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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

20 UNITED STATES POSTAL SERVICE,

21 Plaintiff,

22 v.

23 CITY OF BERKELEY,

24 Defendant.

25 Case No. 16-cv-4815-WHA

26 NOTICE OF MOTION AND
27 MOTION FOR SUMMARY JUDGMENT
28 AND MEMORANDUM IN SUPPORT

29 Date: January 4, 2018

30 Time: 8:00 a.m.

31 Courtroom 8, 19th Floor

32 Hon. William Alsup

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NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT

Date: January 4, 2018
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Courtroom 8, 19th Floor
Hon. William Alsup

20 **NOTICE OF MOTION**

21 PLEASE TAKE NOTICE that on January 4, 2018, at 8:00 a.m. in the United States
22 Courthouse at San Francisco, California, plaintiff U.S. Postal Service, by and through
23 undersigned counsel, will move this Court for summary judgment on all of plaintiff's claims in
24 its Complaint.

25 **MOTION FOR SUMMARY JUDGMENT**

26 Plaintiff U.S. Postal Service hereby moves for summary judgment on all of the claims in
27 plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 56, for the reasons more fully
28 set forth in the following Memorandum of Points and Authorities.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 With its financial viability in doubt, the U.S. Postal Service has resorted to selling its
4 underutilized real estate assets in order to generate cash and reduce costs while continuing to
5 meet its obligation to provide “prompt, reliable, and efficient services to patrons in all areas and
6 [to] render postal services to all communities.” 39 U.S.C. § 101(a). Among the assets selected
7 for disposition is the Berkeley Main Post Office (the “Property”), a 57,200-square-foot building
8 in downtown Berkeley, California, of which approximately 53,200 square feet are unused. In
9 2014, the Postal Service entered into a Purchase and Sale Agreement for the Property with a
10 local developer. That developer ultimately cancelled the contract, however, after the City of
11 Berkeley enacted a zoning overlay, Municipal Code Chapter 23E.98, Civic Center District
12 Overlay (the “Overlay”), that eliminated virtually all commercial uses of the Property. “With
13 this innovative approach [according to then-Councilmember (and now Mayor) Jesse Arreguín],
14 Berkeley became the first city to successfully suspend [such] a sale.”

15 Although perhaps “innovative,” Berkeley’s restrictions on the Postal Service’s functions
16 through a purportedly generally applicable zoning overlay are also illegal. First, the Overlay
17 violates the intergovernmental immunity doctrine under the U.S. Constitution’s Supremacy
18 Clause, because it regulates directly or discriminates against the United States. Not only has the
19 Postal Service been disproportionately affected by the Overlay, but the Overlay has also
20 diminished the Property’s value so greatly that the Postal Service has refrained from placing the
21 Property back on the market. Second, because the Overlay obstructs the Postal Service’s ability
22 to sell its property and adequately maintain postal facilities, it conflicts with the Postal
23 Reorganization Act of 1970 and is therefore preempted. There is no genuine dispute of material
24 fact as to either of these issues. Indeed, the City’s own expert opined that there is a 49%
25 difference in the value of the Property attributable to the Overlay. Accordingly, the Court should
26 grant the Postal Service’s motion for summary judgment.

27 **CONSTITUTIONAL AND STATUTORY BACKGROUND**

28 The Supremacy Clause of the Constitution mandates that the provisions of the

1 Constitution itself, as well as “the Laws of the United States . . . made in Pursuance” of the
2 Constitution, “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws
3 of any State to the Contrary notwithstanding.” U.S. Const., art. VI, cl. 2. As relevant here, the
4 Constitution further provides that Congress may “establish Post Offices and post Roads,” U.S.
5 Const., art. I, § 8, cl. 7 (“Postal Clause”), and also “shall have Power to dispose of and make all
6 needful Rules and Regulations respecting the Territory or other Property belonging to the United
7 States,” U.S. Const., art. IV, § 3, cl. 2 (“Property Clause”).

8 Through the Postal Reorganization Act (“PRA”), Congress has delegated the authority
9 conferred by the Postal Clause to the Postal Service. *See* 39 U.S.C. §§ 101-5605, as amended.
10 The PRA established the Postal Service “as an independent establishment of the executive
11 branch,” *id.* § 201, and prescribed a policy whereby the Postal Service “shall provide prompt,
12 reliable, and efficient services to patrons in all areas and shall render postal services to all
13 communities,” *id.* § 101(a). In fulfilling this broad mandate, the Postal Service is empowered “to
14 establish and maintain postal facilities of such character and in such locations, that postal patrons
15 throughout the Nation will, consistent with reasonable economies of postal operations, have
16 ready access to essential postal services.” *Id.* § 403(b)(3). Further, the Postal Service is
17 authorized “to determine the need for post offices, postal and training facilities, and equipment,
18 and to provide such offices, facilities, and equipment as it determines are needed,” *id.*
19 § 404(a)(3), and “to hold, maintain, sell, lease, or otherwise dispose of such property or any
20 interest therein,” *id.* § 401(5). Because the Postal Service must perform these tasks without the
21 benefit of tax dollars for its operations or facilities, it must finance its activities through the
22 revenue received from the sale of its products and services. *See id.* §§ 2003, 2401.

23 **FACTUAL AND PROCEDURAL BACKGROUND**

24 **A. The Postal Service’s Efforts to Address Its Dire Financial Situation**

25 The Postal Service “faces a serious financial situation that is putting its mission . . . at
26 risk.” Decl. of Julia Berman, Ex. 1 hereto, Ex. 1-QQ, U.S. Gov’t Accountability Office, Report
27 to Congressional Committees, GAO 17-317, High-Risk Series (“GAO Report”), at 130 (Feb.
28 2017). The Postal Service’s universal service obligation, coupled with a continuing decline in

1 the volume of First-Class Mail and an increase in the number of delivery points, has led to
2 staggering financial losses for the agency. Decl. of Diana Alvarado, Ex. 2 hereto, Ex. 2-A, U.S.
3 Postal Serv., Quarter III, 2017 Report on 10-Q (“10-Q Report”), at 8. From 2007 through June
4 30, 2017, the Postal Service reported net losses of \$63.6 billion, including a net loss of \$3.299
5 billion for the nine months ending June 30, 2017. *Id.* at 3, 8. Compounding these difficulties,
6 the Postal Service has defaulted on a total of \$33.9 billion in Postal Service Retiree Health
7 Benefits Fund prefunding payments for the years 2012 through 2016. *Id.* at 8. The Postal
8 Service’s financial viability thus is in doubt. *See* GAO Report at 131.

9 To address this dire situation, the Postal Service has, among other efforts, endeavored “to
10 right-size its operations to better adapt to declining mail volumes that are adversely affecting its
11 financial position. . . . Right-sizing its operations can enable USPS to better match resources
12 with mail volume and address its compensation and benefits costs—which account for close to
13 80 percent of total expenses.” *Id.* at 132. Thus, since 2009 the Postal Service has been selling
14 real estate assets that are in excess of current postal needs. Ex. 1-A, Dep. of Tom Russell, Tr. at
15 18:19-24, 37:15-18; Ex. 2-G, Postal Service, Berkeley Main Post Office Public Meeting, Ex.
16 123, at 11-13 (Feb. 26, 2013). These sales have allowed the Postal Service to generate much-
17 needed cash, reduce costs, and continue to meet its universal service obligation. Ex. 1-A, Russell
18 Tr. at 49:4-6; Ex. 2-G, at 8-13.

19 In 2011, the Postal Service began to evaluate its use of the Berkeley Main Post Office,
20 located at 2000 Allston Way in Berkeley, California, and whether a sale of the Property would
21 further its right-sizing efforts. Ex. 2-B, Postal Service, Facility Optimization Study, Ex. 158
22 (July 21, 2014); Ex. 1-A, Russell Tr. at 138:21, 144:1-2. Built in 1914 and expanded in the
23 1930s, the Property is approximately 57,200 square feet and houses postal retail and delivery
24 operations to service the residents of Berkeley. Ex. 2-B at 2. In 2012, the Postal Service
25 determined that the Property was underutilized because those operations require only 4,000
26 square feet of space—less than 7% of the Property’s square footage. Ex. 1-A, Russell Tr. at
27 19:20-21; Ex. 2-G at 12. The Postal Service further determined that it could reduce costs by
28 selling the Property and moving its operations to a smaller location. Ex. 2-C, Postal Service,

1 Postal Service Approves Relocation of Berkeley Post Office, USPS_0003504 (April 22, 2013);
2 Ex. 2-G at 12-13. USPS therefore decided to move forward with a sale of the Property. Ex. 1-A,
3 Russell Tr. at 49-50; Ex. 2-D, Disposition - Project Initiation Form, Ex. 124 (July 13, 2012).

4 Prior to marketing the Property, the Postal Service conducted extensive public outreach
5 in connection with its planned sale. On July 6, 2012, the Postal Service notified then-Berkeley
6 City Mayor Tom Bates about its decision to sell and the process that would follow. Ex. 2-E,
7 Letter from Alvarado to Bates, USPS_0006677 (July 6, 2012). The Postal Service subsequently
8 announced that it would accept written comments and hold a public meeting regarding the
9 proposed relocation of retail postal services. Ex. 2-F, Postal Service, Notice of Public Meeting
10 and Comment Period, USPS_0006678 (Feb. 5, 2013). That meeting took place on February 26,
11 2013, and allowed the Postal Service to share information directly with and solicit input from the
12 community. See Ex. 2-G at 3; see also 39 C.F.R. § 241.4.

13 CBRE, the real estate firm retained by the Postal Service, began to market the Property in
14 October 2013. Decl. of Joseph D. Lowe, *City of Berkeley v. U.S. Postal Serv.*, Civ. No. 3:14-cv-
15 04916 (N.D. Cal.), ECF No. 25, Ex. 3 hereto, ¶ 4 & Ex. A attached thereto (Nov. 25, 2014); Ex.
16 1-OO, CBRE, Offering Memorandum, Ex. 16. Consistent with regulatory requirements, e.g., 36
17 C.F.R. § 800.1, and to accommodate the community's concerns, e.g., Ex. 2-H, Letter from
18 Turner to Alvarado, USPS_0006809-814 (Sept. 28, 2012), the marketing materials for the
19 Property discussed use restrictions to preserve the Property's historic features, as well as the
20 Postal Service's interest in leasing back 3,500 square feet of the Property for retail postal
21 services. Ex. 1-OO, CBRE Flyer at 4. The Postal Service received offers over multiple rounds
22 and, in February 2014, asked for final and best offers, including lease-back proposals for
23 "[i]deally" a term of five years. See Ex. 1-NN, Email from Kelleher to Korman, Ex. 46 (Feb. 6,
24 2014). Local developer Hudson McDonald LLC submitted the winning bid on the Property. Ex.
25 1-B, Dep. of Christopher Hudson, Tr. at 14:18-25; Ex. 1-A, Russell Tr. at 21:11-14. The Postal
26 Service entered into a purchase agreement for the Property with Hudson McDonald on
27 September 22, 2014. Ex. 1-B, Hudson Tr. at 49:12-17. However, due to the constraints imposed
28 by the Overlay, the sale fell through; and the Postal Service was forced to remove the Property

1 from the market. Ex. 1-LL, Letter from McDonald to Russell, Ex. 5 (Oct. 2, 2014); Ex. 1-MM,
 2 Letter from McDonald to Cioffi, Ex. 7 (Dec. 2, 2014); Ex. 1-B, Hudson Tr. at 62, 65-66, 87.

3 **B. The City of Berkeley's Efforts to Prevent the Sale of the Property**

4 Notwithstanding the Postal Service's public outreach, the City of Berkeley launched a
 5 concerted effort to prevent the sale of the Property. In July 2012, City Councilmembers
 6 Arreguín and Wengraf recommended that the City "[a]dopt a Resolution urging the United States
 7 Postal Service . . . to not proceed with the sale of [the Property]." Ex. 1-P, Berkeley City
 8 Council, Consent Calendar, COB004632 (July 24, 2012). The Council also formed a Berkeley
 9 Main Post Office Subcommittee—comprised of Mayor Bates and Councilmembers Arreguín,
 10 Capitelli, and Wengraf—which met in September 2012 and February 2013 to consider the
 11 unspecified "impacts of sale of" the Property and to "prepar[e] for the public hearing" on
 12 February 26, 2013 regarding the proposed relocation of retail postal services. Ex. 1-Q, Office of
 13 the City Manager, Minutes, COB000182-83 (Sept. 13, 2012); Ex. 1-R, Office of the City
 14 Manager, Action Calendar, COB001160-61 (April 30, 2013).¹

15 Shortly after the public hearing on February 26, 2013, the Berkeley City Council adopted
 16 Resolution 66,025-N.S., announcing that "the City of Berkeley formally opposes the sale of the
 17 Historic Berkeley Main Post Office building." Ex. 1-S, Resolution 66,025-N.S., COB001110
 18 (March 5, 2013).² The City Council also resolved "that the USPS suspend, for one year, efforts
 19 to sell the Berkeley Main Post Office building and work with the City of Berkeley with the goal
 20 of continuing the USPS's ownership of the building" and "request[ed] that USPS immediately
 21 impose a moratorium on all sales of Post Office Buildings nationwide." *Id.* The resolution
 22 further provided that "the City of Berkeley [would] reach out to other cities affected by the sale
 23 of postal facilities to develop a collective response." *Id.*; *see also* Ex. 1-T, Letter from Berkeley
 24 City Council to VP of Facilities, COB001153-58, at 1-2 (Apr. 30, 2013) (Council "strongly
 25 opposes and objects to the sale of the Downtown Berkeley Post Office" and "continues to be
 26 united and passionate in its opposition to the sale of this property."); Ex. 1-U, Office of the

27 ¹ The Council did not form any subcommittees for any other building subject to the Overlay. Ex.
 28 1-C, Arreguín Tr. at 48-49.

² The City "reaffirm[ed]" this resolution in 2015. Ex. 1-PP, Res. No. 67,128-N.S., COB002943.

1 Mayor, Press Advisory, COB004682 (May 2, 2013) (announcing intent to formally appeal the
 2 Postal Service’s decision and to “call for a moratorium on the sale of all historic post offices”).³
 3 By May 2013, the City was considering filing a lawsuit against the Postal Service “concerning
 4 the sale of the Main Berkeley Post Office.” Ex. 1-V, City of Berkeley, Minutes, COB001179
 5 (May 14, 2013).

6 Rather than file a lawsuit at that time,⁴ however, the City Council began discussing a
 7 zoning overlay that would restrict the Property to civic and nonprofit uses as a means of
 8 preventing the sale of the Property. By letter dated July 8, 2013, Councilmember Arreguín
 9 advised the Postal Service that the Council was considering changes to the zoning in the area
 10 where the Property is located that “would [] ensure that the Berkeley Main Post Office building
 11 could only be used for a civic or community-oriented use.” Ex. 1-W, Letter from Arreguín to
 12 Vice President, Facilities, COB004649, at 2 (July 8, 2013). Councilmember Arreguín continued:

13 Given that USPS is in the process of considering the potential sale of the Berkeley Main
 14 Post Office Building, I wanted to bring this to your attention, since the proposal would
 15 change the allowable zoning for the property, and would affect what a buyer could do
 16 with the property if the building was sold. I also want to take this opportunity to
 17 reiterate the Berkeley City Council’s strong opposition to the sale of the Berkeley Main
 18 Post Office and our interest in working with [the Postal Service] to find solutions to
 19 address [the Postal Service’s] financial challenges while keeping the building as a post
 20 office.

21 *Id.* He subsequently elaborated that “[t]he letter includes a copy of my item that is going to the
 22 City Council on July 16th on creating a zoning overlay for the Civic Center District including the
 23 Berkeley Main Post Office site, to restrict the allowable land uses to cultural and community
 24 oriented uses. *Hopefully it will have an impact in [sic] their decision on whether to sell the
 25 property, since it will significant [sic] affect the market value of the property and what a buyer
 26 can do with it.*” Ex. 1-I, Email from Arreguín, COB004648 (July 8, 2013) (emphasis added). In
 27 reference to “next steps in the Save the Post Office campaign,” Councilmember Arreguín

28 ³ Since the passage of the Overlay, [REDACTED]
 [REDACTED] See Ex. 1-TT, [REDACTED] Ex. 1-A, Russell Tr. at 145-49.

⁴ On November 5, 2014, the City filed an action against the Postal Service in the Northern
 District of California, seeking to prevent the then-pending sale of the Property. See Compl. for
 Declaratory & Injunctive Relief, *City of Berkeley v. USPS*, Civ. No. 3:14-cv-04916, ECF No. 1.

1 promised to “work on a draft of the item to the City Council on the zoning overlay for the post
2 office property.” Ex. 1-J, Email from Arreguín, COB004663 (June 26, 2013).

3 On July 16, 2013, Councilmember Arreguín referred a Civic Center District Zoning
4 Overlay to the City’s Planning Commission. Ex. 1-X, Arreguín, Action Calendar, COB001182-
5 83 (July 16, 2013). In making that referral, he explained that “[t]he establishment of a Civic
6 Center District zoning overlay will not only limit uses of properties in the district to those
7 consistent with the character of the district, but it will also ensure that the Downtown Post Office
8 can only be utilized for a civic or community-oriented use, and may help influence the USPS
9 [sic] decide a more favorable future for the building.” *Id.* The referral was considered “time
10 urgent,” Ex. 1-Y, Planning Comm’n Staff Report, COB001288-89, at 1 (Sept. 4, 2013), and thus
11 underwent an “expedited” process which “almost never happens,” Ex. 1-D, Dep. of Tom Bates,
12 Tr. at 13-14. *See also* Ex. 1-Z, Planning Commission, Draft Minutes, COB001862-64 (Nov. 6,
13 2013). Two days later, Councilmember Arreguín issued a statement that “the USPS’ intention to
14 officially move forward with the sale of the Main Post Office may be hampered by” the
15 ordinance he had proposed and that “[t]he Zoning Overlay, if adopted, would significantly
16 reduce the desirability of the property to potential buyers, unless their proposed use falls within a
17 list of allowable uses that are community and civic oriented.” Ex. 1-AA, Arreguín, Statement on
18 Postal Service Decision to Sell Historic Downtown Post Office, COB004635, at 2 (July 18,
19 2013). He continued: “If the USPS is looking to make quick cash in the short-run, they’re going
20 to have a hard time under the proposed zoning overlay I’ve introduced.” *Id.*

21 The City Council debated and heard public comment on the proposed zoning overlay at a
22 meeting on January 28, 2014. Regular City Council Meeting, Berkeley Civic Center Overlay
23 (Jan. 28, 2014).⁵ The Council’s comments at that meeting reaffirmed that the proposed zoning
24 changes were designed to prevent the sale of the Property. Councilmember Wengraf, for
25 example, expressed support for the proposed overlay and stated, “I think you all know that I am
26 very much in favor of saving the Post Office.” *Id.* at 02:57:45-51. Councilmember Anderson
27

28 ⁵ Video available at http://berkeley.granicus.com/MediaPlayer.php?publish_id=83d310b5-da65-1031-891a-4b4781b0f2ab (last visited Nov. 28, 2017).

1 commented at length on the effort to “defend . . . that building and the purposes for which it was
2 originally designed” and warned that for the City Council “to not go ahead and pursue this
3 overlay . . . would be disarming ourselves in the middle of a battle.” *Id.* at 03:06:01-07:11.

4 On June 24, 2014, Mayor Bates and Councilmember Arreguín requested that “the City
5 Manager [] draft an ordinance establishing a Civic Center District Overlay Zone and bring it to
6 the Council for a first reading at the Sept. 9, 2014 meeting.” Ex. 1-BB, Office of the Mayor,
7 Consent Calendar, COB002216-20, at 1 (June 24, 2014). Public comments made by the Council
8 around that time reflected its focus on impacting the sale of the Post Office. For example, Mayor
9 Bates explained to local media that “he decided to push for an overlay”—which he
10 acknowledged “can be easily described as ‘help save the post office’”—“because he had grown
11 increasingly frustrated with his dealing with the U.S. Postal Service.” Ex. 1-RR, Frances
12 Dinkelspiel, *Berkeleyside*, *Berkeley mayor to push for civic center overlay*, Ex. 99, at 2 (June 9,
13 2014); Ex. 1-WW, Def.’s Resps. to Pl.’s 2d Set of RFAs at 4-5. Councilmember Arreguín was
14 even less circumspect in a list of his “legislative accomplishments”: “This proposal is in
15 response [to] the USPS’ decision to sell the historic Downtown Post Office. . . . The proposed
16 zoning would decrease the value of the property, making any sale unattractive. It has
17 successfully brought the USPS to the table so that we may prevent the sale of a public asset.”
18 Ex. 1-K, Email from Arreguín, COB004374-75 (Aug. 4, 2014).

19 During the Council’s September meeting, the City adopted the Overlay, which became
20 effective on September 30, 2014. Ex. 1-CC, Berkeley City Council Meeting, Annotated Agenda,
21 COB002550-649, at 19 (Sept. 9, 2014); *see also* Ex. 1-DD, Berkeley City Council Meeting,
22 Annotated Agenda, COB002881-82, at 2 (Sept. 30, 2014) (adopting second reading). As passed,
23 Berkeley Municipal Code Chapter 23E.98, Civic Center District Overlay restricts nine parcels in
24 downtown Berkeley to civic or nonprofit uses. *See* Ex. 1-EE, COB002908-10. Of the nine
25 parcels, seven are owned by the City or another City government body such as the school
26 district, and the remaining two are owned by the YMCA and the Postal Service. *See id.*

27 The Overlay eliminated virtually all commercially viable uses of the Property. Prior to
28 the passage of the Overlay, allowable uses of those properties were the same as those in the

1 surrounding downtown Berkeley area; previous zoning permitted high density residential, retail,
 2 and other commercial use complementary to the area’s proximity to the Bay Area Rapid Transit
 3 system. *See* Ex. 1-FF, Planning Comm’n Staff Report, COB002452-2523 (Aug. 27, 2014).
 4 Under the Overlay, however, the Property’s only allowable uses include: libraries, judicial
 5 courts, museums, parks and playgrounds, public safety and emergency services, government
 6 agencies and institutions, public schools/educational facilities; non-profit cultural, arts,
 7 environmental, community service and historic organizations, live performance theatre, and a
 8 public market. *See* Ex. 1-EE, COB002909.

9 By letter to the Postal Service dated October 2, 2014, Hudson McDonald explained that
 10 the recently enacted Overlay “dramatically limits the uses permitted in the building resulting in a
 11 significant reduction in the value of the Post Office [P]roperty.” Ex. 1-LL; Ex. 1-B, Hudson Tr.
 12 at 62:15-17. Hudson McDonald continued: “If this zoning remains in place Hudson McDonald
 13 will not be able to close our purchase with the Post Office at the price and terms in our Purchase
 14 and Sale Agreement.” Ex. 1-LL. Because Hudson McDonald was not able to obtain relief from
 15 the Overlay within the timeframe permitted for due diligence under the Purchase and Sale
 16 Agreement—and the Postal Service declined to extend the timeframe based on its belief that the
 17 City would not grant such relief—Hudson McDonald terminated the Purchase and Sale
 18 Agreement by letter dated December 2, 2014.⁶ Ex. 1-MM; Ex. 1-B, Hudson Tr. at 83:13-15; Ex.
 19 1-D, Bates Tr. at 22; Ex. 1-A, Russell Tr. at 78, 84-88, 96-98; Ex. 1-UU. The Property was
 20 taken off the market and has remained so because of the Overlay. Ex. 1-A, Russell Tr. at 91-93.

21 The City of Berkeley, and now-Mayor Arreguín in particular, have taken credit for that
 22 outcome. In January 2015, for example, Councilmember Arreguín boasted:

23 [W]e’ve turned the tide by becoming the first city to successfully stave off an
 24 imminent sale [of historic Postal Service property] with united community support
 25 and an innovative approach using our zoning power. Last year, City Council

26 ⁶ Although Hudson McDonald cited several reasons why they sought an extension, Mr. Hudson
 27 testified that Hudson McDonald’s contemplated project could not proceed with the Overlay in
 28 place. *See, e.g.*, Ex. 1-B, Hudson Tr. at 65 (“Our assumption throughout the whole process was
 that the overlay would not stay.”). Thus, even if the other outstanding issues were resolved, the
 Overlay would have remained an impediment to the completion of the sale. *See id.*

1 unanimously adopted an ordinance, which I wrote, creating an overlay zone to
 2 protect the Downtown Post Office and historic Civic Center. I proposed the zoning
 3 overlay in 2013 when the USPS moved to sell the Downtown Post Office after we
 4 repeatedly requested they work with the community to find an alternative solution.

5 ...

6 The zoning overlay is an innovative approach in which the city can use its power
 7 to prevent the privatization of our public buildings and ensure that they remain in
 8 the public commons. While the fight is not over, we have stopped the sale of the
 9 Downtown Post Office for now.

10 Ex. 1-L, Email from Arreguín to Arreguín, Year in Review, COB004313 (Jan. 27, 2015). In a
 11 series of “Accomplishments Flyers,” now-Mayor Arreguín explained that the Overlay “[wa]s in
 12 response to the USPS’ decision to sell the historic Downtown Post Office *The new zoning
 13 overlay has had the effect of deterring private developers from buying our Historic Downtown
 14 Post Office Building.*” Ex. 1-L, Accomplishments Flyer, COB004318, at 3 (emphasis added).
 15 The following month’s “Accomplishments Flyer,” again in reference to the Overlay, reaffirmed
 16 that “[w]ith this innovative approach, Berkeley became the first city to successfully suspend
 17 a sale and has brought USPS to the table.” See Ex. 1-M, Email from Arreguín to Sanchez, and
 18 Legislative Accomplishments, attached thereto, COB004310, COB004311 (Feb. 5, 2015)
 19 (emphasis in original). Still to this day, the Mayor’s campaign website proclaims that “Jesse
 20 helped save our historic Civic Center by authoring the Civic Center Historic District zoning
 21 overlay. This zoning change stopped our Downtown Post Office from being sold and
 22 privatized.” Ex. 1-O, Arreguín Re-election Campaign Site, “*Jesse Arreguin: Berkeley Values.
 23 Real Results.*”

24 C. Procedural history

25 In 2014, the Mayor recognized “there [was] potential for the USPS to pursue litigation in
 26 response to the overlay because such an ordinance would hinder the sale and desirability of the
 27 building.” Ex. 1-SS, Natalie Meier, *The Daily Californian*, *Ralph Nader Visits Berkeley, Urges
 28 Support of Historic Post Office* (July 29, 2014); Ex. 1-WW, Def.’s Resps. to Pl.’s 2d Set of
 RFAs at 12. That potential became reality on August 22, 2016, when the Postal Service filed this
 action. ECF No. 1. Subsequently, this Court denied the City’s motion to dismiss. ECF No. 43.
 Extensive discovery followed. The Postal Service now moves for summary judgment.

ARGUMENT

Under Federal Rule of Civil Procedure 56, “summary judgment is proper where the pleadings, discovery and affidavits show that there is ‘no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Haley v. Gotshall*, 2016 WL 631944, at *2 (N.D. Cal. Feb. 17, 2016) (quoting Fed. R. Civ. P. 56(c)). “Material facts are those which may affect the outcome of the case.” *Haley*, 2016 WL 631944, at *2 (citation omitted). “A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable [trier of fact] to return a verdict for the nonmoving party.” *Id.* “The moving party for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact.” *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). After the moving party has made such a showing, the nonmoving party may avoid summary judgment only by adducing evidence demonstrating “specific facts showing that there is a genuine issue for trial.” *Haley*, 2016 WL 631944, at *2 (citing *Celotex Corp.*, 477 U.S. at 323). The City cannot make such a showing in this case, and the Court should grant summary judgment for the Postal Service.

I. THE OVERLAY VIOLATES THE INTERGOVERNMENTAL IMMUNITY DOCTRINE.

The intergovernmental immunity doctrine provides that “a state regulation is invalid ‘if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals.’” Jan. 12, 2017 Order, ECF No. 43 at 5 (quoting *North Dakota v. United States*, 495 U.S. 423, 435 (1990), and *Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014)). This doctrine “arose from the Supreme Court’s decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which established that ‘the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.’” *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010); *see also id.* (“The nondiscrimination rule finds its reason in the principle that the States may not directly

1 obstruct the activities of the Federal Government”) (quoting *North Dakota*, 495 U.S. at 435-37).⁷

2 The courts have applied these principles to the operations of the Postal Service, *see, e.g.*,
3 *Johnson v. Maryland*, 254 U.S. 51, 56-57 (1920); *United States v. Pittsburgh*, 661 F.2d 783, 786
4 (9th Cir. 1981); and “have consistently held that the local municipalit[y] cannot regulate the
5 United States Postal Office regarding its opening of post offices.” *U.S. Postal Serv. v. Town of*
6 *Greenwich*, 901 F. Supp. 500, 505 (D. Conn. 1995) (collecting cases). In *U.S. Postal Serv. v.*
7 *Town of Greenwich*, for example, a town sought to regulate the Postal Service indirectly, by
8 imposing the town building code on third parties—the Postal Service’s lessor and contractor. *Id.*
9 at 504. Even such indirect regulation was held violative of the Supremacy Clause. The court
10 reasoned “the Town cannot directly or indirectly regulate post office buildings owned by the
11 Postal Service, even if on leased land[,] without specific authorization from Congress.” *Id.* at
12 507 (citing cases, including *Goodyear Atomic Corp.*, 486 U.S. at 174).

14 That reasoning should apply here to the regulation of the Postal Service’s *disposition* of
15 its property—because that function, like construction or acquisition of new facilities, is
16 authorized by the PRA, *see* 39 U.S.C. §§ 401(5), 403(b)(3), 404(a)(3). Such an approach
17 moreover would be consistent with Property Clause cases where courts have recognized the
18 Federal Government’s unfettered power to dispose of its land. *See United States v. Oregon*, 295
19 U.S. 1, 27–28 (1935) (“The laws of the United States alone control the disposition of title to its
20 lands. The States are powerless to place any limitation or restriction on that control.”).⁸

21 Although not addressing the disposition of Postal Service property, *Boeing Co. v.*

23 ⁷ The sole exception to this rule, where “Congress provides ‘clear and unambiguous’
24 authorization for such regulation,” *Boeing Co.*, 768 F.3d at 840, plainly does not apply here.

25 ⁸ *See also United States v. Bd. of Comm’rs*, 145 F.2d 329, 330 (10th Cir. 1944) (“Manifestly
26 Congress is vested with the absolute right to designate the persons to whom real property
27 belonging to the United States shall be transferred, and to prescribe the conditions and mode of
28 the transfer; and a state has no power to interfere with that right.”); *City of Springfield v. United*
States, 99 F.2d 860, 863 (1st Cir. 1938) (“The right to dispose of property [held] by the United
States which is no longer needed, is an essential governmental function in the economic
management of governmental affairs, and is recognized by . . . the Constitution . . . Congress has
full power to determine the terms and manner of disposal of federal property”).

1 *Movassaghi*, too, is instructive. In that case, the Ninth Circuit applied the intergovernmental
2 immunity doctrine to a state law governing the cleanup of Santa Susana Field Laboratory, a
3 2,850-acre site where the Federal Government, as well as a number of defense contractors, had
4 conducted nuclear research and rocket testing. *See Boeing Co.*, 768 F.3d at 834–35. The Federal
5 Government owned or leased about twenty percent of the site, and Boeing Company owned the
6 remainder. *Id.* When California enacted the challenged law, Boeing was cleaning up the Santa
7 Susana site on behalf of the federal Department of Energy (“DOE”). Consistent with the
8 principle that a state “does not discriminate against the Federal Government and those with
9 whom it deals unless it treats someone else better than it treats them,” Jan. 12, 2017 Order, ECF
10 No. 43 at 6 (quoting *North Dakota*, 495 U.S. at 438), the Ninth Circuit concluded that the
11 challenged law’s requirements were more stringent than those under “California’s generally-
12 applicable environmental laws.” *Boeing Co.*, 768 F.3d at 842. Thus, the Ninth Circuit held that
13 California had “discriminate[d] against the federal government and Boeing as a federal
14 contractor” by “singl[ing] out Boeing, DOE, NASA, and the Santa Susana Field Laboratory site
15 for a substantially more stringent cleanup scheme than that which [it] applie[d] elsewhere in the
16 State.” *Id.* Because the effect of the California law was to regulate an activity reserved to the
17 Federal Government, the law violated the Supremacy Clause.

19 So, too, in this case. The Overlay singles out the Postal Service and its property for more
20 restrictive zoning than that which applies to historic properties elsewhere in the City of Berkeley.
21 As in *Boeing*, the Overlay achieves this effect without expressly stating that it regulates the
22 Federal Government, and the majority of the territory that the Overlay reaches is not federally
23 owned. Under the Ninth Circuit’s analysis, however, neither of these facets of the Overlay
24 undermines that its sole practical effect has been to single out and regulate an activity reserved to
25 the Federal Government, *see* 39 U.S.C. § 401(5). Indeed, the record here establishes that the
26 only effect of the Overlay has been to obstruct the sale of the Property by significantly
27 diminishing its value. There is no genuine dispute that: 1) the Overlay imposes substantially
28 more restrictive zoning than that applicable to other historic properties in the City of Berkeley, or

1 to other properties in the immediate vicinity of the parcels to which it applies; 2) the Overlay's
2 sole practical effect has been its impact on the Property; and 3) the Overlay severely diminished
3 the value of the Property, effectively preventing the Postal Service from selling the Property.

4 **A. The Overlay Is Substantially More Restrictive than the Zoning Applicable to the**
5 **Surrounding Neighborhood or to Other Historic Properties in the City.**

6 Although over 60 properties within the City of Berkeley appear on the National Register
7 of Historic places, *see* Ex. 1-YY, Def.'s Resp. to Pl.'s 1st Set of Interrogatories at 3, 14–17, the
8 Overlay restricts the uses for only nine parcels: the Berkeley Main Post Office, the YMCA, and
9 seven parcels owned by either the City itself or other City of Berkeley entities, such as the school
10 district, *see supra* at 10. While the Overlay limits those parcels to certain specified
11 governmental and nonprofit uses, *see id.*, the City does not impose such restrictions either on the
12 neighboring parcels, or on over four dozen other historic properties within the City limits. *See*
13 Ex. 1-YY, Def's Resp. to Pl.'s 1st Set of Interrogatories at 3. The City has acknowledged that
14 commercial, retail, or residential activity—all activity barred by the Overlay—continues within
15 the same block as property that is subject to the Overlay. *See* Ex. 1-VV, Def.'s Resp. to Pl.'s 1st
16 Set of RFAs at 5. Indeed, activity barred by the Overlay continues in the area surrounding the
17 Berkeley Main Post Office, even in parcels adjacent to the Property. *Id.* at 5–6. As compared to
18 both the surrounding neighborhood, as well as historic properties throughout the City, the
19 Overlay singles out the properties to which it applies for exceptionally restrictive zoning.

20 **B. The Overlay Has Had No Practical Effect Outside of Its Impact on the Property.**

21 Because of the Overlay's geographical limitations to an irregularly-shaped set of parcels
22 across several City blocks, the City has cabined the practical effect of the Overlay to just one
23 parcel: the Berkeley Main Post Office. As to this fact, there also is no genuine dispute.

24 During the Council's consideration of the Overlay, Anthony Sanchez, then-City
25 Councilmember Arreguín's Chief of Staff, responded to another Councilmember's concerns
26 about the proposed Overlay's "unintended consequences" by explaining that "the zoning would
27 only affect specified sites, all of which are publicly owned and are de facto relegated to limited
28

1 uses.” Ex. 1-N, Email from Sanchez, COB004640, at 2 (July 16, 2013). Then-City
 2 Councilmember Arreguín added: “all this would do is keep things as they are” and therefore he
 3 hoped “others d[id]n’t have other plans for any of the other public buildings.” Ex. 1-N, Email
 4 from Arreguín to Sanchez, *et al.*, COB004640, at 1(July 16, 2013).

5 Moreover, throughout this litigation, the City has been unable to identify a single specific
 6 practical change resulting from the Overlay, apart from the obstruction of the sale of the
 7 Berkeley Main Post Office. The City admits that it “has not changed its actual uses of City-
 8 owned property subject to the Zoning Ordinance since the Zoning Ordinance was adopted,” *see*
 9 Ex. 1-XX, Def.’s Resp. to 3d Set of RFAs at 2–3, and could not identify any changes to the uses
 10 of properties subject to the Overlay that are not owned by the City, *see* Ex. 1-ZZ, Def’s Resp. to
 11 Pl.’s 2d Set of Interrogatories at 5. Likewise, the City admits “that the Zoning Ordinance has not
 12 yet⁹ affected the ways that current tenants, lessors or occupants of the City’s properties subject to
 13 the Zoning Ordinance have used those properties since the Zoning Ordinance was adopted.” *Id.*
 14 at 3. Nor has the City identified any change to the plans for the properties subject to the Overlay
 15 resulting from the Overlay, *see id.* at 5, apart from, of course, the obstruction of the sale of the
 16 Berkeley Main Post Office.¹⁰

17 Indeed, counsel for the City acknowledged that the diminution in the Berkeley Main Post
 18 Office’s value constitutes the “only” evidence of the Overlay’s practical effect. Ex. 1-E, Dep. of
 19 the City of Berkeley, by and through Dionne Emerald Early, Tr. 10:6; *see also id.* 9:14–15, 10:2–
 20 6 (refusing to produce a witness to testify regarding “the practical effects of the [Z]oning
 21 [O]rdinance on the properties subject to the [Z]oning [O]rdinance” because “[the City was]

22 _____
 23 ⁹ Although the City suggests that the Overlay has not “yet” affected City tenants’, lessors’ or
 24 occupants’ uses of the Property, it identifies no specific changes in use that it anticipates will
 25 result from the Overlay. *See* Ex. 1-XX, Def’s Resp. to 3d Set of RFAs at 2.

26 ¹⁰ In response to interrogatories asking the City to identify any such changes, the City speculated
 27 that in 2018, an existing tenant in City property subject to the Overlay might follow through on
 28 its stated intention to vacate a portion of its leased space. *See* Ex. 1-ZZ, Def’s Resp. to Pl.’s 2d
 Set of Interrogatories at 2–4. Such speculation cannot be considered in deciding a motion for
 summary judgment. *See In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) (“A
 district court’s ruling on a motion for summary judgment may only be based on admissible
 evidence.”). It is telling that the City must resort to guesswork to identify any effect of the
 Overlay besides its obstruction of the sale of the Property.

1 producing an appraiser, Peter Overton . . . about the practical effects of the zoning ordinance on
2 the properties subject to the zoning ordinance, and that’s the only evidence that [the City has]”).

3 **C. The Overlay Has So Diminished the Value of the Property as to Render an**
4 **Economically Viable Sale Impossible.**

5 Testimony from expert and percipient witnesses alike establishes that the Overlay
6 diminished the value of the Property by at least 39%, and may have had an impact of 50% or
7 more. It is beyond dispute—acknowledged by the Postal Service and the Mayor alike—that that
8 drastic devaluation has effectively prevented the Postal Service from selling the Property.

9 **1. Every expert retained in this litigation—including the City’s —has opined that**
10 **the Overlay substantially diminished the value of the Property.**

11 Peter Overton, the appraiser retained by the City to assess the impact of the Overlay on the
12 Property, concluded that the value of the Property is 49% higher without the Overlay in place,
13 than the value with the Overlay in place. *See* Ex. 1-F, Dep. of Peter Overton, Tr. 170:13–171:14;
14 *see also* Ex. 1-KK, Overton Report. Tim Runde, an appraiser retained by the Postal Service to
15 appraise the Property with and without the Overlay in place, likewise concluded that the Overlay
16 significantly diminished the Property’s value. *Compare* Decl. of Tim Runde, Ex. 4 hereto, Ex.
17 4-A at 6, *with id.* Ex. 4-B at 3.¹¹ Mr. Runde’s appraisals showed this differential as
18 approximately 39%; with the appraised value of the Property constrained by the Overlay being
19 about 39% lower than the unconstrained value.

20 Professor Norm Miller, an expert in real estate valuation theory and methods, assessed the
21 impact of the Overlay and concluded that “[t]he impact of the Zoning Overlay on the Subject
22 Property is at least 40% off the unconstrained market value and could easily be 50% or more.”
23 *See* Decl. of Norm G. Miller, Ex. 5 hereto, Ex. 5-A, Expert Report of Norman G. Miller (“Miller
24 Report”) at 19.¹² Professor Miller observed that with the Overlay in place, “nearly all for-profit

25 ¹¹ Mr. Runde did not calculate a percentage difference; rather, he appraised the Property with the
26 Overlay and without it, and the 39% figure that follows was derived by calculating the difference
27 in values that Mr. Runde provided.

28 ¹² Professor Miller has long contributed to the body of knowledge in valuation. *See* Miller
Report at 4. In addition to publishing and lecturing on a broad range of subjects in the field of
real estate, Professor Miller is the co-author of *Commercial Real Estate Analysis and Investment*,

1 commercial occupants have been eliminated,” excluding 80% or more of the potential occupants
 2 within the Berkeley market. He therefore concluded that “aggregate demand is probably no
 3 more than 20% of that possible, by types of tenants, with the Zoning Overlay compared to
 4 without the Zoning Overlay.” *Id.* at 8-9. He observed that “this reduction in potential tenants
 5 attributable to the Zoning Overlay in the aggregate will dramatically impact the ability to lease
 6 the property and keep it occupied should a vacancy arise.” *Id.* at 9. Furthermore, according to
 7 Professor Miller, this reduction in demand will render the Property riskier for investors,
 8 compared to less-constrained property, resulting in investors demanding a higher yield on their
 9 investment and, thereby, decreasing the present value of the Property. Moreover, according to
 10 Professor Miller, occupants “engaging in [the activities permitted by the Overlay] often require
 11 grants and subsidies to afford rent.” *Id.* at 11. Thus, he concluded that, taken together, the lower
 12 rents, higher vacancy rates, and higher capitalization rates that resulted from the Overlay
 13 diminished the value of the Property by at least 40%. *See id.* at 5-8, 19 (detailing Professor
 14 Miller’s methodology and conclusions).¹³

15 **2. Other evidence supports the experts’ assessment that the Overlay substantially**
 16 **diminished the value of the Property.**

17 The testimony of Christopher Hudson, a partner in the firm that had contracted to
 18 purchase the Property, *see supra* at 5, comports with the experts’ conclusions. Mr. Hudson
 19 testified: “once this building became no longer available to anyone other than a nonprofit or a
 20 public use it eliminated the ability to have competing people looking at the property and made

21 _____
 22 the leading graduate level real estate text book in the world. *See id.* at 4, 22-23. His extensive
 23 scholarship and experience are summarized in his curriculum vitae. *See id.* at 21–30.

24 ¹³ Professor Miller valued the Property, both with and without the Overlay in place, by, for each
 25 scenario: examining the estimated potential future income from the Property, if it were fully
 26 occupied for a year; reducing that figure by the expected vacancy rate and operating expenses;
 27 and then dividing that net operating income by the “capitalization rate,” or the yield that would
 28 be required by investors in the Property based on the amount of risk involved. Professor Miller
 compiled data on tenants that potentially could occupy the site within a limited (.66-mile, and
 then 1-mile) radius around the Property, and also consulted a local commercial real estate expert
 from CBRE who had been involved in marketing the Property. *See Miller Report* at 9-10.
 Following the production of Professor Miller’s report, he noted that a correction was required on
 page 18, and made that correction by hand. The corrected page 18 is appended to Ex. 5-A.

1 the building worth very little.”¹⁴ See Ex. 1-B, Hudson Tr. at 60:6–10. Informed by years of
 2 experience in the Berkeley real estate market, *see id.* at 8:19–22—including the operation of
 3 Berkeley’s zoning laws and the development of historic properties, *see id.* at 12:11–13:15,
 4 61:13–62:8—Mr. Hudson concluded that the Overlay “destroyed” the value of the Property. *Id.*
 5 at 60:4. That conclusion, moreover, was consistent with then-Councilmember Arreguín’s
 6 assessment of the Overlay’s effect. In an email to constituents regarding “Letter to USPS on
 7 Post Office Zoning,” he explained that he had introduced “a zoning overlay for the Civic Center
 8 District including the Berkeley Main Post Office” that “will significant[ly] affect the market
 9 value of the property and what a buyer can do with it.” Ex. 1-I, Email from Arreguín,
 10 COB004648 (July 8, 2013). A year later, he reiterated: “The proposed zoning would decrease
 11 the value of the property, making any sale unattractive.” Ex. 1-K, Email from Arreguín to
 12 Sanchez, and Legislative Accomplishments, attached thereto, COB004374–75 (Aug. 4, 2014).
 13 The record here demonstrates that the Mayor was absolutely right.

14 **3. The substantial diminution in value caused by the Overlay has prevented the
 15 sale of the Property.**

16 It is beyond dispute that the Overlay’s effect on the value of the Property has obstructed
 17 the Postal Service’s effort to sell the Property. Mayor Arreguín’s campaign website cites this
 18 effect: “This zoning change stopped [the Berkeley] Downtown Post Office from being sold and
 19 privatized.” Ex. 1-O, “Jesse Arreguín: Berkeley Values. Real Results,” available at
 20 www.jesse.vote/results, at 4. On September 2, 2015, a flyer enumerating his Legislative
 21 Accomplishments announced in bold font: “**With this innovative approach, Berkeley became
 22 the first City to successfully suspend a sale and has brought USPS to the table.**” Ex.1-GG,

23 ¹⁴ Testimony from unsuccessful bidders on the Property supports Mr. Hudson’s assessment. The
 24 CEO of the YMCA testified that “in any open sale of a public building there’s natural
 25 competition. If we were the only ones, we probably would have bid 2 million.” Ex. 1-G, Dep.
 26 of Fran Gallati, Tr. 25:5–8; *see also id.* Tr. 38:12–18 (“Q. If you had known that you were
 27 bidding only against other nonprofit organizations, would that have affected your bid? A. I think
 28 it would have. Q. How so? A. I think the market value might not be as high, perhaps.”). The
 Director of the Mangalam Center agreed. *See* Ex. 1-H, Dep. of Jack Petranker, Tr. 60:23–61:4
 (“Q. How did your awareness of their interest in the property affect your bid? A. Well, if we had
 been fairly sure that there were no other bidders, that would have caused us to reduce the amount
 of the bid. Since it appeared that there were viable bidders, we tried to assess what the market
 value might be -- I mean the market value for commercial development.”).

1 Email from Sanchez to Arreguín, and Legislative Accomplishments, attached thereto,
 2 COB004275-76 (Sept. 2, 2015); *see also* Ex. 1-L, Email from Arreguín to Arreguín, and
 3 Accomplishments Flyer, attached thereto, at 2, COB004313, COB004318 (Jan. 16, 2015) (“City
 4 after city have fought these sales to no avail. However, this is Berkeley and we’ve turned the
 5 tide by becoming the first city to successfully stave off an imminent sale with united community
 6 support and an innovative approach using our zoning power”).

7 Testimony from Tom Russell, Manager of Real Estate and Assets for the Postal Service,
 8 confirms what is already plain from the record: the Postal Service took the Property off the
 9 market, and has refrained from relisting it, because the Overlay “dramatically” reduced the value
 10 of the Property. Ex. 1-A, Russell Tr. at 91:24-92:9.

11 *****

12 In sum, the undisputed facts demonstrate that, through enactment of the Overlay, the City
 13 singled out the Property for exceptionally restrictive zoning, thereby preventing any
 14 economically viable sale of the Property. Under the intergovernmental immunity doctrine, a
 15 municipality may not so “obstruct the activities of the Federal Government,” *North Dakota*, 495
 16 U.S. at 437–38, and therefore the Overlay is invalid insofar as it regulates the Property.

17 **II. FEDERAL LAW EMPOWERING THE POSTAL SERVICE TO MANAGE ITS**
 18 **RESOURCES AND DISPOSE OF ITS PROPERTY PREEMPTS THE OVERLAY.**

19 “‘State laws are preempted when they conflict with federal law,’ including when they
 20 ‘stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives
 21 of Congress.’” Jan. 12, 2017 Order, ECF No. 43 at 8 (quoting *Arizona v. United States*, 132 S.
 22 Ct. 2492, 2501 (2012)). The Ninth Circuit has twice found conflict preemption where a state law
 23 or local ordinance purported to regulate the Postal Service’s activities undertaken pursuant to the
 24 Postal Reorganization Act of 1970. *See Flamingo Indus. Ltd. (USA) v. U.S. Postal Serv.*, 302
 25 F.3d 985, 996–97 (9th Cir. 2002) (federal provision empowering the Postal Service to
 26 “determine the character [of,] and necessity [for,] its expenditures” preempted application of a
 27 state statute prohibiting “any unlawful, unfair or fraudulent business act or practice” to Postal
 28 Service procurement decisions), *rev’d on other grounds*, 540 U.S. 736 (2004); *City of Pittsburg*,

1 661 F.2d at 785 (federal law preempted municipality’s attempt to regulate postal carriers’
2 activities through a criminal trespass statute). As with the intergovernmental immunity cases
3 discussed above, *see supra* at 12-14, courts have applied these preemption principles not just to
4 situations in which a state or municipality purported to regulate the Postal Service directly, but
5 also to situations in which the regulation operated against a private party, but the effect fell on
6 the Postal Service. *See Town of Greenwich*, 901 F. Supp. at 506-07; *U.S. Postal Serv. v. City of*
7 *Hollywood*, 974 F. Supp. 1459, 1460, 1465 (S.D. Fla. 1997) (federal law preempted application
8 of the building code to a private landlord because the effect fell on the Postal Service; “[t]o
9 impose the impediment of state and local building regulations would result in a direct and
10 unauthorized intrusion upon the Postal Service’s ability to select the location, design and manner
11 of site acquisition for necessary postal facilities”).

12 As this Court recognized, the Second Circuit considered an analogous situation in *Clean*
13 *Air Markets Grp. v. Pataki*, 338 F.3d 82 (2d Cir. 2003). *See* Jan. 12, 2017 Order, ECF No. 43 at
14 10 (observing that “a similar theory prevailed in *Clean Air Mkts. Grp. v. Pataki*”). There, Title
15 IV of the Clean Air Act Amendments of 1990, which created a cap and trade system of emission
16 allowances, preempted a New York law that penalized utilities unless their allowances were sold
17 with restrictive covenants prohibiting the transfer of those allowances to certain states. *Clean*
18 *Air Mkts. Grp.*, 338 F.3d at 88–89. As this Court explained in its January 12, 2017 Order, “[t]he
19 Second Circuit held the New York law preempted, noting that it ‘did not technically limit the
20 authority of New York utilities to transfer their allowances but clearly interfered with their
21 ability to effectuate such transfers’ in two ways.” ECF No. 43 at 10 (quoting *Clean Air Mkts.*
22 *Grp.*, 338 F.3d at 88). “*First*, the law effectively banned sales of allowances to upwind states by
23 ‘requiring utilities to forfeit one hundred percent of their proceeds from any such sale.’” ECF
24 No. 43 at 10 (emphasis in original). “*Second*, because utilities had to sell allowances with
25 restrictive covenants to avoid assessments for subsequent transfers to upwind states, and such
26 covenants ‘indisputably decrease[d] the value of the allowances,’ the law restricted or interfered
27 with allowance trading under the ‘nationwide allowance trading system’ that was ‘an essential
28 element of Title IV.’” *Id.* at 10-11 (emphasis in original).

1 Noting the similarity of this case to *Pataki*, this Court recognized that if the Overlay
2 operated as an effective ban on the sale of the post office—“just as the New York law in *Pataki*
3 effectively banned sales of emissions allowances”—then “the Overlay would obstruct the [Postal
4 Reorganization] Act’s objective of controlling costs to the USPS by, among other things,
5 empowering the USPS to dispose of real property and directing it to ‘maintain postal facilities of
6 such character and in such locations, that postal patrons throughout the Nation will, *consistent*
7 *with reasonable economies of postal operations*, have ready access to essential postal services.’”
8 Jan. 12, 2017 Order, ECF No. 43 at 11 (quoting 39 U.S.C. §§ 101(g), 401(5), 403(b)(3))
9 (emphasis in original). Discovery has borne out that the Overlay indeed operates similarly to the
10 law invalidated in *Pataki*. The real estate developer who previously had contracted to purchase
11 the Property now opines that it is “worth very little” and its value was “destroyed”; and even the
12 real estate appraiser retained by the City testified that the Property is worth 49% more without
13 the Overlay in place. *See supra* at 17-19. In the Mayor’s own words: “This zoning change
14 stopped [the Berkeley] Downtown Post Office from being sold and privatized.” *See* Ex. 1-O,
15 “Jesse Arreguín: Berkeley Values. Real Results,” available at www.jesse.vote/results, at 4; *see*
16 *also supra* at 19-20 (enumerating similar admissions by the Mayor).

17 This admitted obstruction of the Postal Service’s ability “to . . . sell . . . or otherwise
18 dispose of [its] property,” 39 U.S.C. § 401(5), and to “maintain postal facilities . . . consistent
19 with reasonable economies of postal operations,” *id.* at § 403(b)(3), is especially impactful in the
20 context of the Postal Service’s dire financial situation, *see supra* at 3-4, because of the potential
21 national effect. In considering whether federal law preempts an ordinance because it frustrates
22 the objectives of Congress, a court should consider the danger that similar laws will be adopted
23 in other jurisdictions. *Cf. City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639
24 (1973). That danger is evident from the record. *See, e.g., AES Sparrows Point LNG, LLC v.*
25 *Smith*, 470 F. Supp. 2d 586, 589 (D. Md. 2007) (“A local government may not exercise veto
26 power over this nationwide process by local zoning legislation.”).

27 The Berkeley City Council clearly in that vain adopted Resolution 66,025-N.S.,
28 mandating that “the City of Berkeley shall reach out to other cities affected by the sale of postal

1 facilities to develop a collective response.” Ex. 1-S, Resolution 66,025-N.S., COB001110.
2 Although former Mayor Bates and Mayor Arreguín denied awareness of any action by the City
3 in furtherance of that mandate, *see* Ex. 1-D, Bates Tr. 23:19–24:19; Ex. 1-C, Arreguín Tr. 28:6–
4 29:13, [REDACTED]
5 [REDACTED]. *See* Ex. 1-TT; Ex. 1-A, Russell Tr. at 145-49.¹⁵ [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]¹⁶

11 Mayor Arreguín characterized the City’s obstruction of the sale in Berkeley as “turn[ing]
12 the tide.” Ex. 1-L, Email from Arreguín to Arreguín, and Accomplishments Flyer, attached
13 thereto, at 2, COB004313, COB004318 (Jan. 16, 2015) (“City after city have fought these sales
14 to no avail. However, this is Berkeley and we’ve turned the tide by becoming the first city to
15 successfully stave off an imminent sale with united community support and an innovative
16 approach using our zoning power”). If the Overlay does indeed signal the advent of a wave of
17 cities “exercis[ing] veto power over this nationwide process by local zoning legislation,” *AES*
18 *Sparrows Point*, 470 F. Supp. 2d at 589, this Court’s sanction of the City’s actions here would
19 incent other jurisdictions to follow suit. *See City of Burbank*, 411 U.S. at 639 (considering the
20 effect on federal functions if other municipalities “followed suit” as part of preemption analysis);
21 *see also Ogden Envtl. Servs. v. City of San Diego*, 687 F. Supp. 1436, 1446 (S.D. Cal. 1988) (“if
22 every locality were able to dodge responsibility for and participation in this program through
23 artfully designed ordinances, the national goal . . . would surely be frustrated”).

24
25 _____
26 ¹⁵ [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 **III. ANY CONSIDERATION OF THE OVERLAY’S PURPOSE LEAVES NO DOUBT**
 2 **AS TO ITS UNCONSTITUTIONALITY.**

3 While the effect of the Overlay—its frustration of the Postal Service’s effort to sell the
 4 Property—is sufficient to entitle the Postal Service to relief, the circumstances of this case
 5 warrant the Court’s consideration of the Overlay’s purpose. *See supra* at 6-11. Indeed, in
 6 numerous Supremacy Clause cases, the purpose of a challenged law properly was considered in
 7 assessing its constitutionality. *See, e.g., Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733
 8 F.3d 393, 418 (2d Cir. 2013) (courts “do not blindly accept the articulated purpose of a
 9 challenged statute”) (citing *Greater New York Metro. Food Council, Inc. v. Guiliani*, 195 F.3d
 10 100, 108 (2d Cir. 1999) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 106
 11 (1992)), *abrogated on other grounds by Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)).
 12 “The question of preemption is defined, in part, by the purpose of the [challenged law], and, in
 13 part, by the [challenged law’s] actual effect.” *Entergy Nuclear Vermont Yankee, LLC*, 733 F.3d
 14 at 416 (quoting *Vango Media, Inc. v. City of N.Y.*, 34 F.3d 68, 73 (2d Cir. 1994)).

15 The City previously has urged the Court to ignore the overwhelming evidence of the
 16 Overlay’s improper purpose because such evidence allegedly is only relevant in cases of “field
 17 preemption.” *See* Def.’s Reply in Supp. of Motion for Protective Order, ECF No. 69 at 2–7. But
 18 that is not so. To begin with, the Supreme Court expressly has cautioned that the different
 19 categories of preemption “should not be taken [as] rigidly distinct” and that “field pre-emption
 20 may be understood as a species of conflict pre-emption.” *English v. Gen. Elec. Co.*, 496 U.S. 72,
 21 79 n.5 (1990); *see also, e.g., NCAA v. Christie*, 61 F. Supp. 3d 488, 503 (D.N.J. 2014), *affirmed*
 22 *sub nom. on other grounds, NCAA v. Governor of N.J.*, 832 F.3d 389 (3d Cir. 2016), *cert.*
 23 *granted* 137 S. Ct. 2327 (June 27, 2017) (“the categories of preemption . . . are not rigidly
 24 distinct”) (quoting *Treasurer of N.J. v. U.S. Dep’t of Treasury*, 684 F. 3d 382, 406 (3d Cir.
 25 2012)).¹⁷ Because the claims here sound in conflict preemption and the intergovernmental

26 ¹⁷ Preemption may occur in three ways. *See Arizona v. United States*, 132 S. Ct. at 2500–01.
 27 First, “Congress may withdraw specified powers from the States by enacting a statute containing
 28 an express preemption provision.” *Id.* Additionally, “[f]ield preemption” may be found where
 “the intent to displace state law altogether can be inferred from a framework of regulation so
 pervasive that Congress left no room for the States to supplement it or where [there is] a federal
 interest . . . so dominant that the federal system will be assumed to preclude enforcement of state

1 immunity doctrine—“a close cousin” of preemption, *Bainbridge v. Turner*, 311 F.3d 1104, 1113
 2 (11th Cir. 2002)—this Court can and should consider the Overlay’s purpose in assessing its
 3 constitutionality. In *NCAA v. Christie*, the court looked at legislative motive in assessing
 4 whether federal law expressly preempted a state statute that legalized certain forms of gambling.
 5 *See NCAA*, 61 F. Supp. 3d 488. The court explained that “in the preemption context, courts have
 6 looked to the state statute’s legislative history as ‘an important source for determining whether a
 7 particular statute was motivated by an impermissible motive in the preemption context.’” *Id.* at
 8 505 (quoting *Entergy Nuclear Vermont Yankee*, 733 F.3d at 419). Thus after considering a
 9 statement by one of the law’s sponsors, as well as New Jersey’s “history of attempts to
 10 circumvent [the federal law in question],” the court concluded that federal law preempted the
 11 New Jersey statute, *id.* at 506—a clear indication that there is nothing anomalous in considering
 12 the purpose of a challenged law when assessing whether that law is preempted by federal law.

13 *Puente Arizona v. Arpaio*, 821 F.3d 1098 (9th Cir. 2016), is not to the contrary. The
 14 Ninth Circuit in *Puente* held that “it [did] not matter if Arizona passed [the challenged] laws for
 15 a good or bad purpose,” because the Court determined that the statute did not actually encroach
 16 on an area that Congress intended to reserve to the Federal Government. *Id.* at 1106 (“what
 17 matters is whether the legislature succeeded in carrying out that purpose”). As this Court
 18 recognized, such decisions “indicate that allegations of legislative motive behind the Overlay’s
 19 passage would not *suffice* to establish unconstitutionality,” ECF No. 43 at 7 (emphasis in
 20 original). *Puente*, however, does not speak to the situation here, where clear evidence
 21 demonstrates that the effect of the challenged law encroaches on an area that Congress reserved
 22 to the Federal Government. Indeed, it is difficult to imagine what legitimate end would be
 23 served by a rule prohibiting consideration of the law’s purpose under the circumstances here.

24 The undisputed evidence establishes that the purpose of the Overlay was to obstruct the
 25 sale of the Property. *See supra* at 6-11. Although the Overlay was drafted to exclude express

26 _____
 27 laws on the same subject.” *Id.* (quotation omitted). And, finally, as in the instant case, “state
 28 laws are preempted when they conflict with federal law, . . . where the challenged state law
 ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of
 Congress,’” *id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

1 mention of this unconstitutional objective, and the City Officials, at their depositions, claimed to
 2 have no recollection that the Overlay had any relationship with the Berkeley Main Post Office,
 3 the record otherwise leaves no room for doubt. *See, e.g.*, Ex. 1-K, Email from Arreguín to
 4 Sanchez, and Legislative Accomplishments, attached thereto, COB004374–75 (Aug. 4, 2014)
 5 (“This proposal is in response [to] the USPS’ decision to sell the historic Downtown Post Office,
 6 despite overwhelming local opposition. The proposed zoning would decrease the value of the
 7 property, making any sale unattractive.”); Ex. 1-L, Email from Arreguín to Arreguín,
 8 COB004313, at 2 (Jan. 16, 2015) (“I proposed the zoning overlay in 2013 when the USPS
 9 moved to sell the Downtown Post Office While the fight is not over, we have stopped the
 10 sale of the Downtown Post Office for now.”); Email from Arreguín to Arreguín, Year in Review,
 11 and Accomplishments Flyer attached thereto, COB004318, at 3 (Jan. 16, 2015) (“This proposal
 12 is in response [to] the USPS’ decision to sell the historic Downtown Post Office, despite
 13 overwhelming local opposition. The new zoning overlay has had the effect of deterring private
 14 developers from buying our historic Downtown Post Office.”); Ex. 1-RR, Frances Dinkelspiel,
 15 *Berkeley mayor to push for civic center overlay*, Berkeleyside (June 9, 2014) (quoting Mayor
 16 Bates as stating “[t]here is general agreement on the council that we would like to save the Post
 17 Office, and this is a good way to do it”); Ex. 1-SS, Natalie Meier, *The Daily Californian*, *Ralph*
 18 *Nader visits Berkeley, urges support of historic post office* (July 29, 2014) (quoting Mayor Bates
 19 as stating “the Zoning Ordinance . . . would hinder the sale and desirability of the Property,” and
 20 that “he was confident that the council would marshal its support behind passing the Zoning
 21 Ordinance to protect the post office”); *see also* Def.’s Resps. to Pl.’s 2d Set of RFAs at 12; Bates
 22 Tr. at 17:22–18:17.¹⁸

23 The unusual procedure followed by the City to enact the Overlay further evidenced the
 24 Overlay’s improper purpose. The referral of then-Councilmember Arreguín’s proposal to the

25 ¹⁸ Mayor Arreguín and former Mayor Bates testified that they could not recall any discussions of
 26 the Property in connection with the enactment of the Overlay. *See* Ex. 1-C, Arreguín Tr. at
 27 16:23 – 17:20 (testifying that he could not recall a single comment regarding the Property at the
 28 public discussion of the Overlay); Ex. 1-D, Bates Tr. at 36:4–14 (asserting he had no recollection
 of any discussion related to the enactment of the Overlay). Such memory failures do not create a
 genuine dispute as to any material fact.

1 Planning Commission was treated as “time urgent.” Ex. 1-Y, Planning Comm’n Staff Report,
 2 COB001288-89, at 1 (Sept. 4, 2013); *see also* Ex. 1-Z, Planning Comm’n, Draft Minutes,
 3 COB001862-64 (Nov. 6, 2013).¹⁹ Mayor Arreguín in explaining the urgency wrote “if we delay
 4 we lose alot [sic] of leverage in influencing USPS’s final outcome.” Ex. 1-N, Email from
 5 Arreguín to Maldonado, COB004640 (July 16, 2013). Thus, when his proposal was scheduled to
 6 be on the Planning Commission agenda, he wrote, in a message transmitted by “Save the
 7 Berkeley Post Office” that “[i]t would be good if a few people attended to speak in the support of
 8 the proposal, and the importance that the commission [act] as soon as possible given the Postal
 9 Regulatory Commission dismissed the Mayor’s appeal and the sale can now proceed.” Ex. 1-JJ,
 10 Email from Save the Berkeley Post Office, COB 004592 (Sept. 1, 2013).

11 The Planning Commission framed the Overlay’s permissible uses to achieve “the most
 12 efficient and timely way to complete the zoning overlay process”; the Commission cautioned
 13 that adding new uses could “increase the time required to move the zoning overlay through the
 14 City process.” Ex. 1-HH, Planning Comm’n Staff Report, COB001483 (Oct. 2, 2013). The
 15 Commission also decided to forward “all the materials considered” to the Council with “non-
 16 binding straw votes” because doing so “increased the speed with which the Overlay item . . .
 17 returned to the Council.” Ex. 1-II, Action Calendar, COB001700 (Jan. 28, 2014) (noting “the
 18 urgency of the matter”).

19 Taken together, the legislative history and public statements of City officials establish
 20 that the City enacted the Overlay in a thus-far successful effort to “exercise veto power” over the
 21 Postal Service’s disposition of the Property. *AES Sparrows Point*, 470 F. Supp. 2d at 589. Such
 22 obstruction of a federal function by itself is unconstitutional under the intergovernmental
 23 immunity doctrine and is preempted by federal law. But when considered in light of the
 24 Overlay’s obvious purpose, it clearly should be invalidated on the record here.

25 CONCLUSION

26 For the foregoing reasons, Plaintiff’s motion for summary judgment should be granted.
 27
 28

¹⁹ An expedited process “almost never happens.” Ex. 1-D, Bates Tr. at 13-14.

1 Dated: November 29, 2017

Respectfully submitted,

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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. 16-cv-4815-WHA

[PROPOSED] ORDER

This matter comes before the Court on Plaintiff’s Motion for Summary Judgment. Upon consideration of Plaintiff’s motion and of all materials submitted in relation thereto, it is hereby

ORDERED that Plaintiff’s motion is GRANTED; and it is further

ORDERED that summary judgment be entered for the Plaintiff; and it is further

DECLARED that Berkeley Municipal Code Chapter 23E.98, Civic Center District Overlay is invalid, null, and void insofar as it purports to regulate the Berkeley Main Post Office property; and it is further

ORDERED that the City of Berkeley and its successors, agents, and employees, are PERMANENTLY ENJOINED from applying or enforcing Berkeley Municipal Code Chapter 23E.98, Civic Center District Overlay against the Berkeley Main Post Office, and from targeting the Berkeley Main Post Office through substantially similar Ordinances designed to prevent the sale of the Property.

IT IS SO ORDERED.

Date: _____

William Alsup
United States District Judge