

1 BENJAMIN C. MIZER
 Principal Deputy Assistant Attorney General
 2 JOSEPH H. HUNT
 Director, Federal Programs Branch
 3 JACQUELINE COLEMAN SNEAD
 Assistant Branch Director
 4 JULIA BERMAN, CA. Bar No. 241415
 Trial Attorney
 5 U.S. Department of Justice, Civil Division
 20 Massachusetts Avenue, NW
 6 Washington, D.C. 20001
 Phone: (202) 616-8480; Fax: (202) 616-8470
 7 Email: julia.berman@usdoj.gov
 8 *Attorneys for the United States Postal Service*

9
 10 **IN THE UNITED STATES DISTRICT COURT**
 11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

)	
UNITED STATES POSTAL SERVICE,)	Case No. 16-cv-4815-WHA
)	
Plaintiff,)	
)	
v.)	
)	
CITY OF BERKELEY)	
)	
Defendant.)	
)	PLAINTIFF’S
)	SURREPLY IN SUPPORT
)	OF ITS OPPOSITION
)	TO DEFENDANT’S
)	MOTION TO DISMISS

22 At the December 22, 2016 hearing on the Defendant’s Motion to Dismiss, ECF No. 11,
 23 the Court offered Plaintiff the opportunity to respond to the Defendant’s argument, raised for the
 24 first time in its reply brief, that the Court may not consider legislators’ intent in assessing the
 25 constitutionality of the Zoning Ordinance, *see* Def.’s Reply, ECF No. 22 at 4–5. That argument
 26 is erroneous, and Plaintiff respectfully submits this brief surreply in response.
 27

ARGUMENT

1
2 The Ninth Circuit has made clear that it is appropriate for a court to consider objective
3 indicators of an ordinance’s purpose—including statements made by legislators—in assessing
4 whether that ordinance is constitutional. *See, e.g., Colacurcio v. City of Kent*, 163 F.3d 545, 552
5 (9th Cir. 1998); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984). Specifically
6 rejecting a city’s argument that “the court need only look to the stated purposes of [an] ordinance
7 to find a permissible purpose,” the Ninth Circuit instead has instructed that a court’s analysis
8 should encompass “all ‘objective indicators of intent’ including ‘the face of the statute, the effect
9 of the statute, comparison to prior law, facts surrounding the enactment, the stated purpose, and
10 the record of proceedings.’” *Colacurcio*, 163 F.3d at 552 (quoting *City of Las Vegas*, 747 F.2d at
11 1297)); *see also Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1013 (9th Cir. 2004)
12 (looking to “the full record,” including the facts surrounding the enactment of a statute, to
13 determine its purpose).

14 While Defendant correctly notes that the Supreme Court has discussed the “hazard[s]” of
15 inquiring into the subjective motivations of individual legislators, Def.’s Reply at 4 (quoting
16 *United States v. O’Brien*, 391 U.S. 367, 383 (1968)), such concerns are mitigated, and individual
17 statements by city leaders are admissible, if those statements are “part of the chain of events
18 from which intent may be inferred, rather than merely the subjective intent of individual
19 legislators.” *City of Las Vegas*, 747 F.2d at 1297. Thus, the Ninth Circuit in *Tovar* concluded
20 that it was appropriate to consider a mayor’s statement regarding the city council’s purpose in
21 making a zoning decision (*i.e.* “to see what the City Council could do about getting the
22 [plaintiffs’] Gallery Theater out of [the city]”), because that statement had been part of a chain of
23 events from which the council’s purpose could be inferred. *Tovar v. Billmeyer*, 721 F.2d 1260,
24 1264 (9th Cir.1983); *see also City of Las Vegas*, 747 F.2d at 1297.

25 The case law relied on by the Defendant in its reply is not to the contrary in merely
26 recognizing that “an otherwise constitutional statute will not be invalidated on the basis of an
27 alleged illicit legislative motive.” *Id.* (quoting *O’Brien*, 391 U.S. at 383). Thus, the Ninth
28 Circuit in *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004), declined to consider

1 “facts introduced solely to establish a supposed nefarious motive on behalf of the City Council,”
2 where the Court determined the challenged ordinance otherwise was constitutional. *See* 371
3 F.3d at 1146, n.7. Such analysis has no application where, as here, the challenged ordinance is
4 unconstitutional in its effect—specifically, in its interference with the execution of a federal
5 function, *see* Plaintiff’s Opp’n at 17–19, 21–24 (discussing the reasons why the Ordinance
6 violates the Supremacy Clause and is preempted by federal law)—rather than solely because of
7 the alleged purpose behind it.

8 Here, as in the *Tovar* case discussed by the Ninth Circuit in *City of Las Vegas*, the
9 statements by City officials on which the Plaintiff relies are part of an objective chain of events
10 from which the purpose of the Zoning Ordinance, *i.e.*, the interfere with the Postal Service’s
11 ability to sell its property, can be inferred. As alleged in the Complaint, that chain began with a
12 resolution in which the City announced its formal opposition to the sale, and “request[ed] that
13 USPS immediately impose a moratorium on all sales of Post Office Buildings nationwide.”
14 Compl. ¶ 17 (quoting Resolution 66,025-N.S.). The City Council then appealed the then-current
15 decision of the Postal Service to relocate retail services, first to the Postal Service and then to its
16 regulator, reiterating its “passionate . . . opposition to the sale of this property.” *Id.* ¶ 18 (quoting
17 April 30, 2013 Letter to Postal Service). After the Postal Service’s regulator dismissed the
18 City’s Appeal, *id.* ¶¶ 19–20, then-City Councilmember (now Mayor) Jesse Arreguín sent a letter
19 warning the Postal Service that the Council was considering a zoning ordinance that “would
20 affect what a buyer could do with the property if the building was sold,” and reaffirming “the
21 Berkeley City Council’s strong opposition to the sale.” *Id.* ¶ 28 (quoting Exh. 2 to the
22 Complaint). It was in this context that the statements cited in the Complaint arose—a chain of
23 events reflecting the purpose of the City Council in enacting the Zoning Ordinance, not isolated
24 statements by a few individuals about their own subjective motivations.¹ Under such

25
26 ¹ In addition to the “sudden change in policy”—the enactment of the Zoning Ordinance
27 following the failure of other measures taken to prevent the sale of the Property—Plaintiff
28 submits that additional factual development likely will reveal further objective indicia of an
illicit purpose, including “a departure from normal procedures,” as discussed in *Colacurcio v.*
City of Kent, 163 F.3d at 552.

1 circumstances, the Ninth Circuit has made clear that it is appropriate for the Court here to
2 consider, among other things, statements made by City officials in assessing the unlawful
3 purpose and effect of the Zoning Ordinance. The Defendant’s argument to the contrary is
4 without merit, and accordingly should be rejected.

5 **CONCLUSION**

6 For the foregoing reasons and those explained in Plaintiff’s opposition and at the hearing,
7 Defendant’s Motion to Dismiss should be denied.

8 Dated: December 27, 2016

Respectfully submitted,

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10 OF COUNSEL:

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

11 JANINE CASTORINA
12 Attorney
13 Appellate and Commercial Litigation
14 United States Postal Service
15 475 L’Enfant Plaza, SW
16 Washington, DC, 20260
17 Phone: (202) 268-3069
18 Fax: (202) 268-2049
19 E-mail: Janine.Castorina@usps.gov

JOSEPH H. HUNT
Branch Director

JACQUELINE COLEMAN SNEAD
Assistant Branch Director

20 /s/ Julia Berman
21 JULIA A. BERMAN, Bar No. 241415
22 United States Department of Justice
23 Civil Division, Federal Programs Branch
24 20 Massachusetts Avenue, N.W.
25 Washington, D.C. 20001
26 Tel: (202) 616-8480
27 Fax: (202) 616-8470
28 Email: julia.berman@usdoj.gov
Counsel for Plaintiff