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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 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED** **Defendant's Motion for Summary Judgment and Notice; Memorandum of Points and Authorities in Support** Date: January 4, 2018 Time: 8:00 a.m. The Hon. William Alsup Trial Date: January 29, 2018

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NOTICE OF HEARING

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on January 4, 2018 at 8:00 a.m., or as soon thereafter as counsel may be heard by the Court, located at 450 Golden Gate Avenue, San Francisco, California, in the courtroom of the Honorable William Alsup, the Court will hold a hearing on this motion, by which Defendant City of Berkeley seeks an order granting it summary judgment on all of the claims set forth in Plaintiff's Complaint. This motion is brought pursuant to Federal Rule of Civil Procedure 56 and Local Rules 56-1 through 56-3 on the grounds that there is no genuine issue of material fact presented by the Complaint and that the City is entitled to judgment as a matter of law.

This motion is based on this Notice of Motion, the Memorandum of Points and Authorities set forth below; the Declarations of Dionne Early, Andrew Schwartz, and Craig Hill, and the Request for Judicial Notice filed herewith; the pleadings and papers on file, and upon such other matters as may be presented to the Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Supremacy Clause does not invalidate the ordinance adopted by Defendant City of Berkeley to protect the integrity of the City's Civic Center Historic District. Although the District includes the Berkeley Main Post Office ("Property") owned and operated by Plaintiff United States Postal Service, the Civic Center District Overlay does not control the Postal Service's use or sale of the Property. Rather, it only limits the land uses that a private purchaser might make of the Property. Although those limits, like many land use regulations, might reduce the potential revenue from a sale, neither the Supremacy Clause nor the postal statutes entitle the Service to any particular return on its sales of surplus real estate. Indeed, in the prior motions in this case, the Postal Service has failed to cite a single case to support such a fanciful notion.

There is no dispute of material fact to resolve at trial. The City is entitled to judgment as a matter of law because the Postal Service's own evidence shows that the Property retains more than [redacted] in value with the Overlay in place. The Service thus cannot credibly claim that the Overlay has effectively precluded it from exercising its statutory authority to sell the Property — the standard that this

Court has recognized as governing the Service's preemption claim. The Postal Service's intergovernmental immunity claim founders as well because the Overlay does not regulate the Service's own operations or prevent its sale of the Property, and the Service cannot show that the Overlay treats it, or its potential successors, less favorably than any other owner of property in the District. On the contrary, the City itself is subject to the same limits on the uses of five City-owned properties in the District.

The Postal Service's own evidence shows that, at most, the Overlay could reduce potential revenue from a future sale of a property that remains highly valuable. But the Supreme Court has repeatedly rejected the theory that such indirect economic effects on the federal government violate the Supremacy Clause. The City was therefore entitled to exercise its traditional police power to regulate non-federal land uses that might otherwise undermine the integrity of the City's long-established historic district. And it is likewise entitled to summary judgment.

STATEMENT OF ISSUES

1. Whether the Overlay is preempted by the Postal Service Reorganization Act or the Constitution's Property or Postal Clauses, given that the Overlay does not apply to the Postal Service's own use of the Property and given the Service's recognition that the Property retains over [redacted] in value with the Overlay in place.

2. Whether the Overlay violates the Postal Service's intergovernmental immunity given that it neither directly regulates the Service's conduct nor discriminates against the Service as compared to owners of other property in the Civic Center Historic District.

FACTUAL AND PROCEDURAL BACKGROUND

I. The City's initial efforts to protect the historic buildings and civic land uses in the Civic Center Historic District

In 1998, the City Council formed the Civic Center Historic District ("Historic District") as an amendment to the City's historic zoning. Dkt. 1-1, § 23E.98.010[1]; Dkt. 1-2. The nine properties in the Historic District include civic, institutional, and community-serving uses, such as the City's Civic Center Building, Berkeley High School, and the Berkeley Main Post Office. § 23E.98.010. The Historic District recognizes the Civic Center's special role in Berkeley's history, as well as the cultural and artistic

[1] All code references are to the Berkeley Municipal Code unless otherwise indicated.

merit of its buildings. Following its designation by the City, the District was included in the National Register of Historic Places ("National Register"). *See* Dkt. 12-5; Dkt. 23-1 at 2; *see also* Request for Judicial Notice in Support of City's Motion for Summary Judgment ("RJN") at 3.

The Historic District designation provides protection for the facades and interiors of structures, including public hearing and permit requirements for construction, alteration, or demolition and standards for repair and maintenance. *See, e.g.,* §§ 3.24.100, 3.24.200, 3.24.230, 3.24.290. The National Register listing also protects it under Section 106 of the National Historic Preservation Act ("NHPA"), which requires federal agencies to consider the effects of their actions on historic properties and allow the Advisory Council on Historic Preservation opportunity to comment. 36 C.F.R. § 800.1(a). The District is also subject to Policy LU-22 in the City's General Plan to "[m]aintain the Civic Center as a cohesively designed, well-maintained, and secure place for community activities, cultural and educational uses, and essential civic functions and facilities." § 23E.98.020; *see* RJN, Ex. L (LU-22 requires that changes to listed structures in the District be reviewed by the City Landmark Preservation Commission).

The Main Berkeley Post Office was included in the Historic District from the outset. Dkt. 12-5 at 15-16. The Property was built in 1914 and has been used as a post office since the 1930s. *Id.*; Dkt. 1 at ¶ 13. It was designated a City Landmark in 1980 and added to the National Register. Dkt. 12-5 at 16. The Property is the City's first federal government office and "embodies the characteristics of the Beaux Arts Classic Renaissance Revival style." *Id.* at 21, 30. It features a 1936 mural of figures from the Spanish and pioneer period of the City's history, *id.* at 16, and "retains a high degree of integrity of materials and workmanship," *id.* at 30. The Property is in the City's C-DMU Outer Core zoning district, which allows residential, office, retail, parking, and other uses. RJN, Ex. K (Berkeley Zoning Map); § 23E.68.030. But because the Property is owned by the Postal Service, a federal entity, the City has never considered its zoning regulations to apply to the Service's use of the Property. Dkt. 35 at 15.

In 2012, the Postal Service decided to sell the Property to "reduce costs." Dkt. 1 at ¶ 14. In 2013, the Service's broker, CBRE, began marketing the Property. *Id.* at ¶ 16. On March 5, 2013, the City Council adopted Resolution 66,025-N.S., which stated that "the City of Berkeley formally opposes the sale of the Historic Berkeley Main Post Office building and requests that the United States Postal Service maintain existing services at the Berkeley Main Post Office." RJN, Ex. A. It asked the Service to

"work with the City of Berkeley with the goal of continuing the USPS's ownership of the building, and the leasing of the rear portion of the building to provide an ongoing income stream to the USPS." *Id.*

II. The City enacts the Overlay, which provides additional protection for the character of the Property and the rest of the Historic District

On September 30, 2014, the City Council approved the Civic Center District Overlay, Chapter 29E.98 of the Municipal Code. Dkt. 1 at ¶¶ 32, 36; Dkt. 1-1. The Overlay augmented existing protections for the buildings and land uses in the Historic District. *See* Ch. 3.24; § 23E.98.020. The Overlay's boundaries are thus coterminous with those of the Historic District. Dkt. 23-1; Dkt. 23-2. The Overlay modifies and supplements the land use controls imposed by the underlying zoning of the subject parcels.

The Overlay's overarching purposes are to implement (1) General Plan Policy LU-22 Civic Center: "Maintain the Civic Center as a cohesively designed, well-maintained, and secure place for community activities, cultural and educational uses, and essential civic functions and facilities"; and (2) Downtown Area Plan Policy LU-1.4: "Focus City Government and City activity in the Civic Center area, and recognize Downtown's central role in providing community services." § 23E.98.020. More specifically, its purposes include to "[p]reserve and protect the integrity of the . . . Historic Civic Center through preservation of existing buildings and open space listed in the Civic Center Historic District," to "[a]llow a set of uses, which are civic in nature, and support active community interest," and to "maintain public access to the historic buildings and resources." *Id.* The Overlay limits uses of covered properties to the following, regardless of the underlying zoning designation: Libraries; Judicial Courts; Museums; Parks and Playgrounds; Public Safety and Emergency Services; Government Agencies and Institutions; Public Schools/Educational Facilities; Non-Profit Cultural, Arts, Environmental, Community Service and Historical Organizations; Live Performance Theatre; and Public Market. § 23E.98.030.

Five of the nine parcels subject to the Overlay are owned by the City. Dkt. 1 at ¶ 33, § 23E.98.020; Decl. of D. Early in Support of City's Motion for Summary Judgment ("Early Decl.") at ¶ 4. The others are owned by the YMCA, a non-profit entity; the Berkeley Unified School District (two); and the Postal Service. Dkt. 1 at ¶ 33; § 23E.98.020. Several of the City-owned buildings are currently leased or licensed to non-profit entities providing social, community, and educational services. Early Decl. at ¶¶ 5, 7, 12-21 and Exs. C, D, F-M.

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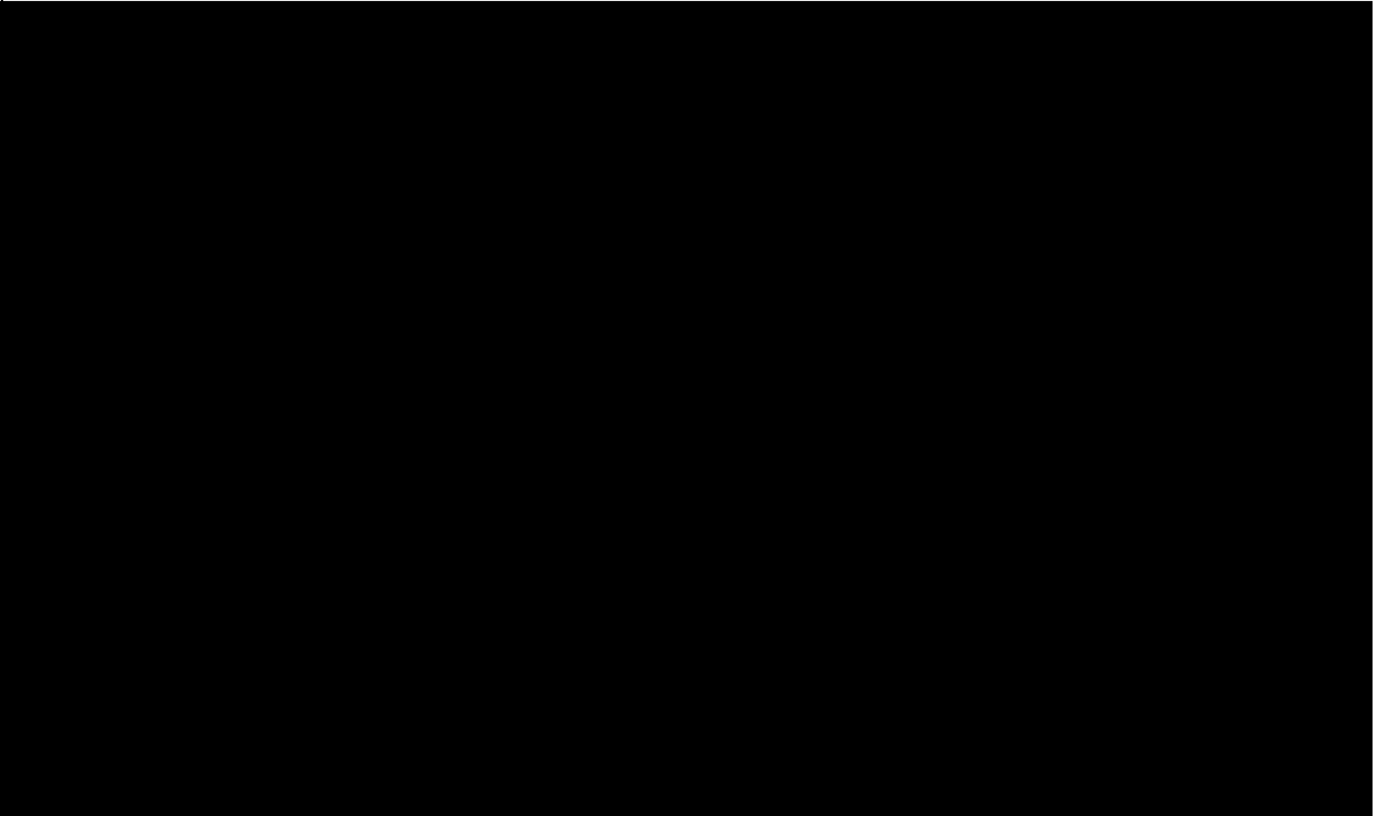
III. The Postal Service withdraws the property from the market and sues the City, alleging that federal law displaces the City's traditional power to regulate land use.



On November 5, 2014, the City sued the Service, and secured a temporary restraining order, on the grounds that the Service failed to comply with the National Environmental Protection Act ("NEPA") and the NHPA before offering the Property for sale. Complaint for Declaratory & Injunctive Relief, *City of Berkeley v. USPS*, Civ. No. 3:14-cv-04916, ECF No. 1 (Nov. 5, 2014). In April 2015, after the Service removed the Property from the market and withdrew its decision to relocate the Post Office, the Court dismissed the City's action as moot. Civ. No. 3:14-cv-04916, ECF No. 54, 56.

On August 22, 2016, the Postal Service filed this action alleging that the Overlay violates the intergovernmental immunity doctrine and is preempted by the Postal Reorganization Act ("PRA" or "Act"), 39 U.S.C. §§ 101–5605, and several constitutional provisions, Dkt. 1 at ¶¶ 1-2, 8-11. The Service argues that the Overlay, in regulating the uses that a subsequent owner may make of the Property, prevents the Service from selling the Property. Dkt. 1 at ¶¶ 44, 47.

The City moved to dismiss the Complaint. Dkt. 11. At the hearing, counsel for the Postal Service repeatedly acknowledged that the Service contended only that the Overlay entirely precludes the Service

from marketing and selling the Property. Dkt. 35 at 20, 25-26, 37-38. The Court denied the City's motion based on that concession. Dkt. 43 at 10-11.

On October 11, 2017, the Court heard the City's motion for a protective order to preclude depositions of City officials that would elicit testimony about their motivations for the Overlay. The Court granted the motion in part. Dkt. 85. The order requires that City officials "not be asked or required to answer any questions as to their subjective intent, purpose, mental states, or motivations." Dkt. 85 at 3.

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The City must "produce either evidence negating an essential element of [Plaintiff's] claim[s] . . . or show that [Plaintiff] does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to the Service to show a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* at 586-87. The "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing former Fed. R. Civ. P. 56(c)).

ARGUMENT

I. The Postal Reorganization Act does not preempt the Overlay.

The Postal Service contends that several provisions of the PRA preempt the Overlay. Dkt. 1 at ¶ 47 (citing 39 U.S.C. §§ 401(5), 403(b)(3), 404(a)(3)). The Service does not allege that the City has ever attempted to apply the Overlay's use restrictions, or its existing zoning regulations, to the Service; all concerned accept that the City's land use regulations do not bind the Service as a quasi-federal entity. *See* Dkt. 11 at 18 & n.13.

Rather, the Service claims that the Act preempts the City's power to regulate the use of the Property *by a private purchaser*. This is an unprecedented and untenable theory. This Court identified the proper test in its order on the motion to dismiss: the Overlay can be preempted only if it is "effectively equivalent to a total frustration of the USPS's ability to dispose of its property." Dkt. 43 at 10. The Ser-

1 vice's own evidence shows that the Property retains at least [redacted] in value and thus defeats its
2 claim.

3 **A. The Act cannot preempt regulation of a private purchaser of federal property unless**
4 **it effectively prohibits the Service from selling the property.**

5 The Service contends that the Overlay is impliedly preempted because it supposedly "conflicts
6 with federal law, and impedes the accomplishment and execution of the full purposes and objectives of
7 federal law." Dkt. 1 at ¶ 47. "Conflict preemption is found . . . where state law 'stands as an obstacle to
8 the accomplishment and execution of the full purposes and objectives of Congress.'" *Ting v. AT&T*, 319
9 F.3d 1126, 1136 (9th Cir. 2003) (citations omitted).

10 In considering a preemption claim, of whatever sort, "[t]he purpose of Congress is the ultimate
11 touchstone." *Id.* (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). Accordingly,
12 whether state regulation poses an unconstitutional obstacle to a federal program is determined "by exam-
13 ining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l*
14 *Foreign Trade Council*, 530 U.S. 363, 373 (2000). "If the purpose of the act cannot otherwise be ac-
15 complished — if its operation within its chosen field else must be frustrated and its provisions be re-
16 fused their natural effect — the state law" is preempted. *Id.* at 373 (citing *Savage v Jones*, 225 U.S. 501,
17 533 (1912)). However, if the court has "any doubt about congressional intent," it is "to err on the side of
18 caution, finding no preemption." *Malabed v. N. Slope Borough*, 335 F.3d 864, 869 (9th Cir. 2003).

19 When the state "regulates a field traditionally occupied by states, such as health, safety, *and land*
20 *use*," a court must apply "a 'presumption against preemption.'" *Atay v. County of Maui*, 842 F.3d 688,
21 699 (9th Cir. 2016) (emphasis added) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009)). The
22 court thus "assume[s] that a federal law does not preempt the states' police power absent a 'clear and
23 manifest purpose of Congress.'" *Id.* (quoting *Wyeth,* 555 U.S. at 565). The presumption reflects "respect
24 for the States as independent sovereigns in our federal system." *Wyeth*, 555 U.S. at 565 n.3 (citation
25 omitted). The Overlay, an amendment to the City's zoning ordinance, is ordinary land use regulation —
26 a paradigmatic local function. *See Atay*, 842 F.3d at 704 (referring to local governments' "traditional
27 authority" to regulate land use); *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 487 (10th
28 Cir. 1998) ("Land use policy such as zoning customarily has been considered a feature of local govern-

ment and an area in which the tenets of federalism are particularly strong.").

1. This Court correctly recognized that the Service must show that the Overlay effectively precludes it from selling the Property.

The Service points to provisions in the Act authorizing the Service "to hold, maintain, sell, lease or otherwise dispose of [its] property or any interest therein," 39 U.S.C. § 401(5); making it the responsibility of the 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," *id.* § 403(b)(3); and authorizing the Service to "determine the need for post offices . . . and to provide such offices, facilities, and equipment as it determines are needed," *id.* § 404(a)(3). The Overlay plainly has no impact on the Service's ability to "determine the need for" postal facilities or on the Service's discretion to maintain or terminate postal facilities. And it has no bearing on the Service's *use* of property or facilities, as it exempts government entities. The Service can only argue that the Overlay poses an obstacle to its ability to "sell, lease or otherwise dispose of [its] property." *Id.* § 401(5).

In its order on the motion to dismiss, the Court recognized that the Overlay can be preempted as an obstacle to the sale of the Property only if it effectively precludes such a sale:

> To be clear, the USPS does *not* theorize that *any* interference in the government's efforts to sell property, even material interference, would be preempted by the Property Clause and Section 401(5) of the Act. Rather, the USPS's theory is that the particular interference caused by the Overlay is *so potent as to be effectively equivalent to a total frustration of the USPS's ability to dispose of its property* — and thus preempted by federal laws that expressly empower the USPS to do just that.

Dkt. 43 at 10 (latter emphasis added); *see also id.* at 11 (Service "alleges the Overlay effectively bans the sale of the post office"); *id.* ("As an effective ban on the sale of the post office, the Overlay would obstruct the Act's objective of controlling costs to the USPS . . . ."); Dkt. 35 at 20:1-12 (describing the test as whether the Overlay "makes it virtually impossible to sell the Post Office building to anybody").

The plain language of the PRA supports this position. The only "clear and manifest" intent of Congress (*Wyeth,* 555 U.S. at 565) that can be gleaned from the cited PRA provisions is that the Service be *able* to "sell, lease or otherwise dispose of [its] property." 39 U.S.C. § 401(5). Only where a local land use regulation so completely obliterates the value of federal property to a purchaser that no one would agree to purchase it, or would do so only at a nominal price, could it be said that this "purpose of the [PRA] cannot otherwise be accomplished." *Crosby*, 530 U.S. at 373. Only then can the presumption

against preemption be overcome and such regulation be invalidated.

As shown below, the Overlay comes nowhere close to preventing the Service from selling the Property. *See infra* Section I.B. The Service's own experts contend that the Property retains over [redacted] [redacted] in value.

2. Mere diminution in value cannot be the basis of a preemption claim.

The Service argues that local land use regulation is preempted by the Act if it prevents an "economically viable" sale of Service property. At the motion to dismiss hearing, counsel for the Service argued, "[The Overlay] makes an *economically viable* sale virtually impossible . . . ." Dkt. 35 at 20:10-11(emphasis added). And in responses to interrogatories, the Service indicated that it views *any* reduction in the "fair market value" of the Property as preventing "economically viable" sale of the Property. Schwartz Decl., Ex. O at 2-3 (responses to interrogatories 2 & 3); *Id.,* Ex. P at 2 (supplemental response to interrogatory 3). The Service appears to contend that the Overlay poses an obstacle to its authority to sell the Property by modifying the allowable uses of the Property by a private purchaser and thus reducing the price such purchaser would pay for the Property. This theory finds no support in the text or legislative history of the PRA or in common sense.

There is not so much as a hint of a congressional purpose — let alone the requisite "clear and manifest purpose" — to prevent local governments from regulating private land uses in a manner that indirectly affects the prices paid to the Postal Service for property. Although the PRA gives the Service control over postal facilities, it neither says nor implies anything about the amount of payments made or received by the Service in carrying out these functions. It thus provides no standard for evaluating whether those transactions generate *sufficient* value for the Service. Nor does it provide a whiff of congressional intent to preclude local governments from regulating land uses made by private parties who happen to purchase land from the Service.[2]

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[2] The legislative history of the PRA provisions cited by the Service is silent on both the Service's power to dispose of property and on its relationship with local governments' land use regulation. *See* 1970 U.S.C.C.A.N. 3649-3723. However, later amendments to the Act address that relationship and belie any "clear and manifest purpose" to displace local land use regulation. Section 409(f), which was added in 2006, Pub. L. No. 109-435, § 404, 120 Stat. 3198, 3227 (2006), requires the Service in constructing facilities to "consider[] . . . all requirements (other than procedural requirements) of zoning laws, land use

(footnote continued on next page)

In *Mount Olivet Cemetery Ass'n v. Salt Lake City*, the Tenth Circuit rejected a stronger argument that local zoning regulation of a private successor to federal property was preempted. The federal government had granted the plaintiff a property for use as a cemetery but retained a possibility of reverter that would vest upon a change in use. 164 F.3d at 485. In 1992, Congress specifically authorized the plaintiff to make other uses of the property despite the federal reversionary interest. *Id.* at 483-84. When the plaintiff then sought to build a skilled nursing facility on the property, the city objected and rezoned the property as open space, precluding the development. *Id.* at 484, 487. The court rejected the claim.

> Congressional authorization for non-cemetery use cannot, in the absence of more persuasive evidence, be considered an unlimited congressional mandate authorizing any use — even a use otherwise prohibited by state or local law — that the Association desires to pursue. It is unlikely by this vague Act that Congress intended to deal the Association such a precious wild-card.

Id. at 489. The plaintiff also argued that the 1992 statute "was designed not merely to allow non-cemetery use of the property, but to specifically allow 'economic or commercial development' of the property sufficient to generate revenue to maintain the cemetery." *Id.* at 488. But the court found that "[t]he open space zoning does not preclude the Association from productively using its property for non-cemetery uses, nor does it prohibit uses of the property for revenue-generating purposes." *Id.* at 489. Although the zoning restricted potential revenue, "many permitted uses of the open space are conducive to revenue generation, including recreation centers, country clubs, and golf courses." *Id.* The court therefore held that "the open space designation does not undermine or frustrate any discernable congressional policy or objective." *Id.*

The Service here argues that the PRA's general authorization to sell property allows it to convey the same "precious wild-card" rejected in *Mount Olivet* to a private party: it asks the Court to immunize a purchaser of the Property from the Overlay. And like the zoning ordinance upheld in *Mount Olivet*, even if it reduces the value of the Property, the Overlay allows a range of uses, ensuring that it retains

(footnote continued from previous page)
laws, and applicable environmental laws of a State or subdivision of a State which would apply to the building" if it were privately owned. 39 U.S.C. § 409(f)(2). Subsection (f) also provides a variety of procedural requirements to ensure that consideration.

1 substantial value: over [redacted] to be precise.[3] *See infra* Section I.B.

2 By contrast, none of the Postal Service's preemption cases support a diminution-in-value theory. 3 The cases the Service cited in opposing the City's motion to dismiss all involved direct local regulation 4 of Postal Service operations: regulation of Service personnel, private parties serving as the Service's 5 agents, lessors of Service facilities, or private parties involved in joint ventures with the Service. *See* 6 *United States v. City of Pittsburg*, 661 F.2d 783 (9th Cir. 1981) (regulation of mail carriers); *Flamingo* 7 *Indus. v. USPS*, 302 F.3d 985 (9th Cir. 2002), *reversed on other grounds by* 540 U.S. 736 (2004) (regu- 8 lation of Postal Service contracts for procurement of mail sacks); *USPS v. City of Hollywood*, 974 F. 9 Supp. 1459 (S.D. Fl. 1997) (building permit requirement preempted as to renovation of building leased 10 by Postal Service); *USPS v. Town of Greenwich*, 901 F. Supp. 500 (D. Ct. 1995) (building code 11 preempted as applied to Postal Service, lessor of land to the Service, and private contractor constructing 12 facilities for the use of the Service).

13 In *City of Pittsburg*, the ordinance prohibited mail carriers from crossing lawns without property 14 owners' permission. 661 F.2d at 784-85. Beyond the obvious problem that it regulated federal employ- 15 ees' exercise of their duties, the ordinance also contradicted a Postal Service regulation which provided 16 that mail carriers *could* cross lawns unless a property owner directed otherwise. *Id.* at 785 & 786 n.5. In 17 *Flamingo Industries*, the court held the plaintiff, who had contracted with the Service to manufacture 18 mail sacks, could not subject the Service to California's unfair business practices statute, Cal. Bus. & 19 Prof. Code § 17200. 302 F.3d at 995-97 (state could not determine whether federal entity's contracting 20 practices are fair; remedy also conflicted with express federal remedy). Finally, *City of Hollywood* and 21 *Town of Greenwich* involved application of local building regulations to private parties who were con- 22 structing postal facilities on the Service's behalf. 974 F. Supp. at 1463; 901 F. Supp. at 507.

23 No one doubts the Overlay could not control the Service's use of the Property or its use by pri- 24 vate parties contracting with the Service as its agents or instrumentalities to build or operate Service fa-

25

26 [3] In arguing that Congress intended to allow development "sufficient to generate revenue to maintain the 27 cemetery," 164 F.3d at 488, the *Mount Olivet* plaintiff at least offered a standard for evaluating whether the zoning ordinance was preempted. The Postal Service offers no such standard here, let alone one 28 rooted in congressional intent. *See infra.*

cilities. By contrast, the Overlay controls future *private* conduct on *private* property and thereby affects the price that such a private party might pay for the Property. The purchaser of Postal Service property is not an agent or instrumentality of the Service such that regulation of the purchaser is tantamount to regulation of the Service itself. *See infra* Section III.A. Nothing in the cases involving regulation of the Service or its agents suggests that such indirect effects could be preempted.

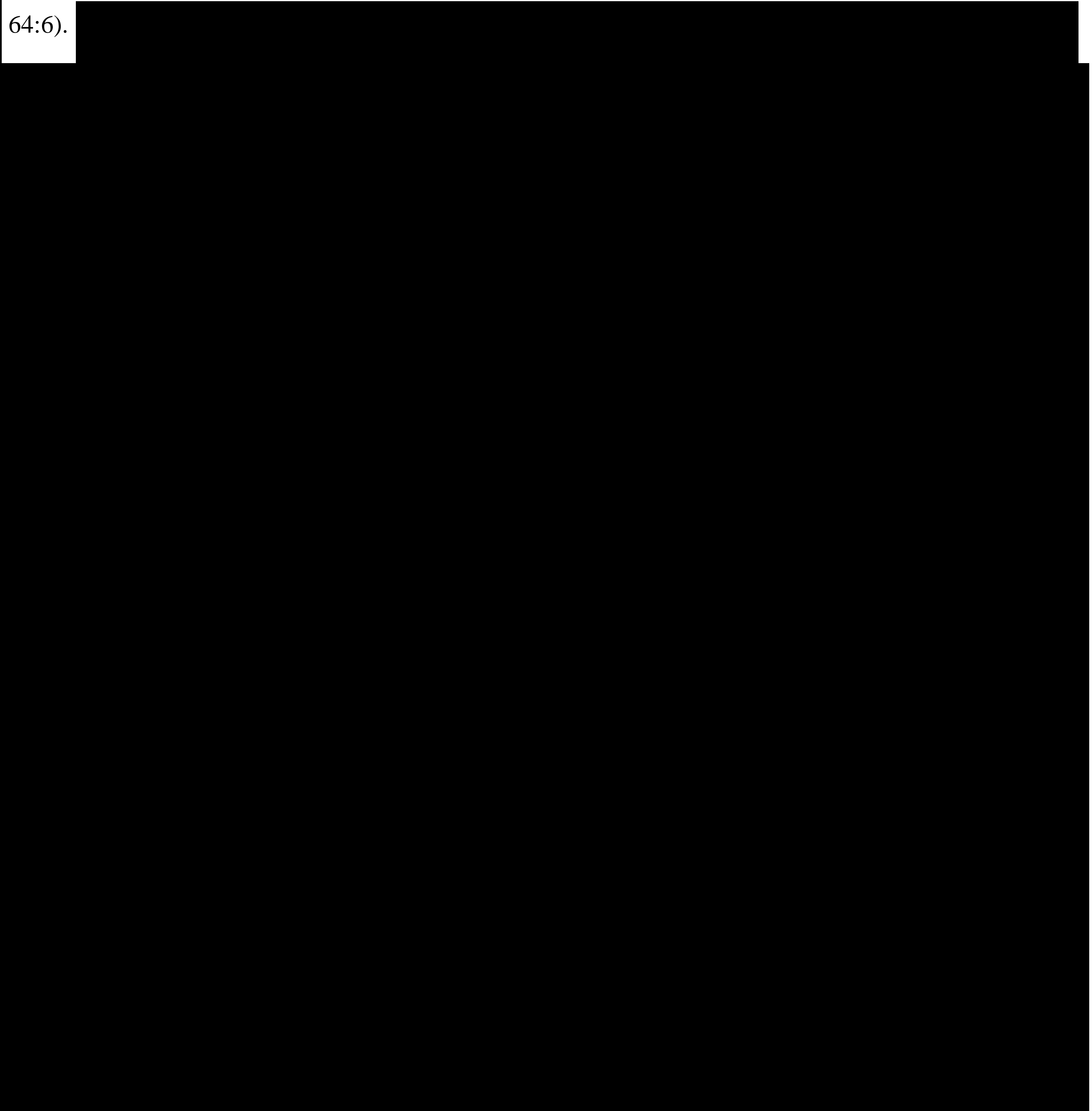
The Service identified only one case in which state regulation was preempted for interfering with the sale of assets authorized by federal statute: *Clean Air Markets Group v. Pataki*, 338 F.3d 82 (2d Cir. 2003). Dkt. 20 at 29. But *Clean Air Markets* involved a federal statute that created both the assets traded *and* the market in which they traded: a market in air pollution permits. The 1990 Clean Air Act Amendments instituted a "cap and trade" program which required emitters of sulfur dioxide to hold emission allowances and established a market for interstate trading of those allowances. *Id.* at 84 (discussing 42 U.S.C. § 7651b). New York adopted a statute that punished interstate sales of allowances by imposing a charge on the transaction that forced the seller to disgorge the full sale price. *Id.* Unsurprisingly, the court found the New York statute to be an obstacle to the "emission allocation and transfer system" created by the federal statute (*id.* at 87 (quoting 42 U.S.C. § 7651(b))) to encourage interstate transfers of allowances, which were also created by the federal statute, *id.* at 88. The state's 100% penalty for interstate sales "effectively *bans* such sales."[4] *Id.* (emphasis added).

By contrast, this case involves a local land use regulation that, like all such regulation, controls private parties' uses of their properties, and which may incidentally affect the sale price of those properties on ordinary the real estate market. The PRA betrays no congressional interest in the operation of such markets or the Service's participation in them. Moreover, because the New York statute in *Clean Air Markets* completely eliminated the value received by the vendor of an emission allowance, the case supports the City's position, and this Court's prior conclusion, that the Overlay can be preempted only if it effectively forecloses *any* sale of the Property by virtually devaluing it. *Clean Air Markets* does not suggest a mere reduction in the value of the Property would be preempted by the PRA's simple grant of

[4] The statute interfered even with intrastate sales by making vendors attach restrictive covenants to allowances sold intrastate that would prohibit later interstate sales. 338 F.3d at 88.

1 authority to the Service to "sell . . . or otherwise dispose of [its] property." 39 U.S.C. § 401(5).
2 The Postal Service's diminution-in-value theory also clashes with a long line of Supremacy
3 Clause cases recognizing that state taxation or regulation of private parties cannot be barred merely be-
4 cause it increases the cost of federal functions or reduces federal revenue. *See infra* Section III.A. In
5 *United States v. City of Detroit*, 355 U.S. 466 (1958), the Court upheld a municipal tax on property
6 owned by the United States but leased to a private party. *Id.* at 469. Like the Postal Service here, the
7 government argued "that it will not be able to secure as high rentals if lessees are taxed for using its
8 property." *Id.* at 472. But the Court rejected the argument, holding "the imposition of an increased fi-
9 nancial burden on the Government does not, by itself, vitiate a state tax." *Id.* And in *North Dakota v.*
10 *United States*, 495 U.S. 423 (1990), the Court rejected a similar argument as unworkable because it
11 "contains no standard by which 'burdensomeness' may be measured." *Id.* at 437 n.8. The Court thus re-
12 fused "to embark on an approach that would either result in the invalidation or the trial, by some undis-
13 closed standard, of every state regulation that in any way touched federal activity." *Id.* If zoning regula-
14 tion were preempted merely because it reduced the "fair market value" of federal property, either all
15 zoning would be preempted as to such purchasers or courts would need to concoct an arbitrary standard
16 of "burdensomeness."
17 "[G]overnment regulation — by definition — involves the adjustment of rights for the public
18 good. Often this adjustment curtails some potential for the use or economic exploitation of private prop-
19 erty." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). As a result, "[g]overnment hardly could go on if to
20 some extent values incident to property could not be diminished." *Penn. Coal Co. v. Mahon,* 260 U.S.
21 393, 413 (1922). The diminution-in-value theory would therefore preempt most local zoning controls.
22 **B. The Postal Service's own evidence demonstrates that the Overlay does not frustrate**
23 **all attempts to sell the Property.**
24 The Postal Service's own evidence shows that it cannot pass the preemption test as described by
25 this Court. The Service's national Manager for Real Estate and Assets admits that the Overlay does not
26 prevent the sale of the Property. Schwartz Decl., Ex. C (Russell Depo. at 93:15-21). And the Service's
27 own expert appraiser concludes that the Property has a market value of [redacted] as of March 2017,
28 with the Overlay in place. Schwartz Decl., Ex. E at 2.

After the City adopted the Overlay, the Service commissioned Timothy Runde to appraise the fair market value of the Property under two scenarios: one assuming that the Overlay applies (*id*., Ex. E at 2), and the other that it does not (*id*., Ex. G at 2). Runde holds the MAI designation and has more than 25 years' experience in real estate appraisals, including in Berkeley, Oakland, and San Francisco. *Id*., Ex. E (resume); *id*., Ex. D (Runde Depo. at 54:13-60:19). Runde has extensive experience appraising older buildings requiring retrofitting and historic properties. *Id*., Ex. D (Runde Depo. at 41:5-7, 62:5-64:6).



Because the Service's *own evidence* demonstrates that the Overlay did not effectively prohibit sale of the Property for more than a nominal sum, there is no genuine dispute of material fact about the effect of the Overlay. The Overlay has not frustrated "any attempts to sell" the Property, and the City is entitled to summary judgment on preemption.

The Service introduced new expert evidence at the eleventh hour in a transparent attempt to evade Runde's opinion, but to no avail. On the date for exchange of expert witness lists and reports, September 29, 2017, the Service did not exchange Runde's name or his appraisal with the City, despite previously sharing the appraisal with the City in March 2017 and the City's having deposed him in August 2017. Schwartz Decl. ¶ 7 & Ex. J. Instead, the Service disclosed a new expert, economist Norman G. Miller. *Id.*; *id.*, Ex. K. At the Service's direction, Miller provided an opinion solely about the reduction in value of the Property due to the Overlay; he offered no opinion about the fair market value of the Property with the Overlay. *Id.*, Ex. K at 17-18.

Not only did the Service attempt to bury its own evidence of the substantial value remaining in the Property, but with Miller's report the Service also attempted to inflate the effect of the Overlay on the Property. Miller adjusts data from the Runde and Overton appraisals and adds his own assumptions to develop three scenarios showing the "value difference" of the Property without and with the Overlay. Schwartz Decl., Ex. K at 17-18. Miller concludes that the difference in value per square foot without the Overlay (indicated as "Market") and with the Overlay (indicated as "AS IS") is "45% less (Runde), "66% less" (Overton), and "43% less" (using Miller's own rents, etc.). *Id.* But Miller admitted that his report misrepresented the impact of the Overlay. He purported to determine the reduction in value of the Property caused by the Overlay, viz., how much "less" the Property is worth with the Overlay. Schwartz Decl., Ex. M (Miller Depo. at 38:24-40:4). Yet he admitted that his figures actually calculated how much "more" the Property would be worth *without* the Overlay. *Id.* A percentage increase will always appear greater than a percentage decrease between the same two numbers. When asked to calculate how much "less" the Property would be worth with the Overlay, Miller admitted that his opinion of the "value difference" is only 31% (Runde), 56.6% (Overton), and 30% (Miller's own analysis). *Id.* at 39:9-13, 39:20-40:17, 40:18-41:4. These percentage differences in value show an impact on the value of the

Property substantially less than the inflated figures presented in Miller's report.[6] Indeed, when accurately represented, Miller's value difference of 31% relying on Runde's analysis is less than Runde's own value difference of 39%

C. The City's legislative purpose in enacting the Overlay is irrelevant, but in any event legitimate: protecting the existing Historic District.

As the City argued in its motion for protective order, City officials' legislative purpose in enacting the Overlay is irrelevant to the Postal Service's preemption claim. Regardless, the Service's preemption claim fails because the Overlay and its legislative history reveal that the City's purpose in enacting the Overlay was fully legitimate.

1. The City's legislative purpose in enacting the Overlay is irrelevant to the preemption claim.

Local legislative purpose is relevant to a preemption claim only if Congress has made it so in its choice of language in an express preemption or savings clause. The PRA includes no such language. Consequently, the Overlay must be evaluated solely based on whether it *in fact* creates an obstacle to realizing Congress's goals in enacting the PRA.

As the City argued in its briefing on the motion for protective order, on a claim of conflict preemption, the inquiry is whether the local ordinance "actually interferes" with a congressional enactment. *Ting*, 319 F.3d at 1137; *see also* Dkt. 67 at 6-7. The purpose behind state or local regulation is therefore generally irrelevant. *See Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 612 (1926); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1026 (9th Cir. 2010) ("[P]reemptive scope [does not] turn on state officials' subjective reasons for adopting a regulation or agreement."); *see also Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096 (2013) (local authority's "intentions are not what matters" in preemption analysis).

In *Puente Arizona v. Arpaio*, 821 F.3d 1098 (9th Cir. 2016), the Ninth Circuit considered whether Arizona's identity theft laws were preempted by federal immigration policy by looking solely to their "effects to determine if the state encroached on an area Congress intended to reserve." *Id.* at 1106. The

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[6] Two days before his deposition, and a month after the Service disclosed his report, Miller purported to "correct" his the analysis using his own rents by changing "less" to "more than AS-IS." Schwartz Decl., Ex. L. Miller did not correct his Runde or Overton scenarios, which suffered from the same error. *Id*.

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*. Because the laws did not in fact interfere with immigration policy, the court held they were not preempted "despite the state legislative history" showing they were intended to do so. *Id.*

Also, in *Mount Olivet Cemetery Ass'n*, the court rejected an argument that "the City intentionally acted to 'nullify the federal scheme.'" 164 F.3d at 488 n.3. Rather, the court held, "in making a preemption determination, it is not appropriate to consider the motive underlying the zoning decision." *Id.* (citing *Blue Circle Cement, Inc. v. Bd. of Cty. Comm'rs*, 27 F.3d 1499, 1508 (10th Cir. 1994)). The court upheld the zoning because "there is no evidence the City's open space classification, *even if enacted for the worst motive*, frustrates any congressional policy." 164 F.3d at 489 n.4 (emphasis added).

Moreover, not one of the preemption cases cited by the Postal Service in opposing the motion to dismiss (*see* Dkt. 20 at 27-28; *supra* Section I.A.2) relies on the local government's purpose underlying the preempted program. They instead focus solely on whether the program in fact was an obstacle to the federal program. *See, e.g., Flamingo Indus.*, 302 F.3d at 997; *City of Pittsburg,* 661 F.2d at 785-86 & n.4. Most telling, local legislative purpose played no role in the *Clean Air Markets* analysis though the state manifestly intended to prevent interstate transfers of emission allowances to ensure that emission reductions would occur within the state. 338 F.3d at 84.

In briefing the motion for protective order, the Postal Service ignored the cases it previously cited and focused instead on preemption cases under the Atomic Energy Act ("AEA"). Dkt. 68 at 10-13. Those cases, beginning with *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983) ("*PG&E*"), are inapt because the AEA includes a preemption savings provision that makes the purpose of local regulation relevant: it allows states 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)); *see also* Dkt. 69 at 7-10. The *PG&E* Court thus reasoned that Congress made it necessary — in that particular statutory context — "to determine whether there is a nonsafety rationale" for the challenged state legislation. *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 savings provision). Moreover, *PG&E* and *English* both invoke purpose in

discussing field preemption, not conflict preemption as asserted here. *See PG&*E, 461 U.S. at 217-20; *English*, 496 U.S. at 87-90. Their conflict preemption analyses 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's remaining cases are also largely applications of *PG&E* and *English* to more AEA preemption claims. *See Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 415 (2d Cir. 2013); *Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 598 (4th Cir. 2017); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1252 (10th Cir. 2004). It also cited a decision that relied on the AEA cases in considering a preemption claim under a different statute, but the district court there failed to consider whether that statute was similar to the AEA. *Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 3d 488, 505 (D.N.J. 2014), *aff'd on other grounds,* 832 F.3d 389 (3d Cir. 2016) (en banc), *cert. granted*, 137 S.Ct. 2327 (June 27, 2017). The Service's reliance on *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), is similarly ineffective: it involved a express preemption of state regulation only "with respect to the advertising or promotion of any cigarettes." *Id*. at 105.

Unlike the AEA cases, this case involves conflict preemption, not field preemption. And the PRA says nothing to make the purpose of state regulation relevant to its preemptive scope; it simply grants authority to the Service. Accordingly, the preemption inquiry is limited to determining whether the Overlay has the *effect* of "actually interfer[ing]" with federal law. *Ting*, 319 F.3d at 1137. The City Council's purpose is orthogonal to that analysis.[7]

2. As this Court recognized in the protective order, any showing of local legislative purpose must be based solely on objective evidence, not the subjective motivations of individual legislators.

Even if the City's legislative purpose were relevant to the preemption claim, the subjective motivations of City officials would still be irrelevant. Indeed, in its protective order, this Court directed that City officials could "not be asked or required to answer any questions as to their subjective intent, purpose, mental states, or motivations." Dkt. 85 at 3.

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[7] Moreover, the Postal Service has never cited a single case suggesting that local legislative purpose, if relevant, could be a *sufficient* basis for preemption. As a result, the Service's claim still fails because it cannot show that the Overlay in effect precludes the Service from selling the Property.

1 The order followed the clear lead of the case law. If legislative purpose is relevant to a claim,
2 that purpose must be gleaned from objective sources, not the subjective motivations of individual legis-
3 lators. *See In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("Stray comments by individual legislators,
4 not otherwise supported by statutory language or committee reports, cannot be attributed to the full body
5 that voted on the bill. The opposite inference is far more likely."), *superseded by statute on other*
6 *grounds*; *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) ("It is axiomatic that if mo-
7 tivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of volu-
8 ble members, that is relevant.") (citing *Aldridge v. Williams*, 44 U.S. 9, 24 (1845)). Accordingly, courts
9 consider only the "text, legislative history and implementation of the statute, or comparable official act."
10 *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005) (citation omitted); *accord Soon Hing v. Crowley*,
11 113 U.S. 703, 710-11 (1885) ("[C]ourts cannot inquire into the motives of the legislators in passing [leg-
12 islation], except as they may be disclosed on the face of the acts, or inferable from their operation.").
13 Where a claim turns on legislative purpose, the court need not accept a legislature's stated pur-
14 pose if it is a "sham." *McCreary County*, 545 U.S. at 864-65. But the assessment must be based solely
15 on "openly available data." *Id.* at 863. "[J]udicial psychoanalysis of a drafter's heart of hearts" is off
16 limits. *Id.* at 862; *see also id.* at 863 ("Establishment Clause analysis does not look to the veiled psyche
17 of government officers[.]"). Relying on statements by individual legislators is fraught with risk. It may
18 lead the court to misperceive legislative purpose because "[w]hat motivates one legislator to make a
19 speech about a statute is not necessarily what motivates scores of others to enact it." *United States v.*
20 *O'Brien,* 391 U.S. 367, 384 (1968). It also risks futility to invalidate a law that could simply be reenact-
21 ed based on more careful statements by legislators. *Id.* And it could foster gamesmanship: any legislator
22 could sabotage a bill simply by expressing an illicit motivation for her yes vote.
23 The Court followed an objective approach in *PG&E*. In asking "whether there was a nonsafety
24 rationale" for the state regulation, 461 U.S. at 213, the Court refused to become "embroiled in attempt-
25 ing to ascertain California's true motive" and looked solely at the face of the regulation and the official
26 report of the committee that proposed it, *id.* at 216. Relying on *O'Brien*, the Court reasoned California's
27 "true motive" was elusive, as the motivation of one legislator "is not necessarily what motivates scores
28 of others." *Id.*; *see also Va. Uranium*, 848 F.3d at 597 (declining to "look past the statute's plain mean-

ing to decipher" legislative intent for similar field preemption claim).

In *Blue Circle Cement, Inc. v. Board of County Commissioners*, a preemption case under the Resource Conservation and Recovery Act ("RCRA"), the court held that "the evaluation of the local ordinance should be conducted on an objective, rather than a subjective, basis."[8] 27 F.3d at 1508. The court emphasized the difficulty of "determin[ing] the bona-fides of a collective legislative body where motivation may vary among the members of that body and where, in most cases, the motivations may be complex and easily disguised." *Id.* It thus adopted an "objective approach, asking whether a legitimate local concern has been identified and whether the ordinance is a reasonable response to that concern." *Id.*

If this Court concludes the City's legislative purpose in enacting the Overlay is relevant, it should adopt a similar "objective approach" and limit review to "whether a legitimate local concern has been identified" and will be advanced by the Overlay, *id.* at 1508, rather than attempting to divine what motive might lay in any individual legislator's "heart of hearts," *McCreary County*, 545 U.S. at 862.

3. Undisputed objective evidence reveals that the City had a proper purpose in enacting the Overlay.

Here, the exclusive and legitimate purpose of the Overlay — maintaining and protecting the integrity of the City's preexisting Historic District as a space focused on civic and community activities — is clear on the face of the ordinance. § 23E.98.020. Nothing in the text of the Overlay evinces any intent to frustrate the sale of the Post Office. Rather, the Overlay concerns the uses of all nine District parcels and the civic character of the District as a whole. *Id.*; *see also* § 23E.98.030 ("All properties in the [District] are restricted to only those uses listed . . . , regardless of uses permitted in the underlying zoning district."). Protection of community character is a legitimate public purpose and a routine component of local land use regulation.[9] *See, e.g., Budnick v. Town of Carefree*, 518 F.3d 1109, 1116 (9th Cir. 2008).

If any further inquiry is needed, the Court need look no further than the undisputed contents of

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[8] Like the AEA, RCRA includes a savings clause that made the local government's purpose relevant to the preemption analysis. *See Blue Circle,* 27 F.3d at 1506.

[9] In floor debate on the 2006 amendments to the PRA, Rep. Blumenauer noted the important civic role played by post offices: "Good government organizations across the country have joined with mayors and local officials who understand that the over-37,000 postal facilities are not just remote outposts of Federal activity. *They can, often are, and always should be centers of community activity*." 151 Cong. Rec. 6511, 6517 (Daily ed. July 26, 2005) (Statement of Rep. Blumenauer) (emphasis added).

1 the legislative history. For instance, the same salutary intent to promote civic uses and protect the unique
2 historical character of the District is reflected in the various draft iterations of the Overlay. *See, e.g.*,
3 RJN, Ex. B (Overlay draft considered at October 2, 2013 Planning Commission Meeting), Ex. C (Over-
4 lay draft considered at January 28, 2014 City Council Hearing), Ex. D (Overlay draft considered at Au-
5 gust 27, 2014 Planning Commission Meeting), Ex. E (Overlay draft considered at September 9, 2014
6 City Council Hearing). Likewise, the staff reports on these proposed drafts of the Overlay reflect the in-
7 tent to protect the character of the District as a whole. *See, e.g.*, *id.*, Ex. C at COB001700 (Jan. 28, 2014
8 staff report to City Council reporting that the Overlay "is a useful tool to guide oversight and use in the
9 Civic Center area. The existing Civic Center Historic Overlay (adopted 1998) identifies both the physi-
10 cal characteristics of buildings and the civic nature of the Civic Center."), Ex. E at COB002576 (Sept. 9,
11 2014 staff report to City Council reporting that the Overlay "is intended to preserve the integrity of the
12 Civic Center area of the City by addressing in particular, Uses Permitted, and Development Standards"),
13 Ex. F at COB001814 (Nov. 6, 2013 staff report to Planning Commission advising that "[t]he purpose of
14 this overlay district is to focus the permissible uses to a range compatible with the broad definition of
15 'civic use'"), Ex. G at COB001484 (Oct. 2, 2013 staff report to Planning Commission advising that the
16 Commission's recommendations "should be made in the context of the best opportunities for maintain-
17 ing the civic nature and public accessibility of the area"); *see also id.,* Ex. D (Aug. 27, 2014 staff report
18 to Planning Commission), Ex. H (Sept. 4, 2013 staff report to Planning Commission).

19 The Service cites the initial referral of the draft ordinance to the Planning Commission by then-
20 councilmember Jesse Arreguin, which suggested his desire to influence the sale of the Post Office. Dkt.
21 1-2 (noting in "limit[ing] uses of the properties in the district to those consistent with the character of the
22 district," the proposed Overlay would "ensure that the Downtown Post Office can only be utilized for a
23 civic or community-oriented use, and may help influence the USPS [to] decide a more favorable future
24 for the building"). But that statement reflected at most a subjective motivation of a single councilmem-
25 ber, not the intent of the legislative body as a whole — the very concern raised by the Supreme Court in
26 *O'Brien* et sim. Stray remarks of a single councilmember provide a poor basis for assessing his motiva-
27 tion for voting for the Overlay, let alone the motivations of the rest of the City Council and Planning
28 Commission.

II. The Postal and Property Clauses add nothing to the Postal Service's preemption claim.

The Postal Service also argues that both the Property Clause, U.S. Const. art. IV, § 3, cl. 2, and the Postal Clause, U.S. Const. art. I, § 8, cl. 7, "preempt" the Overlay. Dkt. 1, ¶ 47. These clauses grant power to Congress; they do not prohibit state action.

The Property Clause does not preclude state jurisdiction over federal property. States retain their police power to regulate private conduct on land currently in federal ownership, provided that regulation is not preempted by act of Congress. *See, e.g., Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 594 (1987) (holding that state environmental regulation of federally authorized mining activities on federally owned lands was not facially invalid)); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) (recognizing the states' general interest in and power to manage wildlife on federal lands).

Given that states can regulate private conduct on land *while in federal ownership*, the Property Clause cannot require that private grantees be immunized from state land-use controls *after* they acquire title to formerly federal lands. Indeed, in *Mount Olivet Cemetery Association,* the court held that local zoning controls fully applied to property transferred by the federal government to the Association, even though the government retained a reversionary interest. 164 F.3d at 483-84.

The Postal Clause similarly imposes no limit on state authority independent of the statutory law enacted by Congress. There is no "dormant Postal Clause" doctrine to displace state or local regulation in the absence of congressional action. Courts look instead to the terms of the statutes enacted under the Postal Clause (or other grant of constitutional power) to determine whether those *statutes* preempt the state regulation. *See, e.g., Roth v. United States*, 354 U.S. 476, 493-94 (1957).

III. The Overlay does not violate the Postal Service's intergovernmental immunity.

Under the intergovernmental immunity doctrine, "[a] state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals." *North Dakota*, 495 U.S. at 434. The Overlay does neither.

A. The Overlay does not regulate the Postal Service: regulation of the use of property by a successor in interest is not regulation of the Service.

The Service "does not contend it is directly regulated by the Overlay." Dkt. 43 at 6. Indeed, the Overlay exempts uses of subject parcels by "Government Agencies" from its restrictions. § 23E.98.030;

see also § 23E.98.020(F) (A "specific purpos[e]" of the Overlay is to "[p]reserve the Civic Center District as a place for government functions."). This is the end of the analysis.

The Service says the Supremacy Clause also immunizes it from the indirect impact of regulating a private party who purchases the Property. Dkt. 20 at 23. But the Supreme Court has "decisively rejected the argument that any state regulation which indirectly regulates the Federal Government's activity is unconstitutional, and that view has now been 'thoroughly repudiated.'" *North Dakota*, 495 U.S. at 434-35 (quoting *South Carolina v. Baker*, 485 U.S. 505, 520 (1988)). State regulation is invalid only if it applies directly to the United States "or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." *United States v. New Mexico*, 455 U.S. 720, 735 (1982); *see also City of Detroit*, 355 U.S. at 503 (state tax is invalid only if a private taxpayer actually "stand[s] in the government's shoes"); *Mayo v. United States*, 319 U.S. 441, 447 (1943) (striking down fees "laid directly upon the United States" and distinguishing cases in which "the exactions directly affected persons who were acting for themselves and not for the United States").

In *North Dakota*, the state required distillers selling alcohol to federal enclaves to report the amount sold and label the liquor for consumption only on federal land. 495 U.S. at 426. Like the Service here, the federal government asserted that the state indirectly regulated its activities by regulating its suppliers. *Id.* at 434. The Court disagreed. Because the regulations "operate[d] against suppliers, not the Government," there was "no claim, nor could there be, that North Dakota regulates the Federal Government directly," *id.* at 436-37, even though the state laws raised prices of liquor sold to federal enclaves, *id.* at 441.

The Overlay's impact on the federal government is even more attenuated. While the alcohol suppliers in *North Dakota* regularly supplied federal enclaves and the regulations singled out federal activities, a private purchaser of the Property performs no government function and has no ongoing relationship with the Service. And the Overlay exempts government functions.

The Service has cited two district court cases in which federal contractors or lessors/lessees were immunized from state or local regulation. Dkt. 20 at 17-18. But they show only that a municipality cannot regulate the federal government's *agents*. *See supra* Section I.A; *Town of Greenwich*, 901 F. Supp. at 506; *City of Hollywood*, 974 F. Supp. at 1461, 1465. In both cases, the contracting entities "effectively

st[ood] in the shoes of the Postal Service." *Town of Greenwich*, 901 F. Supp. at 505. A private owner of property formerly owned by the Postal Service does not.

The Overlay also does not regulate the Service merely because the economic incidence of its restrictions on future private use falls on the Service by reducing the Property's purchase price. The Court has "consistently adhered to its repudiation of the intergovernmental burden theory," which would invalidate state laws based on the incidental economic effect on the federal government. *South Carolina v. Regan*, 465 U.S. 367, 411-12 (1984); *see also, e.g., James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 104 (1940) (upholding application of state safety requirements to contractor constructing post office even though the requirement "may slightly increase the cost of construction to the government"); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989); *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 270 (1943). Courts reject liability for incidental economic burdens even if the "Federal Government shoulders the *entire* economic burden" of the tax or regulation. *United States v. California*, 507 U.S. 746, 753 (1993) (emphasis added) (quotation omitted).

The *North Dakota* Court reasoned that the incidental economic burden theory of liability would require invalidating nearly every state or local enactment on the theory that they "regulate federal activity in the sense that they make it more costly for the Government to do its business." *North Dakota*, 495 U.S. at 434; *see also Johnson v. Maryland*, 254 U.S. 51, 56 (1920) (immunity of postal service employee would not extend to "general rules that might affect incidentally the mode of carrying out the employment"). And the theory would be unworkable in practice because it "contains no standard by which 'burdensomeness' may be measured." *North Dakota,* 495 U.S. at 437 n.8; *see supra* Section I.A.2.

Courts look instead solely to whether the regulation is imposed directly on the government or instead on a third party. In this case, the Overlay has no direct application to the Postal Service.

B. The Overlay does not discriminate against the Postal Service or its agents; it applies identically to the City's own properties.

Nor does the Overlay "discriminate against the federal government or those with whom it deals." *North Dakota*, 495 U.S. at 437. To prevail on that theory, the Service must show that the City "treats someone else better than it treats [the Service]." *Washington v. United States*, 460 U.S. 536, 544-45 (1983). The nondiscrimination rule requires only that a regulation be "imposed equally on other similar-

ly situated constituents of the State," *North Dakota*, 495 U.S. at 438.

The Overlay treats the Service identically to similarly situated constituents — the owners of the other parcels within the Historic District. The Overlay "appl[ies] to the area coterminous with the Civic Center Historic District" created in 1998. § 23E.98.010. That area comprises nine parcels, several hosting multiple structures. *Id.* Five of the parcels are owned by the City itself, another hosts the Berkeley High School, an adjacent parcel contains two community theatres, and another parcel is owned by the YMCA, a private entity. *Id.*; Early Decl. at ¶ 4. The Overlay applies evenhandedly to all these parcels, subjecting them to identical use restrictions to preserve the civic character of the District as a whole. § 23E.98.030; *see In re NSA Telecomms. Records Litig.*, 633 F. Supp. 2d 892, 904 (N.D. Cal. 2007) (rejecting challenge to laws that "regulate equally all public utilities, making no distinction based on the government's involvement"). Far from singling out the federal government for worse treatment, the Overlay explicitly permits government agency uses. *Cf. North Dakota*, 495 U.S. at 439 ("A regulatory regime which so favors the Federal Government cannot be considered to discriminate against it.").

The Service also alleges that "the practical *effect* of the Overlay is only to frustrate the [Service's] attempt to sell the Property while other commercial use in the area remains unimpeded." Dkt. 43 at 7; *see also* Dkt. 1 at ¶ 43. But logic and fact prove just the opposite. The Overlay does not constrain the Service's ability to convey the Property: the Service, like all other owners in the District, remains free to sell its parcel to the buyer of its choosing. And any incidental economic effect of the Overlay's use restrictions is equally borne by all District properties. *See Washington*, 460 U.S. at 544 (upholding tax that, on its face, treated the federal government differently because its economic burdens were evenly allocated); *see also United States v. City of Arcata*, 629 F.3d 986, 991 (9th. Cir. 2010) (An ordinance that "affect[s] the federal government incidentally as the consequence of a broad, neutrally applicable rule" is perfectly constitutional.).

The evidence upends the Service's theory that it alone will be economically affected by the Overlay. It cannot show that the Property is the only one in the District with reduced value, or that the Service is the only owner able or willing to sell. In any event, the undisputed facts prove that the City itself is financially burdened by the Overlay whether or not it intends to sell its District properties.

For one, the Overlay limits the City's ability to collect rental income from its District properties,

such as 1947 Center Street, leased by the International Computer Science Institute ("ICSI"). ICSI intends to vacate one of the two floors it leases and negotiate a new lease for reduced space. Early Decl. at ¶¶ 9-10. The Overlay narrows the pool of potential tenants for that space and may require the City to reduce rents to attract a tenant with a legally viable use. *Id*. at ¶ 11. If the Overlay's restrictions prevent the City from locating a tenant, the space will either remain vacant or be occupied by City staff, in either event generating no revenue for the City. *Id.*

The Overlay potentially limits the City's ability to finance improvements to buildings in the District by issuing debt in the form of Certificates of Participation ("COPs"). Decl. of Craig Hill in Support of Motion for Summary Judgment at ¶¶ 3-5. Because the Overlay may reduce rents, the City's ability to finance the improvements with COPs would be impaired. *Id.* at ¶ 5. As a consequence, a greater proportion of the City's budget may need to be put into financing improvements to City-owned properties in the District than would have been the case without the Overlay, with the result that less money will be available for other City projects and programs.[10] *Id.*

C. Local legislative purpose is irrelevant to the intergovernmental immunity claim.

The Service has effectively conceded that local legislative purpose is irrelevant to an intergovernmental immunity claim by failing to oppose that argument in the City's motion for protective order. And it has never cited a case that considered state or local legislative purpose for an intergovernmental immunity claim. Dkt. 68. Intergovernmental immunity turns on the *effect* of the challenged ordinance — whether it "regulates the United States directly or discriminates against the Federal Government," *North Dakota*, 495 U.S. at 435 — not the intent of the enacting body. *See* Dkt. 67 at 13-15.

In determining whether an ordinance directly regulates the federal government, courts consider the "express terms" of the act, *City of Arcata*, 629 F.3d at 991, and its "application," *Blackburn v. United States*, 100 F.3d 1425, 1435 (9th Cir. 1996); *see also Johnson*, 254 U.S. at 56-57. Likewise, in applying the discrimination prong, courts look to the face of a statute, its regulatory context, and "the econom-

[10] Indeed, before the Planning Commission, the Postal Service introduced evidence that the Overlay "would result in a loss of existing revenue streams to the City, would result in a reduced ability to finance the restoration of the historic City Hall building." RJN, Ex. J; *see also id.,* Ex. K (memo by USPS consultant forecasting the "economic effects [of the Overlay] on the . . . publicly-owned parcels" in the District).

ic burdens that result." *Washington*, 460 U.S. at 544, 546 (tax did not "single[] out contractors who work for the United States for discriminatory treatment" but instead "merely accommodated for the fact that it may not impose a tax directly on the United States as the project owner"); *see City of Arcata*, 629 F.3d 991 (ordinances discriminate against the United States because they expressly "restrict the conduct of military recruiters" while permitting recruitment by non-federal actors); *North Dakota*, 495 U.S. at 438 (a statute that "appears to treat the Government differently on the most specific level of analysis may, in its broader regulatory context, not be discriminatory"). Evidence of local legislative purpose sheds no light on whether the state has directly regulated the federal government or treated it worse than similarly situated constituents. *North Dakota*, 495 U.S. at 434, 438.

Moreover, even if the City's purpose were relevant and suspect, it could not change the outcome. Courts "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383. Thus, for example, to show that a facially neutral law violates the Equal Protection clause, a plaintiff must demonstrate that the law is "motivated by discriminatory intent *and* has a racially discriminatory impact." *Antonelli v. New Jersey*, 419 F.3d 267, 274 (3d Cir. 2005) (emphasis added); *accord Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[N]o case in [the Supreme] Court has held that a legislative act may violate Equal Protection solely because of the motivations of the men who voted for it."). Accordingly, even if the Service could show the City intended to discriminate against or regulate the Service, its claim would fail because no such intent was realized.

CONCLUSION

For the reasons discussed above, the City respectfully requests that the Court grant its motion for summary judgment and dismiss the Service's Complaint in its entirety.

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