FARIMAH F. BROWN, City Attorney (SBN 201227)
SAVITH IYENGAR, Dep. City Attorney (SBN 268342)
JESSICA E. MAR, Dep. City Attorney (SBN 293304)
BERKELEY CITY ATTORNEY'S OFFICE
2180 Milvia Street, Fourth Floor
Berkeley, California 94704
Telephone: (510) 981-6998
Facsimile: (510) 981-6960
FBrown@cityofberkeley.info

ANDREW W. SCHWARTZ (SBN 87699)
MATTHEW D. ZINN (SBN 214587)
STEPHANIE L. SAFDI (SBN 310517)
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Schwartz@smwlaw.com
Zinn@smwlaw.com
Safdi@smwlaw.com

Attorneys for Defendant
CITY OF BERKELEY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

UNITED STATES POSTAL SERVICE,

Plaintiff,

v.

CITY OF BERKELEY,

Defendant.

Case No. 3:16-cv-04815-WHA

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

The Hon. William Alsup

Date: September 28, 2017
Time: 8:00 a.m.

Trial Date: December 4, 2017

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

TABLE OF CONTENTS

Page

INTRODUCTION 1
ARGUMENT 2
I. The Postal Service implicitly concedes that legislative purpose is not an element of an intergovernmental immunity claim. 2
II. The preemption cases cited by the Service involved a statute with an express preemption savings clause that made state legislative purpose relevant. 2
III. The Postal Service's attempt to avoid the mental process and deliberative process privileges is unavailing. 7
IV. The apex doctrine bars depositions on topics that can otherwise be fully investigated with other discovery tools. 9
CONCLUSION 10

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

TABLE OF AUTHORITIES

Page

FEDERAL CASES

City of Columbus v. Ours Garage & Wrecker Serv., Inc.,
536 U.S. 424 (2002) 5

City of Las Vegas v. Foley,
747 F.2d 1294 (9th Cir. 1984) 7, 8

English v. Gen. Elec. Co.,
496 U.S. 72 (1990) 3

Entergy Nuclear Vt. Yankee, LLC v. Shumlin,
733 F.3d 393 (2d Cir. 2013) 3, 4, 7

Fl. Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 4

Green v. Baca,
226 F.R.D. 624 (C.D. Cal. 2005) 10

K.C.R. v. County of Los Angeles,
No. CV 13-3806 PSG (SSx), 2014 U.S. Dist. LEXIS 98279
(C.D.Cal. July 11, 2014) 10

N. Pacifica, LLC v. City of Pacifica,
274 F. Supp. 2d 1118 (N.D. Cal. 2003) 7, 8, 9

N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 5

Napier v. Atl. Coast Line R.R. Co.,
272 U.S. 605 (1926) 4

Nat'l Collegiate Athletic Ass'n v. Christie,
61 F. Supp. 3d 488 (D.N.J. 2014) 4

Nat'l Collegiate Athletic Ass'n v. Governor of N.J.,
137 S.Ct. 2327 (June 27, 2017) 4

Nat'l Collegiate Athletic Ass'n v. Governor of N.J.,
832 F.3d 389 (3d Cir. 2016) 4

North Dakota v. United States,
495 U.S. 423 (1990) 2

Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n,
461 U.S. 190 (1983) 2, 3, 4, 6

Perez v. Campbell,
402 U.S. 637 (1971) 4

Puente Ariz. v. Arpaio,
821 F.3d 1098 (9th Cir. 2016) 5

Skull Valley Band of Goshute Indians v. Leavitt,
215 F. Supp. 2d 1232 (D. Utah 2002) 7

Skull Valley Band of Goshute Indians v. Nielson,
376 F.3d 1223 (10th Cir. 2004) 4

Squaw Valley Dev. Co. v. Goldberg,
375 F.3d 936 (9th Cir. 2004) 8

Tillison v. City of San Diego,
406 F.3d 1126 (9th Cir. 2005) 5

Ting v. AT&T,
319 F.3d 1126 (9th Cir. 2003) 6

Tovar v. Billmeyer,
721 F.2d 1260 (9th Cir. 1983) 7

United States v. O'Brien,
391 U.S. 367 (1968) 6

Va. Uranium, Inc. v. Warren,
848 F.3d 590 (4th Cir. 2017) 4

CALIFORNIA CASES

Landgate v. Cal. Coastal Comm'n,
17 Cal. 4th 1006 (1998) 10

U.S. CONSITITUTION

U.S. Const. art. I, § 8, cl. 7 5

U.S. Const. art. IV, § 3, cl. 2 5

FEDERAL STATUTES

39 U.S.C. § 401(5) 6

39 U.S.C. § 403(b)(3) 6

39 U.S.C. § 404(a)(3) 6

42 U.S.C. § 2021(k) 2

CALIFORNIA STATUTES

Cal. Gov't Code § 34000 10

MISCELLANEOUS

Berkeley City Charter § 21 10

Berkeley City Charter § 38 10

INTRODUCTION

The arguments that Plaintiff United States Postal Service offers in opposition to Defendant City of Berkeley's motion for a protective order fail to justify taking the depositions of City mayors, councilmembers, and planning commissioners. The Postal Service claims that the depositions are necessary to elicit evidence about the motives of these officials in adopting the Civic Center District Overlay. Courts have repeatedly and roundly rejected such inquiry.

The Service provides neither argument nor citation for the proposition that evidence of legislative purpose has any relevance whatsoever to an intergovernmental immunity claim under the Supremacy Clause. On its preemption claim, the Service points to cases applying preemption under the Atomic Energy Act ("AEA"). As the City has already explained, legislative purpose is relevant to a preemption claim under the AEA only because the statute includes a preemption savings clause that expressly makes it relevant. There is nothing comparable in the constitutional and statutory provisions the Service relies on here for preemption. And even if legislative purpose were relevant, the Service offers no authority for exploring the subjective intent of individual legislators.

The Postal Service's objections to the City's arguments based on privilege are similarly unavailing. Ironically, the Service relies most heavily on a case that applied the mental process privilege to *forbid* exactly the kind of depositions inquiring into legislative motive that the Service proposes. And its continuing insistence that local officials are insufficiently important to justify protection under the "apex doctrine" flies in the face of numerous cases. The Service also fails to explain why it cannot obtain any relevant, objective evidence from other sources.

In sum, the Postal Service's proposed depositions are unjustifiable on a variety of grounds. The Court should therefore issue the requested protective order to forbid them.

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

ARGUMENT

I. The Postal Service implicitly concedes that legislative purpose is not an element of an intergovernmental immunity claim.

The Postal Service has abandoned any argument that legislative purpose is an element of an intergovernmental immunity claim. The Service fails to mention its intergovernmental immunity claim anywhere in its opposition, and not one of its cited cases involves such a claim. The Service has thus implicitly conceded that the purpose of the Overlay and the intent of the City Council are entirely irrelevant to that claim. It was correct do so. As the City demonstrated in its opening memorandum, the case law makes clear that intergovernmental immunity claims turn on the *effect* of the challenged ordinance—whether it "regulates the United States directly or discriminates against the Federal Government," *North Dakota v. United States*, 495 U.S. 423, 435 (1990)—not the intent of the enacting body. *See* Dkt. 67 at 13-15.

II. The preemption cases cited by the Service involved a statute with an express preemption savings clause that made state legislative purpose relevant.

The Service argues that inquiry into legislative purpose is relevant to its conflict preemption claim. Dkt. 68 at 6, 9-14. But its cases—*Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983) ("*PG&E*"), and its progeny—are distinguishable. They all consider the preemptive effect of the AEA, which made state legislative purpose relevant to the preemption analysis. Accordingly, they have no bearing on this case.

The Service accuses the City of failing to cite *PG&E* for its consideration of legislative purpose. Dkt. 68 at 11. But the City fully discussed that part of *PG&E*'s analysis in its opening memorandum. *See* Dkt. 67 at 17. As the City explained, the federal statute at issue in *PG&E*, the AEA, contained a savings provision that reserved to the states the right to "regulate activities *for purposes* other than protection against radiation hazards." *PG&E*, 461 U.S. at 210 (quoting 42 U.S.C. § 2021(k)) (emphasis added). Construing that provision, the Court in *PG&E* reasoned that Congress made it necessary—in that particu-

lar statutory context—"to determine whether there is a nonsafety rationale" for the challenged state legislation, and it considered limited evidence of purpose accordingly. *Id.* at 210-11, 213-16; *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990) (explaining that the *PG&E* Court's "approach to defining the field" preempted by the AEA flowed from the language about purpose in the statute's savings provision).

In fact, the Court's decision in *English v. General Electric Co.* (on which the Postal Service curiously relies, Dkt. 68 at 10-11) undercuts any implication that state legislative purpose is universally relevant to preemption analysis. There, the Court refocused the AEA preemption analysis on the effects of the challenged state regulation: whether it "*directly affect[s]* the radiological safety of nuclear-plant construction and operation." 496 U.S. at 84; *see also id.* at 84-85 (explaining that "[t]he real issue . . . is whether petitioner's tort claim is so related to the 'radiological safety aspects involved in the . . . operation of a nuclear [facility],' that it falls within the pre-empted field" (quoting *PG&E*, 461 U.S. at 205)). In doing so, the Court cast doubt on whether legislative purpose is relevant even to an AEA preemption claim. *Id.* at 84 n.7 (declining to reach the question "[w]hether the suggestion of the majority in [*PG&*E] that legislative purpose is relevant to the definition of the pre-empted field is part of the holding of that case"); *see also Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 419 n.27 (2d Cir. 2013) (acknowledging that *PG&E* "does not explain with precision the role legislative history plays in the analysis of an Atomic Energy Act preemption claim").[1]

The other cases the Service relies on for its preemption argument are simply applications of *PG&E* and *English* to more AEA preemption claims. In *Entergy Nuclear Ver-*

[1] The Service also ignores that *PG&E* and *English* invoke state legislative purpose in addressing field preemption, not conflict preemption. *See PG&*E, 461 U.S. at 217-20 (conflict preemption discussion); *English*, 496 U.S. at 87-90. Their conflict preemption analysis turned instead on whether "compliance with both [the federal and state laws] is possible," *PG&E*, 461 U.S. at 219, and whether the state law would in fact "frustrate . . . congressional objective[s]," *English*, 496 U.S. at 88. The Service pleads only conflict preemption in its Complaint and cites no authority making state legislative purpose relevant to that analysis.

1 *mont Yankee, LLC v. Shumlin*, the Second Circuit applied *PG&E* and asked whether Ver-
2 mont statutes governing a nuclear power station were "grounded in safety concerns" and
3 thus preempted by the AEA. 733 F.3d at 415 (quoting *PG&E*, 461 U.S. at 213); *see Va.*
4 *Uranium, Inc. v. Warren*, 848 F.3d 590, 598 (4th Cir. 2017) (characterizing *Entergy* as a
5 "straightforward application of [*PG&E*]"). Likewise, in *Skull Valley Band of Goshute Indi-*
6 *ans v. Nielson*, the Tenth Circuit considered the purpose of a state law under the AEA
7 preemption savings provision because it was "required to follow the preemption analysis
8 set forth in [*PG&E*]" and its progeny. 376 F.3d 1223, 1252 (10th Cir. 2004). The Service
9 also relies on a New Jersey district court decision that relied in turn on the AEA cases in
10 considering a preemption claim based on the Professional and Amateur Sports Protection
11 Act ("PASPA"). *Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 3d 488, 505 (D.N.J.
12 2014). But that court failed to consider whether Congress similarly intended the field
13 preempted by PASPA to be defined in part by state legislative purpose. *Id.* (citing, e.g.,
14 *Entergy*, 733 F.3d at 419). In any event, the Third Circuit affirmed on an unrelated basis
15 without reaching the preemption claim. *See Nat'l Collegiate Athletic Ass'n v. Governor of*
16 *N.J.*, 832 F.3d 389 (3d Cir. 2016) (en banc) (holding that the New Jersey law violates
17 PASPA because it authorized sports gambling, which PASPA makes unlawful), *cert.*
18 *granted*, 137 S.Ct. 2327 (June 27, 2017).

19 Contrary to the Service's insinuation, *PG&E* did not alter the ordinary conflict
20 preemption standard, which focuses on the effects of a challenged regulation, not its pur-
21 pose. *See, e.g., Perez v. Campbell*, 402 U.S. 637, 651-52 (1971) (overruling preemption cas-
22 es that "look[ed] to the purpose rather than the effect of state laws"); *Fl. Lime & Avocado*
23 *Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("The test of whether both federal and state
24 regulations may operate, or the state regulation must give way, is whether both regula-
25 tions can be enforced without impairing the federal superintendence of the field, not
26 whether they are aimed at similar or difference objectives."); *Napier v. Atl. Coast Line R.R.*
27 *Co.*, 272 U.S. 605, 612 (1926) (preemption analysis turns not on whether federal and state
28

laws "are aimed at distinct and different evils" but whether they "operate upon the same subject").

Indeed, the Ninth Circuit recently rejected the Postal Service's position in *Puente Arizona v. Arpaio*, 821 F.3d 1098 (9th Cir. 2016). There, the court declined to wade into legislative history in determining whether Arizona's identity theft laws were preempted by federal immigration policy and instead looked solely to their "effects to determine if the state encroached on an area Congress intended to reserve." *Id.* at 1106. As the court explained, "it does not matter if Arizona passed the identity theft laws for a good or bad purpose—what matters is whether the legislature succeeded in carrying out that purpose." *Id.*; *see also id.* ("[T]he crucial question is whether Congress intended to preempt identify theft laws *given the practical effect of those laws*.") (emphasis added). Because the laws did not in fact interfere with immigration policy, the court held that they were not preempted "despite the state legislative history" showing that they were intended to do so.

Unlike the AEA cases, this case involves not a field preemption claim but rather simple conflict preemption, and none of the federal laws that the Service invokes contain language that makes the purpose of state regulation relevant to their preemptive scope.[2] Rather, the constitutional and statutory provisions at issue in this case simply grant authority to Congress and the Postal Service. *See* U.S. Const. art. I, § 8, cl. 7 (authorizing Congress to "establish Post Offices and Post Roads"); U.S. Const. art. IV, § 3, cl. 2 (authorizing Congress "to dispose of and make all needful rules and regulations respecting the

[2] The court in *Puente Arizona* acknowledged in dicta that purpose evidence may be relevant to, though not dispositive, of a preemption claim where the applicable federal statute makes that purpose relevant. *See Puente Ariz.*, 721 F.3d at 1106 n.8. The cases on which it relied all involved allegedly preemptive federal statutes containing language that made legislative purpose part of the preemptive field. *See Tillison v. City of San Diego*, 406 F.3d 1126, 1129 (9th Cir. 2005) (considering state legislative intent because Congress had included a safety exception to the Federal Aviation Administration Authorization Act's general preemption clause that made it necessary to consider whether the challenged state law was "genuinely responsive to safety concerns" (quoting *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 442 (2002))); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 658 (1995) (noting the purpose of a challenged New York surcharge statute in holding that it did not fall within the Employee Retirement Income Security Act's "clearly expansive" express preemption provision).

territory or other property belonging to the United States"); 39 U.S.C. § 401(5) (authorizing the Postal Service "to hold, maintain, sell, lease or otherwise dispose of [its] property or any interest therein"); 39 U.S.C. § 403(b)(3) (making it the responsibility of the Postal Service "to establish and maintain postal facilities of such character and in such locations, that postal patrons throughout the Nation will . . . have ready access to essential postal services"); 39 U.S.C. § 404(a)(3) (authorizing the Postal Service to "determine the need for post offices . . . and to provide such offices, facilities, and equipment as it determines are needed"). In this context, ordinary preemption principles apply: the inquiry is whether the local ordinance has the effect of "actually interfer[ing]" with federal law. Dkt. 67 at 12 (quoting *Ting v. AT&T*, 319 F.3d 1126, 1137 (9th Cir. 2003)). The purpose of the local legislative body has no bearing on that analysis.

Even if legislative purpose were part of the preemption inquiry in this case, the subjective motivations of City officials would still be irrelevant. The Court in *PG&E* made clear that, when an allegedly preemptive federal statute makes the purpose of state or local regulation relevant, the only evidence that matters is objective evidence: the regulation's text and the official report of the legislative committee that proposed it. 461 U.S. at 216. The Service contends that the *PG&E* Court's refusal to "become embroiled in attempting to ascertain California's true motive," *id.*, was owing to circumstances unique to that case. Dkt. 68 at 11. But the Court relied for that refusal on *United States v. O'Brien*, 391 U.S. 367 (1968), which proscribed inquiry into legislative motive based on "settled principles" of constitutional law.[3] *See PG&E*, 461 U.S. at 216 (citing *O'Brien*, 391 U.S. at 383).

---

[3] The Service contends that the Court in *PG&E* found inquiry into legislative motive uniquely "pointless" because the state could carry out the same action based on economic rather than safety concerns. Dkt. 68 at 11 n.5 (quoting *PG&E*, 461 U.S. at 216). But that concern is hardly unique to the circumstances in *PG&E*. *O'Brien* was equally concerned with the futility of invalidating a law that could be "reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." 391 U.S. at 384.

Furthermore, none of the Service's AEA preemption cases suggest that individual legislators may be interrogated about their subjective motivations, which is the only non-duplicative evidence the Service seeks through the instant depositions. Rather, those cases cited statements by legislators made on the record, such as in floor debates and committee hearings. *See, e.g., Entergy*, 733 F.3d at 420 (referencing "floor debates and committee meetings"); *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232, 1248 n.10 (D. Utah 2002) (citing legislators' comments at hearing as well as the governor's published statement to a newspaper). The Service already possesses the legislative history of the Overlay, including records of hearings in which the Overlay was considered. City of Berkeley's Initial Disclosures (12-8-16); Plaintiff's Initial Disclosures (12-8-16). And City officials' statements made to newspapers are already covered by the Service's Court-ordered requests for admissions.

Unable to find a case on point, the Service again invokes *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983). But *Tovar* was a First Amendment case, not a preemption case, so it does not speak to the relevance of purpose evidence for preemption claims. And, as discussed at length in the City's opening memorandum, Dkt. 67 at 21, the Ninth Circuit has already rejected, for a panoply of reasons, the argument that *Tovar* "allows discovery of a legislator's subjective motivations." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir. 1984).

III. The Postal Service's attempt to avoid the mental process and deliberative process privileges is unavailing.

As the City explained in the opening memorandum, the mental process privilege and the deliberative process privilege bar the proposed depositions. Dkt. 67 at 18-21. The Postal Service acknowledges both privileges, but claims that *North Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118 (N.D. Cal. 2003), demonstrates they are inapplicable. Dkt. 68 at 14-15. On the contrary, the case shows that the privileges do apply here.

First, although the Postal Service emphasizes the portion of the opinion on the deliberative process privilege, the *North Pacifica* court held that the mental process privilege

was indeed applicable and prohibited the very inquiry into motive that the Service seeks here. The court "permit[ted] NP to question the City Council members only about *objective* manifestations of the decisionmaking process" and *refused* to "allow NP to inquire as to the City Council members' subjective uncommunicated thoughts," citing *City of Las Vegas.*[4] 274 F. Supp. 2d at 1125 (citing 747 F.2d at 1299). The Postal Service contends nevertheless that such inquiry is justified here by "a *strong showing* of bad faith or improper behavior." Dkt. 68 at 15 (quoting *N. Pacifica*, 274 F. Supp. 2d at 1123) (emphasis restored). But the Service makes no showing, weak or strong, of either.

Moreover, the court's refusal to apply the deliberative process privilege—which protects deliberative communications, *see* Dkt. 67 at 19-20—was based on grounds not present here. Crucially, *North Pacifica* concerned an equal protection claim, one of the claims for which legislative purpose is an element. *See* Dkt. 67 at 11-12. Legislative purpose was thus "highly relevant to NP's equal protection claim," which was based on allegations that differential treatment "was motivated by animus directed at the Plaintiff." 274 F. Supp. 2d at 1124; *see also Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 946 (9th Cir. 2004) (equal protection plaintiff may prove that rational basis was pretextual and that "the defendant actually acted based on an improper motive"). That the City of Pacifica's "motive and intent [were] *central to NP's equal protection claim*" weighed in favor of disclosure. 274 F. Supp. 2d at 1124 (emphasis added); *see also id.* at 1125 (holding that looking beyond the administrative record may be necessary in equal protection cases). Here, by contrast, legislative purpose is not even peripheral, let alone "central," to the Postal Service's Supremacy Clause claims. *See supra* Section II; Dkt. 67 at 10-15.

The *North Pacifica* court also looked to "the availability or unavailability of comparable evidence from other sources," which it characterized as "perhaps the most important

---

[4] The Postal Service largely ignores *City of Las Vegas*, in which the Ninth Circuit took the unusual step of issuing a writ of mandamus to compel the district court to enter a protective order forbidding precisely the kind of depositions that the Service seeks to take. *See* Dkt. 67 at 19.

factor." 274 F. Supp. 2d at 1124. As noted in the opening memorandum and below, the Postal Service can obtain objective evidence from the requests for admissions it has already propounded. Dkt. 67 at 16, 22-23; *see infra* Section IV. The Service's opposition does not explain why that evidence is "unavailab[le]."

In sum, the mental process privilege plainly bars inquiry into City officials' subjective considerations and motivations in adopting the Overlay, as it did in *North Pacifica*. And the *North Pacifica* court's refusal to apply the deliberative process privilege to bar other evidence of legislative purpose does not justify allowing depositions to seek such evidence here, where that purpose has no relevance to the Postal Service's claims and other avenues of discovery are available.

IV. The apex doctrine bars depositions on topics that can otherwise be fully investigated with other discovery tools.

The City has shown that the "apex doctrine" also prevents the Service from deposing senior governmental officials because any needed evidence can be obtained by other, less intrusive means. Dkt. 67 at 21-24. The Postal Service claims that the apex doctrine does not apply because the City councilmembers and planning commissioners are not sufficiently important to qualify for the doctrine's protection. Dkt. 68 at 16-17. The Service suggests that the doctrine applies only to "cabinet-level officials of the federal government and high-level White House staff." Dkt. 68 at 16. But the City pointed to cases in which mayors, deputy mayors, city attorneys, police chiefs, sheriffs, and even undersheriffs—all local government officials—have all been held to qualify. Dkt. 67 at 23. The quasi-federal Postal Service's solicitude for federal officials might be predictable, but it is unjustifiable given these cases. The City councilmembers are the highest officials in the City's governmental hierarchy. "The Council shall be the governing body of the municipality. It shall exercise the corporate powers of the City, and . . . shall be vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent

with the Constitution of the State."[5] Berkeley City Charter § 38; *see also* Cal. Gov't Code § 34000 ("'[L]egislative body' means board of trustees, city council, or other governing body of a city."). The mayor is the chairperson of the Council. Berkeley City Charter § 21. To be sure, the planning commissioners do not hold the same preeminent position in the City. However, the twin purposes of the doctrine—avoiding repeated disruptions to the work of busy officials and "protect[ing] the officials from unwarranted inquiries into their decision-making process"—*K.C.R. v. County of Los Angeles,* No. CV 13-3806 PSG (SSx), 2014 U.S. Dist. LEXIS 98279, at *13 (C.D. Cal. July 11, 2014) (citation omitted)—support applying the doctrine to planning commissioners. Land use litigation is routine in California. *See Landgate v. Cal. Coastal Comm'n*, 17 Cal. 4th 1006, 1030 (1998) (recognizing that such litigation is a "normal part of the development process"). Requiring planning commissioners to sit for depositions thus threatens the kind of repeated intrusions that the doctrine seeks to avoid. *Cf. K.C.R.,* 2014 U.S. Dist. LEXIS at *18 (undersheriff potentially subject to repeated depositions).

The Postal Service also asserts (and the City admitted in the opening, Dkt. 67 at 22-23) that the apex doctrine does not bar depositions if relevant evidence would be garnered that "is not available through any other source." Dkt. 68 at 17 (quoting *Green v. Baca*, 226 F.R.D. 624, 648 (C.D. Cal. 2005)). The Postal Service argues that City officials have relevant information, but it makes no effort to explain why the information it seeks is not available by other means of discovery, such as the requests for admission they have already propounded, Dkt. 67-1, Ex. 1.

CONCLUSION

For these reasons and those discussed in the opening memorandum, the City respectfully requests that the Court grant the motion for a protective order.

[5] The Service's reference to "councilmembers or other members of committees of city government" is odd. Dkt. 68 at 17. The City Council is hardly a mere "committee."

DATED: September 14, 2017

SHUTE, MIHALY & WEINBERGER LLP

By: /s/

ANDREW W. SCHWARTZ
MATTHEW D. ZINN
STEPHANIE L. SAFDI

Attorneys for Defendant
CITY OF BERKELEY