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16 **UNITED STATES DISTRICT COURT**

17 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

18 UNITED STATES POSTAL SERVICE,

19 Plaintiff,

20 v.

21 CITY OF BERKELEY,

22 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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1 **NOTICE OF MOTION**

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

4 NOTICE IS HEREBY GIVEN that on September 28, 2017 at 8:00 a.m., or as soon
5 thereafter as counsel may be heard by the above-entitled Court, located at 450 Golden
6 Gate Avenue, San Francisco, California, in the courtroom of the Honorable William Alsup,
7 the Court will hold a hearing on this motion, by which Defendant City of Berkeley seeks
8 issuance of a protective order under Rules 26(c)(1) and 26(b)(2) of the Federal Rules of Civ-
9 il Procedure. This motion is based on this Notice of Motion, the Memorandum of Points
10 and Authorities set forth below, the Declaration of Andrew Schwartz filed herewith, the
11 pleadings and papers on file, and upon such other matters as may be presented to the
12 Court at the time of the hearing.

13 In this motion, the City seeks a protective order precluding the Postal Service from
14 deposing past or present mayors of the City or members of the City of Berkeley City Coun-
15 cil or Planning Commission. If the Court allows depositions to proceed, the City requests
16 that the Court nevertheless issue a modified protective order limiting the scope of any
17 such depositions to “relevant objective circumstances under which the [City’s Civic Center
18 District Overlay] was enacted.” *City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir.
19 1984).

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **STATEMENT OF ISSUES**

22 Plaintiff United States Postal Service wishes to depose Defendant City of Berkeley’s
23 mayors, city councilmembers, and planning commissioners—21 officials in all. The Service
24 seeks to elicit those officials’ thoughts and motives regarding their adoption of the Civic
25 Center District Overlay (“Overlay”), a legislative amendment to the City’s zoning ordi-
26 nance. An unbroken line of cases stretching back to Chief Justice Marshal’s opinion in
27 *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), prohibits that line of inquiry. The Court
28

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

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

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

18 **FACTUAL AND PROCEDURAL BACKGROUND**

19 The Main Berkeley Post Office at 2000 Allston Way has been in use as a post office
20 since the 1930s. Dkt. 1, ¶ 13. On September 9, 2014, the City Council adopted the Civic
21 Center District Overlay, Chapter 29E.98 of the Municipal Code, after a first reading. Dkt.
22 1, ¶ 32; Dkt. 1-1. The City again adopted the Overlay on September 30, 2014 after a sec-
23 ond reading, Dkt. 1, ¶ 36, and the Overlay went into effect 30 days later.¹ The Overlay was
24 designed to augment the protections for the buildings and land uses provided by the City's

25 _____
26 ¹ The Complaint alleges that the Overlay "went into effect" on September 30. Actually, this
27 was the date of its second reading, and it took effect 30 days thereafter. Cal. Gov't Code §
28 36937; City of Berkeley Charter § 93.

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

3 The Post Office is located within the City’s Civic Center Historic District, which was
4 formed in 1998 as an amendment to the City’s historic zoning. Dkt. 1-1, § 23E.98.010; Dkt.
5 1-2. The Civic Center Historic District was designated under the city’s Landmarks Preser-
6 vation Ordinance, referenced as Chapter 3.24 in the Overlay. Dkt. 1-1, § 23E.98.010. That
7 historic district recognizes the Civic Center’s special role in Berkeley’s history, as well as
8 the cultural and artistic merit of its buildings, including the Post Office. Following its des-
9 ignation, the Civic Center Historic District also was included in the National Register of
10 Historic Places. *See* Dkt. 12, Ex. E; Dkt. 23, Ex. B. The boundaries of the Overlay are co-
11 terminous with those of the Civic Center Historic District. Dkt. 23, Ex.’s A & B.

12 The Overlay’s general purpose is to implement (1) General Plan Policy LU-22 Civic
13 Center: “Maintain the Civic Center as a cohesively designed, well-maintained, and secure
14 place for community activities, cultural and educational uses, and essential civic functions
15 and facilities”; and (2) Downtown Area Plan Policy LU-1.4: “Focus City Government and
16 City activity in the Civic Center area, and recognize Downtown’s central role in providing
17 community services.” Dkt. 1-1, § 23E.98.020. Its several specific purposes include to
18 “[p]reserve and protect the integrity of the . . . Historic Civic Center through preservation
19 of existing buildings and open space listed in the Civic Center Historic District,” to “[a]llow
20 a set of uses, which are civic in nature, and support active community interest,” and to
21 “maintain public access to the historic buildings and resources.” *Id.*

22 The nine properties in the Overlay area include a variety of civic, institutional, and
23 community-serving uses, such as the City’s Civic Center Building, Berkeley High School,
24 and the Post Office. Dkt. 1-1, § 23E.98.010. Five of the nine buildings subject to the new
25 regulations are owned by the City. The others are owned by the YMCA, a non-profit enti-
26 ty; the Berkeley Unified School District (two); and the Postal Service. Dkt. 1, ¶ 32; Dkt. 1-
27 1, § 23E.98.010. The Overlay controls the allowable uses on all of the affected properties to
28 ensure that they retain their historic community-serving roles. Dkt. 1-1, § 23E.98.030.

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

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

17 ARGUMENT

18 This Court may issue a protective order “forbidding . . . discovery” or “forbidding in-
19 quiry into certain matters” for good cause under Rule 26(c)(1). Fed. R. Civ. P. 26(c)(1)(A),
20 (D). Further, the Court may enter an order under Rule 26(b)(2)(C) to “limit the . . . extent
21 of discovery” as necessary to avoid duplicative discovery or discovery outside the scope es-
22 tablished by Rule 26(b)(1). Fed. R. Civ. P. 26(b)(2)(C)(i), (iii). As demonstrated below, good
23 cause justifies an order forbidding, or at the least limiting the scope of, the depositions of
24 City officials sought by the Postal Service.

25 **I. The City’s intent in adopting the Overlay is irrelevant to whether the** 26 **Overlay violates the Supremacy Clause.**

27 Rule 26(b) limits discovery to any “nonprivileged matter that is relevant to any par-
28 ty’s claim or defense.” Fed. R. Civ. P. 26(b)(1). The City’s intent in adopting the Overlay is

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

8 As a general rule, legislative intent is irrelevant to judicial review of the constitu-
9 tionality of an enactment. *See McCray v. United States*, 195 U.S. 27, 56 (1904) (“The deci-
10 sions of this court from the beginning lend no support whatever to the assumption that the
11 judiciary may restrain the exercise of lawful power on the assumption that a wrongful
12 purpose or motive has caused the power to be exerted.”); *Arizona v. California*, 283 U.S.
13 423, 456 (1931) (collecting cases); *Fletcher*, 10 U.S. at 131 (A court “cannot sustain a suit . .
14 . founded on the allegation that the act is a nullity, in consequence of the impure motive
15 which influenced certain members of the legislature which passed the law.”); *see also*
16 *United States v. O’Brien*, 391 U.S. 367, 382-85 (1968) (applying this rule to First Amend-
17 ment claims). Rather, “analysis of the constitutionality of an ordinance must proceed from
18 the text of the ordinance, not the alleged motives behind it.” *RUI One Corp.*, 371 F.3d at
19 1146 n.7. In particular, when the constitutional test turns on “the effect of the [challenged]
20 regulation,” facts about supposed nefarious legislative intent are wholly irrelevant to the
21 analysis. *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984).

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

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

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

16 **A. Legislative purpose is irrelevant to conflict preemption claims.**

17 First, the Postal Service alleges the Overlay is preempted because it actually con-
18 flicts with federal law giving the Postal Service exclusive power to obtain, operate, and
19 dispose of postal property. *See* Dkt. 43, at 9; Dkt. 1, ¶ 47. Conflict preemption arises where
20 “compliance with both federal and state regulations is a physical impossibility” and “where
21 the challenged state law stands as an obstacle to the accomplishment and execution of the
22 full purposes and objectives of Congress.” *Arizona v. United States*, 567 U.S. 387, 399
23 (2012) (citations omitted). In both instances, the inquiry is whether the local ordinance
24 “actually interferes” with a Congressional enactment. *Ting v. AT&T*, 319 F.3d 1126, 1137
25 (9th Cir. 2003); *see also, e.g., Arizona*, 567 U.S. at 406 (striking down a state law that
26 “would interfere with the careful balance struck by Congress with respect to unauthorized
27 employment of aliens”). A court “will find conflict preemption only in those situations
28

1 where conflicts will *necessarily* arise.” *Shroyer v. New Cingular Wireless Servs.*, 498 F.3d
2 976, 988 (9th Cir. 2007) (emphasis added) (citation omitted).

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

18 **B. Legislative purpose is irrelevant to intergovernmental immunity**
19 **claims.**

20 Under the intergovernmental immunity doctrine, “[a] state regulation is invalid on-
21 ly if it regulates the United States directly or discriminates against the Federal Govern-
22 ment or those with whom it deals.” *North Dakota*, 495 U.S. at 435. Here too, it is the ef-
23 fect, not the purpose, of that state regulation that is determinative.

24 In determining whether an ordinance directly regulates the federal government,
25 this Court must consider the “express terms” of the act, *United States v. Arcata*, 629 F.3d
26 986, 991 (9th Cir. 2010), and its “application,” *Blackburn v. United States*, 100 F.3d 1425,
27 1435 (9th Cir. 1996). Whether the local agency *intended* to regulate the federal govern-
28 ment is beside the point. *See, e.g., Hancock v. Train*, 426 U.S. 167, 180 (1976) (federal gov-

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

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

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

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

3 **II. Even if *the City's* purpose in enacting the Overlay were relevant, the mo-**
4 **tives of individual City officials would not be a proper subject for discov-**
5 **ery.**

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

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

15 Even in that narrow class of claims that have improper legislative intent as an ele-
16 ment—a class to which the Supremacy Clause claims here do not belong—subjective moti-
17 vations of legislators are irrelevant because they cannot be imputed to the legislative body
18 as a whole. *See In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("Stray comments by in-
19 dividual legislators, not otherwise supported by statutory language or committee reports,
20 cannot be attributed to the full body that voted on the bill. The opposite inference is far
21 more likely."); *S.C. Educ. Ass'n*, 883 F.2d at 1262 ("It is axiomatic that if motivation is per-
22 tinent, it is the motivation of the entire legislature, not the motivation of a handful of vol-
23 ule members, that is relevant.") (citing *Aldridge v. Williams*, 44 U.S. 9, 24 (1845)). Ra-
24 ther, courts consider only objective indicia of legislative purpose: the "text, legislative his-
25 tory and implementation of the statute, or comparable official act." *McCreary Cty. v.*
26 *ACLU*, 545 U.S. 844, 862 (2005) (citation omitted); *see also Soon Hing v. Crowley*, 113 U.S.
27 703, 710-11 (1885) (This "rule is general with reference to the enactments of all legislative
28

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

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

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

26
27 ² Judicial scrutiny of legislators’ motivations also represents a breach of the separation of
28 powers between the judicial and political branches of government. *S.C. Educ. Ass’n*, 883
F.2d at 1257.

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

5 The Supreme Court’s decision in *Pacific Gas & Elec. Co. v. State Energy Res. Con-*
6 *servation & Dev. Comm’n*, 461 U.S. 190 (1983), is on point. There, the Court rejected the
7 claim that a California regulation governing the construction of nuclear plants was
8 preempted by the federal Atomic Energy Act. Although the purpose of a challenged regula-
9 tion is typically irrelevant to preemption analysis, it came into play in that case only be-
10 cause Congress, while occupying the field of nuclear safety regulation, had expressly re-
11 served to the states the authority to regulate for “purposes other than protection against
12 radiation hazards.” *Id.* at 199 (citation omitted). In inquiring into “whether there was a
13 nonsafety rationale” for the state regulation so that it fell within this reservation, *id.* at
14 213, the Court declined the petitioner’s invitation to become “embroiled in attempting to
15 ascertain California’s true motive” and instead limited its inquiry to the face of the regula-
16 tion and to the official report of the Assembly Committee that had proposed it, *id.* at 216.
17 Relying on *O’Brien*, the Court reasoned that ascertaining California’s “true motive” was an
18 “unsatisfactory venture” as “[w]hat motivates one legislator to vote for a statute is not
19 necessarily what motivates scores of others to enact it.” *Id.*; *see also Va. Uranium, Inc. v.*
20 *Warren*, 848 F.3d 590, 597 (4th Cir. 2017) (declining to “look past the statute’s plain mean-
21 ing to decipher” legislative intent for similar field preemption claim).

22 In sharp contrast to its litigation position here, the Department of Justice recently
23 urged the Ninth Circuit to ignore extrinsic evidence of intent in ascertaining whether
24 President Trump’s most recent executive order on immigration violated the Establishment
25 and Equal Protection Clauses. Brief for Appellants at 58-60, *Hawaii v. Trump*, 859 F.3d
26 741 (9th Cir. April 7, 2017) (No. 17-15589), ECF No. 23. As the Government there ex-
27 plained, “[s]earching for governmental purpose outside the operative terms of governmen-
28 tal action and official pronouncements is fraught with practical ‘pitfalls’ and ‘hazards’ that

1 would make courts' task [*sic*] 'extremely difficult.'" *Id.* at 58 (quoting *Palmer v. Thompson*,
2 403 U.S. 217, 224 (1971)); *see also id.* at 59 (arguing that Supreme Court precedent pre-
3 cludes "inquiry into [a public decision maker's] 'veiled psyche'" (quoting *McCreary Cty.*,
4 545 U.S. at 863)). In that case, the Government tried to curtail inquiry into the "subjective
5 views" of a single official—the President who signed the order into law. *Id.* at 58. The haz-
6 ards of inquiry into subjective motivation are even more pronounced when it comes to in-
7 vestigating the personal motives of the many members of a legislative body that voted on
8 an ordinance. If President Trump's subjective motivations are irrelevant then certainly
9 the conflicting intentions of nearly two dozen City officials are as well.

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

12 The irrelevance of legislators' subjective motivations for enacting legislation has
13 compelled the courts to recognize a "mental process privilege," which prohibits discovery of
14 public agency decision makers' subjective motivations for or considerations in reaching a
15 challenged decision. *See N. Pacifica LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122
16 (N.D. Cal. 2003) (citing, among other cases, *United States v. Morgan*, 313 U.S. 409 (1941),
17 *City of Las Vegas*, 747 F.2d 1294, and *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40
18 F.R.D. 318 (D.D.C. 1966)); *Kay v. City of Rancho Palos Verdes*, No. CV 02-03922 MMM
19 (RZ), 2003 U.S. Dist. LEXIS 27311 (C.D. Cal. Oct. 9, 2003) (granting protective order pro-
20 hibiting deposition of city councilmembers and planning commissioners about their moti-
21 vations in adopting ordinance); *Knights of Columbus v. Town of Lexington*, 138 F. Supp. 2d
22 136, 139 (D. Mass. 2001) (holding that "inquiry into each Selectman's personal motivation
23 generally is not appropriate") (citing *City of Las Vegas*); *Miles-UN-Ltd. v. Town of New*
24 *Shoreham*, 917 F. Supp. 91, 98 (D.N.H. 1996) (denying motion to compel testimony about
25 local officials' motives for amending an ordinance to regulate mopeds); *Searingtown Corp.*
26 *v. N. Hills*, 575 F. Supp. 1295, 1299 (E.D.N.Y. 1981) (refusing motion to compel local legis-

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

4 *City of Las Vegas v. Foley* is precisely on point. The plaintiff there challenged a city
 5 zoning ordinance that restricted the location of sexually oriented businesses and sought to
 6 depose city officials to determine their motives for enacting the ordinance. After the dis-
 7 trict court denied the city’s motion for a protective order, the Ninth Circuit issued a writ
 8 ordering the district court to grant a protective order prohibiting the plaintiff from depos-
 9 ing the officials. The court held that “[a]llowing discovery of legislative motives . . . would .
 10 . . . create a major departure from the precedent rejecting the use of legislative motives.”
 11 747 F.2d at 1297-98. The court accordingly directed the district court to limit any deposi-
 12 tions of city officials “to establishing relevant objective circumstances under which the or-
 13 dinance was enacted.” *Id.* at 1299.

14 Like the zoning ordinance in *City of Las Vegas*, the zoning Overlay here was a legis-
 15 lative enactment of the Planning Commission and City Council.⁴ The mental process privi-
 16 lege precludes the Postal Service from inquiring about those decision makers’ thought pro-
 17 cesses and their subjective considerations underlying enactment of the Overlay.

18 To the extent the Postal Service seeks to inquire into officials’ statements made dur-
 19 ing the process of formulating the Overlay, that inquiry is also barred by the “deliberative
 20 process privilege.” *N. Pacifica*, 274 F. Supp. 2d at 1121 (holding that the privilege applies
 21 to deliberations by local legislators). The purpose of this privilege is to “allow agencies
 22

23 ³ In the context of legislative decisions such as the amendment of a zoning ordinance at
 24 issue here, some courts discuss the privilege as a “legislative testimonial privilege” arising
 25 from legislators’ immunity from liability for legislative acts. *See, e.g., Miles-UN-Ltd.*, 917
 26 F. Supp. at 102.

27 ⁴ The Postal Service has argued that the mental process privilege applies only in adjudica-
 28 tory, not legislative, proceedings. Dkt. 65 at 2 n.2. *City of Las Vegas* demonstrates other-
 wise, 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 legis-
 lative context[s]”) (citing *City of Las Vegas*).

1 freely to explore possibilities, engage in internal debates, or play devil’s advocate without
 2 fear of public scrutiny.” *Assembly of Cal. v. United States Dep’t of Commerce*, 968 F.2d 916,
 3 920 (9th Cir. 1992). It precludes the taking of testimony about policy makers’ delibera-
 4 tions, including their pre-decisional “opinions, recommendations, or advice about . . . poli-
 5 cies” as well as facts that are “so interwoven with the deliberative material that [they] are
 6 not severable.” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *see al-*
 7 *so N. Pacifica*, 274 F. Supp. 2d at 1121-22 (applying the privilege to testimony and docu-
 8 ments). Here, any deliberative statements between the legislators are in the public record
 9 as required under the Brown Act. Cal. Gov’t Code §§ 54950-54963. And the deliberative
 10 process privilege (as well as the mental process privilege) bars further inquiry into the
 11 thought processes behind those statements, as well as inquiry into any confidential delib-
 12 erative statements by the legislators, such as those made to their staff.

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

26 _____
 27 ⁵ In fact, the *Colacurcio* court held that such statements could only be relevant “if they
 28 show objective manifestations of an illicit purpose, such as a departure from normal pro-
 cedures or a sudden change in policy.” 163 F.3d at 552. In that case, the court held that
 (footnote continued on next page)

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

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

17 In sum, City officials’ thoughts about the Overlay are protected by the mental pro-
18 cess privilege, which is rooted in two centuries of case law about the irrelevance of indi-
19 viduals’ subjective motivations to the constitutionality of their actions.

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

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

26 _____
(footnote continued from previous page)

27 the statements did not “indicate unusual procedural maneuvering” by the city or “proce-
28 dural lapses that might suggest unjust treatment.” *Id.*

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

9 “[H]igh ranking government officials are generally not subject to depositions unless
10 . . . the party seeking the deposition makes a showing that the information cannot be ob-
11 tained elsewhere.” *Alexander v. FBI*, 186 F.R.D. 1, 4 (D.D.C. 1998); accord *Kyle Eng’g Co.*
12 *v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) (“Heads of government agencies are not nor-
13 mally subject to deposition.”); *Church of Scientology of Boston v. IRS*, 138 F.R.D. 9, 12 (D.
14 Mass. 1990).⁶ “[T]he party seeking the depositions must demonstrate that the particular
15 official’s testimony . . . is essential to that party’s case, [and] the evidence must not be
16 available through an alternative source or via less burdensome means.” *Warzon v. Drew*,
17 155 F.R.D. 183, 185 (E.D. Wis. 1994).

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

26 _____
27 ⁶ Qualifying “officials continue to be protected by the apex doctrine even after leaving of-
28 fice.” *K.C.R.*, 2014 U.S. Dist. LEXIS 98279, at *9.

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

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

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

26
27 ⁷ The Service cites *Green v. Baca*, 226 F.R.D. 624, 649 (C.D. Cal. 2005). Dkt. 65, at 1 n.1.
28 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).

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

6 **IV. If depositions are allowed to proceed, they should be limited to question-**
7 **ing about officials’ knowledge of historical facts unrelated to subjective**
8 **motivation.**

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

17 **CONCLUSION**

18 For the foregoing reasons, the City respectfully requests that the Court grant the
19 [Proposed] Order filed herewith prohibiting depositions of City officials. If the Court al-
20 lows depositions to proceed, the City requests that the Court nevertheless issue a modified
21 protective order limiting the scope of any such depositions to “relevant objective circum-
22 stances under which the [City’s Civic Center District Overlay] was enacted.” *City of Las*
23 *Vegas*, 747 F.2d at 1299.

1 DATED: August 24, 2017

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