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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

DEFENDANT'S MOTION FOR PROTECTIVE ORDER TO PRECLUDE DEPOSITIONS OF CITY OFFICIALS

The Hon. William Alsup

Date: September 28, 2017
Time: 8:00 a.m.
Trial Date: December 4, 2017

Filed Concurrently with Declaration of Andrew W. Schwartz

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NOTICE OF MOTION

TO PLAINTIFF UNITED STATES POSTAL SERVICE AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on September 28, 2017 at 8:00 a.m., or as soon thereafter as counsel may be heard by the above-entitled 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 issuance of a protective order under Rules 26(c)(1) and 26(b)(2) of the Federal Rules of Civil Procedure. This motion is based on this Notice of Motion, the Memorandum of Points and Authorities set forth below, the Declaration of Andrew Schwartz 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.

In this motion, the City seeks a protective order precluding the Postal Service from deposing past or present mayors of the City or members of the City of Berkeley City Council or Planning Commission. If the Court allows depositions to proceed, the City requests that the Court nevertheless issue a modified protective order limiting the scope of any such depositions to "relevant objective circumstances under which the [City's Civic Center District Overlay] was enacted." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir. 1984).

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES

Plaintiff United States Postal Service wishes to depose Defendant City of Berkeley's mayors, city councilmembers, and planning commissioners—21 officials in all. The Service seeks to elicit those officials' thoughts and motives regarding their adoption of the Civic Center District Overlay ("Overlay"), a legislative amendment to the City's zoning ordinance. An unbroken line of cases stretching back to Chief Justice Marshal's opinion in *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810), prohibits that line of inquiry. The Court

should issue the City's proposed protective order to prevent that unprecedented intrusion into the City's legislative process.

The City's purpose in adopting the Overlay is irrelevant to the Postal Service's two Supremacy Clause claims. It can point to no case in which a court has found legislative purpose relevant to either the intergovernmental immunity doctrine or conflict preemption. Moreover, even if legislative purpose were relevant, the plaintiff must prove it solely with objective, extrinsic indicia of intent: the terms of the ordinance, its legislative history, and the circumstances of its adoption. In fact, the cases recognize that the subjective motivations of individual legislators are irrelevant and therefore have found evidence of those motive to be privileged. The City is therefore entitled to a protective order prohibiting depositions that inquire into the City officials' motives in adopting the Overlay.

Finally, even if the Postal Service claims that it wishes to inquire only about events and public statements of the proposed deponents, the Court should forbid the depositions. Senior government officials may not be deposed unless the evidence to be elicited cannot be obtained by less intrusive means. The Postal Service has demonstrated that it has such evidence already in its possession and in any event has other, less burdensome discovery mechanisms available to obtain it.

FACTUAL AND PROCEDURAL BACKGROUND

The Main Berkeley Post Office at 2000 Allston Way has been in use as a post office since the 1930s. Dkt. 1, ¶ 13. On September 9, 2014, the City Council adopted the Civic Center District Overlay, Chapter 29E.98 of the Municipal Code, after a first reading. Dkt. 1, ¶ 32; Dkt. 1-1. The City again adopted the Overlay on September 30, 2014 after a second reading, Dkt. 1, ¶ 36, and the Overlay went into effect 30 days later.[1] The Overlay was designed to augment the protections for the buildings and land uses provided by the City's

[1] The Complaint alleges that the Overlay "went into effect" on September 30. Actually, this was the date of its second reading, and it took effect 30 days thereafter. Cal. Gov't Code § 36937; City of Berkeley Charter § 93.

historic preservation zoning controls, the first of which were adopted in 1974. *See* City of Berkeley Municipal Code ("Muni. Code") ch. 3.24; Dkt. 1-1, § 23E.98.020.

The Post Office is located within the City's Civic Center Historic District, which was formed in 1998 as an amendment to the City's historic zoning. Dkt. 1-1, § 23E.98.010; Dkt. 1-2. The Civic Center Historic District was designated under the city's Landmarks Preservation Ordinance, referenced as Chapter 3.24 in the Overlay. Dkt. 1-1, § 23E.98.010. That historic district recognizes the Civic Center's special role in Berkeley's history, as well as the cultural and artistic merit of its buildings, including the Post Office. Following its designation, the Civic Center Historic District also was included in the National Register of Historic Places. *See* Dkt. 12, Ex. E; Dkt. 23, Ex. B. The boundaries of the Overlay are coterminous with those of the Civic Center Historic District. Dkt. 23, Ex.'s A & B.

The Overlay's general purpose is 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." Dkt. 1-1, § 23E.98.020. Its several specific 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 nine properties in the Overlay area include a variety of civic, institutional, and community-serving uses, such as the City's Civic Center Building, Berkeley High School, and the Post Office. Dkt. 1-1, § 23E.98.010. Five of the nine buildings subject to the new regulations are owned by the City. The others are owned by the YMCA, a non-profit entity; the Berkeley Unified School District (two); and the Postal Service. Dkt. 1, ¶ 32; Dkt. 1-1, § 23E.98.010. The Overlay controls the allowable uses on all of the affected properties to ensure that they retain their historic community-serving roles. Dkt. 1-1, § 23E.98.030.

The Postal Service filed this suit under the Supremacy Clause, claiming that the Overlay violates the intergovernmental immunity doctrine and is preempted by several constitutional and statutory provisions. Dkt. 1, ¶¶ 1-2, 8-11. Specifically, the Postal Service alleges that the Overlay interferes with the Service's desire to sell the Post Office building. Dkt. 1, ¶ 27.

The Postal Service now seeks to depose 21 City officials: sitting and former members of the City Council and Planning Commission, as well as the current mayor and a former mayor. Dkt. 65 at 1 n.1 & Ex. 1. On August 3, 2017, after conferring with the Postal Service, the City filed a letter brief requesting a protective order to prevent the Service from deposing up to 21 City officials. Dkt. 63. The Postal Service filed a responsive letter. Dkt. 65. The parties conferred again on August 17, 2017. Following that conference, at an August 17, 2017 hearing, this Court directed the City to file a noticed motion for a protective order by August 24, 2017. Dkt. 66. In the meantime, on August 18, 2017, the Postal Service served the City with a series of 49 requests for admission seeking information about statements made by many of the officials that the Service seeks to depose. Schwartz Decl., ¶ 3 & Ex. 1.

ARGUMENT

This Court may issue a protective order "forbidding . . . discovery" or "forbidding inquiry into certain matters" for good cause under Rule 26(c)(1). Fed. R. Civ. P. 26(c)(1)(A), (D). Further, the Court may enter an order under Rule 26(b)(2)(C) to "limit the . . . extent of discovery" as necessary to avoid duplicative discovery or discovery outside the scope established by Rule 26(b)(1). Fed. R. Civ. P. 26(b)(2)(C)(i), (iii). As demonstrated below, good cause justifies an order forbidding, or at the least limiting the scope of, the depositions of City officials sought by the Postal Service.

I. The City's intent in adopting the Overlay is irrelevant to whether the Overlay violates the Supremacy Clause.

Rule 26(b) limits discovery to any "nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). The City's intent in adopting the Overlay is

not relevant to either of the Postal Service's Supremacy Clause claims. *See RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1146 n.7 (9th Cir. 2004) ("[F]acts . . . introduced solely to establish a supposed nefarious motive on behalf of the City Council" are "wholly irrelevant" to its constitutionality). Because the evidence sought in the Postal Service's proposed depositions "is not relevant, the court should restrict discovery by issuing a protective order." *Travelers Indem. Co. v. Arch Specialty Ins. Co.*, No. 2:11-cv-1601 JAM CKD, 2012 U.S. Dist. LEXIS 80775, at *12 (E.D. Cal. June 11, 2012) (citations omitted).

As a general rule, legislative intent is irrelevant to judicial review of the constitutionality of an enactment. *See McCray v. United States*, 195 U.S. 27, 56 (1904) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."); *Arizona v. California*, 283 U.S. 423, 456 (1931) (collecting cases); *Fletcher,* 10 U.S. at 131 (A court "cannot sustain a suit . . . founded on the allegation that the act is a nullity, in consequence of the impure motive which influenced certain members of the legislature which passed the law."); *see also United States v. O'Brien*, 391 U.S. 367, 382-85 (1968) (applying this rule to First Amendment claims). Rather, "analysis of the constitutionality of an ordinance must proceed from the text of the ordinance, not the alleged motives behind it." *RUI One Corp.*, 371 F.3d at 1146 n.7. In particular, when the constitutional test turns on "the effect of the [challenged] regulation," facts about supposed nefarious legislative intent are wholly irrelevant to the analysis. *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984).

There are several narrow exceptions to this rule, but none apply here. First, a court may inquire into legislative purpose when *interpreting* legislation rather than reviewing its constitutionality "because the benefit of sound decision-making in [the former] circumstance is thought sufficient to risk the possibility of misreading Congress' purpose." *O'Brien*, 391 U.S. at 383-84. Second, judicial inquiry into legislative purpose is permitted for the "very limited and well-defined class of cases where the very nature of the constitutional question requires" it. *Id.* at 383 n.30. That class comprises claims challenging stat-

utes as violating the Bill of Attainder, Establishment, or Equal Protection Clauses. *See id.*; *Planned Parenthood v. Moser*, 747 F.3d 814, 841 (10th Cir. 2014). In those instances, legislative intent is relevant only because it is "a substantive element of the test of constitutionality." *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1259 (4th Cir. 1989).

The Postal Service's claims do not fall within this tightly circumscribed class of exceptions because legislative purpose is not an element of either claim. Both claims arise under the Supremacy Clause: (1) that the Overlay is preempted by federal constitutional and statutory provisions governing the disposition of Postal Service property, and (2) that the Overlay violates the doctrine of intergovernmental immunity by allegedly preventing the federal government's sale of the Post Office. *See North Dakota v. United States*, 495 U.S. 423 (1990). Motive is a substantive element of neither a preemption nor an intergovernmental immunity claim. Rather, as in the First Amendment context, *see City of Las Vegas*, 747 F.2d at 1298, the legal effect of the Overlay—whether it conflicts with the mandates of federal law or singles out the federal government for direct regulation—is dispositive.

A. Legislative purpose is irrelevant to conflict preemption claims.

First, the Postal Service alleges the Overlay is preempted because it actually conflicts with federal law giving the Postal Service exclusive power to obtain, operate, and dispose of postal property. *See* Dkt. 43, at 9; Dkt. 1, ¶ 47. Conflict preemption arises where "compliance with both federal and state regulations is a physical impossibility" and "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citations omitted). In both instances, the inquiry is whether the local ordinance "actually interferes" with a Congressional enactment. *Ting v. AT&T*, 319 F.3d 1126, 1137 (9th Cir. 2003); *see also, e.g., Arizona*, 567 U.S. at 406 (striking down a state law that "would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens"). A court "will find conflict preemption only in those situations

where conflicts will *necessarily* arise." *Shroyer v. New Cingular Wireless Servs.*, 498 F.3d 976, 988 (9th Cir. 2007) (emphasis added) (citation omitted).

The purpose of the local legislating body has no bearing on this analysis: either a local ordinance actually conflicts or it does not. For this reason, both Circuit cases that the Postal Service relies on for its conflict preemption claim (*see* Dkt. 20 at 27-28) consider only the actual effect of the challenged action on a federal program or interest. In *Flamingo Indus. v. United States Postal Serv.*, 302 F.3d 985 (9th Cir. 2002), *rev'd on other grounds by* 540 U.S. 736 (2004), the plaintiff brought a claim under California Business & Professions Code section 17200 to challenge the Postal Service's procurement decisions. The Ninth Circuit found the state law to be preempted in that context because it would have "impinge[d] upon the Service's right to control the character and necessity of its purchases free from state constraint, and would negate the deferential standards Congress has created for federal court review of such decisions." *Id.* at 997. The court did not consider either the plaintiff's or the state's intent. Nor was the city's intent at issue in *United States v. City of Pittsburg*, 661 F.2d 783 (9th Cir. 1981), in which the Ninth Circuit invalidated a local ordinance that had the proven effect of interfering with Congress's objective to promote efficient mail delivery. *Id.* at 785-86 & n.4.

B. Legislative purpose is irrelevant to intergovernmental immunity claims.

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 435. Here too, it is the effect, not the purpose, of that state regulation that is determinative.

In determining whether an ordinance directly regulates the federal government, this Court must consider the "express terms" of the act, *United States v. Arcata*, 629 F.3d 986, 991 (9th Cir. 2010), and its "application," *Blackburn v. United States*, 100 F.3d 1425, 1435 (9th Cir. 1996). Whether the local agency *intended* to regulate the federal government is beside the point. *See, e.g.*, *Hancock v. Train*, 426 U.S. 167, 180 (1976) (federal gov-

ernment could not be compelled to comply with state permitting scheme that would directly prohibit a federal activity); *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 410-11 (3d Cir. 2012) (application of unclaimed property acts to recover for states the proceeds of matured but unredeemed United States savings bonds would directly interfere with exclusive federal authority over the disposition of its property). A contrary rule would represent a profound and unprecedented departure from the "restraint" that has "marked" "[t]he Supreme Court's modern-day treatment of the intergovernmental immunity doctrine." *In re NSA Telecomms. Records Litig.*, 633 F. Supp. 2d 892, 903 (N.D. Cal. 2007).

Intent is equally irrelevant to inquiries under the discrimination prong of the intergovernmental immunity doctrine. "The nondiscrimination rule finds its reason in the principle that the States may not directly obstruct the activities of the Federal Government." *North Dakota*, 495 U.S. at 437-38. Unlike discrimination claims brought under the Equal Protection Clause, the City has found no case suggesting that improper animus or illicit purpose is an element of an intergovernmental immunity discrimination claim. *Cf. United States v. Windsor*, 133 S.Ct. 2675, 2693 (2013) ("improper animus or purpose" is an element of equal protection clause claims). Rather, a state only discriminates against federal actors when "it *treats* someone else better than it treats them." *Washington v. United States*, 460 U.S. 536, 544-45 (1983) (emphasis added).

In performing this analysis, a court considers the face of the challenged ordinance. *See Arcata*, 629 F.3d 992 (ordinances discriminate against the United States because they expressly "restrict the conduct of military recruiters" while permitting recruitment by non-federal actors). It also considers the broader regulatory regime of which the ordinance is a part because a law that appears to treat the Government differently "may, in its broader regulatory context, not be discriminatory." *North Dakota*, 495 U.S. at 438; *see Boeing Co. v. Movassaghi*, 768 F.3d 832, 837-38, 842-43 (9th Cir. 2014) (state law violated intergovernmental immunity because it required more stringent environmental remediation for a federal site than was required elsewhere in the state under other state and federal laws). But the court does not examine legislative purpose because it is irrelevant to the disposi-

tive question whether the state has in fact harmed the federal government as compared to similarly situated actors.

II. Even if *the City's* purpose in enacting the Overlay were relevant, the motives of individual City officials would not be a proper subject for discovery.

Even in the limited legal contexts in which a legislative body's purpose is relevant to judicial review, courts have repeatedly held that evidence of the subjective considerations and motivations of individual legislators is irrelevant and that evaluating legislation on the basis of such motivations would be a "hazardous task." *City of Las Vegas,* 747 F.2d at 1297. Courts have therefore recognized a privilege against discovery and introduction of evidence of legislators' motives. Because the proposed depositions would inquire about officials' subjective motives, they both seek irrelevant evidence and are barred by privilege. The Court should therefore issue a protective order forbidding them.

A. Evidence of individual officials' motives for adopting the Overlay is irrelevant.

Even in that narrow class of claims that have improper legislative intent as an element—a class to which the Supremacy Clause claims here do not belong—subjective motivations of legislators are irrelevant because they cannot be imputed to the legislative body as a whole. *See In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely."); *S.C. Educ. Ass'n*, 883 F.2d at 1262 ("It is axiomatic that if motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant.") (citing *Aldridge v. Williams*, 44 U.S. 9, 24 (1845)). Rather, courts consider only objective indicia of legislative purpose: the "text, legislative history and implementation of the statute, or comparable official act." *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005) (citation omitted); *see also Soon Hing v. Crowley*, 113 U.S. 703, 710-11 (1885) (This "rule is general with reference to the enactments of all legislative

bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation.").

That does not mean that where a claim turns on legislative intent, the court need accept a legislature's stated purpose if it is a "sham." *McCreary Cty.*, 545 U.S. at 864-65. But in considering whether a stated purpose is pretext for illicit legislative intent, the reviewing court is restricted to "openly available data." *Id.* at 863. "[J]udicial psychoanalysis of a drafter's heart of hearts" is off limits." *Id.* at 862; *see also id.* at 863 ("Establishment Clause analysis does not look to the veiled psyche of government officers[.]"); *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring) ("[A] court has no license to psychoanalyze the legislators" and should "generally defer to [the] stated intent" in a statute's text or legislative history.). Here, the legitimate purposes of the Overlay—including to maintain and protect the integrity of the City's Historic Civic Center as a space focused on civic and community activities—are laid bare on the face of the Act, and if any further inquiry is needed, the Court need look no further than the legislative history already produced in discovery. *See* Dkt. 1-1, § 23E.98.020; Schwartz Decl., ¶ 2.

The Supreme Court in *United States v. O'Brien* set forth three reasons for proscribing inquiry into statements by individual legislators. First, inquiry into subjective motivations carries too high a risk of "misreading Congress' purpose," since "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *O'Brien*, 391 U.S. at 384. Second, it would be futile to invalidate a law that could simply be "reenacted in it exact form if the same or another legislator made a 'wiser' speech about it." *Id.* And third, the Court expressed its reluctance to authorize judicial invalidation of beneficial laws only because they resulted from a tainted process.[2] *Id.* (declining "to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact"); *see generally* John Hart Ely, *Legislative & Administrative Mo-*

[2] Judicial scrutiny of legislators' motivations also represents a breach of the separation of powers between the judicial and political branches of government. *S.C. Educ. Ass'n*, 883 F.2d at 1257.

tivation in Constitutional Law, 79 Yale L.J. 1205, 1212-17 (1970). Furthermore, a contrary rule would open the door to absurd gamesmanship: if individual motives could be imputed to the legislative body as a whole, any legislator could sabotage a bill simply by making a speech about the illicit intent motivating her yes vote.

The Supreme Court's decision in *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), is on point. There, the Court rejected the claim that a California regulation governing the construction of nuclear plants was preempted by the federal Atomic Energy Act. Although the purpose of a challenged regulation is typically irrelevant to preemption analysis, it came into play in that case only because Congress, while occupying the field of nuclear safety regulation, had expressly reserved to the states the authority to regulate for "purposes other than protection against radiation hazards." *Id.* at 199 (citation omitted). In inquiring into "whether there was a nonsafety rationale" for the state regulation so that it fell within this reservation, *id.* at 213, the Court declined the petitioner's invitation to become "embroiled in attempting to ascertain California's true motive" and instead limited its inquiry to the face of the regulation and to the official report of the Assembly Committee that had proposed it, *id.* at 216. Relying on *O'Brien*, the Court reasoned that ascertaining California's "true motive" was an "unsatisfactory venture" as "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Id.*; *see also Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 597 (4th Cir. 2017) (declining to "look past the statute's plain meaning to decipher" legislative intent for similar field preemption claim).

In sharp contrast to its litigation position here, the Department of Justice recently urged the Ninth Circuit to ignore extrinsic evidence of intent in ascertaining whether President Trump's most recent executive order on immigration violated the Establishment and Equal Protection Clauses. Brief for Appellants at 58-60, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. April 7, 2017) (No. 17-15589), ECF No. 23. As the Government there explained, "[s]earching for governmental purpose outside the operative terms of governmental action and official pronouncements is fraught with practical 'pitfalls' and 'hazards' that

would make courts' task [*sic*] 'extremely difficult.'" *Id.* at 58 (quoting *Palmer v. Thompson*, 403 U.S. 217, 224 (1971)); *see also id.* at 59 (arguing that Supreme Court precedent precludes "inquiry into [a public decision maker's] 'veiled psyche'" (quoting *McCreary Cty.*, 545 U.S. at 863)). In that case, the Government tried to curtail inquiry into the "subjective views" of a single official—the President who signed the order into law. *Id.* at 58. The hazards of inquiry into subjective motivation are even more pronounced when it comes to investigating the personal motives of the many members of a legislative body that voted on an ordinance. If President Trump's subjective motivations are irrelevant then certainly the conflicting intentions of nearly two dozen City officials are as well.

B. The evidence of legislators' motives that the Postal Service seeks is also privileged.

The irrelevance of legislators' subjective motivations for enacting legislation has compelled the courts to recognize a "mental process privilege," which prohibits discovery of public agency decision makers' subjective motivations for or considerations in reaching a challenged decision. *See N. Pacifica LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (citing, among other cases, *United States v. Morgan,* 313 U.S. 409 (1941), *City of Las Vegas,* 747 F.2d 1294, and *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318 (D.D.C. 1966)); *Kay v. City of Rancho Palos Verdes*, No. CV 02-03922 MMM (RZ), 2003 U.S. Dist. LEXIS 27311 (C.D. Cal. Oct. 9, 2003) (granting protective order prohibiting deposition of city councilmembers and planning commissioners about their motivations in adopting ordinance); *Knights of Columbus v. Town of Lexington*, 138 F. Supp. 2d 136, 139 (D. Mass. 2001) (holding that "inquiry into each Selectman's personal motivation generally is not appropriate") (citing *City of Las Vegas*); *Miles-UN-Ltd. v. Town of New Shoreham*, 917 F. Supp. 91, 98 (D.N.H. 1996) (denying motion to compel testimony about local officials' motives for amending an ordinance to regulate mopeds); *Searingtown Corp. v. N. Hills*, 575 F. Supp. 1295, 1299 (E.D.N.Y. 1981) (refusing motion to compel local legis-

lators to testify about their motives in rezoning property).[3] The mental process privilege is based generally on the same rationales as expressed in the cases barring inquiries into the state of mind of legislators on relevance grounds.

City of Las Vegas v. Foley is precisely on point. The plaintiff there challenged a city zoning ordinance that restricted the location of sexually oriented businesses and sought to depose city officials to determine their motives for enacting the ordinance. After the district court denied the city's motion for a protective order, the Ninth Circuit issued a writ ordering the district court to grant a protective order prohibiting the plaintiff from deposing the officials. The court held that "[a]llowing discovery of legislative motives . . . would . . . create a major departure from the precedent rejecting the use of legislative motives." 747 F.2d at 1297-98. The court accordingly directed the district court to limit any depositions of city officials "to establishing relevant objective circumstances under which the ordinance was enacted." *Id.* at 1299.

Like the zoning ordinance in *City of Las Vegas,* the zoning Overlay here was a legislative enactment of the Planning Commission and City Council.[4] The mental process privilege precludes the Postal Service from inquiring about those decision makers' thought processes and their subjective considerations underlying enactment of the Overlay.

To the extent the Postal Service seeks to inquire into officials' statements made during the process of formulating the Overlay, that inquiry is also barred by the "deliberative process privilege." *N. Pacifica*, 274 F. Supp. 2d at 1121 (holding that the privilege applies to deliberations by local legislators). The purpose of this privilege is to "allow agencies

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[3] In the context of legislative decisions such as the amendment of a zoning ordinance at issue here, some courts discuss the privilege as a "legislative testimonial privilege" arising from legislators' immunity from liability for legislative acts. *See, e.g., Miles-UN-Ltd.*, 917 F. Supp. at 102.

[4] The Postal Service has argued that the mental process privilege applies only in adjudicatory, not legislative, proceedings. Dkt. 65 at 2 n.2. *City of Las Vegas* demonstrates otherwise, and another judge of this Court has expressly rejected that argument. *N. Pacifica*, 274 F. Supp. 2d at 1122 (the privilege "has been applied in both the adjudicative and legislative context[s]") (citing *City of Las Vegas*).

freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." *Assembly of Cal. v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). It precludes the taking of testimony about policy makers' deliberations, including their pre-decisional "opinions, recommendations, or advice about . . . policies" as well as facts that are "so interwoven with the deliberative material that [they] are not severable." *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *see also N. Pacifica*, 274 F. Supp. 2d at 1121-22 (applying the privilege to testimony and documents). Here, any deliberative statements between the legislators are in the public record as required under the Brown Act. Cal. Gov't Code §§ 54950-54963. And the deliberative process privilege (as well as the mental process privilege) bars further inquiry into the thought processes behind those statements, as well as inquiry into any confidential deliberative statements by the legislators, such as those made to their staff.

In its letter brief, the Postal Service offered several theories why the well-established mental process privilege should not apply. It argued "where there is a chain of events from which the City's illicit purpose can be inferred . . . depositions of government officials are appropriate, and an inquiry into legislators' purpose is proper." Dkt. 65 at 1, 2 (quoting *City of Las Vegas,* 747 F.2d at 1298). There is no support whatever for the notion that the existence of evidence of such a "chain of events" will defeat the mental process privilege. The "chain of events" language derives from *City of Las Vegas*'s discussion distinguishing *Tovar v. Billmeyer,* 721 F.2d 1260 (9th Cir. 1983), in which decision makers were deposed *without objection*; no privilege had been asserted. *See City of Las Vegas,* 747 F.2d at 1298 (discussing *Tovar,* 721 F.2d at 1265-66); *see also infra*. Similarly, in *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998), on which the Service relies (Dkt. 65 at 3), the court held (and characterized *City of Las Vegas* as holding) that officials' statements could be *relevant* if the statements showed such a "chain of events."[5] 163 F.3d at 553 (dis-

[5] In fact, the *Colacurcio* court held that such statements could only be relevant "if they show objective manifestations of an illicit purpose, such as a departure from normal procedures or a sudden change in policy." 163 F.3d at 552. In that case, the court held that
(footnote continued on next page)

cussing *Las Vegas,* 747 F.2d at 1298). In *Colacurcio*, the statements had been made in public meetings, and no discovery issue was presented. *Id.* Neither case holds or implies that municipal legislators may be compelled to testify about their intentions or motivations.

The Service leans heavily on *Tovar v. Billmeyer*. Dkt. 65 at 3. But *City of Las Vegas*—which arose in a procedural posture identical to our case—distinguished *Tovar* at length and on points equally applicable here. 747 F.2d at 1298-99. First, the court noted that *Tovar* "does not even discuss Supreme Court precedent" holding subjective motives to be irrelevant, implying that *Tovar* is inconsistent with those cases. *Id.* at 1298. Second, the propriety of deposing councilmembers "was not an issue before the Court" because "[t]he parties did not raise this issue and the court had no occasion to consider it." *Id.* Third, the deposition testimony in *Tovar* provided evidence of objective events or actions that indicated legislative purpose, such as the mayor's instruction to the building inspector to deny a permit. *Id.* In light of these distinctions, the court thus concluded that "*Tovar* provides inadequate support for plaintiffs' contention that inquiry into legislators' individual motivations is a proper avenue of discovery." *Id.* at 1299.

In sum, City officials' thoughts about the Overlay are protected by the mental process privilege, which is rooted in two centuries of case law about the irrelevance of individuals' subjective motivations to the constitutionality of their actions.

III. If the court were to limit depositions to inquiring about the officials' knowledge of events or other historical facts unrelated to motive, the depositions would be of such meager utility that they would be barred as an unjustified imposition on senior government officials.

If the Court concludes that the City officials can be questioned about subjects other than their motives, the Court should still refuse to allow depositions on other topics. If the depositions were limited to questions about public statements or actions, they would be

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the statements did not "indicate unusual procedural maneuvering" by the city or "procedural lapses that might suggest unjust treatment." *Id.*

duplicative and burdensome and thus barred by the principle that "[h]eads of government agencies . . . are not normally subject to deposition" absent extraordinary circumstances. *K.C.R. v. Cty. of L.A.*, No. CV 13-3806 PSG (SSx), 2014 U.S. Dist. LEXIS 98279, at *8 (C.D. Cal. July 11, 2014) (discussing this "apex doctrine," referring to officials at the apex of an agency or organization) (citation omitted). Further, the depositions would not be "proportional to the needs of the case, considering . . . the importance of the discovery in resolving the issues" and because "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

"[H]igh ranking government officials are generally not subject to depositions unless . . . the party seeking the deposition makes a showing that the information cannot be obtained elsewhere." *Alexander v. FBI*, 186 F.R.D. 1, 4 (D.D.C. 1998); *accord Kyle Eng'g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) ("Heads of government agencies are not normally subject to deposition."); *Church of Scientology of Boston v. IRS*, 138 F.R.D. 9, 12 (D. Mass. 1990).[6] "[T]he party seeking the depositions must demonstrate that the particular official's testimony . . . is essential to that party's case, [and] the evidence must not be available through an alternative source or via less burdensome means." *Warzon v. Drew*, 155 F.R.D. 183, 185 (E.D. Wis. 1994).

The Postal Service cannot satisfy the prerequisites for deposing senior governmental officials under the apex doctrine. Its letter brief demonstrates that depositions are unnecessary to obtain evidence other than the subjective motivations of the deponents—evidence that is both irrelevant and privileged, as described above. The Service's letter brief cites evidence, presumably already in its possession, of statements made by the City officials they wish to depose. Dkt. 65 at 3. Further, it has propounded requests for admission asking the City to confirm a host of specific statements by City officials, and the City is in the process of responding to those requests. Schwartz Decl., ¶ 3 & Ex. 1.; *cf. Alexan-*

[6] Qualifying "officials continue to be protected by the apex doctrine even after leaving office." *K.C.R.*, 2014 U.S. Dist. LEXIS 98279, at *9.

der, 186 F.R.D. at 5 (ordering plaintiffs to seek information via interrogatories before the court would allow depositions of senior officials). The Postal Service thus cannot show that depositions are "essential to [its] case" and that "the evidence [sought is] not . . . available through an alternative source or via less burdensome means." *Warzon*, 155 F.R.D. at 185. Furthermore, the burden on high-level officials imposed by the proposed depositions here dwarfs that in the apex doctrine cases cited above, in which parties sought to depose one or two officials. The Postal Service seeks to depose *21 City policymakers* in this case.

In its letter brief, the Service suggests that municipal officials are a lesser species of official not entitled to the protection of the apex doctrine. Dkt. 65 at 1 n.1. On the contrary, the doctrine has been repeatedly applied to a variety of local government officials. *See, e.g., Lederman v. N.Y.C. Dep't of Parks & Rec.*, 731 F.3d 199, 204 (2d Cir. 2013) (mayor and deputy mayor); *Payne v. Dist. of Columbia*, 859 F. Supp. 2d 125, 135-36 (D.D.C. 2012) (mayor); *First Resort, Inc. v. Herrera*, No. CV 11-5534 SBA (KAW), 2014 U.S. Dist. LEXIS 19418, at *21-22 (N.D. Cal. Feb. 14, 2014) (city attorney); *Arizmendi v. City of San Jose*, No. C08-05163 JW (HRL), 2010 U.S. Dist. LEXIS 46288, at *7-8 (N.D. Cal. Apr. 7, 2010) (police chief); *K.C.R.*, 2014 U.S. Dist. LEXIS 98279, at *17-18 (sheriff).[7] The officials that the Postal Service seeks to depose here—current and former mayors, city council members, and planning commissioners (Dkt. 65, at 1 n.1)—are the top legislators and policymakers for the City. They are comparable to the array of local officials to whom the doctrine has been applied.

It appears that any evidence, other than evidence of motive, that the Postal Service could obtain is duplicative of information already in its possession or can be obtained by other, less burdensome means of discovery, such as the requests for admission recently propounded by the Postal Service. Schwartz Decl., ¶ 3 & Ex. 1. Accordingly, the depositions are not "proportional to the needs of the case," due to the limited "importance of the

[7] The Service cites *Green v. Baca,* 226 F.R.D. 624, 649 (C.D. Cal. 2005). Dkt. 65, at 1 n.1. However, "*Green* did *not* rest on an affirmative finding that the LASD Sheriff was not a high-ranking official . . . ." *K.C.R.*, 2014 U.S. Dist. LEXIS 98279, at *14 (emphasis added).

discovery in resolving the issues" and because "the burden or expense of the proposed discovery"—requiring 21 busy public officials to sit for depositions—"outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1); *see Hancock v. Aetna Life Ins. Co.*, No. C16-1697JLR, 2017 U.S. Dist. LEXIS 113284, at *14 (W.D. Wash. 2017) (denying motion to compel responses to interrogatories that were not proportional to the needs of the case).

IV. If depositions are allowed to proceed, they should be limited to questioning about officials' knowledge of historical facts unrelated to subjective motivation.

If despite the arguments made above, the Court determines that depositions may proceed, it should sharply limit the subjects to be covered by the depositions. The Court should modify the [Proposed] Order to limit the scope of depositions to inquiring "relevant objective circumstances under which the [City's Civic Center District Overlay] was enacted." *City of Las Vegas*, 747 F.2d at 1299. To the extent deponents are to be questioned about prior statements, the questioning should be limited to objective facts about the statements, such as where and when they were made, and should not inquire about the deponent's intention in making the statements.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court grant the [Proposed] Order filed herewith prohibiting depositions of City officials. If the Court allows depositions to proceed, the City requests that the Court nevertheless issue a modified protective order limiting the scope of any such depositions to "relevant objective circumstances under which the [City's Civic Center District Overlay] was enacted." *City of Las Vegas*, 747 F.2d at 1299.

DATED: August 24, 2017

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