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Via E-Filing and U.S. Mail

Hon. William Alsup
Judge of the U.S. District Court
Northern District of California

Re: Depositions of City Councilmembers and Planning Commissioners: *United States Postal Service v. City of Berkeley*, Case No. 3:16-cv-04815-WHA

Dear Judge Alsup:

Under this Court's "Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases Before Judge William Alsup," ¶ 25, the City of Berkeley requests a protective order for depositions of up to 21 current and former City Councilmembers and Planning Commissioners that Plaintiff United States Postal Service ("USPS") intends to notice over the next few weeks. USPS intends to depose the City legislators about their subjective motivations in voting to adopt the zoning ordinance at issue in this case, the Civic Center Historic Overlay ("Overlay"). Under longstanding precedent, such examination of legislators' intent is prohibited. Thus, the City requests a protective order to either bar these depositions entirely or to prohibit questioning to elicit the deponents' motivations or intent in voting to adopt the Overlay. The parties met and conferred about this issue by telephone on July 31, 2017.

In recognition of separation of powers between the courts and the political branches of government, the Supreme Court has held that courts must not permit the deposition of government officials to scrutinize their motives for adopting legislation. *United States v. Morgan*, 313 U.S. 409, 422 (1941). According to the Court, "it [i]s not the function of the court to probe the mental processes" of these officials. *Id*. Moreover, this type of "examination of a high government official threaten[s] to undermine the 'integrity of the administrative process.'" *Green v. Baca* 226 F.R.D. 624, 648 (C.D.Cal. 2005) (quoting *Morgan*, 313 U.S. at 422); *see also Thomas v. Cate*, 715 F.Supp.2d 1012, 1023 (E.D.Cal. 2010) (*Morgan* stands for "[t]he notion that courts must afford agencies 'appropriate independence' and respect") (quoting *Morgan*, 313 U.S. at 422). The Supreme Court has likewise explained that "the judiciary may [not] restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

Federal courts have followed these instructions. *Alexander v. FBI* (D.D.C. 1998) 186 F.R.D. 1, 4 ("[H]igh ranking government officials are generally not subject to depositions unless they have

some personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere"); *see also Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) ("Heads of government agencies are not normally subject to deposition"). "Absent evidence of bad faith or improper behavior, government decisionmakers cannot be compelled to testify about their mental processes in reaching a decision or about their communications and consultations with subordinates." Rutter Group Prac. Guide, Fed. Civil Proc. Bef. Trial 11:765 (citing *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211(4th Cir. 1991)).

When briefing a related issue in connection with the City's Motion to Dismiss, USPS failed to cite a single case that supports allowing depositions of City legislators here. Doc. 34 (addressing whether the Court may consider legislator's intent in assessing the constitutionality of the Overlay). In *Las Vegas v. Foley*—the only cited case that is even remotely relevant—the Ninth Circuit actually granted a writ of mandamus to *prevent* the deposition of city legislators under similar circumstances. 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. The district court denied the city's motion for a protective order. The Ninth Circuit disagreed and ordered the district court to grant a protective order prohibiting the plaintiff from deposing the officials. In doing so, the court cited numerous cases in which federal courts have refused to look into legislative motives to resolve constitutional challenges. *Las Vegas*, 747 F.2d 1294, 1297. "Allowing discovery of legislative motives . . . would . . . create a major departure from the precedent rejecting the use of legislative motives" and "is also inconsistent with basic analysis under the First Amendment which has not turned on the motives of the legislators, but on the effect of the regulation." *Id*. at 1298.

The same reasoning applies here. As this Court held in denying the City's Motion to Dismiss, the question presented by USPS's claims is not one of *intent* but of *effect*: Did the Overlay have an effect that is prohibited by the supremacy clause or preempted by the Postal Reorganization Act? Doc. 43 at 6-7. The Court then cited *United States v. O'Brien* and *RUI One Corp. v. City of Berkeley* as holding that "courts 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive'" and "facts 'introduced solely to establish a supposed nefarious motive on behalf of the City Council . . . are *wholly irrelevant*" to a constitutional challenge. Doc. 43 at 6-7 (citing *United States v. O'Brien*, 391 U.S. at 383 and *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1146 n.7 (9th Cir. 2004) (internal citations omitted; emphasis added). In *Las Vegas*, the Ninth Circuit applied these same doctrines in the context of a discovery dispute and held that the doctrines required the issuance of a protective order to prevent a plaintiff from deposing city legislators about their motives.

The other two cases cited by USPS on opposition to the City's motion to dismiss—*Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998) and *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983)—are irrelevant. Unlike *Las Vegas*, neither resolved the discovery dispute at issue here, i.e., whether to grant a protective order to prevent the deposition of legislators. Rather, in *Colacurcio*, the court simply held that it would "look to the full record," including, among other things, the face of the statute, facts surrounding enactment, and the stated purpose to determine

whether the purpose of a law was to suppress speech or simply ameliorate secondary effects. *Id*. at 552. While *Colacurcio* referred to statements made by legislators, there is no indication that they were made in depositions rather than at public meetings. And, in *Tovar*, the Court merely referred to "deposition testimony" of the mayor. It did not discuss whether the City sought a protective order to prevent this deposition, much less provide any ruling on its appropriateness.

USPS tries to shoehorn its demand for depositions into a narrow exception to this rule referred to in *Las Vegas*: Evidence obtained through depositions may be admissible if it "show[s] the chain of events from which intent may be inferred, rather than merely the subjective intent of individual legislators." *Las Vegas*, 747 F.2d at 1298. Here, however, unlike in the First Amendment context, intent is "wholly irrelevant." *RUI One Corp.*, 371 F.3d at 1146 n.7. As a result, any "chain of events from which intent may be inferred" is likewise irrelevant. Nor has USPS provided any explanation of how the "chain of events" leading up to the City's adoption of the Overlay has anything to do with the *effect* of the ordinance.

Under this case law, if the Court is inclined to allow depositions of City legislators, it must nonetheless issue a protective order to prevent any questions regarding the deponents' subjective intent. Under that order, USPS could still ask questions about events leading up to the adoption of the Overlay, such as "Did you attend the March 5 hearing?", but would be prohibited from asking why the legislators "What did you hope to accomplish by voting for the Overlay?"

This more limited protective order raises a separate concern, however: the undue burden and expense of preparing and deposing as many as 21 deponents who will only be asked factual questions that are answered in other sources, such as staff reports and transcripts. The City does not concede that these sources are relevant to the sole issue here – the effect of the Overlay on the Postal Service's ability to sell the property. However, given that these sources exist and describe everything said at every City meeting held on the Overlay, the burden and expense of conducting 21 depositions far outweighs any practical value the USPS could obtain from questioning these individuals.

Finally, USPS has indicated it believes the City already agreed to depositions of City Councilmembers, citing correspondence from the former City Attorney. However, that correspondence was simply logistical (e.g., discussing times and dates); the City has never waived any right to assert the deliberative or mental process privilege. Also, that discussion was limited to depositions of City Councilmembers, not Planning Commissioners.

For these reasons, the City respectfully requests a protective order to prevent or limit the scope of City Councilmember and Planning Commissioner depositions.

Very truly yours,

/s/

Andrew W. Schwartz
Counsel for City of Berkeley