet and confer process, the Postal Service proposed to halve the requested number of depositions by having the City designate a 30(b)(6) deponent from the Planning Commission(*see* Fed. R. Civ. P. 30(b)(6)), rather than each Planning Commissioner sitting for a deposition. The City did not accept that offer.

At the August 17, 2017 hearing, undersigned counsel explained that one purpose of the requested depositions was to confirm City Councilmembers' and Planning Commissioners' currently-inadmissible statements to the press about the purpose of the Overlay. The Court directed the Postal Service to serve on the City requests for admission seeking confirmation of such statements, which the Postal Service did on August 18, 2017. *See* ECF No. 67-1, Ex. 1. The City's responses have not been produced as of this filing The Court further ordered both parties to submit briefing addressing when it is appropriate for the Court to consider legislative purpose, and when it is appropriate to permit depositions of legislators. *See* ECF No. 66. The Postal Service respectfully submits the instant response pursuant to the Court's Order. The City filed a Motion for Protective Order to Preclude Depositions of City Officials on August 24, 2017. The Postal Service herein opposes that motion and addresses the Court's questions.[2]

ARGUMENT

I. The Law is Clear that the Court Can Consider Legislative Motive in this Context, Including by Examining the Statements of Individual Legislators.

"Inquiries into legislative intentions, purposes, and motivations feature prominently in American constitutional law." Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 Harv. L. Rev. 523, 525 (2016). Examples of cases in which the Supreme Court has undertaken such inquiries include cases brought under the Equal Protection Clause, the Dormant

[2] The Postal Service has proposed a solution that would obviate the City's motion, but as of this filing, the City had not responded substantively to the Postal Service's offer.

Commerce Clause, the Establishment Clause, the Free Exercise Clause, the Free Speech Clause, and the Due Process Clause. *See id.* at 525–26 (collecting cases). Additional examples abound in challenges based on the right to travel; the prohibitions against *ex post facto* laws, bills of attainder, and double jeopardy. *See id.* at 526 (collecting cases).[3] Most importantly for this case, however, the Supreme Court has unequivocally held that such an inquiry is appropriate in a preemption action based on the Supremacy Clause. *See English v. General Elec. Co.*, 496 U.S. 72, 84 (1990) (involving the challenge that federal law preempted a common law tort claim).

As the Supreme Court in *English* explained, under the Supremacy Clause, a law may be preempted by federal law in three circumstances. First, Congress "can define explicitly the extent to which its enactments pre-empt state law." *Id.* at 78. "Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended to occupy exclusively." *Id.* at 79. And, [f]inally, state law is preempted to the extent it actually conflicts with federal law." *Id.* In describing these forms of preemption, however, the Supreme Court cautioned that "[b]y referring to these three categories, we should not be taken to mean that they are rigidly distinct." *Id.* at 79 n.5. Rather, the Supreme Court clarified: "field preemption may be understood as a species of conflict preemption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or implied) to exclude state regulation." *Id.*

In *English*, moreover, the Supreme Court observed that it previously had "defined the pre-empted field, in part, by reference to the motivation behind the state law" in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 213 (1983) (herein "*PG&E*"). *English*, 496 U.S. at 84 (citing *PG&E*, 461 U.S. at 213). Although the Court indicated that "another part of the field is defined by the state law's actual effect," *English*, 496 U.S. at 84, the Court was clear that motivation or statutory purpose was an

[3] An exhaustive discussion of the different settings in which the courts may appropriately undertake such inquiries would far exceed the twenty-five pages allotted to the Plaintiff for this response.

appropriate part of its inquiry. *See id.*

In its Memorandum, the City cites *PG&E* as "on point," yet misses that aspect of its holding. *See* Def's Mot. at 11.[4] The City correctly notes that the Supreme Court in *PG&E* ultimately declined to try to "ascertain California's true motive" in enacting the state law at issue in that case, but misses that the Supreme Court nonetheless considered a number of arguments related to the California legislature's motivation, *see PG&E*, 461 U.S. at 213–16, and concluded that "it would be particularly pointless for [the Supreme Court] to engage in such inquiry" there in light of other circumstances unique to that case, *id.* at 216.[5] In *English* and its progeny—in the absence of such special circumstances—courts routinely have looked to legislators' motivations in preemption actions brought under the Supremacy Clause.

As the Second Circuit explained, courts "do not blindly accept the articulated purpose of an ordinance for preemption purposes." *Entergy Nuclear Vermont Yankee, LLC*, 733 F.3d at

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[4] *Virginia Uranium, Inc. v. Warren*, 848 F.3d 590 (2017), upon which Defendant also relies, *see* Def's Mot. at 11, is not to the contrary. In *Virginia Uranium*, the Fourth Circuit followed the Supreme Court's instruction in *O'Brien* that a court "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 597–98 (quoting *O'Brien*, 391 U.S. at 383). In *O'Brien*, the Supreme Court had declined "to void a statute . . . on the basis of what fewer than a handful of Congressmen said about it." 391 U.S. at 384. That is, the Supreme Court did not bar any examination of legislators' statements but focused, instead, on whether such comments could be the basis for invalidating an otherwise constitutional statute. *Id.* As this Court recognized in its decision denying the City's Motion to Dismiss, such decisions simply "indicate that allegations of legislative motive behind the Overlay's passage would not suffice to establish unconstitutionality." Order ECF No. 43 at 6–7. Because the Plaintiff's claims here encompass not only the purpose of the Overlay, but also its effect, such cases are inapposite. *See id.* at 7 (recognizing that the Postal Service's claims encompass both improper purpose and improper effect).

[5] There, the argument as to the purpose behind California legislation had hinged on whether the legislature was motivated by economic concerns or safety concerns in passing a law that conditioned construction of new nuclear plants on findings by a state commission that adequate storage facilities and means of disposal were available for nuclear waste. *See PG&E*, 461 U.S. at 194, 216. The State of California asserted that its purpose was economic, and the Supreme Court observed that further inquiry regarding the purpose of the challenged law was "particularly pointless" because the state had another lawful path under the federal statutory scheme to halt construction of new nuclear plants based on economic concerns. *Id.*

418. "If that were the rule, legislatures could 'nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.'" *Id.* (quoting *Greater New York Metropolitan Food Council, Inc.*, 195 F.3d at 108 (quoting *Gade*, 505 U.S. at 106)). On the contrary, preemption analysis "must" include an inquiry "to determine if it was passed with an impermissible motive." *Entergy Nuclear Vermont Yankee*, 733 F.3d at 418; *see also id.* at 419 ("We therefore believe that legislative history is an important source for determining whether a particular statute was motivated by an impermissible motive in the preemption context."). Cases from other jurisdictions have followed the same approach. *See, e.g.*, *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1252 (10th Cir. 2004) (affirming the district court's decision that federal law preempted provisions of a state statute found to be based on an improper purpose in light of, *inter alia*, statements by the governor and the state legislator who sponsored the provisions)[6]; *National Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 3d 488, 505 (D.N.J. 2014) (examining whether a state statute was motivated by an impermissible motive in the preemption context), *affirmed sub nom. on other grounds, National Collegiate Athletic Ass'n v. Governor of N.J.*, 832 F.3d 389 (3d Cir. 2016), *cert. granted*, 137 S. Ct. 2327 (Jun 27, 2017).[7]

Moreover, contrary to the City's argument that the motivations of individual legislators are irrelevant because "they cannot be imputed to the legislative body as a whole," Def's Mot. at 9, this line of cases makes plain that statements by individual legislators may inform the Court's analysis of legislative motive. *See, e.g.*, *Skull Valley Band of Goshute Indians*, 376 F.3d at 1252 (citing statements by the legislator who sponsored the challenged provision, and the governor's

[6] The Tenth Circuit noted that "controlling Supreme Court decisions require[d]" that the court "consider *the purpose* and effect of the state law at issue." *Skull Valley Band of Goshute Indians*, 376 F.3d at 1247–48 (emphasis added).

[7] The City's motion omits any discussion of these decisions, and instead objects that the Postal Service "can point to no case in which a court has found legislative history relevant to . . . conflict preemption." Def's Mot. at 2.

"state of the state" address); *Skull Valley Band of Goshute Indians*, 215 F. Supp. 2d at 1249 n.10 (citing individual legislators' statements, the governor's comments to a newspaper, and testimony by a speaker at a hearing on the challenged legislation); *id.* at 1250 (citing a state senator's comments in floor debate); *Entergy Nuclear Vermont Yankee LLC*, 733 F.3d at 420–21 (relying on extended discussion of individual legislators' comments during hearings); *Greater New York Metropolitan Food Council, Inc.*, 195 F.3d at 108 n.1 (citing comments by individual legislators, including the primary sponsor of the law). Thus, the record in this case clearly should not be confined, as the City urges, to the face of the Overlay and the materials included in the legislative history. Indeed, the evidence that the Postal Service seeks to elicit in the requested depositions resembles the evidence on which the Ninth Circuit relied in *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983). There, the Ninth Circuit considered a mayor's deposition testimony regarding the purpose of a city council meeting that he had convened. *See id.* at 1264 (citing the mayor's "deposition testimony indicat[ing] that he, in his capacity as Pocatello's mayor, called the September 2nd Council meeting "to see what the City Council could do about getting the [plaintiffs' theater] out of Pocatello"). The Ninth Circuit also considered testimony from the building inspector regarding the mayor's instructions to him. *Id.* Because that evidence had "cast suspicion on [the legislative body's] motives" and "objectively indicated the Council's purpose," *City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir. 1984) (discussing *Tovar*), the court considered it when assessing the constitutionality of that city's actions.[8] So too should this Court in deciding the challenge here. Thus this Court should

[8] The City argues that *City of Las Vegas v. Foley*, is "exactly on point" in its holding that it was appropriate to enter a protective order against the requested depositions in that case, Def's Mot. at 13, but ignores that in *City of Las Vegas*, the plaintiff relied on a "mere statement" that "a motivating factor in the zoning decision" was at issue in that case. *City of Las Vegas*, 747 F.2d at 1299. The Court concluded that bare allegation "[wa]s not sufficient to shift the focus of inquiry from the objective manifestations of legislative purpose to the subjective motivations of individual legislators." *Id.* That situation bears no resemblance to the instant circumstance, where there is extensive evidence of the City's unlawful purpose in enacting the Overlay. *See supra* at 3.

consider the purpose of the Overlay and the motivations of the City Officials who enacted it. Accordingly, the depositions of those individuals should be allowed.

II. Neither of the Privileges the City Purports to Invoke Should Preclude the Requested Depositions.

The City alternatively contends that the mental process privilege and deliberative process privilege "prohibit" or "bar[]" the depositions of the City Officials regarding their reasons for enacting the Overlay. Def's Mot. at 12, 13. Both privileges, however, are qualified privileges that should yield if "the need for the materials [or information] and the need for accurate fact-finding override the government's interest in non-disclosure." *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (quoting *FTC v. Warner Communications*, 742 F.2d 1156, 1161 (9th Cir. 1984)). Indeed, in *North Pacifica LLC*, the primary case on which the City relies, the court discussed the application of the deliberative process privilege and the mental process privilege, but ultimately held that the deliberative

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Nor does the Government's position in the litigation regarding Executive Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017), support the City's argument. That litigation arose in the context of immigration law where the Supreme Court has articulated a specific test about how to judge the legitimacy of official acts—a test that specifically excludes "look[ing] behind" the four corners of the official act. *See Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Additionally, that litigation involved the Establishment Clause, for which precedent does not permit looking beyond "official objectives" or "openly available data." *See McCreary County v. ACLU*, 545 U.S. 844, 862–63 (2005). And, that litigation involved the significant separation of powers concerns that would be raised by judicial probing of the President's psyche. Of course, none of these considerations applies here; neither the precedent addressing immigration law, nor domestic Establishment Clause jurisprudence, has any bearing on this Supremacy Clause case, and separation of powers concerns do not arise because the Court is not considering the actions of the President here. Additionally, the statements of alleged improper motivation in that case largely were made by the President as a candidate, rather than in his office as an elected official. *See* Petitioner for Writ of Certiorari, *Trump v. International Refugee Assistance Project*, 2017 WL 3475820 (U.S.), 73 (2017) ("Here, virtually all of the President's statements on which the Fourth Circuit relied were made before he assumed office, before he took the prescribed oath to "preserve, protect and defend the Constitution," U.S. Const. Art. II, § 1, Cl. 8, and formed a new Administration, including Cabinet-level officials who recommended adopting the Order."). Such considerations do not arise in the instant case where the statements upon which the Postal Service relies, and regarding which it seeks discovery, are those of elected officials and address the specific legislative act challenged herein.

process privilege did not protect the information at issue. *Id.* at 1125–26. The court in that case permitted questioning regarding "what [lawmakers] said to others about [the challenged law], what they heard, what they read, what they were told, and so forth." *Id.* at 1125. The court stopped short of permitting questioning regarding mental processes, but noted that such questioning may be appropriate where (as here) there is "a strong showing of bad faith or improper behavior." *Id.* at 1126 (quotation omitted). Furthermore, the court "reserve[d] the authority . . . to revisit the line drawn . . . at trial should it become clear that the objective evidence is inadequate to satisfy the countervailing truth-finding interests at issue." *Id.*

Courts consider eight factors in determining whether the qualified deliberative process privilege may be overcome, and the court in *N. Pacifica, LLC* applied these factors to assess the application of the mental process privilege as well:

> (1) the relevance of the evidence, (2) the availability of other evidence, (3) the government's role in the litigation, and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions[,] . . . (5) the interest of the litigant, and ultimately society, in accurate judicial fact finding, (6) the seriousness of the litigation and the issues involved, (7) the presence of issues concerning alleged governmental misconduct, and (8) the federal interest in the enforcement of federal law

274 F. Supp. 2d at 1122 (citation omitted); *see also id.* at 1123.

Each of these factors supports both privileges yielding in this case, and therefore the requested depositions should proceed. As to the first factor, relevance, the numerous cases discussed above demonstrate that the purpose of legislation, including statements by individual legislators regarding its purpose, is properly within the scope of the Court's inquiry in an action brought under the Supremacy Clause. *See supra* at 5–9. With respect to the second factor, the availability of other evidence, the Postal Service seeks the depositions specifically to obtain evidence that has not been otherwise produced in discovery, for example, to inquire about otherwise-inadmissible statements that City Officials have made about the Overlay, and about the effects, if any, of the Overlay on the City's parcels. The third factor, the government's role in the litigation, likewise supports moving forward with the depositions because the City is

directly involved as a defendant and the lawfulness of the Overlay it enacted is at issue in this case. As to the fourth factor—the question of whether frank discussions might be chilled—the court in *North Pacifica*, a case upon which the City relies, reasoned: "if because of this case, [local legislators] are reminded that they are subject to scrutiny, a useful purpose will have been served." 274 F. Supp. 2d at 1125 (quoting *Newport Pacific Inc. v. County of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001)).

The remaining four factors—the interests in accurate judicial fact finding, the seriousness of the issues involved in this litigation, the presence of allegations of governmental misconduct, and the federal interest in the enforcement of federal law, *see id.* at 1122—are interrelated in this case, and strongly favor a finding that neither deliberative process privilege nor mental process privilege applies. The instant action is unusual in its gravity; it is a claim by the Federal Government that the City enacted an ordinance, in knowing defiance of the Constitution. Such situations arise rarely, but, when they do, the societal interest in accurate fact finding is magnified. The Court should find therefore that neither the deliberative process privilege nor the mental process privilege is applicable here.

III. The Apex Doctrine Does Not Bar the Requested Depositions.

Finally, the City continues to rely on the apex doctrine to support its refusal to make the City Officials available for deposition. *See* Def's Mot. at 16–17. The apex doctrine provides that "high ranking government officials are generally not subject to depositions unless they have some personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere." *Alexander v. F.B.I.*, 186 F.R.D. 1, 4 (D.D.C. 1998). The City has not demonstrated, however, that the doctrine that protects senior government officials such as cabinet-level officials of the federal government and high-level White House staff, *see id.* at 2 n.1, 4, extends to city planning commissioners or city councilmembers beyond the mayor. *See, e.g., Sec. & Exch. Comm'n v. Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 250 (S.D.N.Y. 2015) ("A

survey of the relevant case law indicates that a staff director of a congressional subcommittee does not qualify as a 'high-ranking government official.'"); *Byrd v. District of Columbia*, 259 F.R.D. 1 (D.D.C. 2009) (concluding that deputy mayor and general counsel for the Department of Youth and Rehabilitation Services were not "high-ranking officials"). Indeed, while the City collects cases which are meant to demonstrate that the depositions at issue here would be barred by this doctrine, the City does not cite any instance where the doctrine applied to councilmembers or other members of committees of city government, rather than the office of the mayor. *See* Def's Mot. at 17. Moreover, because Mayor Arreguin, who first proposed the Overlay, *see* Compl., Ex.2, was a councilmember but had not yet been elected to the office of mayor, at the time the Overlay was enacted, the City has not established that these considerations would apply with respect to even his deposition.

In any event, like the privileges discussed above, even in those cases where the apex doctrine applies, it may be overcome. Indeed, "[a]n exception to this general rule exists concerning top officials who have direct personal factual information pertaining to material issues in an action ... [and] where the information to be gained . . . is not available through any other source." *Green v. Baca*, 226 F.R.D. 624, 648 (C.D. Cal. 2005), *order clarified*, 2005 WL 283361 (C.D. Cal. Jan. 31, 2005). Here, the officials whom the Postal Service seeks to depose all were personally involved in the enactment of the Overlay and could testify not only to the objective chain of events leading to its enactment, but also to the effect—if any—of the Overlay on the City's parcels that are subject to its restrictions as well their motivations. For all of the reasons discussed above, including the gravity of the issues at stake in this constitutional case, the Court should decline the City's request to shield such information from discovery.

CONCLUSION

For the reasons explained herein, the Court should deny the City's Motion for a Protective Order. In the alternative, if the Court were to grant the City's motion, the Court should also enter an order precluding the City from introducing new evidence, beyond that which is produced to the Postal Service in discovery, regarding the purpose of the Overlay.

Dated: September 7, 2017

Respectfully submitted,

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