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9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO
12 UNLIMITED JURISDICTION
13

14 SAVE THE PLASTIC BAG COALITION,
an unincorporated association,

15 Petitioner,

16 vs.

17 CITY AND COUNTY OF SAN
FRANCISCO, a political subdivision of the
18 State of California and a municipal
corporation; SAN FRANCISCO PLANNING
19 DEPARTMENT, an agency of the City and
County of San Francisco; SAN FRANCISCO
20 DEPARTMENT OF THE ENVIRONMENT,
an agency of the City and County of San
21 Francisco; and DOES 1-100, inclusive,

22 Respondents.
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Case No. CPF-12-511978

SAN FRANCISCO'S MEMORANDUM OF
POINTS AND AUTHORITIES IN OPPOSITION
TO PRELIMINARY INJUNCTION

Hearing Date: June 1, 2012
Hearing Judge: Hon. Teri Jackson
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Judicial Notice

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

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 3

 I. SAN FRANCISCO PROPERLY INVOKED CEQA'S CATEGORICAL
 EXEMPTIONS 4

 A. San Francisco Is A "Regulatory Agency" 5

 B. The "Project" Includes The Single-Use Bag Charge 5

 C. Manufacturers Have Failed To Present A "Fair Argument" Supported By
 Evidence That The Ordinance Will Cause Substantial Adverse Effects 7

 II. STATE HEALTH AND SAFETY LAWS DO NOT PREEMPT SAN
 FRANCISCO'S AMENDMENTS TO ITS PLASTIC BAG ORDINANCE 9

 A. Manufacturers Bear The Burden Of Showing Preemption 9

 B. The Retail Food Code Does Not Preempt San Francisco's Ordinance 10

 1. Overview of the California Retail Food Code ("CRFC") 10

 2. Because the Ordinance creates no "health and sanitation
 standards," it is not expressly preempted 10

 3. Manufacturers' preemption arguments are fatally flawed 12

 III. THE BALANCE OF HARDSHIPS WEIGHS AGAINST INTERIM RELIEF ... 14

 A. A Preliminary Injunction Would Squander San Francisco's Public
 Education And Outreach, As Well As Retailers' Own Advance
 Preparations 14

 B. Manufacturers' Evidence Of Harm Is Vague, Speculative And Lacks
 Foundation 15

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

1

2 *Association for Protection v. City of Ukiah*

3 2 Cal.App.4th 7208

4 *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*

5 52 Cal.App.4th 1165 (1997)6, 7

6 *Big Creek Lumber Co. v. County of Santa Cruz*

7 38 Cal.4th 1139 (2006)10, 11, 12

8 *Bozung v. Local Agency Formation Comm'n.*

9 13 Cal.3d 263 (1975)6

10 *Bravo Vending v. City of Rancho Mirage*

11 16 Cal.App.4th 383 (1993)14

12 *Bronco Wine Co. v. Jolly*

13 33 Cal.4th 943 (2004)12

14 California Environmental Quality Act § 15300.2(a)6

15 *California Grocers Ass'n v. City of Los Angeles*

16 52 Cal.4th 177 (2011)9

17 *California Rifle & Pistol Ass'n v. City of W. Hollywood*

18 66 Cal.App.4th 1302 (1998)9

19 *California Veterinary Med. Ass'n v. City of W. Hollywood*

20 152 Cal.App.4th 536 (2007)14

21 *Candid Enter., Inc. v. Grossmont Union H.S. Dist.*

22 39 Cal.3d 878 (1985)9

23 *Citizens for Responsible Equitable Envir. Dev. v. City of San Diego*

24 196 Cal.App.4th 515 (2011)8

25 *Dawson v. East Side Union H.S. Dist.*

26 28 Cal.App.4th 998 (1994)4

27 *Dehne v. County of Santa Clara*

28 115 Cal.App.3d 827 (1981)8

DVD Copy Control Ass'n. v. Bunner

 116 Cal.App.4th 241 (2004)4

Fleishman v. Superior Court

 102 Cal.App.4th 350 (2002)4

Grocers Ass'n, 52 Cal.4th9, 10, 11, 13

1	<i>Harrahill v. City of Monrovia</i>	
	104 Cal.App.4 th 761 (2002)	14
2	<i>Hines v. Cal. Coastal Cmm'n.</i>	
3	186 Cal.App.4 th 830 (2010)	8
4	<i>Lincoln Place Tenants Ass'n v. City of Los Angeles</i>	
5	155 Cal.App.4 th 425 (2007)	6
6	<i>Magan v. County of Kings</i>	
	105 Cal.App.4 th 468 (2002)	5, 7
7	<i>No Slo Transit, Inc. v. City of Long Beach</i>	
8	197 Cal.App.3d 241 (1987)	6
9	<i>Salmon Protection & Watershed Network (SPAWN) v. County of Marin</i>	
10	125 Cal.App.4 th 1098 (2004)	6
11	<i>San Francisco Newspaper Printing Co. v. Super. Ct.</i>	
	170 Cal.App.3d 438 (1985)	4
12	<i>Save the Plastic Bag Coalition v. City of Carpinteria</i>	12
13	<i>Save the Plastic Bag Coalition v. City of Manhattan Beach</i>	
14	52 Cal.4 th 155 (2011)	1, 15
15	<i>Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova</i>	
16	40 Cal.4 th 412 (2007)	8
17	<i>Waste Resource Technologies v. Dept. of Public Health</i>	
	23 Cal.App.4 th 299 (1994)	10
18	<i>Wollmer v. City of Berkeley</i>	
19	193 Cal.App.4 th 1329 (2011)	6
20	Statutes	
	California Public Resource Code § 21083	8
21	California Public Resource Code § 21804	8
22	Health and Safety Code §113703	10
23	Health and Safety Code §113705	11, 12
24	Public Resource Code § 42254(b)(2)	12
25	Other Authorities	
26	Black's Law Dictionary (9 th ed. 2009)	5
27	California Environmental Quality Act § 15378(a)	6
28		

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4
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California Environmental Quality Act § 15378(a)6
California Environmental Quality Act §15307.....3, 5
California Environmental Quality Act § 15308.....3, 5
California Environmental Quality Act §15060(c)5
California Environmental Quality Act §15354.....8

INTRODUCTION

1
2 The California Legislature has expressly found that plastic bag production causes significant
3 environmental impacts. Each year, it has found, billions of plastic bags end up as litter. Most do not
4 biodegrade, but instead contaminate soil and enter the food chain. The Legislature has stated its desire
5 to encourage consumers and retailers to use reusable bags and to consume fewer single-use bags. *See*
6 *Stats. 2006, Ch. 845, at §1, p. 2 (San Francisco's RJN, Ex. D).*

7 In February 2012, San Francisco helped in this effort by enacting its Checkout Bag Ordinance.
8 The Ordinance amends and expands San Francisco's existing ban on noncompostable plastic checkout
9 bags, which currently applies only to large grocery stores and drug store chains. The 2012 Ordinance
10 bans single-use noncompostable plastic checkout bags at all retail stores, beginning in October 2012,
11 and requires retailers to charge a 10 cent bag charge when they provide customers a single-use paper
12 or compostable plastic bag. The Ordinance will not apply to retail food establishments, such as take-
13 out restaurants, until July 2013. Similar charges on single-use bags in other jurisdictions have reduced
14 single-use bag use by as much as 95%. By substantially reducing all single-use bags, San Francisco
15 will come one step closer to its ambitious "zero waste" goal, reducing litter and landfill, while
16 conserving natural resources.

17 Petitioner Save The Plastic Bag Coalition ("Manufacturers") is "a coalition of plastic bag
18 manufacturers and distributors." *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52
19 Cal.4th 155, 160 (2011). Manufacturers have one purpose only – to halt the broad movement to ban
20 plastic bags. Consistent with their statewide litigation strategy, Manufacturers sued to overturn San
21 Francisco's Ordinance, because they perceive it to be against their narrow economic interests.

22 Manufacturers cannot show they are likely to succeed on their CEQA challenge or their
23 preemption challenge. Because the Ordinance will reduce waste, landfill and litter, it will protect the
24 environment and natural resources. The Ordinance fits squarely within CEQA's Class 7 and Class 8
25 Categorical Exemptions. Because the Ordinance is an environmental measure, not a health and
26 sanitation measure, California's Retail Food Code does not preempt any portion of it.

27 Furthermore, Manufacturers have not demonstrated the irreparable harm necessary to support a
28 preliminary injunction. Manufacturers rely on two declarations from corporate executives who

1 provide vague and speculative assertions that retailers will "immediately or soon" be ordering paper
2 bags and compostable plastic bags instead of ordinary plastic bags to comply with the Ordinance,
3 without quantified the supposed harm in any way. By contrast, the City's substantial investment in
4 public outreach and education, preparing to implement the Ordinance, including information the City
5 has already mailed to 10,000 retailers, will be entirely wasted if the Court delays implementation. The
6 public interest in reducing litter and waste further weighs against the requested injunction.

7 For these reasons, the Court should deny Manufacturers' motion for preliminary injunction.

8 BACKGROUND

9 In September 2002, San Francisco adopted citywide goals of 75 percent landfill diversion by
10 2010 and zero waste by 2020. Declaration of Guillermo Rodriguez, filed herewith ("Rodriguez
11 Decl."), ¶4. In 2007, San Francisco enacted its Plastic Bag Reduction Ordinance, which prohibits
12 large supermarkets and retail pharmacies from using noncompostable plastic checkout bags. *Id.* In
13 February 2012, San Francisco enacted its Checkout Bag Ordinance, the subject of this lawsuit.

14 The Checkout Bag Ordinance extends the plastic bag ban to all retail stores and establishes a
15 10-cent charge, paid to the retailer, for compliant single-use checkout bags. A compliant single-use
16 checkout bag is a paper bag made with minimum 40% recycled content or a compostable plastic bag.
17 Significant to Manufacturers' motion, the Ordinance has a staggered implementation schedule. The
18 noncompostable plastic bag ban will apply to retailers, excepting retail food establishments, in October
19 2012, and will apply to retail food establishments beginning in July 2013.

20 The Ordinance is intended to further reduce use of plastic bags, which cause litter, foul the
21 marine environment and constitute the largest and most costly contaminant to the City's curbside
22 recycling and composting systems. A key feature of the Ordinance, which Manufacturers ignore, is
23 the reduction of *all* types of single-use checkout bags.

24 Having reviewed the proposed ordinance and relevant information, the San Francisco Planning
25 Department issued a Certificate of Determination that the Ordinance was Categorically Exempt from
26 CEQA review. Specifically, Categorical Exemptions Class 7 and Class 8 applied.

27 Class 7 consists of actions taken by regulatory agencies as authorized by state law or
28 local ordinance to assure the maintenance, restoration, or enhancement of a natural
resource where the regulatory process involves procedures for protection of the

1 environment. Examples include but are not limited to wildlife preservation activities
2 of the State Department of Fish and Game. Construction activities are not included in
3 this exemption.

4 Class 8 consists of actions taken by regulatory agencies, as authorized by state [law?]
5 or local ordinance, to assure the maintenance, restoration, enhancement, or protection
6 of the environment where the regulatory process involves procedures for protection of
7 the environment. Construction activities and relaxation of standards allowing
8 environmental degradation are not included in this exemption.

9 CEQA Guidelines §§15307, 15308. The categorical exemption determination included a detailed 10-
10 page analysis of the environmental impact of plastic and paper single-use bags over their entire life-
11 cycle and the extent to which a single-use bag charge will reduce the use of all single-use bags. After
12 considering all the available evidence, the Planning Department concluded that the Ordinance would
13 have no substantial adverse effect on the environment.

14 Single-use plastic bags have known environmental impacts to aesthetics, air quality
15 and GHG emissions, hydrology and water quality, water usage, and biological
16 resources. The proposed project would eliminate single-use plastic bags at "stores"
17 within San Francisco, thereby protecting the environment from the impacts associated
18 with single-use plastic bags. By eliminating single-use plastic bag use at more
19 "stores" covered by the ordinance, the proposed project would result in greater use of
20 single-use paper bags, single-use compostable bags, and reusable bags. Single-use
21 paper bags and compostable bags have greater environmental impacts on air quality
22 and GHG emissions and water usage than single-use plastic bags and reusable bags
23 (or no bag at all) have lesser environmental impacts in all categories than single-use
24 plastic bags. Studies have shown that banning single-use [plastic] bags and imposing
25 a mandatory charge on single-use paper and compostable bags results in an increase
26 in reusable bag and no bag use and a decrease in single-use bag use. Because the
27 proposed project would ban single-use plastic bags and impose a mandatory charge
28 on single-use paper and compostable bags at all "stores" in San Francisco and the
proposed project would include a public education campaign aimed at promoting
reusable bags, the proposed project would protect the environment and not have a
significant impact on the environment.

Manufacturers' Ex. B, at 11.

When it enacted the Checkout Bag Ordinance in February 2012, the Board of Supervisors
expressly affirmed and adopted the Planning Department's categorical exemption determination, "upon
consideration of the whole record, including public testimony." Manufacturers' Ex. A, at 1.

ARGUMENT

The Court should deny Manufacturers' preliminary injunction motion, unless they demonstrate
they are likely to succeed on the merits *and* that implementing the Ordinance as scheduled will cause
them irreparable harm that outweighs the harm to the public from delay.

In deciding whether to issue a preliminary injunction, a trial court weighs two
interrelated factors: the likelihood the moving party ultimately will prevail on the

merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction

DVD Copy Control Ass'n. v. Bunner, 116 Cal.App.4th 241, 249-50 (2004) (internal quotation and citations omitted).

“To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should it be exercised in a doubtful case.” *Fleishman v. Superior Court*, 102 Cal.App.4th 350, 355 (2002) [internal quotes, brackets omitted]; *San Francisco Newspaper Printing Co. v. Super. Ct.*, 170 Cal.App.3d 438, 442 (1985). This is especially true in a case involving the government. “[W]here governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.” *Dawson v. East Side Union H.S. Dist.*, 28 Cal.App.4th 998, 1040 (1994) (internal quotations and citation omitted). Moreover, if there is little possibility that the moving party will succeed on the merits, then a preliminary injunction “must not issue” regardless of the plaintiff’s showing of harm. *San Francisco Newspaper Printing Co.*, 170 Cal.App.3d at 442.

I. SAN FRANCISCO PROPERLY INVOKED CEQA'S CATEGORICAL EXEMPTIONS

Manufacturers assert three CEQA violations. First, Manufacturers contend San Francisco is not a “regulatory agency” within the meaning of the Class 7 and Class 8 Categorical Exemptions. Second, Manufacturers assert the single-use bag fee is a mitigation measure the court must ignore in evaluating whether the Categorical Exemptions apply. Third, Manufacturers insist they presented a fair argument of substantial adverse environmental effects.

Manufacturers have unsuccessfully asserted the identical claims in neighboring Marin County. In 2011, Marin County enacted its regulation banning single-use plastic checkout bags and imposing a five cent charge on single-use paper checkout bags. Like San Francisco, Marin County invoked Class 7 and Class 8 Categorical Exemptions. Manufacturers made the identical three arguments in their lawsuit challenging Marin County’s ordinance. The Marin County Superior Court rejected each of these arguments and upheld Marin County’s regulation. Manufacturers’ appeal is now fully briefed and awaiting argument. For the same reasons that the Marin County Superior Court upheld the Class 7 and Class 8 CEQA Exemptions, Manufacturers cannot demonstrate they are likely to succeed on the merits of their San Francisco CEQA challenge.

1 **A. San Francisco Is A "Regulatory Agency"**

2 Without any supporting authority, Manufacturers assert San Francisco is not a "regulatory
3 agency" eligible to invoke Class 7 and Class 8 Categorical Exemptions, and that these Exemptions do
4 not apply to "legislative acts." See Manufacturers' MPA, at 1:1-21, 12:1-28.

5 In a procedurally indistinguishable case, the Court of Appeal held that the Kings County Board
6 of Supervisors properly invoked the Class 8 Exemption for an ordinance restricting the application of
7 sewage sludge on agricultural land. *Magan v. County of Kings*, 105 Cal.App.4th 468 (2002).
8 Likewise, the Marin County Superior Court expressly rejected Manufacturers' identical argument that
9 Class 7 and Class 8 Exemptions were unavailable to the Marin County Board of Supervisors. See San
10 Francisco's RJN, Ex. A.

11 Manufacturers' "three-level hierarchy" of legislative, regulatory and ministerial government
12 action has no basis in CEQA. See Manufacturers' MPA, at 12:3-16. To the contrary, Categorical
13 Exemptions, like all of CEQA, are based upon a two-level hierarchy: ministerial acts versus
14 discretionary acts. CEQA Guidelines §15060(c).

15 When an ordinance, like San Francisco's Checkout Bag Ordinance, advances the entity's police
16 powers, the ordinance constitutes a "regulation." The California Constitution provides: "A county or
17 city may make and enforce within its limits all local police, sanitary, and other ordinances and
18 regulations not in conflict with general laws." Cal. Const. Art. 11 §7. The Dictionary confirms the
19 common sense understanding that ordinances, indeed, *are* regulations. An ordinance is "[a]n
20 authoritative law or decree, esp. a municipal regulation." Black's Law Dictionary (9th ed. 2009).
21 Manufacturers' contrary assertions notwithstanding, to recognize that the City and County of San
22 Francisco, acting through its Board of Supervisors and its Mayor, may act as a regulatory agency to
23 enforce its police power, does *not* render any of the text of sections 15307 or 15308 superfluous.

24 **B. The "Project" Includes The Single-Use Bag Charge**

25 Manufacturers next assert that the Court must ignore the 10 cent single-use bag charge when
26 evaluating the categorical exemption determination. Manufacturers' MPA, at 14:1-15:8. In this case,
27 however, the charge is not a mitigation measure, as Manufacturers assert, but an integral part of the
28 "project" itself and therefore belongs in the categorical exemption analysis. In fact, failure to analyze

1 the Ordinance's single-use bag fee together with the expanded ban on non-compostable plastic would
2 violate CEQA's directive to analyze "the whole of an action," CEQA Guidelines §15378(a), and not
3 "chop[] a large project into many little ones." *Bozung v. Local Agency Formation Comm'n*, 13 Cal.3d
4 263, 283-84 (1975). The Marin County Superior Court properly recognized that Marin County's five
5 cent bag charge supported the categorical exemption in that case. San Francisco's RJN, Ex. A.

6 In *Wollmer v. City of Berkeley*, 193 Cal.App.4th 1329 (2011), the Court of Appeal upheld a
7 Class 32 categorical exemption (which exempts in-fill development projects) for an affordable housing
8 project against a similar contention that the categorical exemption had improperly relied on a
9 mitigation measure. The Court held that a dedicated left turn lane to ease traffic congestion was not a
10 separate mitigation measure, but was an integral part of the affordable housing project.

11 We agree with the trial court that the City did not mitigate the project into qualifying
12 for a categorical exemption. Rather, it properly exercised discretion to find it would
13 not cause a significant traffic impact. As the lower court found, the dedication of a
14 five-foot right-of-way, enabling the City to improve the San Pablo and Ashby
Avenues intersection, was not a CEQA mitigation measure for project impacts, but a
component of the project that assisted the City with an existing traffic issue.

15 *Id.* at 1352. Mitigation measures, by contrast, are optional conditions an agency may impose on a
16 project. *No Slo Transit, Inc. v. City of Long Beach*, 197 Cal.App.3d 241, 256 (1987); *Lincoln Place*
17 *Tenants Ass'n v. City of Los Angeles*, 155 Cal.App.4th 425, 445 (2007).

18 In this case, the single-use bag charge is an essential component of the Ordinance. The
19 Ordinance's goal is to encourage use of reusable bags and to reduce waste – not simply to replace
20 plastic bags with single-use paper bags. The single-use bag charge was not an optional condition or a
21 suggestion to ameliorate the environmental impacts of the Ordinance as proposed.

22 Manufacturers' reliance on *Azusa Land Reclamation Co. v. Main San Gabriel Basin*
23 *Watermaster*, 52 Cal.App.4th 1165 (1997), and *Salmon Protection & Watershed Network (SPAWN) v.*
24 *County of Marin*, 125 Cal.App.4th 1098 (2004), is misplaced. In *SPAWN*, the Court of Appeal held
25 that a new home to be built in a designated resource area of critical concern for endangered salmon
26 was not eligible for a categorical exemption. Indeed, mitigation measures could not save the project.
27 CEQA Guidelines expressly except from the categorical exemptions any project located in a
28 designated resource area of critical concern. CEQA Guidelines §15300.2(a).

1 In *Azusa*, the court held that the project proponent's plan to reopen a solid waste landfill to
2 deposit 3.2 million tons of solid waste in an unlined sand and gravel pit atop a groundwater basin that
3 supplied water for a million people did not qualify for the existing facility categorical exemption.
4 Before approving the project, the local water board had concluded "that the landfill was releasing
5 pollutants, that the existing safeguards had not prevented degradation of the groundwater and were not
6 capable of doing so in the future, that its staff's study indicated that pollutants from the landfill could
7 adversely affect the groundwater, and that the board did not have enough data to determine the full
8 extent of the pollutants being released by the landfill." *Azusa*, 52 Cal.App.4th at 1199. Under these
9 circumstances, the court rejected the project proponent's contention "that its proposed mitigation
10 measures, when installed, would prevent further degradation of the environment." *Id.*

11 **C. Manufacturers Have Failed To Present A "Fair Argument" Supported By
12 Evidence That The Ordinance Will Cause Substantial Adverse Effects**

13 The Court of Appeal's summary of the *Magan* case applies with full force to this case. As the
14 court itself put it:

15 Let us get this straight: We have a party whose business it is to dump sewage sludge
16 generated in Southern California on agricultural property located in the San Joaquin
17 Valley. His complaint is that the board of supervisors violated environmental laws
18 when it took regulatory action phasing out and ultimately prohibiting this practice.
19 Astoundingly, he alleges there was a reasonable possibility that the board's decision
20 to prohibit the spread of sewage sludge would have an adverse environmental impact.
21 He reasons that, among other things, *not* spreading sewage sludge degrades
22 agricultural land. We, like the trial court, do not buy it. Judgment affirmed.

23 *Magan*, 105 Cal.App.4th at 470 (emphasis in original). Likewise, in this case, Manufacturers are in the
24 business of making and selling single-use plastic checkout bags, which the state itself has found cause
25 toxic environmental pollution. Manufacturers argue that San Francisco's Ordinance, designed to
26 discourage all single-use bags and thereby reduce waste and litter, will harm the environment.

27 Manufacturers identify five ways they believe San Francisco's Ordinance will adversely affect
28 the environment. They assert: (1) single-use paper and compostable bags are worse for the
environment than single-use plastic bags; (2) reusable bags have negative impacts; (3) people may
stop recycling; (4) the Ordinance may increase litter and dog waste on sidewalks; and (5) the 10 cent
charge may not be sufficient to discourage single-use bag use. Manufacturers' MPA, at 2:2-3:24.

This Court evaluates San Francisco's enactment of its Ordinance for abuse of discretion.

1 In reviewing an agency's compliance with CEQA in the course of its legislative or
2 quasi-legislative actions, the courts' inquiry shall extend only to whether there was a
3 prejudicial abuse of discretion. Such an abuse is established if the agency has not
4 proceeded in a manner required by law or if the determination or decision is not
5 supported by substantial evidence.

6 *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 426-
7 27 (2007) (citations and internal quotations omitted). Substantial evidence means "enough relevant
8 information and reasonable inferences from this information that a fair argument can be made to
9 support a conclusion, even though other conclusions might be reached" *Citizens for Responsible*
10 *Equitable Envir. Dev. v. City of San Diego*, 196 Cal.App.4th 515, 522 (2011).

11 In this case, San Francisco based its categorical exemption determination on a finding that the
12 Ordinance does not have a significant adverse effect on the environment. Cal.Pub.Res. Code §§
13 21083, 21804; CEQA Guidelines §15354; *Association for Protection v. City of Ukiah*, 2 Cal.App.4th
14 720, 732. This Court should affirm San Francisco's categorical exemption determination if substantial
15 evidence supports it. *Dehne v. County of Santa Clara*, 115 Cal.App.3d 827, 842 (1981).

16 Where, as here, a challenger contends an exception to the categorical exemption applies, the
17 burden shifts. The challenger must produce substantial evidence showing a reasonable possibility of
18 adverse environmental impact sufficient to remove the project from the categorical exemption. *Ukiah*,
19 2 Cal.App.4th at 728. Substantial evidence includes "fact, a reasonable assumption predicated upon
20 fact, or expert opinion supported by fact. Substantial evidence is not argument, speculation,
21 unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous." *Hines v.*
22 *Cal. Coastal Cmm'n*, 186 Cal.App.4th 830, 856-57 (2010) (citations and internal quotation omitted).

23 The applicable standard for reviewing the sufficiency of the challenger's factual showing is
24 unsettled.

25 Some courts have relied on cases involving review of a negative declaration, holding
26 that a finding of categorical exemption cannot be sustained if there is a "fair
27 argument" based on substantial evidence that the project will have significant
28 environmental impacts, even where the agency is presented with substantial evidence
to the contrary. Other courts apply an ordinary substantial evidence test . . . , deferring
to the express or implied findings of the local agency that has found a categorical
exemption applicable.

Hines, 186 Cal.App.4th at 855-56 (internal citations and quotations omitted).

1 In this case, Manufacturers cannot even survive the most favorable "fair argument" standard.
2 Manufacturers rely exclusively on counsel's "Comments and Legal Objections," that Manufacturers
3 submitted to the San Francisco Planning Commission. See Manufacturers' MPA, at 2-3 (citing to
4 Manufacturers' Ex. D). This document, prepared by counsel, constitutes argument, not evidence.
5 Asserting the deleterious effects of single-use paper bags, Manufacturers ignore the fact that the
6 single-use bag fee will reduce *all* varieties of single-use bags. Manufacturers' criticism of reusable
7 bags relies on speculation how often consumers will in fact reuse their bags. Likewise, Manufacturers
8 speculate that without free single-use bags, consumers will recycle less, litter more and stop cleaning
9 up after their dogs. There is no factual basis for Manufacturers' conjecture that the Ordinance's 10 cent
10 single-use bag charge is too low to discourage single-bag use. Refuting Manufacturers' conjecture, a 5
11 cent fee in Washington D.C. resulted in an 81% reduction in single-use bags. Manufacturers' Ex. B, at
12 5-6. Studies from other jurisdictions show that fees on single-use bags of 5-25 cents per bag have
13 reduced all single-use bag consumption by 60-95%. *Id.* at 4-6.

14 **II. STATE HEALTH AND SAFETY LAWS DO NOT PREEMPT SAN FRANCISCO'S 15 AMENDMENTS TO ITS PLASTIC BAG ORDINANCE**

16 **A. Manufacturers Bear The Burden Of Showing Preemption**

17 Article XI, Section 7 of the California Constitution empowers a city to "make and enforce
18 within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with
19 general laws." *Id.* So long as this municipal police power is exercised within local territorial limits
20 and subordinate to state law, it "is as broad as the police power exercisable by the Legislature itself."
21 *Candid Enter., Inc. v. Grossmont Union H.S. Dist.*, 39 Cal.3d 878, 885 (1985). Thus, the question is
22 not whether the Legislature has given San Francisco the power to enact the Ordinance; rather, it is
23 "whether the Legislature has taken away the City's constitutional power" to do so. *California Rifle &
24 Pistol Ass'n v. City of W. Hollywood*, 66 Cal.App.4th 1302, 1310 (1998).

25 An ordinance conflicts with general law and is void if it "duplicates, contradicts, or enters an
26 area fully occupied by general law, either expressly or by legislative implication." *California Grocers
27 Ass'n v. City of Los Angeles*, 52 Cal.4th 177, 188 (2011) (emphases omitted). Courts apply a
28 "presumption against preemption," placing "the burden of demonstrating preemption" on the party

1 claiming preemption. *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal.4th 1139, 1149 (2006).
2 Courts are "particularly reluctant to infer legislative intent to preempt a field covered by municipal
3 regulation when there is a significant local interest to be served that may differ from one locality to
4 another." *Id.* at 1149. Absent "a clear indication of preemptive intent from the Legislature," courts
5 presume that local regulation in an area traditionally within local control is not preempted. *Id.*

6 San Francisco's Ordinance is a refuse control and environmental protection measure. It thus
7 addresses matters of strong local concern, regulating in a field in which cities have long regulated.
8 *See, e.g., Waste Resource Technologies v. Dept. of Public Health*, 23 Cal.App.4th 299, 304 (1994)
9 (noting longstanding "substantial body of law" upholding municipal police power "to legislate on the
10 issue of refuse"). Cities routinely adopt such laws. Indeed, many California cities restrict merchants
11 from dispensing plastic checkout bags. Petition at ¶¶ 107-111. Manufacturers thus face a particularly
12 heavy burden of showing the Ordinance is preempted.

13 **B. The Retail Food Code Does Not Preempt San Francisco's Ordinance**

14 **1. Overview of the California Retail Food Code ("CRFC")**

15 The CRFC's sole purpose is "to safeguard public health and provide to consumers food that is
16 safe, unadulterated, and honestly presented." H&S Code §113703. To do so, the CRFC's detailed
17 statutory scheme addresses innumerable aspects of food storage, handling, and cooking. "As examples
18 of the sorts of concerns addressed and level of detail provided," the CRFC "specifies, to the degree and
19 minute, the temperatures at which various foods must be stored and cooked, to the hour, how long
20 food contact surfaces may go between cleanings, and, to the inch, how large food preparation sinks
21 must be." *Grocers Ass'n*, 52 Cal.4th at 189 fn. 3 (citations omitted).

22 Notably, the CRFC does not require, or forbid, any retail food facility to use any particular type
23 of checkout bag. In fact, the CRFC does not require any retail food facility to use checkout bags at all.

24 **2. Because the Ordinance creates no "health and sanitation standards," it is 25 not expressly preempted**

26 Manufacturers appear to contend that the Ordinance impermissibly regulates within a field that
27 the CRFC expressly occupies. Manufacturer's MPA at 4, 6. "Express field preemption turns on a
28 comparative statutory analysis: What field of exclusivity does the state preemption clause define, what

1 subject matter does the local ordinance regulate, and do the two overlap?" *Grocers Ass'n*, 52 Cal.4th at
2 188; *Big Creek*, 38 Cal.4th at 1152. Thus, a local law is not expressly preempted merely because it
3 overlaps with a term or provision found somewhere in the state statute; rather, the local law is
4 expressly preempted only if it overlaps with the state statute's *preemption clause*.

5 Because "the words the Legislature chose are the best indicators of its intent" to occupy a field,
6 the touchstone of express preemption is the text of the statute's preemption clause. *Id.* The CRFC is
7 "clear and precise" in "defin[ing] ... the regulatory field it reserves for the state." *Grocers Ass'n*, 52
8 Cal.4th at 189 – namely, the field of **health and sanitation standards**:

9 [I]t is the intent of the Legislature to occupy the whole field of **health and sanitation**
10 **standards for retail food facilities**, and the standards set forth in this part and
11 regulations adopted pursuant to this part shall be exclusive of all local **health and**
12 **sanitation standards relating to retail food facilities**.

13 H&S Code §113705 (emphases added). Thus, the CRFC expressly "preempts **only** those [local laws]
14 that establish 'health and sanitation standards' for retail food establishments." *Grocers Ass'n*, 52
15 Cal.4th at 191 (emphasis added). Conversely, the CRFC does not preempt local laws that "impose[] no
16 substantive food safety standards." *Id.* at 189 (even if grocery worker retention ordinance seeks to
17 promote health and safety, and even though CRFC imposes many requirements on employees at food
18 facilities, retention ordinance is not preempted because it "regulates employment, not food safety,
19 while the [CRFC] regulates food safety, not employment.").

20 San Francisco's Ordinance, likewise, does not establish "health and sanitation standards" (or
21 regulate food safety). It does not address, or even mention, food contamination, purity, cleanliness,
22 spoilage, or any other topic connected to health or sanitation in relation to food facilities. It has no
23 connection to such issues. Instead, it regulates in the distinct field of refuse control and environmental
24 protection. To reduce the number of single-use checkout bags (particularly noncompostable plastic
25 bags) in the City's waste stream, and thus to help the City meet its landfill diversion goals and improve
26 environmental quality, the Ordinance bars retail stores of all kinds from using noncompostable plastic
27 checkout bags – while allowing retailers to provide their customers, for a small charge, with checkout
28

1 bags made of paper or compostable plastic, or with reusable checkout bags. The Ordinance imposes
2 environmental mandates, not health and sanitation standards. It is not expressly preempted.¹

3 **3. Manufacturers' preemption arguments are fatally flawed**

4 Manufacturers invite this Court to construe Section 113705 to preempt *all* standards, of *any*
5 *kind*, relating to retail food facilities. They argue (incorrectly) that the Ordinance "creat[es] a standard
6 that only paper may be used," and imposes "standards for the material used in paper and reusable
7 bags." Manufacturers' MPA at 5. But even if one views the Ordinance's requirements as "standards,"
8 they clearly are not "**health and sanitation** standards for retail food facilities." This Court must not
9 read the limiting phrase "health and sanitation" out of Section 113705.² "[E]ach phrase within an
10 express preemption provision limits the universe of local action preempted by the statute," and must be
11 given effect. *Big Creek*, 38 Cal.4th at 1155 (emphasis original). If the Legislature had wanted to
12 preempt all local standards for retail food facilities – including, for example, environmental, zoning,
13 employment, and building standards – it could easily have done so, by stating that it was occupying
14 the field of regulation of retail food facilities. That the Legislature instead chose to occupy only the
15 considerably narrower field of **health and sanitation** standards for such facilities shows that it sought
16 to expressly preempt only local food safety laws. It did not seek to make retail food facilities immune
17 from virtually all local regulations, as Manufacturers effectively argue.

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20 ¹ That the CRFC does not preempt local laws regulating food facilities' use of plastic checkout
21 bags is also shown by the Legislature's adoption of AB 2449 in September 2006, just months after it
22 adopted the CRFC in May 2006. AB 2449 added Section 42254 to the Public Resources Code to
23 expressly bar cities from "[i]mpos[ing] a plastic carryout bag fee upon a store," including a
24 supermarket. See Stats. 2006, Ch. 845, at §2, pp. 3-4 (RJN, Ex. D); Pub.Res.Code §42254(b)(2). If
25 the earlier-enacted CRFC had preempted local regulation of food facilities' use of plastic checkout
26 bags, Section 42254 would have been entirely unnecessary. AB 2449 thus "strongly suggest[s]" that
27 the Legislature – which presumably knew which fields it had occupied in legislation adopted mere
28 months earlier – did not believe that the CRFC preempted local regulation of food facilities' use of
plastic checkout bags. *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 989 (2004).

² The Santa Barbara trial court made this error in overruling the defendant's demurrer in *Save
the Plastic Bag Coalition v. City of Carpinteria*. In its Tentative Ruling, that court stated that
Carpinteria's ordinance provides "standards" for single-use bags, but it did not discuss (or apparently
consider) whether they were "health and sanitation standards." Of course, that court did not rule that
the CRFC preempts Carpinteria's bag ordinance (which, unlike San Francisco's, bans all plastic
carryout bags, even compostable plastic bags). It merely concluded that Manufacturers had
sufficiently pleaded a cause of action.

1 Similarly, Manufacturers erroneously claim that *Grocers Ass'n* held that all local laws –
2 whether they are "health and sanitation standards for retail food facilities" or not – are preempted if
3 they regulate such subjects as "food display and service" and "food transportation, storage and
4 preparation." Manufacturers' MPA at 6 (citing 52 Cal.4th at 189). But Manufacturers artfully splice
5 together words taken from two different sentences in the opinion. In fact, the Court held that "the state
6 alone may adopt 'health and sanitation standards for retail food facilities.'" *Id.* And while the Court, in
7 very general terms, discussed the breadth of subjects the CRFC addresses, it did not suggest that any
8 local law that overlaps in any way with the CRFC is for that reason a preempted "health and sanitation
9 standard." Nor did it suggest that the CRFC preempts any local law of general application that has any
10 effect, however incidental, on the transportation or service of food.³

11 Nor did *Grocers Ass'n* "rule[] that the purpose of the Ordinance is irrelevant." Manufacturers'
12 MPA at 6. True, it held that "[p]urpose alone is not a basis for concluding a local measure is
13 preempted," if the measure does not regulate within a preempted field. But the Court *expressly*
14 *approved* of earlier decisions that had considered the purpose of a local enactment in finding no
15 preemption. *Grocers Ass'n*, 52 Cal.4th at 190-91. And it explained that an ordinance's purpose *can* be
16 "relevant to state preemption analysis ... in the context of a nuanced inquiry into the ultimate question
17 in determining field preemption: whether the effect of the local ordinance is in fact to regulate in the
18 very field the state has reserved to itself." *Id.*, at 190. Thus, the Court held, the CRFC "does not
19 preempt all laws that have as their purpose the promotion of food health and safety; it preempts *only*
20 *those that establish 'health and sanitation standards' for retail food establishments[.]*" *Id.* at 191
21 (emphasis added). Here, the Ordinance's express findings and other terms make no mention of health
22 and sanitation concerns, and the legislative record shows that the City enacted the measure to reduce
23 litter, aid recycling and waste diversion, and improve the environment. The Ordinance thus creates no
24 health and sanitation standards for food facilities and is not preempted.

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26
27 ³ For example, a local zoning law that barred drive-through windows at fast-food restaurants,
28 or a local law requiring all retail establishments to close at 11 p.m., would regulate food "service." But
such laws would not be preempted "health and sanitation standards for retail food facilities."

1 Manufacturers also contend the Ordinance must be preempted because it and the CRFC
2 "legislate the same subject matter." Manufacturers' MPA at 6. But "it is well-settled that the
3 preemption doctrine does not preclude a city from exercising its police power on a subject simply
4 because the Legislature has also enacted a law on the same subject." *Harrahill v. City of Monrovia*
5 104 Cal.App.4th 761, 767 (2002) (ordinance prohibiting school-age children from being in public
6 places other than school not preempted by state compulsory school attendance laws). Indeed, courts
7 commonly find local laws are not preempted even where they address or affect a subject also
8 addressed in a state statutory scheme. *See, e.g., California Veterinary Med. Ass'n v. City of W.*
9 *Hollywood*, 152 Cal.App.4th 536, 561-62 (2007) (even if state law fully occupies field of regulating
10 veterinary medicine, local anti-animal cruelty ordinance that bans certain feline declawing procedures
11 is not preempted because it has "only a secondary or incidental effect" on occupied field, and its
12 "incidental restriction of a particular form of surgical procedure ... does not materially interfere with
13 any legislative purpose expressed" in the state law); *Bravo Vending v. City of Rancho Mirage*, 16
14 Cal.App.4th 383, 408-412 (1993) (ordinance prohibiting cigarette sales from vending machines not
15 preempted by statute prohibiting cigarette sales to minors, even though both laws "regulate the
16 business of selling cigarettes"). That the CRFC imposes a few very general requirements on "bags"
17 does not show that it preempts the Ordinance.

18 **III. THE BALANCE OF HARDSHIPS WEIGHS AGAINST INTERIM RELIEF**

19 **A. A Preliminary Injunction Would Squander San Francisco's Public Education And 20 Outreach, As Well As Retailers' Own Advance Preparations**

21 San Francisco has already spent \$75,000 on public outreach and education to prepare for the
22 October 2012 implementation of the Checkout Bag Ordinance. Rodriguez Decl., ¶5. San Francisco
23 has mailed "Official Notice" of the Ordinance to nearly 10,000 retailers, specifically advising them of
24 the October 2012 effective date. *Id.* ¶6. Retailers themselves have invested heavily to prepare for the
25 October 2012 implementation of the Checkout Bag Ordinance. *Id.* ¶10. A stay would squander all
26 this work and expenditures, it would require additional unbudgeted expenditures to notify these 10,000
27 retailers of the delay, and would cause widespread confusion among the public. *Id.*
28

1 **B. Manufacturers' Evidence Of Harm Is Vague, Speculative And Lacks Foundation**

2 Manufacturers rely on the declarations of Peter Grande and Catherine Browne to support their
3 claim of irreparable harm. Each is an executive at a company that manufactures plastic bags. Grande
4 Decl., ¶¶5, 8; Browne Decl., ¶3, 6. Without establishing any foundation, each asserts in identical
5 terms that stores and restaurants "usually purchase several months, sometimes up to two years, worth
6 of supply" of plastic bags, and that to comply with the Ordinance, retailers "will have to purchase
7 paper or compostable bags immediately or soon." Grande Decl., ¶¶13, 14; Browne Decl., ¶¶10, 11.

8 Neither declarant indicates how much of its business constitutes sales of plastic checkout bags
9 to retailers. Neither declarant indicates how much of its business constitutes such sales to retailers *in*
10 *San Francisco*. Neither declarant identifies *a single customer* it has lost or is at risk of losing as a
11 result of the October 2012 implementation of the Ordinance. Neither declarant indicates whether his
12 or her company has capacity to manufacture or sell compostable plastic or reusable bags. "According
13 to [Manufacturers], the movement to ban plastic bags is a broad one." *Save The Plastic Bag Coalition*
14 *v. City of Manhattan Beach*, 52 Cal.4th 155, 174 n.10 (2011). Accordingly, whatever happens in San
15 Francisco, it is imperative for the long-term viability of any company that sells single-use plastic
16 checkout bags to diversify. San Francisco's Ordinance is creating an ideal opportunity for these
17 companies to do so.

18 Manufacturers do not even attempt to show or to argue that the 2013 implementation of the
19 Ordinance as to Retail Food establishments – still more than a year away – must be further delayed to
20 avoid immediate irreparable harm. Their argument, inadequate as it is, focuses exclusively on the
21 general retail aspects of the Ordinance, which are scheduled to take effect in October 2012.

22 **CONCLUSION**

23 For the foregoing reasons, the Court should deny petitioner's motion for preliminary injunction.

24 Dated: May 18, 2012

DENNIS J. HERRERA
City Attorney

25
26 By: 
JAMES M. EMERY

27 Attorneys for Respondents
28 CITY AND COUNTY OF SAN FRANCISCO, et al.

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PROOF OF SERVICE

I, Catherine Pearson declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

On May 18, 2012, I served the attached:

SAN FRANCISCO'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PRELIMINARY INJUNCTION

on the following persons at the locations specified:

Stephen L. Joseph
350 Bay Street, Suite 100-328
San Francisco, California 94133

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) and served the named document in the manner indicated below:

BY UNITED STATES MAIL: I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, City and County of San Francisco, CA 94102, for collection and mailing with the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

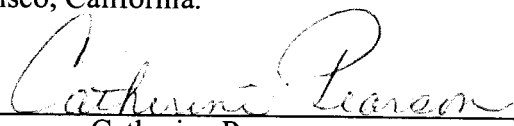
BY PERSONAL SERVICE: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

BY ELECTRONIC MAIL: I caused a copy of such document to be transmitted via electronic mail in Portable Document Format ("PDF") Adobe Acrobat from the electronic address: *catherine.pearson@sfgov.org*. The electronic transmission was reported as complete and without error.

BY FACSIMILE: I caused a copy(ies) of such document(s) to be transmitted via facsimile machine. The fax number of the machine from which the document was transmitted was (415)554-4757. The fax number(s) of the machine(s) to which the document(s) were transmitted are listed above. The fax transmission was reported as complete and without error. I caused the transmitting facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed May 18, 2012, at San Francisco, California.



Catherine Pearson