

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF THE CITY AND
COUNTY OF SAN FRANCISCO

Docket No. C2011-2

**MOTION OF UNITED STATES POSTAL SERVICE
FOR PARTIAL DISMISSAL OF THE COMPLAINT**
(June 7, 2011)

The Postal Service respectfully requests that the Commission grant this motion for partial dismissal of the complaint brought by the City and County of San Francisco (the "Complaint").¹ On May 18, 2011, the City and County of San Francisco (the "Complainant") filed the Complaint pursuant to 39 U.S.C. § 3662, alleging that the Postal Service's single point mail delivery to single-room occupancy ("SRO") hotels violates 39 U.S.C. § 403(c) and other statutes and regulations, including 39 U.S.C. § 401(2). Complainant alleges facts and legal violations in two counts. In Count I, Complainant essentially challenges the Postal Service's interpretation of its own regulations as applying or not applying to SRO hotels. Under the alleged facts, Complainant contends that the Postal Service has inaccurately and unlawfully elected to classify delivery to SRO hotels as governed by regulations DMM § 508.1.7.2 and POM § 615.2 (rules applicable to "hotels, schools, and similar places"), rather than to classify such delivery as governed by POM § 631.451 (rules applicable to "a residential building containing apartments or units occupied by different addressees").² The only

¹ Complaint of the City and County of San Francisco, PRC Docket No. C2011-2 (May 18, 2011).

² POM § 631.45 applies, however, only after the Postal Service has already concluded that a building, or set of buildings, provides long term permanent housing for occupants

statutory basis alleged for this count is violation of 39 U.S.C. § 401(2), which consists of a general grant of power to the Postal Service to adopt regulations that further its legitimate functions under controlling legislation. The Complainant, however, has not challenged either set of regulations under section 401(2) as beyond the Postal Service's authority to carry out its functions, or the validity of the regulations under applicable procedural requirements controlling their adoption. Alternatively, the Complainant argues that the act of interpreting these regulations, namely, a letter issued by the Postmaster of San Francisco, should have been adopted as a regulation under section 401(2), according to unspecified procedural requirements.

In Count II, the Complainant alleges violation of 39 U.S.C. § 403(c). Under the facts alleged in this count, the Complainant contends that the Postal Service's continuing provision of the established mode of delivery to residents of SRO hotels constitutes undue or unreasonable discrimination.

The Commission's jurisdiction to entertain complaints under 39 U.S.C. § 3662 is strictly limited to allegations of violations of specifically enumerated statutory provisions. While the Complainant has arguably alleged facts sufficient to complain of undue disparate treatment under section 403(c), it has not alleged facts sufficient to sustain a challenge under section 401(2). To the extent that provision provides an independent basis for jurisdiction, it is not a broad exception to the statutory limitation on the Commission's jurisdiction. It does not permit circumvention of that limitation by allowing challenges to the Postal

and that some form of centralized delivery is appropriate. Complainant accordingly attacks decisions made many decades ago, or longer, when delivery to those SRO hotels first commenced.

Service's delivery policies or operational decisions generally. Nor is the Complainant's alternative theory, that any act of interpreting Postal Service regulations must be authorized by formal amendment of existing regulations, supported by any statute or legal principle. Accordingly, since Count I does not constitute a valid basis for a complaint under section 3662, it should be dismissed for lack of jurisdiction.

PROCEDURAL HISTORY

On May 5, 2009, the Complainant filed a complaint with the United States District Court for the Northern District of California, challenging the Postal Service's practice of providing single point delivery to SRO hotels. On November 5, 2009, the court dismissed the Complainant's claims for declaratory judgment, all claims based upon regulatory or statutory grounds, and its claims against Postal Service employees in their individual capacities, leaving only the Complainant's constitutional claims based on the equal protection provision of the Fifth Amendment, the right of free speech and freedom of association under the First Amendment, and the right to privacy. See Exhibit 1 (District Court Pleadings).³ The Complainant now challenges the same Postal Service operational policy in the Complaint filed with the Commission on May 18, 2011, effectively reviving grounds already dismissed by the federal district court.

³ Exhibit 1 includes the Postal Service's motion to dismiss, Plaintiffs' opposition to the Postal Service's motion to dismiss, the Postal Service's reply to Plaintiffs' opposition, and the court's order partially granting Defendants' motion to dismiss.

The court's order fails to address the many specific grounds identified by the Postal Service that bar Plaintiffs from any relief on regulatory or statutory grounds (and that, in the Postal Service's view, should also bar Plaintiffs' constitutional tort theories). These grounds include: (1) lack of standing, (2) failure to show any causal nexus between Postal Service actions and the claimed harms, (3) the lack of any valid cause of action, (4) that the relief sought cannot resolve Plaintiffs' problems (redressability), (5) that Plaintiffs' claims are barred by the Federal Tort Claims Act, (6) Plaintiffs' alternate avenues for relief (a tort claim that would be handled in conformity with the Federal Tort Claims Act, appeal to the Postal Service Consumer Advocate, or a complaint with the Postal Regulatory Commission), (7) criminal complaints pursuant to 18 U.S.C. §§ 1391-1437, (8) the lack of a justiciable controversy since any impact of the supremacy clause on the San Francisco statutory requirement that SRO hotels install apartment style delivery receptacles was not properly raised and (9) that *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2003), which found the PRC lacked jurisdiction to hear that complaint (and therefore that of Plaintiffs herein), was superseded by the Postal Accountability and Enhancement Act's expansion of complaint jurisdiction under section 3662. So while Plaintiffs' statutory and regulatory claims were all dismissed in the Northern District of California, leaving only so-called constitutional torts, Complainant revives its non-constitutional claims before the Commission. The Postal Service does not dispute the Complainant's case rests upon section 403(c) of title 39, if only because Complainant seeks undue discrimination in its favor: centralized delivery to hotels that elsewhere in

San Francisco and the nation generally qualify for only the single point drop they now receive.

FACTUAL BACKGROUND

SRO hotels are buildings in which occupants rent single rooms, usually without a private bathroom or kitchen. Complaint at ¶ 19. SRO hotels are not necessarily considered apartment buildings under Postal Service regulations, as Complainant asserts. Under the Postal Service's regulatory scheme, SRO hotels fit under regulations governing "hotels, schools, and similar places." Postal Operations Manual ("POM") § 615.2⁴; Domestic Mail Manual ("DMM") § 508.1.7.2.⁵ At most SRO hotels, the Postal Service delivers mail to a single point, such as a desk clerk or receptacle ("single point delivery"). See Complaint at ¶ 7.⁶

⁴ POM § 615.2 provides: "Mail Addressed to Persons at Hotels, Schools, and Similar Places. Mail addressed to persons at hotels, schools, and similar places is delivered to the hotel or school. If the addressee is no longer at that address, the mail is redirected to his or her current address by the hotel or school. If the forwarding address is unknown, the mail is returned to the Post Office." The POM consists of regulations of the Postal Service. 39 C.F.R. § 211.2(a)(2).

⁵ DMM § 508.1.7.2 (changed to DMM 508.1.6.2 on January 2, 2011) provides: "Hotel or School. Mail addressed to a person at a hotel, school, or similar place is delivered to the hotel, school, etc. If the addressee is no longer at that address, the mail must be redirected to the current address, if known, or endorsed appropriately and returned by the institution to the Post Office." The DMM consists of regulations of the Postal Service. 39 C.F.R. § 211.2(a)(2).

⁶ The specific location or receptacle to which the Postal Service delivers is established by joint agreement of the Postal Service and a representative of the ownership or management responsible for the business located in the building prior to commencement of delivery. The Postal Service does not agree to any location where the safety of the mail, or of customers or carriers, is in question. After delivery of mail each day, building management becomes responsible for the mail and provides it to respective addressees. Prior to the making of such agreement, the Postal Service first

In 2006, the City of San Francisco (the “City”) enacted the Residential Hotel Mail Receptacle Ordinance (“Ordinance”), codified at S.F. Admin. Code § 41E.3. Complaint at ¶ 22. The Ordinance requires the owners of SRO hotels to install separate mail receptacles for each residential unit. *Id.* Despite the passage of the City’s Ordinance, many SRO hotel owners have refused to install individual mail receptacles. Complaint at ¶ 48.

Prior to December 2008, some Postal Service employees in San Francisco agreed to convert the mode of delivery from single point delivery to centralized delivery into individual mail receptacles (“expanded delivery”) at some SRO hotels after the installation of receptacles. See Complaint at ¶¶ 24-25.

In November 2008, the Postal Service, through San Francisco Postmaster Noemi Luna, explained in a letter to the City’s Department of Building Inspection that the conversion of delivery to individual mail receptacles at SRO hotels was contrary to postal regulations and expensive (the “Luna Letter”). Complaint at ¶¶ 29-30.

In December 2008, San Francisco Postmaster Noemi Luna informed the Department of Building Inspection that the Postal Service would no longer deliver to individual mail receptacles beginning on January 5, 2009.⁷ Luna stated that the City’s ordinance is preempted “to the extent that it attempts to frustrate or interfere with the operations of the Postal Service.” See Complaint, Exhibit 1.

determines the mode or modes of delivery for which the location is eligible. SRO hotels generally qualify for only single point delivery as described by POM § 615.2. By means of this Complaint, Complainant seeks to renege on this arrangement as a solution to its own ongoing failures at respective SRO hotels to take proper custody of the mail and deliver it securely to respective SRO hotel guests.

⁷ The Complainant designated a copy of the letter as Exhibit 1 to the Complaint.

In January 2009, Postal Service employees in San Francisco discontinued the improvidently granted conversion of delivery mode (which was contrary to the standard specified in POM § 631.6) to centralized delivery and reverted to single point delivery at those SRO hotels where the improper mode of centralized delivery had been in place for fewer than 90 days, as provided by POM § 631.7. See Complaint at ¶ 6.

An unspecified number of SRO hotel guests have complained that they do not always receive all of their mail. Complaint at ¶ 45. The Complainant alleges that the mail of some SRO hotel guests has been mishandled after delivery by the mail carrier. Complaint at ¶ 45. The Complainant has identified misconduct by SRO hotel managers that has prevented SRO hotel occupants from receiving all of their mail. See Exhibit 2 (Federal Court Complaint) at ¶¶ 24-25. Some occupants claim that SRO hotel managers or desk clerks have violated their privacy by reading their mail. *Id.* One occupant claimed that her manager required her to retrieve her mail during specified time frames, causing her to use the stairs more frequently than her disability affords. Exhibit 2 at ¶ 23. Other occupants have told the Complainant that they did not receive potential governmental benefits, faced eviction, or suffered medical, financial, or emotional consequences because they did not receive one or more pieces of mail. Complaint at ¶ 47.

The Complainant alleges that the Postal Service directs mail carriers to leave mail at a single point, commonly the front desk or entryway of a SRO hotel. See Complaint at ¶ 6. The Complainant alleges that this policy is inconsistent

with the mail delivery service provided at other buildings, and in other cities.

Complaint at ¶¶ 68-69.

The Complaint alleges two counts: Count I (Declaratory Relief) and Count II (Violation of 39 U.S.C. § 403(c)).

ARGUMENT

This motion focuses on the Complainant's claims brought pursuant to a statute or regulation other than 39 U.S.C. § 403(c) ("non-403 claims"). In Count I of the Complaint, the Complainant cites only section 401(2) as a statutory basis for challenging the Postal Service's conduct. In essence, the Complainant challenges the Postal Service's act of interpreting and applying regulations governing the delivery of mail to various types of buildings where occupants stay for one or more nights. The Complainant does not, however, explain how the Postal Service's interpretations violate section 401(2). In fact, the only connection alleged between that statutory provision and the challenged Postal Service interpretations is the assertion that the questioned regulations were adopted pursuant to the Postal Service's authority under section 401(2). The Complainant does not allege that the regulations are beyond the scope of that authority, or that they were improperly established. Alternatively, the Complainant alleges that the act of interpreting and applying the regulations, to the extent that such conduct conflicts with the Complainant's own interpretations, could only have been accomplished through formal amendment of the existing

regulations. In this regard, the Complainant contends that the interpretations (including the Luna Letter) constitute *de facto* regulations that should have been adopted through some unspecified obligation contained in section 401(2)'s general grant of authority.

Both variations asserted in Count I fail to establish jurisdiction under section 3662, which strictly limits the scope of the Commission's jurisdiction to specific statutory bases. Section 401(2) is not a gateway to challenging any type of Postal Service conduct, simply because that conduct may have been guided or authorized by regulations. Nor does the general grant of authority in section 401(2) establish any obligation to apply regulations only through formal amendment, or specify any procedure for such amendment. In this regard, the Complainant has pointed to no other statutory basis or legal principle that would sustain its theory. Accordingly, since the Complainant has not alleged facts or law sufficient to sustain its claim under Count I, it must be dismissed.

I. THE COMPLAINANT'S NON-403 CLAIMS DO NOT FALL WITHIN THE COMMISSION'S COMPLAINT JURISDICTION.

The Complaint purports to allege violations of 39 U.S.C. § 401(2). Complaint at ¶ 8. The claims under section 401(2) assume an interpretation of the Commission's complaint jurisdiction that is overbroad and reflects an inaccurate understanding of the relevant statutes.

For the Commission to entertain a complaint, the allegations in that complaint must fall within the Commission's authority under section 3662. That section limits the Commission's subject-matter jurisdiction to certain other enumerated statutes or regulations promulgated under those statutory

provisions. 39 U.S.C. § 3662(a); *see also*, 39 C.F.R. § 3030.2. Under the Commission's rules, a complaint must clearly identify and explain how Postal Service action or inaction violates applicable statutory standards or regulatory requirements, and it must include citations to the relied upon section or sections of title 39 of the United States Code, or the governing order, regulation, or other regulatory requirements. 39 C.F.R. § 3030.10(a)(2).

Except for the portion of its Complaint that claims a violation of section 403(c), the Complainant relies solely on section 401(2) as a basis for jurisdiction under section 3662(a).⁸ Section 401(2) authorizes the Postal Service, as one of its general powers, "to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title[.]" The Complainant implies that the Postal Service's application and interpretation of regulations governing mail delivery, as reflected in its single point mail delivery to SRO hotels, violates section 401(2). *See* Complaint at ¶ 8. But the Complainant does not explain how the Postal Service's delivery method violates section 401(2), and instead merely quotes the statutory provision. *See* Complaint at ¶¶ 8-13.

A. The Postal Service's Actions Alleged in the Complaint Do Not Implicate Section 401(2).

Even taken on its own terms, the Complaint does not fall properly within the Commission's subject-matter jurisdiction under sections 3662(a) and 401(2). Section 401(2) grants the Postal Service authority to adopt, amend, and repeal

⁸ The Postal Service would agree with the tacit acknowledgment that no other statute enumerated in section 3662 is relevant to the allegations of this Complaint.

regulations “as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title.” The Complainant, however, has not alleged violation of this provision by challenging the regulations under the standard expressed in this grant of authority. In fact, the Complainant has not challenged the regulations governing delivery policy at all. Rather, the Complainant has challenged the Postal Service’s application of those regulations to SRO hotels.

Reference to section 401(2) in section 3662 does not create a back door under the statutory complaint procedure that would permit circumvention of the clear limitation on the Commission’s jurisdiction, simply because alleged Postal Service conduct is authorized or guided by regulation. By its terms, section 3662 is limited to complaints that the Postal Service is not acting in conformance with “the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations promulgated under those provisions). . . .” Unless a complainant can establish a clear violation of the “requirements” of the alleged statutory basis for the complaint, it must fail for lack of jurisdiction.

As a policy matter, and consistent with the legislative history of amended section 3662, this plain-meaning understanding avoids the disruptive effect that the Complainant’s view would have on Postal Service operations: if parties were allowed to litigate Postal Service operations decisions under sections 3662(a) and 401(2), and the application and interpretation of regulations reflected by these decisions, the Postal Service’s ability to manage and conduct operations

would be seriously disrupted. An acceptance of the Complainant's misunderstanding of section 401(2) would allow Postal Service operations to be held up by any disagreement raised by a customer, and make it impossible for the Postal Service to conduct its business effectively.

B. The Complaint Relies on an Overbroad View of Section 401(2) as a Basis for Section 3662(a) Jurisdiction.

The Complainant's broad take on the relation between sections 401(2) and 3662(a) threatens to explode section 3662(a)'s express limits on the Commission's complaint jurisdiction. In its non-403 claims, the Complainant cites section 401(2) as the basis for the Commission's jurisdiction over its allegation that the Postal Service's mail delivery to SRO hotels is inconsistent with Postal Operations Manual § 631.45. But the Complainant does not explain how Postal Service operations allegedly inconsistent with a provision of the Postal Operations Manual trigger section 401(2) jurisdiction. The Complainant has not alleged inconsistency between a regulation and any statute. Instead, the Complainant has focused on the consistency of operations with regulations, which is not the subject of section 401(2). Congress explicitly excluded Postal Service operations decisions from the scope of jurisdiction under § 401(2). 152 Cong. Rec. S767 (daily ed. Feb. 7, 2006) (statement of Sen. Collins) (It is my hope that ... we can work to assure that the Postal Regulatory Commission does not become embroiled in attempts to resolve disputes as to ... purely operational decisions of the Postal Service).

It appears that the Complainant seeks to convert the reference to section 401(2) and that provision's condition specifying regulations "inconsistent with this

title” into a catch-all for the Commission to exercise complaint jurisdiction over the Postal Service’s general compliance with any statute, regulation, or internal guideline related to title 39, US Code. Thus, the Complainant’s approach to sections 401(2) and 3662(a) would expand the Commission’s jurisdiction beyond Congress’s delineations in section 3662(a).

II. THE LUNA LETTER IS NOT A REGULATION UNDER 39 C.F.R. §211.2.

The Complainant makes an inconsistent and false assertion that “the Postal Service’s stated policy [regarding mail delivery to SRO hotels], set out in the Luna Letter, is a regulation enacted outside the scope of the Postal Service’s regulatory authority as set forth in 39 U.S.C. § 401(2) and 39 C.F.R. § 211.2(a).” Complaint at ¶ 11. Without explanation, the Complainant makes statements in complete opposition to the assertion that the policy in the Luna Letter is a regulation. See, e.g., Complaint at ¶ 34 (“The Luna Letter is not a Postal Service regulation.”). The Complainant even seeks, as declaratory relief, a judgment that “[t]he Luna Letter is not a federal regulation and is not a valid Postal Service regulation pursuant to 39 U.S.C. § 401(2) and 39 C.F.R. § 211.2(a).” Complaint at ¶ 59.

The only way to reconcile this verbal inconsistency is to infer from the Complainant’s allegations that the Luna Letter represents a *de facto* amendment of the existing regulation governing delivery to apartment-style residences (POM § 631.45). The logic of this contention would rest on the unstated and unestablished principle that every action by the Postal Service interpreting an existing regulation governing delivery policy or operations can only be

accomplished through formal amendment of the regulation. The Complainant's allegations also imply that section 631.45 specifically includes reference to SRO hotels, and that any attempt to interpret that regulation as not encompassing such buildings would constitute a violation of the terms of the existing regulation.

However, the questioned regulation does not specifically refer to SRO hotels, but, rather, describes buildings in general terms capable of being applied to how buildings are used in a wide array of factual circumstances. In this instance, the Postal Service long ago determined that SRO hotels must first be examined in light of POM § 615.2 and therefore do not fall within the ambit of section 631.45, but rather meet the definition of "hotels, schools, and similar places" under POM § 615.2 and DMM § 508.1.7.2. The Complainant, however, has alleged no facts or law that would establish that the Luna Letter conflicts with the plain language of either set of regulations, or that the Postal Service's interpretation is inconsistent with the "requirements" of 39 U.S.C. § 401(2). The Complainant, moreover, simply chooses to ignore POM § 631.6, Conversion of Mode of Delivery, when that is the relief it actually seeks under postal regulations.

The Postal Service agrees with the Complainant's representations that the Luna Letter is not a regulation. The Luna Letter is a letter describing the Postal Service's interpretation of statutes and regulations that support its single point mail delivery to SRO hotels. Section 211.2(a) defines Postal Service regulations, and the Luna Letter does not fall within that definition.⁹ The Postal Service has

⁹ 39 C.F.R. 211.2(a) provides:

(a) The regulations of the Postal Service consist of:

not asserted that the Luna Letter is a regulation, and the Complainant does not contend that the Postal Service has made such assertions.

For the reasons above, the Complainant's non-403 claims fall outside the Commission's jurisdiction under 39 U.S.C. § 3662(a), and should be dismissed.

III. THE SUBMISSION OF THIS PARTIAL MOTION TO DISMISS ENLARGES THE TIME PERIOD FOR FILING THE ANSWER.

The filing of a partial motion to dismiss enlarges the time for the defendant's answer to all counts of a complaint, including the counts not addressed in the partial motion to dismiss. *Brocksopp Engineering, Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485 (E.D. Wis. 1991); see generally Michael D. Moberly and Andrea G. Lisenbee, *To Plead or Not to Plead?: Assessing the Effect of a Partial Motion to Dismiss on the Duty to Answer*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 45 (2008) (discussing majority view that partial motion to dismiss tolls the time period for a defendant's answer to all claims). The Postal Service intends to file its answer after the Commission rules on this motion, in accordance with Commission Rule 3030.12.

(1) The resolutions of the Governors and the Board of Governors of the U.S. Postal Service and the bylaws of the Board of Governors;

(2) The *Mailing Standards of the United States Postal Service, Domestic Mail Manual*; the *Postal Operations Manual*; the *Administrative Support Manual*; the *Employee and Labor Relations Manual*; the *Financial Management Manual*; the *International Mail Manual*; and those portions of Chapter 2 of the former *Postal Service Manual* and chapter 7 of the former *Postal Manual* retained in force.

(3) Headquarters Circulars, Management Instructions, Regional Instructions, handbooks, delegations of authority, and other regulatory issuances and directives of the Postal Service or the former Post Office Department. Any of the foregoing may be published in the FEDERAL REGISTER and the Code of Federal Regulations.

CONCLUSION

The United States Postal Service respectfully requests that the Postal Regulatory Commission dismiss claims brought by the Complainant pursuant to any statutory authority other than 39 U.S.C. § 403(c).

Respectfully submitted,

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12 CITY AND COUNTY OF SAN
13 FRANCISCO, CENTRAL CITY SRO
COLLABORATIVE, SAN FRANCISCO
14 TENANTS UNION, and HOUSING
RIGHTS COMMITTEE OF SAN
15 FRANCISCO,

16 Plaintiffs,

17 v.

18 UNITED STATES POSTAL SERVICE;
19 JOHN E. POTTER, MICHAEL DALEY
and NOEMI LUNA, in their official
20 capacities,

21 Defendants.

No. 09-1964 JSW

**FEDERAL DEFENDANTS' NOTICE OF
MOTION AND MOTION TO DISMISS
COMPLAINT**

Date: September 4, 2009
Time: 9:00 a.m.
Ctrm: 11, 19th Floor

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1 **PLEASE TAKE NOTICE** that defendant United States Postal Service, (“USPS” or
2 “Postal Service”) and individual defendants John Potter, Michael Daley, and Noemi Luna will
3 move this Court on **September 4, 2009**, at 9:00 a.m. in Courtroom 11, 19th Floor, United States
4 Federal Court House, 450 Golden Gate Avenue, San Francisco, California, before the Honorable
5 Jeffrey S. White, U.S. District Judge, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), for an
6 order dismissing each and every claim of Plaintiffs’ Complaint. This motion is based on this
7 notice, the memorandum of points and authorities, and all the matters of record filed with the
8 Court, and such other evidence as may be submitted.

9 **ISSUES TO BE DECIDED**

- 10 1. Does the City and County of San Francisco (“City”) have standing to bring the
11 claims alleged in the complaint on behalf of its citizens?
- 12 2. Do Plaintiffs satisfy the constitutional minimums of causation and redressability for
13 standing to bring this Complaint against USPS?
- 14 3. Should this Court dismiss Plaintiffs’ claims because Plaintiffs must bring them
15 under the exclusive, statutorily mandated regime – the Postal Reorganization Act, as most
16 recently modified by the Postal Accountability and Enhancement Act?
- 17 4. Does a justiciable, actual controversy exist between the City and USPS for purposes
18 of declaratory judgment?
- 19 5. Should the individual defendants be dismissed from this case because the only
20 proper defendant is USPS?

21 **I. INTRODUCTION**

22 The Court should grant the USPS’s motion to dismiss for four reasons. First, the City
23 lacks standing to bring claims on behalf of its residents. Second, Plaintiffs’ complaint does not
24 satisfy the constitutional minimums for standing to sue USPS because the alleged harms resulted
25 from actions by third parties – namely, the owners or managers serving as agents of the owners of
26 the single room occupancy residential hotels (“SROs”). Third, because Congress has created an
27 exclusive statutory scheme for addressing Plaintiffs’ first four claims, these claims
28 must be dismissed. Fourth, no justiciable, actual controversy exists between the City and USPS;

1 thus, this Court lacks jurisdiction to provide declaratory relief.

2 Finally, the individual defendants should be dismissed because the real party in interest is
3 USPS, and the individuals sued in their official capacities add nothing to the litigation.

4 **II. FACTUAL BACKGROUND**

5 **A. SROs and the City's Ordinance**

6 SROs are buildings in which tenants rent single rooms, usually without a private
7 bathroom or kitchen. SROs are not necessarily considered apartment buildings under USPS
8 regulations. Under the USPS's regulatory scheme, SROs fit under regulations governing "hotels,
9 schools, and similar places." Postal Operations Manual ("POM") § 615.2¹; Domestic Mail
10 Manual ("DMM") § 508.1.7.2.² At most SROs, USPS delivers mail to a single point, such as a
11 desk clerk or receptacle ("single point delivery"). Compl. ¶¶ 2, 17.

12 In 2006, the City enacted the Residential Hotel Mail Receptacle Ordinance
13 ("Ordinance"), codified at S.F. Admin. Code § 41E.3. Compl. ¶ 27. The Ordinance requires the
14 owners of SROs to install separate mail receptacles for each residential unit. *Id.* Despite the
15 passage of the Ordinance, most of the owners have failed to install separate mail receptacles for
16 their units. *Id.*

17 **B. USPS's Voluntary Expanded Delivery and Subsequent Cessation**

18 Prior to December, 2008, some USPS employees in San Francisco agreed to convert the
19 mode of delivery from single point delivery to individual mail receptacles ("expanded delivery")
20 at some SROs after the owners had installed receptacles.

22 ¹ POM § 615.2 provides: "Mail Addressed to Persons at Hotels, Schools, and Similar
23 Places. Mail addressed to persons at hotels, schools, and similar places is delivered to the hotel
24 or school. If the addressee is no longer at that address, the mail is redirected to his or her current
25 address by the hotel or school. If the forwarding address is unknown, the mail is returned to the
Post Office." The POM consists of regulations of the Postal Service. 39 C.F.R. § 211.2(a)(2).

26 ² DMM § 508.1.7.2 provides: "Hotel or School. Mail addressed to a person at a hotel,
27 school, or similar place is delivered to the hotel, school, etc. If the addressee is no longer at that
28 address, the mail must be redirected to the current address, if known, or endorsed appropriately
and returned by the institution to the Post Office." The DMM consists of regulations of the
Postal Service. 39 C.F.R. § 211.2(a)(2).

1 In November, 2008, USPS through San Francisco Postmaster Noemi Luna explained in a
2 letter to the City's Department of Building Inspection that the conversion of delivery to
3 individual mail receptacles at SROs was contrary to postal regulations and expensive.

4 In December, 2008, San Francisco Postmaster Noemi Luna informed the Department of
5 Building Inspection that USPS would no longer deliver to individual mail receptacles beginning
6 on January 5, 2009. Luna stated that the City's ordinance is preempted "to the extent that it
7 attempts to frustrate or interfere with the operations of the Postal Service." *Id.* at ¶ 29.

8 In January, 2009, USPS employees in San Francisco discontinued the practice of
9 expanded delivery and reverted to single point delivery at some SROs with individual mail
10 receptacles. Compl. ¶ 29.³

11 **C. Misconduct on the Part of SRO Owners**

12 Despite the passage of the City's Ordinance, SRO owners have steadfastly refused to
13 install individual mail receptacles. Compl. ¶ 9f. An unspecified number of SRO tenants have
14 complained that they do not always receive all of their mail. Some claim that SRO managers or
15 desk clerks have violated their privacy by reading their mail. Compl. ¶¶ 24-25. One tenant
16 claimed that her manager required her to claim her mail during specified time frames, causing her
17 to use the stairs more frequently than her disability affords. Compl. ¶ 23. Other tenants have
18 told plaintiffs that they did not receive potential governmental benefits, faced eviction, or
19 suffered medical, financial, or emotional consequences because they did not receive one or more
20 pieces of mail. Compl. ¶¶ 17-22.

21 **D. Plaintiffs' Allegations**

22 Plaintiffs allege that USPS now directs mail carriers to leave mail at the front desk of
23 SROs or near their entryways. Compl. ¶ 2. Plaintiffs allege that this policy is inconsistent with
24 the mail delivery service provided at other apartment complexes, whose residents are more
25 affluent. Compl. ¶¶ 3, 5. Plaintiffs allege that the mail of some SRO residents has been stolen,
26

27 ³ Paragraph 29 of the Complaint fails to note that single point delivery was not reinstated
28 at those SROs whose delivery to apartment style receptacles had been in effect for more than 90
days, a limit specified in POM § 631.7 – *Correction of Improper Mode of Delivery.*

1 mis-delivered, or withheld by SRO clerks after delivery by the mail carrier. Compl. ¶ 2.
 2 Plaintiffs also allege that some residents do not receive federal benefits information or checks,
 3 communication of personal medical information, private letters, and other mail. *Id.* Plaintiffs
 4 claim that the City must “pick up the slack” in providing public services, which causes increased
 5 expenditures. *Id.* ¶ 9(a).

6 **E. Plaintiffs’ Complaint**

7 Plaintiffs’ Complaint alleges five claims: First Claim (Equal Protection), Second Claim
 8 (Free Speech), Third Claim (Freedom of Association), Fourth Claim (Right to Privacy), and Fifth
 9 Claim (Declaratory Relief).

10 **III. THE COURT SHOULD GRANT DEFENDANTS’ MOTION TO DISMISS**

11 **A. Standards for Motion to Dismiss for Lack of Jurisdiction**

12 For purposes of a motion to dismiss for lack of jurisdiction, this Court must accept as true
 13 all alleged facts that have a plausibility of truth. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949
 14 (2009). However, this Court is not required to accept as true mere “conclusory statements” that
 15 purport to support “threadbare” causes of action. *Id.*, citing *Bell Atlantic Corp. v. Twombly*, 550
 16 U.S. 544, 555 (2007). Therefore to survive this motion to dismiss, the complaint must contain
 17 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.*
 18 A claim has “facial plausibility” when plaintiff pleads factual content that allows court to draw a
 19 reasonable inference that defendant is liable for misconduct alleged. *Id.*

20 **B. The City Lacks Standing to Bring Its Constitutional Claims on Behalf of its
 21 Residents**

22 The City lacks standing to sue for vindication of the rights of or redress harms inflicted
 23 upon some segment of its population. In the Ninth Circuit, cities and municipalities do not have
 24 standing to sue on behalf of their citizens as *parens patriae*. In *In re Multidistrict Vehicle Air
 25 Pollution*, 481 F.2d 122 (9th Cir. 1973), *cert. denied*, 414 U.S. 1045 (1973), the court stated that,
 26 “the federal government and the states, as the twin sovereigns in our constitutional scheme, may
 27 in appropriate circumstances sue as *parens patriae* to vindicate interests of their citizens. On the
 28 other hand, political subdivisions such as cities and counties, whose power is derivative and not
 sovereign, cannot sue as *parens patriae*, although they might sue to vindicate such of their own

1 proprietary interests as might be congruent with the interests of their inhabitants.” (Citations
 2 omitted); see also City of Rohnert Park v. Harris, 601 F.2d 1040 (9th Cir. 1979) (City did not
 3 have standing to sue to vindicate interests of its members). Suing as *parens patriae* is the only
 4 way the City might be suing on behalf of its residents, and therefore claims one through four
 5 should be dismissed as to the City.

6 **C. The Remaining Allegations Do Not Satisfy the Constitutional Minimums to
 7 Confer Standing Upon Them Against USPS**

8 The remaining plaintiffs also lack standing to sue USPS because the harms alleged lack
 9 sufficient causal connection with actions of USPS and thus are not redressable by this Court.
 10 The irreducible constitutional minimum of standing requires that plaintiff has (1) suffered an
 11 injury in fact, (2) that there be a causal connection between the injury and conduct complained of
 12 so that the injury is fairly traceable to the challenged action of the defendant and not the result of
 13 the independent action of some third party who is not before the court; and (3) that it be likely, as
 14 opposed to merely speculative, that injury will be redressed by a favorable decision. See Lujan v.
 15 Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). Under the Supreme Court’s standing
 16 jurisprudence and the requirements articulated in Twombly and Iqbal, Plaintiffs’ complaint fails
 17 to show that the alleged harms are caused by USPS and that any injunctive remedy of this Court
 18 against USPS can redress those harms.

19 **1. Causal Connection**

20 Plaintiffs’ complaint fails to show any causal connection between alleged harms and
 21 USPS’ actions because these harms are caused by third parties not before the court, not Postal
 22 Service provision of delivery service. Compl. ¶¶ 17-18. If the harms alleged are caused by a
 23 third party, the plaintiff cannot sue defendant for those harms. Specifically, harm caused by
 24 independent third party action, rather than government action or policy, are insufficient to confer
 25 standing upon plaintiffs to sue the government. The Supreme Court has a long and consistent
 26 history of sustaining these requirements. In Simon v. Eastern Kentucky Welfare Rights
 27 Organization, 426 U.S. 26, 42 (1976), the Court denied standing because the purported injury
 28 “result[ed] from the independent action of some third party not before the court.” The Court held
 that poor individuals who had been denied service at particular hospitals lacked standing to sue

1 the IRS over their policy of providing tax breaks to hospitals that did not serve indigents, since
2 they could not show that any changes in the tax policy would cause the hospitals to change their
3 policies regarding indigent individuals. Id. See also Warth v. Seldin, 422 U.S. 490 (1975) (low-
4 income individuals lacked standing because plaintiffs failed to show that their alleged injury,
5 inability to obtain adequate housing within their means, was not necessarily attributable to or
6 caused by the city ordinance they sought to challenge); Allen v. Wright, 468 U.S. 737 (1984)
7 (parents of African-American children attending public schools lacked standing to challenge
8 IRS's under-enforcement of prohibitions against tax exemptions for discriminatory schools
9 because fact that schools could carry on their policies regardless of the IRS's tax treatment
10 eliminated requisite causal connection).

11 As in Simon, Warth, and Allen, the plaintiffs' harms are caused by a third party not
12 before the Court. Plaintiffs do not allege that USPS fails to deliver SRO tenants' mail. Rather,
13 Plaintiffs allege that USPS delivers the mail to SROs, and that at some point after delivery, the
14 "mail will be stolen or misdelivered or otherwise 'disappear.'" Compl. ¶2. These harms are
15 caused by third party actions and do not flow from the act of delivery by USPS.⁴ Indeed,
16 Plaintiffs concede that in many instances the third party causing the alleged harm is the SRO
17 owner or desk clerk, who withhold or read their tenants' mail. Compl. ¶9(e). Moreover, the
18 proposed installation of mailboxes in SROs would not prevent SRO owners from accessing,
19 withholding, and/or misdelivering tenants' mail because they would have access to those
20 mailboxes. Because the alleged harms result from SRO owner interference with the mail after it
21 has been delivered by USPS in accordance with lawful regulations, Plaintiffs lack standing to sue
22 USPS.

23 The alleged harms of increased expenses for public welfare and services are at least two
24 causative steps removed from the Postal Service's act of delivery. SROs could have, but failed
25 to, redress their inability to deliver mail to residents; and the same is true of the City. The City,
26

27 ⁴ See also 28 U.S.C. § 2680(b) by which Congress chose to immunize the Postal Service
28 from liability for "any claim arising out of the loss, miscarriage or negligent transmission of
letters or postal matter."

1 having required installation of USPS compliant apartment style delivery receptacles, could also
2 have required that those same SROs fulfilled their management responsibility to make proper use
3 of them. Thus, the harms alleged by Plaintiffs are not caused by the Postal Service's act of
4 delivering the mail to a single point of delivery. Aside from a few anecdotes of missing mail
5 arising after the Postal Service effectuated delivery, Plaintiffs' factual showing consists of
6 conclusory allegations. Plaintiffs' claims should accordingly be dismissed as a matter of law.

7 2. Redressability

8 Because the alleged harms are caused by the intervention of third parties or other factors
9 independent of USPS mail delivery, they are not redressable by injunctive relief applied to the
10 Postal Service. Hence, Plaintiffs lack standing.⁵ The Supreme Court has held that it must be
11 "likely, as opposed to merely speculative" that the alleged harm will be addressed by judicial
12 action against the Defendant. Friends of the Earth v. Laidlaw Env'tl. Servs., 528 U.S. 167, 169
13 (2000); see also Lujan, supra at 595 (requiring a "substantial likelihood" the harm will be
14 addressed). The redressability requirement is closely linked to the causality requirement, so
15 much so that the Ninth Circuit has at times treated challenges on these grounds as one category.
16 See Idaho Conservation League v. Mumma, 956 F.2d 1508, 1517 (9th Cir. 1992) ("We can deal
17 with the two components together, for they are both 'alike in focusing on the question of
18 causation.'") (citations omitted). The corollary to these cases is that the alleged harm is being
19 caused by an independent party or other factor external to USPS conduct. Consequently, were
20 this Court to enjoin the Postal Service as Plaintiffs request, the alleged harms would not be
21 redressed.

22 Here, the alleged problems arise from individuals who interfere with mail after its lawful
23 delivery to SROs. Compl. ¶ 2. For example, plaintiffs allege that desk clerks tamper with the

24 ///

25 ///

26
27 ⁵ In this matter, arguments put forth by Defendants regarding the lack of standing overlap
28 with this Court's lack of jurisdiction, the legal system's lack of redressability, and with Plaintiffs' lack of a cause of action.

1 mail.⁶ Id. ¶ 4. Because SRO owners and their management teams also have access to delivery
 2 receptacles, no injunction against the USPS would redress the claimed injury. Moreover, any
 3 injunction against the Postal Service would not reduce the City's claimed expenditures because
 4 the real malefactors' conduct would still occur. It is pure speculation to conclude that a change
 5 in USPS's policies would affect the City's public expenditures. The City's failure to plead facts
 6 supporting injury in fact caused by Postal Service action requires that Plaintiffs' claims one
 7 through four must be dismissed for lack of standing and for failure to state claims that the
 8 requested relief would cure.

9 **D. Plaintiffs' Claims Should be Dismissed Because Congress has Created an**
 10 **Alternative, Exclusive Avenue for Relief**

11 Plaintiffs' first through fourth claims are cognizable under the exclusive statutory scheme
 12 for grievances against USPS that Congress established when it enacted the 2006 Postal
 13 Accountability and Enhancement Act ("PAEA"). The Act created the Postal Regulatory
 14 Commission ("Regulatory Commission" or "PRC") to replace the former Postal Rate
 15 Commission ("Rate Commission"). See 39 U.S.C. § 501. This Court should thus dismiss
 16 Plaintiffs' claims for failure to exhaust remedies available only through the exclusive
 17 congressionally-established venue for such claims. The PAEA provides that "[A]ny interested
 18 person . . . who believes the Postal Service is not operating in conformance with the requirements
 19 of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations
 20 promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory
 21 Commission in such form and manner as the Commission may prescribe." 39 U.S.C. § 3662
 22 (emphasis added). 39 U.S.C. § 403(c), in turn, states that, "In providing services and in
 23 establishing classifications, rates, and fees under this title, the Postal Service shall not, except as
 24 specifically authorized, in this title, *make any undue or unreasonable discrimination among*

25 ⁶ Such conduct can constitute criminal acts. For this reason, the Postal Service has
 26 repeatedly requested that complaints regarding the (mis-) delivery of mail be referred to the
 27 United States Postal Inspection Service. A letter reminding SRO managers of their obligations to
 28 distribute mail has recently been sent to more than 300 SROs identified as receiving single point
 delivery. Nevertheless, without the assistance of complainants or victims, enforcement can be
 problematic.

1 *users of the mails*, nor shall it grant any undue or unreasonable preferences.” 39 U.S.C. § 403(c)
 2 (emphasis added). Congress endowed the Postal Regulatory Commission with the exclusive
 3 authority to “take such action as the Commission considers appropriate in order to achieve
 4 compliance with the applicable requirements and to remedy the effects of noncompliance. . . .”
 5 39 U.S.C. § 3662. Decisions of the Regulatory Commission are only reviewable in the United
 6 States Court of Appeals for the District of Columbia. 39 U.S.C. § 3663.⁷

7 Plaintiffs’ claims one through four allege that USPS discriminates between users of the
 8 mail – SRO renters and apartment renters. Plaintiffs complain of harms caused “because of the
 9 Postal Service’s discriminatory mail delivery policy.” Compl. ¶ 3. Specifically, Plaintiffs allege
 10 that USPS discriminates against a particular class of economically disadvantaged individuals,
 11 “some of the city’s most vulnerable residents.” *Id.* Plaintiffs filed their claim on behalf of
 12 “disabled, elderly, and low-income residents of San Francisco,” *id.* ¶ 5, because Plaintiffs believe
 13 “they are entitled to the same method of mail delivery . . . that is afforded to all other tenants in
 14 all other apartment buildings.” *Id.* ¶ 2. Simply put, Plaintiffs allege that “[t]he Postal Service’s
 15 decision to deny mail delivery to individual SRO residents – while continuing to provide
 16 individual mailbox delivery to all other apartments in the City – is discriminatory. . . .” *Id.* ¶ 31.
 17 Plaintiffs’ allegations fall squarely under the prohibition against discrimination among users of
 18 the mails under 39 U.S.C. § 403(c).

19 Plaintiffs’ exclusive avenue for redress is the Postal Regulatory Commission, subject to
 20 federal appellate review in the District of Columbia Court of Appeals. There are few federal
 21 court decisions following Congress’s enactment of the PAEA and creation of the PRC in place of
 22 the Rate Commission, and none addressing the Regulatory Commission’s authority to adjudicate
 23 service complaints. The Rate Commission had a comparatively limited regulatory role extending
 24 largely to the definition, terms of service and prices for respective Postal Service products
 25 embodied in a schedule of rates and fees, and the Domestic Mail Classification Schedule. *See*
 26 *e.g.*, Postal Rate Commission Docket No. R2006-1, available at www.PRC.gov. Today, the

27
 28 ⁷ Moreover, such judicial review is narrowly prescribed – available only for a period of
 thirty days following final PRC action.

1 Postal Regulatory Commission is a full blown regulator as reflected in its new name.⁸
2 Notwithstanding the old Postal Rate Commission's limited authority, other Circuits held that the
3 former Rate Commission provided the sole venue for claims the Rates Commission was
4 statutorily authorized to hear. The Rate Commission's authority did extend to hearing
5 complaints as follows:

6 Interested parties who believe the Postal Service is charging rates which do not
7 conform to the policies set out in this title or who believe that they are not
8 receiving postal service in accordance with the policies of this title may lodge a
complaint with the Postal Rate Commission in such form and manner as it may
prescribe. . . .

9 Former 39 U.S.C. § 3662

10 In LeMay v. Postal Service, 450 F.3d 797 (8th Cir. 2006), the plaintiff complained that
11 the Postal Service was not giving Priority Mail expedited handling. The Eighth Circuit affirmed
12 the lower court decision dismissing the case for lack of jurisdiction, finding that § 3662 provided
13 the sole remedy for complaining about postal services:
14

15 The [Postal Reorganization Act's] legislative history shows that, in crafting the
16 Act, Congress intended to minimize external intrusions on the Postal Service's
17 managerial independence. Buchanan v. United States Postal Service, 508 F.2d
18 259, 262 (5th Cir. 1975). Congress intended to afford postal management the
"unfettered authority and freedom that has been denied for years to maintain and
operate an efficient service." Sen. Rep. No. 912, 91st Cong., 2d Sess. 2 (1970).

19 Congress gave meaning to this intention by placing within the Postal Service the
20 means to redress a disaffected party's concerns about postal rates and services.
21 Unhappy postal patrons were given recourse to the [Rate Commission]. This is a
22 specific grant of authority over a defined category of postal rate/postal service
23 concerns. This specific designation is contrasted with the District Courts'
otherwise general jurisdiction. Considering the differing treatment of the varying
types of postal disputes, in light of Congress's stated purpose in enacting the
PRA, it is "fairly discernable" that Congress intended to remove consideration of
most postal service complaints from the courts altogether.

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26 _____
27 ⁸ See PAEA Title II (*Modern Rate Regulation*), Title III (*Modular Service Standards*),
28 and Title VII (*Enhanced Regulatory Commission*). *Postal Accountability and Enhancement Act*,
Public Law 109-435.

1 Section 3662, as amended by the PAEA, expressly affords the PRC with jurisdiction over
2 the fairness standard in title 39 – section 403(c). The PAEA also expressly limits how
3 complainants can get judicial review in federal courts. Complainants must first go to the PRC,
4 and then within 30 days after a final PRC action, an undue discrimination matter can only be
5 appealed to the District of Columbia Court of Appeals. Because Plaintiffs have failed to avail
6 themselves of the exclusive avenue to judicial review in the federal courts, this Court should
7 dismiss the Complaint in its entirety.

8 By analogy, it is “fairly discernable” that the Regulatory Commission (subject to
9 appellate review) is the exclusive remedy for complaints cognizable under § 3662, including all
10 of Plaintiffs’ allegations of discrimination. The Sixth Circuit dismissed for lack of jurisdiction a
11 case similar to the present case, holding that the plaintiff could not bring First Amendment
12 challenges to USPS’s policies in federal court before bringing them before the Postal Rates
13 Commission because the challenges implicated mail rates and classifications. See The Enterprise,
14 Inc. v. Bolger, 774 F. 2d 159 (6th Cir. 1985) (“review of a mail rate or classification decision . . .
15 may be sought only on review in the United States Court of Appeals and not by plenary action in
16 the district court.”). Congress specifically identified and categorized discrimination complaints
17 in § 403(c) and singled them out for the Regulatory Commission’s jurisdiction. This Court
18 should not accept Plaintiffs’ attempted re-branding of their allegations of discrimination
19 regarding delivery of mail as constitutional claims that allow them to circumvent the explicit
20 statutory avenues of redress Congress created for such grievances. Cf. Weinberger v. Salfi, 422
21 U.S. 749, 762 (1975) (holding that the district court lacked jurisdiction to hear plaintiff’s
22 constitutional challenge to sections of the Social Security Act because Congress required
23 constitutional challenges to be brought along with nonconstitutional challenges under the Act’s
24 jurisdictional grant).

25 Even if this Court chooses to recognize the Plaintiffs’ constitutional claims as
26 independent causes of action from § 403(c) statutory claims, it should dismiss those claims
27 without prejudice so the underlying, statutory administrative process can be applied. 28 U.S.C.
28 §1331 grants federal courts jurisdiction to hear Constitutional claims. See FDIC v. Meyer, 510

1 U.S. 471 (1994). Notwithstanding the existence of Constitutional claims should not preclude
2 dismissal with prejudice in this case, where the Constitutional claims all depend entirely on an
3 express statutory claim for which this Court lacks jurisdiction.

4 Lastly and significantly, the mix of fact and law in the instant docket falls squarely within
5 a recent Ninth Circuit decision governed by the pre-PAEA Postal Reorganization Act – with one
6 critical distinction. In Currier v. Potter, 379 F.3d 716 (9th Cir. 2003), the Ninth Circuit held that
7 the Postal Rate Commission did not have jurisdiction to hear constitutional and other claims
8 based on the USPS's mail delivery policies. The court held that the Postal Rate Commission
9 lacked jurisdiction because the case did not concern the Postal Service Board of Governor's Rate
10 determination (what it was statutorily authorized to review). Id. at 724 n. 5. On this specific
11 point, the instant case is readily distinguishable from Currier because the PAEA dramatically
12 altered the regulatory landscape in 2006. Congress granted the Regulatory Commission authority
13 to hear complaints different from and broader than the former Rate Commission, and that
14 authority explicitly includes claims sounding under section 403(c). The private right of action
15 found in Currier has now been superseded by the clear intent of Congress to give the Regulatory
16 Commission, and ultimately the District of Columbia Circuit Court, jurisdiction over 403(c)
17 complaints.

18 **E. No Justiciable Controversy Exists Between the City and USPS**

19 This Court cannot provide declaratory judgment as to whether S.F. Administrative Code
20 § 41E is preempted by the Supremacy Clause of the U.S. Constitution because Plaintiffs allege
21 no case or controversy implicating the legal rights of USPS. Therefore Plaintiffs provide no
22 basis for this Court's jurisdiction. Congress provided federal courts discretionary authority to
23 grant declaratory relief in "a case of actual controversy within its jurisdiction." 28 U.S.C. §
24 2201. A case or controversy for purposes of § 2201 must implicate the legal rights of at least two
25 parties with adverse legal interests. The Supreme Court held that the determination of whether a
26 case is judiciable for declaratory judgment turns on "whether the facts alleged, under all the
27 circumstances, show that there is a substantial controversy, *between parties having adverse legal*
28 *interests*, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

1 MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007), quoting Maryland Casualty Co.
2 v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) (emphasis added). Further, to satisfy the
3 case and controversy requirement, the alleged controversy must be “touching the *legal relations*
4 of parties having adverse legal interests.” *Id.* quoting Aetna Life Ins. Co. v. Haworth, 300 U.S.
5 227, 241 (1937) (emphasis added). In summary, declaratory relief “is available only for a
6 ‘concrete case admitting of an immediate and definite determination of the legal rights of the
7 parties.’” Public Service Commission of Utah v. Wycoff Co., Inc., 344 U.S. 237, 243 (1952),
8 quoting Aetna at 466.

9 Plaintiffs’ request for declaratory judgment does not satisfy the “actual controversy”
10 requirement because the alleged controversy does not implicate the legal rights or duties of
11 USPS. In enacting S.F. Administrative Code § 41E, the City imposed duties on San Francisco
12 SRO owners – namely, to install individualized mail receptacles and make arrangements with
13 USPS for delivery to them. Compl. ¶ 29. However, the City explicitly does not attempt to
14 regulate the activities of USPS. One need only consider whether the legal rights or duties of
15 USPS would be altered by a declaration by this Court as to whether the City’s statute is
16 preempted by federal regulation. They would not. Instead, the City is asking this Court to
17 provide a declaration as to the constitutional validity of its own statute in total absence of a
18 legally proper defendant. This Court does not have jurisdiction to do so. It would by contrast be
19 proper for SRO owners to challenge the validity of the City’s ordinance because it imposes legal
20 duties upon them; but it is inappropriate for the City to ask the Court for a declaration, in absence
21 of another party whose legal rights and duties are implicated, at this time. While USPS has
22 offered its opinion on the legal status of the City’s ordinance, a mere alleged difference of
23 opinion does not entitle Plaintiffs to the binding force of a judicial declaration. This Court
24 cannot issue any declarative relief because, for these reasons, Plaintiffs’ allegations do not satisfy
25 the controversy clause of 28 U.S.C. § 2201 and thus the Court lacks jurisdiction to hear the
26 City’s fifth claim.

27 **F. The Court Should Dismiss the Individual Defendants**

28 Defendants John Potter, Michael Daley and Noemi Luna should be dismissed from this

1 suit, as there is no valid reason to sue them in their official capacities when their employer, the
2 Postal Service – which is the focus of Plaintiffs’ grievances – is also a named defendant in the
3 suit. Courts have consistently found that a suit brought against an individual government officer
4 in his or her official capacity “is not a suit against the official but rather a suit against the
5 official’s office.” Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Indeed, the
6 Supreme Court held in Brandon v. Holt, 469 U.S. 464, 470-472 (1985), that a plaintiff bringing a
7 constitutional claim could either proceed directly against a government entity that had waived
8 sovereign immunity, or indirectly sue the entity through an “official capacity” suit against an
9 individual officer – indicating that the two actions were equivalent. However, the Court
10 subsequently stated that its decision in Monell v. New York City Dept. of Social Servs., which
11 waived sovereign immunity with respect to local government units, had rendered official-
12 capacity actions against local government officers unnecessary. See Kentucky v. Graham, 473
13 U.S. 159, 167 n.14 (1985), citing Monell, 436 U.S. 658 (1978). The Court further found that
14 unless a plaintiff intended to state a cause of action against the government officer in a personal
15 capacity, the government entity, and not the officer, should be named as the defendant.
16 Kentucky, 473 U.S. at 165-66. Thus, suing individual government officers in their official
17 capacities is reasonable only when it is a necessary means to avoid a potential sovereign
18 immunity problem where direct claims against the government entity in question are barred. See
19 Bakal v. Ambassador Contr., No. 94-CV-584, 1995 U.S. Dist. LEXIS 10542, *10-11 (S.D.N.Y.
20 Jul. 26, 1995) (explaining that suits against officials are permitted as necessary to avoid obstacles
21 relating to Eleventh Amendment or sovereign immunity). But where a plaintiff sues an
22 individual government officer in his or her official capacity, and also sues the government entity
23 of which that officer is an agent, courts have determined that the official-capacity claims are
24 redundant and unnecessary.

25 Thus, the Ninth Circuit has consistently dismissed official-capacity agents as defendants
26 in constitutional rights cases where the government agency is being or can potentially be sued.
27 See Ctr. For Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep’t, 533 F.3d 780, 799 (9th
28 Cir. 2008) (dismissing sheriff as a “redundant defendant” because the sheriff’s department,

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17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19

20 CITY AND COUNTY OF SAN
 FRANCISCO, CENTRAL CITY SRO
 21 COLLABORATIVE, SAN FRANCISCO
 TENANTS UNION, and HOUSING RIGHTS
 22 COMMITTEE OF SAN FRANCISCO

23 Plaintiffs,
 24 vs.

25 UNITED STATES POSTAL SERVICE;
 JOHN E. POTTER, MICHAEL DALEY and
 26 NOEMI LUNA, in their official capacities,

27 Defendants.
 28

Case No. C09-1964 JCS

PLAINTIFFS' OPPOSITION TO MOTION TO
 DISMISS COMPLAINT

Hearing Date: September 4, 2009
 Time: 9:00 a.m.
 Place: Courtroom 11, 19th Floor

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1 INTRODUCTION

2 This lawsuit stems from the unwillingness of the United States Postal Service, John E. Potter,
3 Michael Daley and Noemi Luna (collectively, "Defendants" or the "Postal Service") to deliver the
4 mail in accordance with the United States Constitution and the Postal Service's own regulations. As
5 explained in detail in the Complaint, the Postal Service's unsupportable mail delivery policy harms
6 San Francisco's most vulnerable residents, many of whom rely on the mail for their sole means of
7 support, their only contact with loved ones, their only means of accessing medical care, and in some
8 cases their ability to survive.

9 Rather than take action to prevent future such harms, Defendants have moved to dismiss the
10 Complaint for lack of subject-matter jurisdiction. They present a smorgasbord of theories that rely, in
11 the end, only on misrepresentations of the Plaintiffs' complaint, their own procedurally improper and
12 factually unsupported assertions, and inapposite case law. First, for example, Defendants ask this
13 Court to find that the City of San Francisco ("City") lacks standing to sue on behalf of its citizens as
14 *parens patriae*. But the City is not asserting *parens patriae* standing. Rather, as Defendants fail to
15 mention, the City alleges ample harm to its own interests to more than satisfy Article III.

16 Next, Defendants claim that any harms SRO residents may suffer when they do not receive
17 their mail are not Defendants' fault because the real culprits are the third parties who lose or steal the
18 mail that Defendants practically place in their hands. Defendants conveniently ignore the critical fact
19 that those third parties would not even have access to the mail if Defendants would simply deliver it to
20 individual, locked mailboxes as they do for all other apartment residents. And even if third parties do
21 share some of the responsibility, the harm remains "fairly traceable" to Defendants' conduct, which is
22 all that is needed to establish causation.

23 Defendants also assert that Plaintiffs could have brought a statutory claim for relief, and
24 therefore the constitutional claims that Plaintiffs actually did plead must be brought first to the Postal
25 Regulatory Commission. Every aspect of this argument breaks down under scrutiny, but ultimately it
26 runs aground on *Currier v. Potter*, a Ninth Circuit case that is factually and legally on point, and
27 squarely holds that the district courts have jurisdiction over both the constitutional claims Plaintiffs
28 have actually alleged and the statutory claim that Defendants seem to wish they had alleged instead.

1 Next, ignoring that their threatening letter caused the City to have a reasonable apprehension
 2 that it would face legal action, Defendants assert that the City's claim for declaratory relief is
 3 improper. But the City is entitled under the Declaratory Judgment Act to relief from threats that place
 4 the City in fear of legal action and undermine the City's ability to enforce its own ordinance.

5 Finally, the individual Defendants ask to be dismissed on the grounds that the Postal Service
 6 has not yet asserted sovereign immunity as a defense in this case. Defendants have offered only
 7 inapposite cases rather than legal authority in support of their position. Like all the rest of the motion
 8 to dismiss, the Court should reject this argument too.

9 BACKGROUND

10 The United States Postal Service has refused to deliver mail into individual locked boxes at
 11 Single Room Occupancy buildings ("SROs") in San Francisco, even though SROs satisfy the Postal
 12 Service's own definition of "apartment buildings,"¹ and even though the Postal Service places the mail
 13 into individual locked boxes at all other San Francisco apartment buildings. Compl. ¶2. This has
 14 caused grievous harm to some SRO residents and the City and County of San Francisco. Compl.
 15 ¶¶9a-d, 22, 28.

16 SROs are buildings with small, one-room apartments, usually 8'x10' in size. Unlike studio
 17 apartments in more expensive buildings, SRO tenants usually do not have cooking or bathing facilities
 18 in their rooms and must share communal kitchens and bathrooms. Because they are the least
 19 expensive of all rentals, SROs often house people who are just one step away from homelessness.
 20 Many of them are retirees or people with disabilities living on small, fixed incomes; others are families
 21 with children, such as recent immigrants and/or working parents whose wages are low. Compl. ¶1.

23 ¹ Postal carriers are required to deliver mail to individual mailboxes in "apartment houses," a
 24 Postal Service category that encompasses SROs. According to the Postal Operations Manual
 25 ("POM"), "apartment houses" include all "residential building[s] containing apartments or units
 26 occupied by different addressees (regardless whether the building is an apartment house, a family
 27 hotel, residential units, or business units in a residential area and regardless of whether the apartments
 28 or units are owned or rented)" as long as the building has (1) at least three units; (2) a common
 building entrance; (3) a common street address; (4) mail receptacles approved by the Postal Service;
 (5) one mailbox per apartment; and (6) mailboxes at a central location readily accessible to the carrier.
 POM 631.45. SROs are clearly "residential units" and they satisfy all of the other criteria for
 "apartment houses." Thus, under the Postal Service's own regulations, mail carriers must treat SROs
 as they do all other apartment buildings and deliver the mail to individual mailboxes.

1 The Postal Service delivers these tenants' mail by tossing a mailbag or perhaps an open mail bin
2 somewhere near the door, or maybe at the front desk of the building—and walking away. Everyone in
3 the vicinity has access to this mail: clerks, tenants, visitors, intruders, and any other passersby. Such
4 unsecured delivery results in a significant amount of stolen, misdelivered, withheld and/or lost mail,
5 almost all of which the tenants would have received had the mail carrier simply followed the USPS
6 regulations on apartment buildings and delivered the mail to the tenants' individual boxes. Compl. ¶2.
7 Indeed, residents in a small number of SRO buildings where the Postal Service does deliver the mail
8 into individual locked boxes nearly universally report a vast improvement in the actual receipt of their
9 mail. Compl. ¶28.

10 The people who live in SROs tend to have very few resources, and those they do have tend to
11 come in the mail. Compl. ¶3. The harms that SRO residents face when they do not receive these
12 resources can be devastating, and include eviction, homelessness, hunger, loss of access to medical
13 care, and the like. *Id.* One SRO resident, doing everything he could to stave off eviction, arranged a
14 payment schedule that he could meet only if he pawned his only valuable possession, a laptop
15 computer, and asked his mother for a final bit of financial help. He made his initial payments and
16 pawned his laptop, but the \$150 money order from his mother never arrived. It was cashed shortly
17 after the Postal Service delivered it in an unsecured bag to the SRO, but not by him. He now lives in a
18 San Francisco homeless shelter. Compl. ¶18. Another SRO resident lost his Medi-Cal coverage while
19 undergoing medical treatment for terminal cancer because he did not receive a mailed notice to which
20 he was supposed to respond. Compl. ¶21. Other information from his doctors, like appointment
21 notices and treatment-related correspondence, has also failed to arrive. *Id.*

22 SRO residents also face privacy harms when their mail is delivered in one unsecured pile, on
23 display for building management and unknown others to see. Sometimes they receive their mail
24 already opened. Compl. ¶24. Other times they do not receive their mail at all—but plainly someone
25 else has. One resident, for example, lives in a building where rent increases are automatic when the
26 tenant starts receiving a new benefit. That resident's rent went up shortly after the letter notifying him
27 that he had been approved for a new benefit had been mailed—even though he never received the
28 notice of acceptance. Compl. ¶ 25. Moreover, many tenants with medical conditions or controversial

1 beliefs worry that their personal medical or associational information, which they have a right to keep
2 private, will come to the attention of building managers or other tenants. Compl. ¶26.²

3 In addition to the SRO residents, the City and County of San Francisco also faces substantial
4 economic harm from the Postal Service's refusal to provide the same secure delivery to SRO tenants
5 as it does to other apartment building tenants. For example, San Francisco foots the bill whenever a
6 SRO tenant who fails to receive a federal or state benefits check loses his or her housing or groceries
7 or childcare or prescriptions or transportation as a result. Compl. ¶9a. When SRO residents lose not
8 just a benefit check for a month, but instead their eligibility to receive a state or federal benefit at all
9 because they have not, for example, received a notice requiring a response, then San Francisco incurs
10 significant ongoing expenses providing benefits and assistance that the state or federal government
11 should be providing instead. Compl. ¶¶9b, 19.

12 The Postal Service's refusal to provide reasonably secure delivery at SROs also impedes the
13 City's ability to exercise its core governmental functions. For example, the San Francisco Department
14 of Public Health ("DPH") exists to protect and promote the health of all San Franciscans. Compl. ¶9c.
15 It provides medical services for some SRO residents, and it relies on the mail to communicate with
16 those patients. When that communication is systematically hampered by the Postal Service's refusal
17 to use the comparably more secure delivery method at SROs that it uses at all other apartment
18 buildings, the consequences can be devastating to the patient and also the City. Compl. ¶¶9c&d. So,
19 for example, an SRO resident did not receive a letter informing him that DPH had diagnosed him with
20 a serious and transmissible infectious disease. He discovered his condition more than a year later,
21 when he for the first time saw the letter that DPH had sent him in a chart maintained by another
22 provider. The delay in receiving his diagnosis subjected him serious medical consequences. But
23 because he also was left unaware of his disease and how to prevent further contagion, both DPH and
24 the public at large faced injury through the unintended, but also unchecked, spread of an infectious
25 disease that resulted from the Postal Service's failure to provide the same relatively secure mail
26

27 ² Defendants appear insensible to these many harms they inflict by failing to follow their own
28 regulations and cavalierly describe the Complaint as nothing more than "a few anecdotes of missing
mail." Def. Mem. at 7.

1 delivery to SROs as to other apartment buildings. Compl. ¶9d. The City faces similar injuries to its
 2 core governmental functions and interests when the unsecured mail delivery at SROs chills tenants'
 3 willingness to report health and safety violations for fear of discovery or retaliation, or when tenants
 4 do not receive their voter pamphlet or absentee voter materials, or the like. Compl. ¶¶9,9e.

6 ARGUMENT

7 I. THE LEGAL STANDARD DOES NOT TOLERATE DEFENDANTS' UNSUPPORTED 8 FACTUAL CONTENTIONS.

9 Federal district courts, like other Article III courts, are "courts of limited jurisdiction ... [that]
 10 possess only that power authorized by [the] Constitution and statute." *Exxon Mobil Corp. v.*
 11 *Allapattah Servs.*, 545 U.S. 546, 552 (2005) (internal quotation marks omitted). A plaintiff bears the
 12 burden of demonstrating that its complaint falls within this limited grant of jurisdiction. *Lujan v.*
 13 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). And a defendant that believes jurisdiction is lacking
 14 may, as here, file a motion to dismiss on this ground under Rule 12(b)(1) of the Federal Rules of Civil
 15 Procedure.

16 At the initial pleading stage, courts generally limit their review of a motion to dismiss "to the
 17 face of the complaint, materials incorporated into the complaint by reference, and matters of which
 18 [they] may take judicial notice." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir.
 19 2009). Only if the defendant submits evidence that puts jurisdiction in doubt does the burden shift to
 20 the plaintiff to produce evidence that demonstrates jurisdiction. *See La Reunion Francaise SA v.*
 21 *Barnes*, 247 F.3d 1022, 1026 n.2 (9th Cir. 2001). Here, since Defendants have submitted no evidence,
 22 nor even requested judicial notice of any extrinsic materials, the Court considers only whether the
 23 plausible, well-pleaded factual allegations³ in the complaint, when assumed to be true and construed in
 24 the light most favorable to the plaintiff, are sufficient to establish jurisdiction. *See Johnson v.*
 25

26 ³ Defendants invoke the heightened "plausible facts" pleading standard of *Ashcroft v. Iqbal*,
 27 129 S.Ct. 1937, 1949 (2009). By its terms, *Iqbal* governs motions to dismiss under Rule 12(b)(6), but
 28 its application to Rule 12(b)(1) motions is so far unclear. In any event, however, Plaintiffs are
 confident that their jurisdiction-related factual allegations are both plausible and well pleaded, and
 note that Defendants have not identified any such allegation that falls below the *Iqbal* threshold.

1 *Riverside Healthcare System*, 534 F.3d 1116, 1122 (9th Cir. 2008). Defendants' repeated attempts to
2 inject their own unsupported assertions into the Court's deliberations are improper.⁴

3 **II. THE CITY HAS STANDING IN ITS OWN RIGHT BASED ON ITS OWN INJURY IN**
4 **FACT.**

5 Defendants argue that the City lacks standing to sue on behalf of its citizens in *parens patriae*.
6 That is true and would be relevant if the City were asserting *parens patriae* standing, but as any fair
7 reading of the allegations in the Complaint reveals, it is not. The City is suing in its own right for
8 redress of its own injuries, and Defendants' argument about third-party standing misses the mark.⁵

9 The City has direct standing under Article III because it has suffered an independent "injury in
10 fact," that is, the invasion of a legally protected interest that is concrete and particularized, and actual
11 or imminent rather than hypothetical or speculative. *Lujan*, 504 U.S. at 560. The City's injuries
12 satisfy all of these criteria. Because of the Postal Service's refusal to deliver the mail into individual
13 mailboxes at SROs, the City must provide additional financial support and costly services to SRO
14 residents. Compl. ¶¶9a, 9b & 19. These actual, concrete financial costs are particular to it alone. The
15 City is also injured by its diminished ability to carry out some of its key government functions, such as
16 safeguarding public health, enforcing health and safety laws, and engaging in government speech
17 about important civic matters. Compl. ¶¶9, 9c-e.

18 Only the City suffers these injuries, not its residents. The City has Article III standing in its
19 own right, independent of the *parens patriae* doctrine.

20
21 ⁴ Consider, for example, Defendants' repeated but entirely unsupported assertion that the
22 owners and managers at the SROs are the cause of the missing mail along with their similarly
23 unsupported claim that SRO owners and their management teams always have access to individual
24 mailboxes. These two impermissible "facts" form the sole basis for Defendants' attack on the
25 redressability requirement.

26 ⁵ The only cases Defendants cite in regard to the lack of municipal standing under the *parens*
27 *patriae* doctrine both emphasize that a city may sue on its own behalf to vindicate its proprietary
28 interests regardless of *parens patriae* limitations. See *City of Rohnert Park v. Harris*, 601 F.2d 1040,
1044 (9th Cir. 1979); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th
Cir. 1973). As the Ninth Circuit recently explained,

The term "proprietary" is somewhat misleading, for a municipality's cognizable interests are not
confined to protection of its real and personal property. The "proprietary interests" that a municipality
may sue to protect are as varied as a municipality's responsibilities, powers, and assets.
City of Sausalito v. O'Neill, 386 F.3d 1186, 1197 (9th Cir. 2004).

1 **III. THE ASSOCIATIONAL PLAINTIFFS HAVE STANDING.**

2 **A. The Harms Alleged In The Complaint Are Caused By Defendants Mail Delivery Policy.**

3 Based solely on factual assertions that appear nowhere in the Complaint, Defendants contend
4 that Plaintiffs lack standing because their Complaint fails to allege a causal connection between the
5 alleged harms and Defendants' conduct. According to Defendants, they cannot be held responsible for
6 their unconstitutional mail delivery practices because a third party—namely, the "SRO owners" who
7 Defendants have entrusted to deliver the mail—sometimes steal it. This argument fails both as a
8 matter of law and as a matter of common sense.

9 The causation element of the standing test requires that the injury be "fairly . . . trace[able] to
10 the challenged action of the defendant" rather than to the actions of third parties not before the Court.
11 *Simon v. E. Ky. Welf. Rights Org.*, 426 U.S. 26, 41-42 (1976). Plaintiffs need only plead "general
12 factual allegations of injury resulting from the defendant's conduct . . . [because] on a motion to
13 dismiss we presume that general allegations embrace those specific facts that are necessary to support
14 the claim." *Lujan*, 504 U.S. at 561 (internal quotations omitted).

15 The Complaint easily satisfies this standard by alleging that the harms suffered by SRO
16 residents and the City are caused by Defendants' refusal to deliver mail to individual, locked
17 mailboxes. Compl. ¶¶9, 17-25, 28. The allegations are supported by common sense. Although SRO
18 desk clerks, thieves, and acts of nature may bear some responsibility for the missing mail, Compl. ¶24,
19 those "third parties" would not even have access to the mail if it were delivered to individual, locked
20 mailboxes, rather than being left in an unsecure location or with people who the Postal Service knows
21 cannot be trusted to deliver it. Compl. ¶¶2, 24. Thus, the harms alleged in the Complaint are all
22 "fairly . . . trace[able]" to Defendants' mail delivery policy with respect to SROs, *Simon*, 426 U.S. at
23 41, and would cease outright if the Court granted the relief sought.⁶ Compl. ¶¶9, 17-25, 28.

24 Defendants assert that their refusal to deliver mail to individual, locked mailboxes at SROs
25 does not cause Plaintiffs' harms because SRO owners would still have a key to the mailboxes and

26 _____
27 ⁶ The close connection here between the harms alleged and Defendants' unlawful conduct bears
28 no resemblance to the attenuated, speculative connections in *Simon*, 426 U.S. at 42, *Warth v. Seldin*,
422 U.S. 490 (1975), and *Allen v. Wright*, 468 U.S. 737 (1984). Accordingly, those cases do not
support Defendants' argument.

1 would be able to access the tenants' mail even if it were properly delivered by Defendants. But there is
2 no support for Defendants' speculation that SRO owners would necessarily have keys to the individual
3 tenants' mailboxes,⁷ much less the suggestion that SRO owners would violate federal law by
4 disturbing mail properly delivered to secure mailboxes. Defendants are not entitled to a motion to
5 dismiss based on hypothetical scenarios and factual assertions that are outside the Complaint.⁸ *Arpin*
6 *v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001). Further, Defendants'
7 argument (even if it could be considered by the Court on a motion to dismiss) only concerns mail loss
8 attributable to intentional misconduct by SRO owners. It ignores the fact that delivering mail to secure
9 mailboxes would prevent mail from being taken or lost by SRO desk clerks, managers, fellow tenants,
10 thieves in the neighborhood, or acts of nature – all "third parties" that are not likely to have access to
11 locked mailboxes. Compl. ¶24.

12 Finally, it is no response to contend, as Defendants do, that their conduct did not cause
13 Plaintiffs' harms because other parties share some of the blame. Indeed, it is well established that "the
14 fact that the defendant is only one of several persons who caused the harm does not preclude a finding
15 of causation sufficient to support standing." Moore's Federal Practice §101.41[1]; *see also Nat'l*
16 *Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) (causation element satisfied even
17 though "chain of causation has more than one link"); *Loyd v. Paine Webber, Inc.*, 208 F.3d 755, 758
18 (9th Cir. 2000) (causation element satisfied in suit against law firm where law firm negligently failed
19 to prevent the fraudulent conduct of third party); *Lac Du Flambeau Band of Lake Superior Chippewa*
20 *Indians v. Norton*, 422 F.3d 490, 500 (7th Cir. 2005) ("While the Secretary may not be the only party
21 responsible for the injury alleged here, a plaintiff does not lack standing merely because the defendant
22 is one of several persons who caused the harm."). Defendants' refusal to deliver mail to SRO residents
23 in a secure manner, notwithstanding their own regulations requiring such secure delivery, allows

24
25 ⁷ Indeed, Plaintiffs counsel is aware of instances in which the Postal Service kept the master
26 key rather than leaving it in the owner or manager's possession where the owner or manager had a
27 history of tampering with the mail.

28 ⁸ Defendants also rely on the unsubstantiated assertion that the Postal Service delivers mail to
SROs "in accordance with lawful regulations." Def. Mem. at 6. That is not correct. As explained in
paragraph 30 of the Complaint, the Postal Service's refusal to deliver mail to individual, locked
mailboxes at SROs conflicts with its own regulations as set forth in POM 631.45.

1 important mail to be lost, stolen, carried off by the wind, or read by someone other than the addressee,
2 and thus causes the harms pled in the Complaint. Compl. ¶¶9, 17-25, 28. Accordingly, the causation
3 element is satisfied here.

4 **B. The Harms Alleged In The Complaint Are Redressable.**

5 Defendants' redressability argument fails for the same reasons as their causation argument. To
6 demonstrate redressability, Plaintiffs must plead facts suggesting it is "likely, as opposed to merely
7 speculative" that the alleged harm will be redressed by a ruling in Plaintiffs' favor. *Friends of the*
8 *Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 169 (2000). Here, the harms alleged in the complaint
9 would cease if Defendants would satisfy their constitutional obligations and deliver mail to SRO
10 residents as they do to all other apartment residents. Compl. ¶¶9, 17-25, 28.

11 Defendants speculate the harms in the complaint are not redressable because "SRO owners and
12 their management teams" would have access to the mailboxes, but there is no support in the Complaint
13 or in the Defendants' moving papers for that factual assertion. Def. Mem. at 8. Therefore, that
14 argument cannot be considered on a motion to dismiss. *Arpin*, 261 F.3d at 925. Further, the
15 redressability of many of the harms pled in the Complaint does not necessarily have anything to do
16 with whether or not SRO owners "and their management teams" would steal mail from locked mail
17 receptacles. Compl. ¶¶9, 18 -24, 26. Indeed, Defendants' mail delivery policy allows the mail to be
18 lost or stolen by persons other than SRO management, including SRO desk clerks and other
19 employees, fellow tenants, thieves in the neighborhood, or even just acts of nature. Compl. ¶¶9, 18 -
20 24, 26. Defendants offer no explanation for why these harms would not be redressed if Defendants
21 delivered mail to individual, locked mailboxes. Indeed, as the Complaint alleges and the Court is
22 required to accept on a motion to dismiss, these harms would be redressed if the Defendants' ceased
23 their unconstitutional mail delivery policy. Compl. ¶28 ("SRO residents whose mail is delivered to
24 private, locked mailboxes almost universally report a vast improvement in the actual receipt of their
25 mail.")

1 **IV. THE PLAINTIFFS ARE NOT REQUIRED TO EXHAUST THEIR**
2 **CONSTITUTIONAL CLAIMS.**

3 Defendants next argue that the Court lacks jurisdiction because the Plaintiffs are required to
4 exhaust their constitutional claims before the Postal Regulatory Commission. This is incorrect.

5 The jurisdictional analysis in *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2004) squarely controls
6 this case. In *Currier*, three homeless persons lacking residential access to the mail filed suit after the
7 Postal Service deemed two of them ineligible for no-fee postal boxes because they could not provide a
8 physical address, and because general delivery services were provided only at a single downtown
9 Seattle post office, making access difficult.⁹ *Id.* at 722-23. As relevant here, the plaintiffs alleged that
10 these actions violated § 403(c) of the Postal Reorganization Act, 39 U.S.C. § 101 *et seq.*, and the First
11 and Fifth Amendments. *Id.* at 723.

12 The court concluded that there was federal jurisdiction to entertain both the statutory and the
13 constitutional claims. Section 403(c) provides that, in providing services and establishing rates, “the
14 Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable
15 discrimination among users of the mails” Because the provision was intended to benefit persons
16 such as the plaintiffs and because of Congress’s particular concern with preventing discrimination, the
17 court explained, 39 U.S.C. § 403(c) creates a private right of action in federal court. *Id.* at 726. The
18 court further held that the district court also had subject-matter jurisdiction over the constitutional
19 claims, a conclusion that even “[t]he Postal Service does not dispute.” *Id.*¹⁰

20 In arguing that, contrary to *Currier*, Plaintiffs in the Ninth Circuit must actually exhaust their
21 constitutional claims before the Postal Regulatory Commission, Defendants face a difficult task. Their
22 basic argument is as follows: the post-*Currier* Postal Accountability and Enhancement Act (“PAEA”)
23 (Pub.L. 109-435, Dec. 20, 2006, 120 Stat. 3198) places exclusive jurisdiction for § 403(c) violations

24 ⁹ The court noted that although some shelters are willing to receive mail on behalf of homeless
25 persons, that potential solution is unsatisfactory because “mail theft in shelters is a recurring problem.”
Currier, 379 F.3d at 722.

26 ¹⁰ Defendants quite properly refrain from arguing that the Postal Service’s concession is the
27 basis of the court’s holding. As the *Currier* panel opinion’s author has elsewhere explained, although
28 “[t]he parties do not question our jurisdiction . . . we have an ‘independent obligation’ to ensure that
such exists.” *Poore v. Simpson Paper Co.*, 566 F.3d 922, 925 (9th Cir. 2009) (quoting *Hernandez v.*
Campbell, 204 F.3d 861, 865 (9th Cir. 2000) (per curiam)).

1 with the Postal Regulatory Commission (PRC) and thus abrogates *Currier's* holding that § 403(c)
 2 creates a private right of action in federal court; Plaintiffs' constitutional claims should all be
 3 construed as a single, statutory § 403(c) "unfair discrimination" violation and dismissed; or
 4 alternatively, a § 403(c) claim should be implied into the complaint alongside the existing
 5 constitutional claims, all of which should be dismissed without prejudice so that the statutory claim
 6 may first be heard by the PRC. The constitutional claims, apparently, would only see the light of day
 7 on the limited review of PRC decisions conducted by the in the D.C. Circuit. *See generally* Def. Mem.
 8 8-12. Just to recite this highly creative theory goes most of the way toward disproving it.

9 Defendants' argument hinges primarily on their contention that the PAEA abrogates the
 10 holding in *Currier* that there is a private right of action in federal court under § 403(c). For if there is
 11 still federal jurisdiction over § 403(c) claims after the PAEA, it is irrelevant for jurisdictional purposes
 12 whether Plaintiffs could have or should have brought a § 403(c) claim in addition to or instead of their
 13 constitutional claims. Only if the PAEA actually abrogates *Currier* does Defendants' proposed
 14 alchemy of Plaintiffs' constitutional claims into a statutory one take on any possible practical
 15 significance.

16 Defendants contend that the PAEA altered the jurisdiction of the Postal Rate Commission,
 17 which it also renamed the Postal Regulatory Commission.¹¹ The pre-PAEA jurisdictional grant
 18 provided:

19 Interested parties who believe the Postal Service is charging rates which do not
 20 conform to the policies set out in this title or *who believe that they are not*
 21 *receiving postal service in accordance with the policies of this title* may lodge a
 complaint with the Postal Rate Commission in such form and in such manner as
 it may prescribe.

22 39 U.S.C. § 3662 (Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 764) (italics added). Section 403(c) of same
 23 title has not been amended and prohibited then as now "any undue or unreasonable discrimination
 24 among users of the mails" in rates or services. 39 U.S.C. § 403(c). Thus, prior to the 2006 PAEA
 25 amendments and at the time of the 2004 *Currier* decision, former § 3662 allowed aggrieved postal

26 _____
 27 ¹¹ Defendants make much of this name change, claiming that it signals a new era for the
 Commission as "a full blown regulator." Def. Mem. at 10. As the discussion of the modest scope of
 28 changes in the Commission's actual jurisdiction indicates, Defendants may be indulging in a bit of
 hyperbole.

1 customers to file a complaint with the Postal Rate Commission alleging that the were not receiving
2 postal service in accordance with the non-discrimination policy in § 403(c).

3 After amendment in December 2006, the current jurisdictional grant of the Postal Regulatory
4 Commission provides:

5 Any interested person (including an officer of the Postal Regulatory
6 Commission representing the interests of the general public) *who believes the*
7 *Postal Service is not operating in conformance with the requirements of the*
8 *provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or*
regulations promulgated under any of those provisions) may lodge a complaint
with the Postal Regulatory Commission in such form and manner as the
Commission may prescribe.

9 39 U.S.C. § 3662(a) (italics added). Compared to prior § 3662, the Regulatory Commission's
10 jurisdiction is broader because it is not restricted to rates and services. But it is also narrower, because
11 rather than permitting complaints on the basis of all of the policies in Title 39, it limits the Regulatory
12 Commission's jurisdiction to just a few enumerated statutory provisions and their attendant
13 regulations. And most important for present purposes, the aspect of the jurisdictional grant most
14 relevant to the private-right-of-action holding in *Currier* as well as to the instant case remains
15 unchanged. Now, just as before, aggrieved postal customers may lodge a complaint before the Postal
16 Commission alleging that they were not receiving postal service in conformance with the requirements
17 of § 403(c). Where hardly anything has changed for § 403(c) claims, it is disingenuous to assert that
18 "the PAEA dramatically altered the regulatory landscape" such that "[t]he private right of action found
19 in *Currier* has now been superceded by the clear intent of Congress to give the Regulatory
20 Commission . . . [exclusive] jurisdiction over 403(c) complaints." Def. Mem. at 12. There is no basis
21 in the PAEA, much less a compelling one, to justify this Court in rejecting controlling precedent.

22 The case law Defendants cite in support of their abrogation argument serves them no better.
23 As they themselves candidly admit, there are no cases analyzing the role of the Postal Regulatory
24 Commission in adjudicating service complaints under PAEA. Def. Mem. at 9. Needless to say, that
25 means there is no Supreme Court case overruling *Currier*, nor even any case anywhere expressing any
26 doubts about it. Without much to choose from, Defendants must rely chiefly on an Eighth Circuit case
27 that predates the PAEA and holds that district courts lack jurisdiction over those claims that can be
28 brought before the Postal Rate Commission under § 3662. *See LeMay v. Postal Serv.*, 450 F.3d 797

1 (8th Cir. 2006) (declining to interpret “may” in § 3662 as indicative of permissive rather than exclusive
2 jurisdiction). Defendants then employ *LeMay* to argue that post-PAEA, this Court should adopt a
3 similar rule and find exclusive jurisdiction in the Regulatory Commission for claims under § 403(c).

4 This Court would be unwise to do so. *LeMay*’s exclusive regulatory jurisdiction is clearly
5 incompatible with *Currier*’s private right of action, and *Currier* is still good law. “A district judge
6 may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of
7 appeals who have ruled on a controlling legal issue Binding authority within this regime cannot
8 be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is*
9 the law.” *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001).

10 Defendants’ reliance on a nearly 25-year-old Sixth Circuit case is similarly unavailing because
11 its conclusion that some mail rate and classification decisions are outside the jurisdiction of federal
12 district courts is anchored in an appellate review statute that has no application to this case and, even if
13 it did, has since been repealed. *See The Enterprise, Inc. v. Bolger*, 774 F.2d 159, 161 (6th Cir. 1985)
14 (construing former 39 U.S.C. § 3628 to place exclusive review jurisdiction over enumerated
15 challenges to mail rate or classification decisions in the Court of Appeal, including when constitutional
16 challenges are raised). In contrast, *Currier* is a binding Ninth Circuit decision that holds that there is
17 federal jurisdiction to hear constitutional claims related to the discriminatory provision of mail
18 delivery. 379 F.3d at 726.

19 A lower court should proceed with utmost caution when a litigant urges it to disregard a
20 controlling case from a higher court in the absence of clear authority for such a bold and disfavored
21 move. But here, while Defendants urge this Court out on the limb of ignoring a Ninth Circuit case that
22 is directly on point, they offer little in the way of a safety net. The “dramatic” statutory changes said
23 to abrogate the Ninth Circuit’s holding that there is a private right of action for § 403(c) claims would
24 actually have altered the regulatory landscape in *Currier* not one whit. And it goes without saying that
25 contradictory cases from other circuits cannot unseat a controlling Ninth Circuit opinion. Finally, lest
26 the Court forget, Defendants’ whole exhaustion argument is a hypothetical exercise premised on the
27 counterfactual assertion that Plaintiffs have brought a claim, and perhaps all of their claims, under
28

1 § 403(c). Plaintiffs have not. Ironically, that may mean that this Court lacks jurisdiction to render an
2 advisory opinion on the issue.

3 **V. THE CITY IS ENTITLED TO DECLARATORY RELIEF**

4 There is no support for Defendants' assertion that the City's claim for declaratory relief does
5 not satisfy the case and controversy requirement. Under the Declaratory Judgment Act, a federal court
6 may "declare the rights and other legal relations" of parties to a "case of actual controversy." 28
7 U.S.C. § 2201. The purpose of the Act is "to relieve potential defendants from the Damoclean threat
8 of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure
9 – or never." *Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1091-92 (9th Cir. 1992) (quoting
10 *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1989). A justifiable
11 case or controversy exists under the Declaratory Judgment Act where "the defendant's actions cause
12 the plaintiff to have a 'real and reasonable apprehension that he will be subject to liability.'" *Id.* at
13 1092; *Chiron Corp. v. Advanced Chemtech, Inc.*, 869 F. Supp. 800, 801 (N.D. Cal. 1994) (declaratory
14 relief is proper where the plaintiff demonstrates a "a reasonable apprehension of being sued").

15 In *Spokane Indian Tribe*, the Ninth Circuit held that declaratory relief was proper under facts
16 similar to those presented here. The plaintiff in that case received a letter from the United States
17 government asserting that it was operating gaming devices in violation of state and federal law, and
18 requesting that the plaintiff cease operating those devices. Although the letter never directly
19 threatened legal action, the "reference to the violation of state and federal law" and the assertion that
20 the federal government had the power to seize the gaming devices gave the Plaintiff "a reasonable
21 apprehension that it would be subject to litigation and loss of its property." *Spokane Indian Tribe*, 972
22 F.2d at 1092. Accordingly, the letter sent by the United States created a case and controversy that
23 allowed the Tribe to seek declaratory relief.

24 Similarly, here, the letter Defendant Noemi Luna sent to the City on December 18, 2008 gave
25 the City a reasonable apprehension of being sued. Compl. ¶29. After asserting that the City's
26 Ordinance frustrated and burdened the operations of the Postal Service, Ms. Luna's letter asserted that
27 City's ordinance and its attempts to enforce it were preempted under the Supremacy Clause of the
28 United States Constitution. Compl. ¶29. By suggesting that the City's actions violated federal law,

1 Ms. Luna's letter gave the City a "reasonable apprehension" that it would face legal action from the
2 Postal Service. *Spokane Indian Tribe*, 972 F.2d at 1092. Although Defendants now claim to have
3 merely offered an "opinion" as to the legality of the City's ordinance, that attempt to rewrite history
4 should not be accepted by this Court. Ms. Luna's reference to the Supremacy Clause makes little
5 sense unless the Postal Service intended the City to understand that it could face legal action if it
6 continued to engage in conduct that the Postal Service believed burdened its operations.

7 Further, taking Defendants at their word that they do not intend to bring suit, there remains a
8 case or controversy between the parties on the question whether Defendants' unilateral refusal to
9 deliver the mail to individual mailboxes at SROs is legal. That Defendants took the disputed action
10 without first suing to resolve the Supremacy Clause question has done nothing to moot or otherwise
11 ameliorate the ongoing controversy between the parties. Rather, it has only sharpened the conflict
12 over the question whether the Postal Service is acting lawlessly or in conformance with its own
13 regulations. *See Bartholomew v. U.S.*, 740 F.2d 526, 531 (7th Cir. 1984) ("While the Postal Service is
14 not an executive agency and is generally subject to a unique body of legislation . . . , it is not at liberty
15 to ignore its own regulations."). The Court has jurisdiction to settle that controversy by declaration.

16 **VI. THE INDIVIDUAL DEFENDANTS SHOULD NOT BE DISMISSED.**

17 Defendants contend that Plaintiffs' claims against Defendants John Potter, Michael Daley, and
18 Noemi Luna ("the individual defendants") should be dismissed with prejudice because the Postal
19 Services has not yet asserted any sovereign immunity defense in this case. Defendants have offered no
20 authority that supports their argument, and it should be rejected by the Court.

21 As Defendants acknowledge, it is well established that suits against federal government
22 officials are permitted, *inter alia*, to avoid sovereign immunity concerns that might arise if Plaintiffs
23 sued a government entity directly. *See United States v. Yakima Tribal Court*, 806 F.2d 853, 859 (9th
24 Cir. 1986) (explaining that suits that charge federal officials with unconstitutional acts are not barred
25 by sovereign immunity); Def. Mem. at 14. The Postal Service has not expressly waived any sovereign
26 immunity arguments that it may make in this case. To the contrary, their motion asserts only that, to
27 date, "USPS has not asserted sovereign immunity as a defense in this action" Def. Mem. at 15

1 (emphasis added). Unless and until the Postal Service expressly waives sovereign immunity, there is
2 no justification for dismissing the individual defendants with prejudice.

3 The cases cited by Defendants are not to the contrary. Defendants cite numerous cases that
4 provide that "[t]here is no longer a need to bring official-capacity actions against *local government*
5 *officials*" because, under *Monell v. New York City Dep't. of Social Servs.*, 436 U.S. 658 (1978), *local*
6 *governments* cannot assert sovereign immunity.¹² Def. Mem. at 14-15. These cases have nothing to
7 do with whether individual defendants should be dismissed from a case against a *federal* governmental
8 entity that *still may* assert sovereign immunity as a defense.

9 Further, there is no support for Defendants' assertion that allowing the individual defendants to
10 remain in this case would lead to duplication of documents and pleadings or would waste resources.
11 Given that Plaintiffs have sued the individual defendants in their official capacity, there are likely to be
12 few, if any, issues in this case that relate only to the individual defendants. To the contrary, Plaintiffs
13 anticipate that all the motions in this case will relate equally to all defendants and will not require
14 separate briefing for the individual defendants. Given that the individual defendants and the Postal
15 Service are represented by the same counsel, it is unlikely that the presence of the individual
16 defendants in this case will add any additional burden at all to Defendants or to the Court's docket.

17 Accordingly, Defendants have not met their burden of demonstrating that the individual
18 defendants should be dismissed from this action.

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¹² The only case Defendants cite that concerns federal officials at all is an unpublished opinion from the Western District of Oklahoma that has no persuasive value in the courts of this circuit.

CONCLUSION

For the foregoing reasons, this Court should deny the motion to dismiss in full. But in the event that the Court dismisses the Complaint in whole or in part, Plaintiffs respectfully request leave to amend.

Dated: August 11, 2009

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12 CITY AND COUNTY OF SAN
13 FRANCISCO, CENTRAL CITY SRO
COLLABORATIVE, SAN FRANCISCO
14 TENANTS UNION, and HOUSING
RIGHTS COMMITTEE OF SAN
15 FRANCISCO,

16 Plaintiffs,

17 v.

18 UNITED STATES POSTAL SERVICE;
19 JOHN E. POTTER, MICHAEL DALEY
and NOEMI LUNA, in their official
20 capacities,

21 Defendants.
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No. 09-1964 JSW

**FEDERAL DEFENDANTS' REPLY
BRIEF IN SUPPORT OF MOTION TO
DISMISS COMPLAINT**

Date: September 4, 2009
Time: 9:00 a.m.
Ctvm: 11, 19th Floor

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1 **I. INTRODUCTION**

2 Plaintiffs' complaint must be dismissed because it involves claims relating to postal
3 service. Under 39 U.S.C. § 3662, this Court lacks jurisdiction to hear claims relating to postal
4 services because Plaintiffs must first lodge their complaint with the Postal Regulatory
5 Commission. Prior to the enactment of the Postal Enhancement and Accountability Act of 2006
6 ("PAEA"), the federal courts were all in accord that claims about postal services were properly
7 initiated before the predecessor to the Postal Regulatory Commission – the Postal Rate
8 Commission. *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2004) does not hold otherwise because
9 the claims in *Currier* were subject to a different internal adjudication process that the plaintiffs
10 exhausted before bringing their claims before the district court. Moreover, *Currier* did not
11 address whether 39 U.S.C. § 3662 deprived district courts of jurisdiction; thus, there is no
12 controlling Ninth Circuit authority on this issue. Finally, the Court should require Plaintiffs to
13 seek the Postal Regulatory Commission's intervention to develop an administrative record for
14 judicial review.

15 Plaintiffs' complaint fails for three additional reasons. First, Plaintiffs cannot show
16 Article III standing because Plaintiffs' alleged harms are not fairly traceable to USPS's conduct
17 and because it is only speculative that any relief given by this Court would redress their alleged
18 harms. Second, no justiciable, actual controversy exists between the City and USPS because
19 Plaintiffs fail to allege that USPS threatened suit against the City. Third, the individual
20 defendants should be dismissed because USPS has not asserted sovereign immunity in this case.

21 The Court should grant the motion to dismiss.

22 **II. FACTUAL BACKGROUND**

23 Plaintiffs' Complaint evinces that their claims are fundamentally about the nature and
24 quality of the postal service received by occupants of SROs.

25 Plaintiffs claim that the location of the delivery of mail (near an entry way or at a desk) is
26 problematic. Compl. ¶¶ 2, 17. Plaintiffs claim that delivery to a desk clerk, to an outside box, or
27 to the entryway of an SRO is inadequate. Compl. ¶ 17. Plaintiffs claim that the security of mail
28 delivery differs from delivery to those who reside elsewhere. Compl. ¶ 5. Plaintiffs attack the

1 safety and reliability of mail delivery. Compl. ¶ 9a. Plaintiffs contend that USPS is required to
2 deliver to individual, locked mailboxes. Compl. ¶ 20. Plaintiffs claim that delivery to a desk
3 clerk or to a lobby imposes hardships on those with disabilities. Compl. ¶ 23.

4 Each of these allegations relates to the location, nature, and quality of postal service.

5 **III. THE COURT SHOULD GRANT DEFENDANTS' MOTION TO DISMISS**

6 **A. This Court Lacks Jurisdiction Over Plaintiffs' Claims Because 39 U.S.C. Section
7 3662 Provides the Exclusive Remedy for Claims Relating to Postal Service**

8 In 1970, Congress passed the Postal Reorganization Act "to deal with the problems of
9 increasing deficits and shortcomings in the overall management and efficiency of the Post
10 Office." *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 112 (1981). The Postal
11 Reorganization Act abolished the Post Office Department as a Cabinet-level Department and
12 established in its place the United States Postal Service as a government-owned corporation. *Del
13 Gallo v. Parent*, 557 F.3d 58, 63 (1st Cir. 2009).

14 Congress directed the new Postal Service to be funded by its own revenue and "run more
15 like a business than had its predecessor, the Post Office Department." *Franchise Tax Bd. v. U.S.
16 Postal Serv.*, 467 U.S. 512, 529-20 (1984); *Currier*, 379 F.3d at 725.

17 Under the PRA, Congress further removed the district courts' jurisdiction over claims
18 regarding postal rates and services. Former 39 U.S.C. § 3662 provided: "Interested parties who
19 believe the Postal Service is charging rates which do not conform to the policies set out in this
20 title or who believe that they are not receiving postal service in accordance with the policies of
21 this title may lodge a complaint with the Postal Rate Commission in such form and in such
22 manner as it may prescribe." The PRA's legislative history shows that in crafting the Act,
23 Congress intended to minimize external intrusions on the Postal Service's managerial
24 independence. *Buchanan v. United States Postal Service*, 508 F.2d 259, 262 (5th Cir. 1975).

25 Indeed, the only published decisions interpreting 39 U.S.C. § 3662 have unanimously
26 concluded that district courts lack jurisdiction in cases involving the Postal Service's service and
27 that the postal customer's remedy for unsatisfactory service lies with the Postal Rate
28 Commission. For example, in *LeMay v. United States Postal Service*, 450 F.3d 797 (8th Cir.

1 2006), the Eighth Circuit affirmed the district court's dismissal for lack of subject matter
2 jurisdiction. The court held that Congress removed the district courts' jurisdiction over claims
3 regarding postal rates and services. The court noted that the Eighth Circuit, the Tenth Circuit,
4 and district courts in four jurisdictions – all held that a postal customer's remedy for
5 unsatisfactory service then lay with the Postal Rate Commission, which became the Postal
6 Regulatory Commission in 2006. *See* 450 F.3d at 800, n. 4 (citing cases).¹

7 *Shelby Resources, Inc. v. United States Postal Service*, 619 F. Supp. 1546, 1549
8 (S.D.N.Y. 1985) is instructive. There, plaintiffs sued USPS complaining that USPS was
9 delivering mail at later and later times, drastically affecting plaintiff's business. The district
10 court dismissed for lack of jurisdiction: "This Court concludes that these sections [39 U.S.C. §§
11 3662 and 3668], read together, provide the sole remedy for a user of postal services who is not
12 receiving adequate service or service equal to that furnished to others. We find no residual
13 jurisdiction, on a due process theory or otherwise to deal with that portion of the controversy
14 which concerns the United States Postal Service."

15 Similarly, in *Tedesco v. United States Postal Service*, 553 F. Supp. 1387 (W.D. Pa. 1983),
16 the district court granted the Postal Service's motion to dismiss for lack of jurisdiction where
17 plaintiffs sought to have a post office established in their township. Holding that the Postal
18 Reorganization Act did not create a private cause of action for alleged service inadequacies, the
19 court noted: "We believe that the clear intent of the Postal Reorganization act was to permit the
20 Postal Service to operate like a business and to respond with flexibility and imagination to the
21 task of moving the mail. If this goal is to be effectuated, the courts must permit the Postal
22 Service to act like a business, without subjecting routine decisions to the cost and delay of
23 judicial interference." 553 F. Supp. at 1391.

24 _____
25 ¹ The other courts holding similarly are: *Bovard v. United States Post Office*, 47 F.3d
26 1178, 1995 WL 74678 (10th Cir.) (affirming the district court's dismissal for lack of subject
27 matter jurisdiction); *Azzolina v. United States Postal Service*, 602 F.Supp. 859, 864 (D.N.J.
28 1985) ("Plaintiff does not have a private right of action to bring service-related complaints in
federal court"); *Martin v. Sloan*, 432 F.Supp. 616, 618 (W.D.N.C. 1977) (postal patrons are
remitted to the complaint procedure established in section 3662).

1 The 2006 PAEA amended 39 U.S.C. § 3662 to give the new Postal Regulatory
2 Commission the authority to adjudicate complaints that “the Postal Service is not operating in
3 conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a or
4 601, of this chapter (or regulations promulgated under any of those provisions).” The amended
5 section 3662 substantially increases the authority of the Regulatory Commission to hear
6 complaints and to order the Postal Service to change its practices.

7 Plaintiffs maintain that the jurisdictional grant of the Postal Regulatory Commission, as
8 provided by 39 U.S.C. § 3662, is now limited to just a few enumerated statutory provisions and
9 their attendant regulations. Pl. Opp. 12:11-13. But the very provision under which Plaintiffs’
10 claim is cognizable – Section 403(c) – is explicitly stated to be within the Commission’s
11 jurisdiction. *See* 39 U.S.C. §3662. Under fundamental canons of statutory construction, this
12 provision indicates that the proper avenue for complaints about the allegedly discriminatory
13 provision of postal services is the Postal Regulatory Commission, and that the legislature did not
14 intend to create a private right of action in courts for such grievances. *See Caminetti v. U.S.*, 242
15 U.S. 470 (1917) (“[i]t is elementary that the meaning of a statute must, in the first instance, be
16 sought in the language in which the act is framed, and if that is plain... the sole function of the
17 courts is to enforce it according to its terms.”)

18 Because Plaintiffs’ remedy is filing a complaint with the Postal Regulatory Commission,
19 this Court should dismiss for lack of jurisdiction.

20 **B. The Ninth Circuit’s Decision in *Currier* Does Not Confer Jurisdiction**

21 Plaintiffs maintain that the Ninth Circuit’s decision in *Currier v. Potter*, 379 F.3d 716
22 (9th Cir. 2004) controls this case. Not so. In *Currier*, the USPS simply did not raise a
23 jurisdictional challenge to the constitutional claims because plaintiffs had sued USPS and the
24 individual defendants for damages and equitable relief. 379 F.3d at 726 (“The Postal Service
25 does not dispute that the district court had jurisdiction over Currier’s constitutional claims, *see*
26 *FDIC v. Meyer*, 510 U.S. 471, 483 (1994). . .”). Thus, the Ninth Circuit had jurisdiction over

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1 these constitutional claims seeking monetary damages.² Here, in contrast to *Currier*, Plaintiffs
2 do not sue the individual defendants for monetary damages under a constitutional tort theory;
3 thus the Postal Service properly challenges the jurisdiction of this Court to adjudicate Plaintiffs'
4 claims.

5 Second, the Ninth Circuit in *Currier* only addressed the applicability of 39 U.S.C. § 3628
6 and found that *Currier*'s challenge did not implicate postal rates and classifications on a national
7 scale. 379 F.3d at 724, n. 5. The parties and the Ninth Circuit did not address any jurisdictional
8 challenge based on 39 U.S.C. § 3662. Thus, because *Currier* is simply silent as to whether
9 Section 3662 bars this Court's jurisdiction, this Court should grant defendants' motion.

10 **C. The Remedial Powers of the Postal Regulatory Commission are Far Greater**
11 **Than When *Currier* Was Decided**

12 Another reason to reject *Currier* as controlling is that the Postal Regulatory Commission
13 now has the power to redress complaints. Plaintiffs characterize as "disingenuous" the argument
14 that the PAEA significantly increased the authority of the Postal Regulatory Commission. They
15 are wrong. The PAEA substantially increased the authority of the PRC to act on complaints.
16 While a complainant could have filed a service complaint with the Rate Commission prior to the
17 PAEA, that complaint would have only resulted in the filing of a public report, which the Postal
18 Service would be free to ignore. At most, if the complaint touched upon rates or classifications,
19 the Commission could have filed a recommended decision with the Governors, which the
20 Governors were free to reject. The PAEA amended section 3662 so that the Commission now
21 has the broad authority to *order* the Postal Service to remedy a violation of section 403(c) or any
22 other postal law and regulation covered by section 3662. Section 3662(c) now states that if the
23 Commission finds a complaint to be justified, it shall "order that the Postal Service take such
24 action as the Commission considers appropriate in order to achieve compliance with the
25 applicable requirements [of the law or regulation at issue] and to remedy the effects of any
26 noncompliance." The Commission now also has the authority to fine the Postal Service if it
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28 ² See generally *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

1 finds that the agency deliberately failed to comply with section 403(c) or a host of other postal
2 statutes.³

3 This Court should find that *Currier* does not control the jurisdictional analysis in this
4 case.

5 **D. The Court Should Exercise its Authority to Require Plaintiffs to Exhaust Their**
6 **Administrative Remedies**

7 The *Currier* case is distinguishable in another important respect that supports PRC
8 adjudication of this matter. The *Currier* plaintiffs had gone through the other administrative
9 process available to them, creating a record on which to seek judicial review. The *Currier*
10 plaintiffs appealed from the Final Agency Decision of the Postal Service denying their
11 entitlement to three postal services that they were seeking – (1) ability to rent PO Boxes despite
12 having no valid point of contact; (2) no-fee PO Boxes; and (3) localized rather than centralized

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14 ³ The legislative history is clear on these points:

15 Under current statute, rate and service complaints can be filed; however, relatively little recourse
16 is available if the complaint is found to be justified. This legislation strengthens the authority of
17 the Postal Regulatory Commission to act on a complaint and to require the Postal Service to take
18 action if the complaint is found to be justified. Any person who believes that the Postal Service is
19 not operating in conformance with the statute may lodge a complaint with the Postal Regulatory
20 Commission which then is required (within 90 days) to either begin proceedings on the
21 complaint or issue an order dismissing the complaint. If the Postal Regulatory Commission does
22 not act on a complaint in a timely manner it shall be treated as if it were dismissed. If, after open
23 proceedings the Postal Regulatory Commission finds that the complaint is justified, this act gives
24 the Commission broad authority to correct violations by ordering the Postal Service to take
25 whatever steps the Commission considers appropriate. In cases of deliberate noncompliance with
26 the law, the Commission is authorized to levy fines based on the seriousness of the
27 noncompliance. ... Senate Report 108-318, page 21 (108th Congress, 2nd Session, 2004). *See also*,
28 House Report 109-66, page 52 (109th Congress, First Session, 2005).

24 Section 3662 provides the Postal Regulatory Commission with enhanced authority to respond to
25 complaints of pricing, service, or other actions by the Postal Service in violation of law. As
26 revised, this section would require the Commission to begin proceedings on or dismiss
27 complaints within 90 days and if not acted on, the complaint shall be treated in the same way as
28 if it had been dismissed pursuant to an order issued by the Commission on the last day allowable
for the issuance of such order under paragraph (1). In subsection 3662(c), the amendment gives
the Commission broad authority.

1 General Delivery Services. This was the entire *Currier* case. Thus, when they brought their
2 constitutional and other claims to the federal district court, the parties had exhausted the Postal
3 Service's internal appeal process, received a final agency decision, and created a record for
4 constitutional scrutiny.

5 Here, the Plaintiffs, in their Complaint and their response to the Defendants' motion to
6 dismiss, ask this Court to decide how the Postal Service must apply its regulations nationwide,
7 based only upon anecdotal complaints and excerpts of a letter sent by the Postmaster of San
8 Francisco, Noemi Luna, with the implicit approval of Pacific Area Vice President Michael Daley.
9 In that letter, Luna told the City that the Postal Service will not deliver mail to SRO hotels in San
10 Francisco as the Plaintiffs would like. The Plaintiffs' complaint, while containing broad
11 generalizations about Postal delivery methods, cites to no other correspondence, decision, or
12 other determination from the Postal Service.

13 Because the Plaintiffs have not yet sought review of SRO delivery in San Francisco by
14 the adjudicative body designated by statute and regulation to do so, this Court has the discretion
15 to dismiss the complaint because it does not plead facts sufficient to show that Plaintiffs have
16 exhausted their administrative remedies. *Stauffer Chemical Company v. FDA*, 670 F.2d 106 (9th
17 Cir. 1982) (court properly dismissed a complaint based on an opinion letter from a subordinate
18 FDA official because judicial review would deny the agency the opportunity to apply its
19 expertise and create a record.) This court has the authority to require the Plaintiffs to exhaust
20 remedies based upon non-jurisdictional exhaustion. *Avocados Plus Inc. v. Veneman*, 370 F.3d
21 1243 (D.C. Cir. 2004) ("Non-jurisdictional exhaustion serves three functions: "giving agencies
22 the opportunity to correct their own errors, affording parties and courts the benefits of agencies'
23 expertise, [and] compiling a record adequate for judicial review[.]" 370 F.3d at 1247; *Marine*
24 *Mammal Conservancy, Inc. v. Dep't. of Agric.*, 134 F.3d 409 (D.C. Cir. 1998); *McCarthy v.*
25 *Madigan*, 503 U.S. 140, 145-46 (1992). Plaintiffs could very well be successful. In any event,
26 the PRC record would be ripe for constitutional scrutiny in the federal court designated in

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1 Title 39 to review PRC decisions.⁴

2 **E. Plaintiffs Cannot Satisfy the Constitutional Minimums for Standing**

3 To satisfy the Constitution's standing requirements, a plaintiff must show (1) an injury in
4 fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or
5 hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant; and
6 (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a
7 favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Covington v.*
8 *Jefferson County*, 358 F.3d 626, 637-38 (9th Cir. 2004). Plaintiffs must also show standing
9 separately for each form of relief sought. *Friends of the Earth, Inc. v. Laidlaw Environmental*
10 *Services (TOC), Inc.*, 528 U.S. 167, 185 (1983). In order to establish standing to seek injunctive
11 relief, Plaintiffs must show a credible threat of future injury which is sufficiently concrete and
12 particularized to meet the case or controversy requirement of Article III. *Lujan*, 504 U.S. at 560-
13 61.

14 Here, the injuries alleged by Plaintiffs cannot be fairly traceable to the Postal Service's
15 lack of single-point delivery. The actions of SRO owners or mail clerks are primarily responsible
16 for any alleged failure to receive mail. Compl. ¶¶ 9f, 17.

17 Moreover, it is only speculative that the alleged injuries will be redressed by any decision
18 of this Court.⁵ A significant cause of the harms alleged is the failure of the SRO owners to install
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20 ⁴ To the extent that Plaintiffs seek to require the defendants to "deliver the mail in
21 accordance with . . . the Postal Service's own regulations," this claim is barred under *Currier*,
22 which held that Congress has not waived the Postal Service's sovereign immunity "to subject the
Postal Service to suit for violations of regulations." 379 F.3d at 725.

23 ⁵ Plaintiffs make much of the fact that the Postal Service included in its motion a factual
24 allegation not contained in its Complaint – that delivering mail to individual mail receptacles will
25 not prevent hotel managers from having access to occupants' mail. This is a fact of which this
Court may take judicial notice. Fed. R. Evid. 201. The Postal Operations Manual provided:

26 Carriers are prohibited from accepting keys for locks on private mail receptacles,
27 buildings, or offices, except where an electromechanical door lock system or a key keeper
28 box located within convenient reach of the door is used. Both devices must incorporate an
Arrow lock to access the key or device needed to gain entry to the building. If customers
place locks on their receptacles, the receptacles must have slots large enough to

1 individual mail boxes. Thus, even were this Court to order USPS to engage in expanded
2 delivery, for the majority of SROs, there would be no place to which mail could be delivered.

3 Finally, Plaintiffs cannot show a credible threat of future injury should injunctive relief
4 not be granted.

5 **F. No Justiciable Controversy Exists Between the City and USPS**

6 To maintain a proper action for declaratory relief, Plaintiffs must show a “reasonable
7 apprehension of being sued.” *Chiron Corp. v. Advanced Chemtech, Inc.*, 869 F.Supp. 800, 801
8 (N.D. Cal. 1994). This Court must look into the totality of the circumstances to determine if an
9 actual case or controversy existed at the time the action for declaratory relief was filed. A single
10 cease and desist letter is insufficient to make a case or controversy. *Dunn Computer Corp. v.*
11 *Loudcloud, Inc.*, 133 F.Supp.2d 823, 827 (E.D. Vir. 2001); *see also Fidelity National Financial,*
12 *Inc. v. Ousley*, 2006 U.S. Dist. LEXIS 53965 (N.D. Cal. 2006) (Breyer, J.).

13 Here, Plaintiffs fail to allege facts in their complaint that would give the City a reasonable
14 apprehension of being sued. First, as pled in Plaintiffs’ complaint, Luna informed the City that
15 “the Postal Service would no longer deliver mail to individual mail receptacles in SROs effective
16 January 5, 2009. Compl. ¶ 29. Second, Luna informed the City that “delivering mail to
17 individual SRO residents in San Francisco is contrary to Postal Service regulations contained in
18 the Domestic Mail Manual (“DMM”) and the Postal Operations Manual (“POM”). *Id.* Finally,
19 Luna stated that San Francisco’s Ordinance is preempted “to the extent that it attempts to
20 frustrate or interfere with the operations of the Postal Service.” Compl. ¶ 29.

21 Luna’s letter did not threaten any kind of legal action, made no demands, and asserted no
22 power over the actions of the City. Thus, *Spokane Indian Tribe v. United States*, 972 F.2d 1090,
23 1091 (9th Cir. 1992) is inapposite. There, the Government specifically informed the Spokane
24 Indian tribe that its lotto was “being operated in violation of state and federal law,” and that
25 because state law “provided for the immediate seizure of the machines without court orders and

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27 accommodate their normal daily mail volume so that delivery may be made by the carrier
28 without using a key. POM Section 632.2.

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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,
et al.,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE, et al.,
Defendants.

No. C 09-01964 JSW

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS**

Now before the Court is the motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) filed by defendants United States Postal Service ("USPS"), John Potter, Michael Daley, and Noemi Luna (collectively "Defendants"). Having considered the parties' pleadings and the relevant legal authority, the Court hereby grants in part and denies in part Defendants' motion to dismiss.

BACKGROUND

Plaintiffs contend that Defendants refusal to deliver mail to individual locked mailboxes of residents at Single Room Occupancy buildings ("SROs") violates the equal protection provision of the Fifth Amendment, the right of free speech and freedom of association under the First Amendment, and the right to privacy under the United States Constitution. The Court shall address additional facts as necessary to its analysis in the remainder of this Order.

ANALYSIS

A. Legal Standards Applicable to Motion to Dismiss.

A party moving to dismiss under Rule 12(b)(1) may make a facial or a factual attack on jurisdiction. A facial attack challenges the sufficiency of the jurisdictional allegations in a complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A factual challenge instead “attack[s] the substance of a complaint’s jurisdictional allegations despite their formal sufficiency, and in so doing rel[ies] on affidavits or any other evidence properly before the court.” *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (citation omitted); accord *Safe Air*, 373 F.3d at 1039. In resolving a factual attack on jurisdiction, the court “need not assume the truthfulness of the plaintiff’s allegations.” *Id.* (citation omitted).

When “the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action,” a jurisdictional finding of genuinely disputed facts is inappropriate. *Id.* (internal quotations and citations omitted). “The question of jurisdiction and the merits of an action are intertwined where a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff’s substantive claim for relief.” *Id.* (internal quotation and citation omitted). Notwithstanding this general rule, dismissal for lack of subject matter jurisdiction, even when intertwined with the merits, may be appropriate “when the allegations of the complaint are frivolous.” *Thornhill Publ’g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 734 (9th Cir. 1979) (citation omitted).

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The court, however, is not required to accept legal conclusions cast in the form of factual allegations, if those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim upon which relief may be granted. *McGlinchy v. Shell Chemical Co.*,

1 845 F.2d 802, 810 (9th Cir. 1988). Even under the liberal pleading standard of Federal Rule of
2 Civil Procedure 8(a)(2), a plaintiff must do more than recite the elements of the claim and must
3 “provide the grounds of his entitlement to relief.” *Bell Atlantic Corporation v. Twombly*, 550
4 U.S. 544, 555 (2007) (internal brackets and quotations omitted). The pleading must not merely
5 allege conduct that is conceivable. Rather, plaintiffs must allege “enough facts to state a claim
6 to relief that is plausible on its face.” *Id.* at 570.

7 **B. Defendants’ Motion to Dismiss.**

8 **1. Plaintiffs Sufficiently Allege Standing.**

9 Defendants challenge Plaintiffs’ standing to bring this action. “Article III of the
10 Constitution requires that a plaintiff have standing before a case may be adjudicated.”
11 *Covington v. Idaho*, 358 F.3d 626, 637 (9th Cir. 2004). To satisfy the Constitution’s standing
12 requirements, a plaintiff must show (1) an “injury in fact” that is (a) concrete and particularized
13 and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly
14 traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to
15 merely speculative, that the injury will be redressed by a favorable decision. *Lujan v.*
16 *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Covington v. Jefferson County*,
17 358 F.3d 626, 637-38 (9th Cir. 2004). A plaintiff, as the party invoking federal jurisdiction,
18 bears the burden of establishing these elements. *Lujan*, 504 U.S. at 561. “At the pleading stage,
19 general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a
20 motion dismiss, [courts] presume that general allegations embrace those specific facts that are
21 necessary to support the claim.” *Id.* (internal cite and quotations omitted).

22 Upon review of the complaint, the Court finds that Plaintiffs allege sufficient facts to
23 satisfy all three requirements of standing. The City alleges that it has been injured by
24 Defendants’ conduct, that the injuries alleged are traceable to Defendants’ conduct, and that
25 their injuries will be redressed by a favorable decision.

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2 **2. The Postal Accountability and Enhancement Act Does Not Bar Plaintiffs’
Constitutional claims.**

3 Defendants argue that Congress created an exclusive statutory scheme for addressing
4 Plaintiffs’ claims through the 2006 Postal Accountability and Enhancement Act (“PAEA”) and
5 that the Court should dismiss Plaintiffs’ first through fourth claims for failure to exhaust the
6 administrative remedies for claims under the PAEA. The PAEA amended Section 3662 of the
7 Postal Reorganization Act, 39 U.S.C. §§ 101, *et seq.*, to provide: “Any interested person ... who
8 believes the Postal Service is not operating in conformance with the requirements of the
9 provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations
10 promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory
11 Commission in such form and manner as the Commission may prescribe.” *See* 42 U.S.C. §
12 3662. Section 403(c) provides: “In providing services and in establishing classifications, rates,
13 and fees under this title, the Postal Service shall not, except as specifically authorized in this
14 title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant
15 any undue or unreasonable preferences to any such user.” *See* 39 U.S.C. § 403(c). Defendants
16 contend that Plaintiffs’ claims fall under Section 403(c) because they allege that USPS
17 discriminates between users of the mails, and thus, Plaintiffs should be required to first exhaust
18 their remedies by lodging a complaint with the Postal Regulatory Commission in accordance
19 with Section 3662.

20 By its terms, Section 3662 applies only to violations of the statute or the regulations
21 promulgated pursuant to the statute. Defendants seek to have the Court construe Plaintiffs’
22 claim as statutory claims under Section 403(c). But Plaintiffs allege that Defendants’ conduct
23 violate provisions of the United States Constitution, not Section 403(c). Contrary to
24 Defendants’ contention, Plaintiffs’ constitutional claims do not “depend entirely on an express
25 statutory claim.” (Mot. at 12.) Notably, the court in *Currier v. Potter*, 379 F.3d 716 (9th Cir.
26 2003), which is binding on this Court, analyzed the court’s jurisdiction over the plaintiffs’
27 regulatory, statutory, and constitutional claims separately. Defendants argue that the PAEA
28 changed the legal landscape so dramatically as to render *Currier* inapplicable or overrule

1 *Currier*. The Court disagrees. Nevertheless, the Court need not determine, pursuant to *Currier*,
2 whether claims under Section 403(c) may be adjudicated in federal court because Plaintiffs do
3 not assert statutory claims here. Their claims are constitutional ones.

4 In support of their argument that Plaintiffs' claims fall under Section 403(c) of the
5 PAEA, they cite to inapplicable out of circuit authority. See *LeMay v. Postal Service*, 450 F.3d
6 797 (8th Cir. 2006); *The Enterprise, Inc. v. Bolger*, 774 F.2d 159 (6th Cir. 1985).
7 In *LeMay*, the court held that the plaintiff's claim that the USPS entered into and breached a
8 federal common law contract to provide enhanced services with Priority Mail was a claim
9 regarding postal rates and services under the Postal Reorganization Act. *Id.*, 450 F.3d at 800-
10 801. The court did not address whether constitutional claims against the USPS would be barred
11 by the Postal Reorganization Act.

12 In *Enterprise*, the court held that it lacked jurisdiction to review claims alleging that a
13 provision of the Domestic Mail Manual violated the first and fifth amendments to the
14 Constitution and the Postal Reorganization Act, 39 U.S.C. § 3623(c)(1), which requires the
15 establishment of a fair and equitable mail classification system. The court concluded, based on
16 the legislative history of the Postal Reorganization Act, that "review of a mail rate or
17 classification decision may be sought only in a direct appeal to a United States Court of Appeals
18 under 39 U.S.C. § 3628." *Id.*, 774 F.2d at 161. Because the court in *Enterprise* was construing
19 a predecessor statute to the PAEA with different language, the Court does not find this case
20 persuasive here.

21 The Court finds that Plaintiffs were not required under the PAEA to bring their
22 constitutional claims before the Postal Regulatory Commission. Therefore, the Court will not
23 dismiss Plaintiffs claims on this ground.

24 3. Plaintiffs' Claim for Declaratory Relief.

25 In order to establish subject matter jurisdiction over the declaratory relief claim,
26 Plaintiffs bear the burden of establishing that an "actual controversy" existed at, and has
27 continued since, the time they filed this action. See 28 U.S.C. § 2201; *Rhoades v. Avon*
28 *Products, Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007) ("When presented with a claim for a

1 declaratory judgment, ... federal courts must take care to ensure the presence of an actual case
2 or controversy, such that the judgment does not become an unconstitutional advisory opinion.”).
3 “The purpose of the Declaratory Judgment Act is to relieve potential defendants from the
4 Damoclean threat of impending litigation which a harassing adversary might brandish, while
5 initiating suit at his leisure-or never.” *Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896
6 F.2d 1542, 1555 (9th Cir.1990) (internal quotes and citation omitted). The Court must
7 determine “whether the facts alleged, under all the circumstances, show that there is a
8 substantial controversy, between parties having adverse legal interests, of sufficient immediacy
9 and reality to warrant issuance of a declaratory judgment.” *Maryland Casualty Co. v. Pacific*
10 *Coal & Oil Co.*, 312 U.S. 270, 273 (1941). “If the defendant’s actions cause the plaintiff to
11 have a ‘real and reasonable apprehension that he will be subject to liability,’ the plaintiff has
12 presented a justiciable case or controversy.” *Spokane Indian Tribe v. United States*, 972 F.2d
13 1090, 1092 (9th Cir. 1992) (quoting *Hal Roach*, 896 F.2d at 1555).

14 In *Spokane Indian Tribe*, the government sent the plaintiff a letter stating that the
15 plaintiff was violating state and federal law and that state law provided for the immediate
16 seizure of the plaintiff’s gaming machines without court orders and destruction by order of the
17 court. The court held that “the reference to the violation of state and federal law and the power
18 to confiscate and destroy the gaming devices” gave the plaintiff a reasonable apprehension that
19 it would be subject to litigation and the loss of its property. *Id.* at 1092.

20 In contrast here, Plaintiffs rely on a letter sent by defendant San Francisco Postmaster
21 Noemi Luna (“Luna”) to the San Francisco Department of Building Inspection announcing that
22 the Postal Service would no longer deliver mail to individual mail receptacles in SROs.
23 (Compl., ¶ 29.) Luna asserted that delivering mail to individual SRO resident is contrary to
24 Postal Service regulations and that San Francisco’s Ordinance is preempted to the extent that it
25 attempts to frustrate or interfere with the operations of the Postal Service. (*Id.*) As Defendants
26 argue, Luna did not threaten any legal action, make any demands, or assert any power over the
27 City’s actions. The letter by Luna does not give rise to a “real and reasonable apprehension”
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1 that the City “will be subject to liability.” *Spokane*, 972 F.2d at 1092. Therefore, the Court
2 grants Defendants’ motion as to Plaintiffs’ claim for declaratory relief.

3 **4. Plaintiffs’ Claims Against the Individual Defendants.**

4 Defendants argue that the claims against John Potter, Michael Daley, and Noemi Luna
5 (collectively, the “Individual Defendants”) in their official capacity are superfluous to
6 Plaintiffs’ claims against USPS and thus, should be dismissed. Plaintiffs counter that the claims
7 against the Individual Defendants would not be superfluous of Defendants’ challenge to
8 Plaintiffs’ claims on the grounds of sovereign immunity. However, in their reply brief,
9 Defendants clarify that 39 U.S.C. § 409 waives USPS’s sovereign immunity and that USPS is
10 not raising sovereign immunity as a defense. In light of the waiver by Section 409 and USPS’s
11 representations, the Court finds that the claims against the Individual Defendants are
12 superfluous. Therefore, the Court grants Defendants’ motion to dismiss Plaintiffs’ claims
13 against the Individual Defendants in their official capacities.

14 **CONCLUSION**

15 For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART
16 Defendants’ motion to dismiss. The Court GRANTS Defendants’ motion as to Plaintiffs’
17 declaratory relief claim and claims against the Individual Defendants and DENIES Defendants’
18 motion as to Plaintiffs’ constitutional claims against USPS.

19 **IT IS SO ORDERED.**

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21 Dated: November 5, 2009

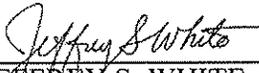
22 
23 _____
24 JEFFREY S. WHITE
25 UNITED STATES DISTRICT JUDGE
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EXHIBIT 2

FILED
03 MAY -5 AM 10:50
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
Handwritten signatures and initials are present over the stamp.

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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA

JCS

20 CITY AND COUNTY OF SAN
FRANCISCO, CENTRAL CITY SRO
21 COLLABORATIVE, SAN FRANCISCO
TENANTS UNION, and HOUSING RIGHTS
22 COMMITTEE OF SAN FRANCISCO,

Case **CV 09 - 1964**

23 Plaintiffs,
24 vs.

**COMPLAINT
DEMAND FOR JURY TRIAL**

25 UNITED STATES POSTAL SERVICE;
JOHN E. POTTER, MICHAEL DALEY and
26 NOEMI LUNA, in their official capacities,

27 Defendants.
28

PRELIMINARY STATEMENT

1
2 1. Many of San Francisco's most vulnerable residents – including elderly, disabled or low
3 income individuals and families – live in buildings known as Single Room Occupancy buildings or
4 "SROs." SROs in San Francisco are residential buildings in which tenants rent single rooms,
5 typically 8' x 10' in size. SROs rooms differ from studios in higher income apartment buildings only
6 in that they usually do not have a private bathroom or kitchen. Tenants typically share communal
7 bathrooms and/or kitchens with other SRO residents. Given the high cost of living in San Francisco
8 (the "City"), SROs often provide the only affordable housing option for persons living on fixed
9 benefits such as social security, disability payments, general assistance and other social safety nets.
10 SROs also serve as the housing of last resort for the working poor, particularly families with children.

11 2. Under the United States Postal Service's ("Postal Service" or "USPS") own regulations,
12 SROs are considered apartment buildings, and they are entitled to the same method of mail delivery—
13 to individual locked boxes—that is afforded to all other tenants in all other apartment buildings. But
14 at SROs, the Postal Service directs its mail carriers to leave a bag of the building's mail near the
15 entryway or at the desk and just walk away, with no concern for the obvious danger that the mail will
16 be stolen or misdelivered or otherwise "disappear." For many sensitive pieces of mail containing
17 monthly benefits checks, postal orders, critical health information, treasured personal letters and the
18 like, that is exactly what happens—and the Postal Service knows and tolerates it.

19 3. This unsupportable practice inflicts a panoply of harms on some of the City's most
20 vulnerable residents. Many SRO residents have been unable to pay the rent, faced eviction
21 proceedings, been forced into homelessness, lost crucial financial and medical benefits, and grown
22 estranged from family and friends as a direct result of the Postal Service's delivery policy. One
23 resident infected with Hepatitis C did not learn of his diagnosis until more than a year later, when he
24 happened to discover in his medical file a copy of a long-undelivered letter informing him he had
25 tested positive for the life-threatening blood-borne pathogen. Another long-term SRO resident who
26 had been diagnosed with terminal cancer missed appointment notices and even lost Medi-Cal coverage
27 because of the Postal Service's discriminatory mail delivery policy. Still more SRO tenants lost the
28

1 opportunity to receive such state and federal benefits as Section 8 housing and SSI benefits because
2 they did not receive notices informing them of their eligibility until it was too late.

3 4. The Postal Service's delivery policy has also harmed San Francisco and its taxpayers.
4 Time and time again, the City has been forced to provide an economic safety net that would have been
5 unnecessary had the U.S. Postal Service delivered mail to low-income SRO apartment building
6 residents the same way it does to their economically better-off neighbors. Through its wrongful and
7 unjustified delivery policy, the Postal Service has impeded the City's ability to treat and prevent the
8 spread of diseases, to communicate matters of vital importance of its citizens, to fight homelessness,
9 and to carry out other necessary government services.

10 5. To enforce the rights of SRO tenants to receive their mail in the same reasonably secure
11 manner as all other apartment building residents, Plaintiffs City and County of San Francisco, the
12 Central City SRO Collaborative, the San Francisco Tenants Union, and the Housing Rights Committee
13 of San Francisco seek declaratory and injunctive relief to prevent Defendants United States Postal
14 Service, Postmaster General John E. Potter, Postal Service Vice President Michael Daley and San
15 Francisco Postmaster Noemi Luna from continuing to violate the equal protection, free speech, privacy
16 and freedom of association rights of disabled, elderly and low-income residents of San Francisco.

17 **JURISDICTION AND VENUE**

18 6. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under the
19 Constitution and laws of the United States. In addition, this Court has jurisdiction under 39 U.S.C.
20 § 409(a) to hear actions brought against the Postal Service.

21 7. Venue in this District is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial
22 part of the events or omissions giving rise to the claims occurred in this District.

23 **INTRADISTRICT ASSIGNMENT**

24 8. Pursuant to Civil Local Rule 3-2(d), intradistrict assignment is proper in either San
25 Francisco or Oakland because the acts or omissions giving rise to the claims presented in this
26 Complaint occurred in the County of San Francisco.

PARTIES

1
2 9. San Francisco is a charter city and county organized and existing under the Constitution
3 and laws of the State of California. According to recent estimates, approximately 30,000 San
4 Francisco residents—4% of the City's population—live in SROs. San Francisco relies on the mail to
5 communicate with SRO tenants about medical care, disease prevention, public assistance, elections,
6 and other important civic matters. The Postal Service's failure and refusal to deliver these
7 communications in the significantly more secure manner it uses for all other apartment buildings
8 causes great harm to the City. These harms include, but are not limited to, the financial, public health
9 and safety, and governance harms listed below:

10 a. Because Defendants refuse to provide safe and reliable mail service to SRO
11 residents in the same way they do for other apartment residents, SRO residents often do
12 not receive state or federal benefits checks or other government services on which they
13 depend. When an SRO resident does not receive the state or federal assistance he or
14 she needs, the City and County of San Francisco is left to pick up the slack in the form
15 of shelter, food, transportation, clothing, general assistance, and family respite child
16 care. All of these services are expensive and drain City resources.

17 b. SRO residents are also frequently denied federal and state benefits to which
18 they would have been entitled—such as Medi-Cal or Section 8 housing—because they
19 do not receive, and thus cannot respond to, correspondence sent by the federal or state
20 government. In such cases, San Francisco again provides City benefits and services at
21 its own expense, even though the individuals are entitled to receive state or federal
22 assistance.

23 c. The mission of the San Francisco Department of Public Health is to protect and
24 promote the health of all San Franciscans. To accomplish its duties, it is essential that
25 DPH have a safe, reliable, and private means of communicating with all residents of
26 San Francisco about their health and steps they can take to prevent the spread of
27 infectious diseases. Defendants' refusal to provide reliable and private mail service to
28 SRO residents (as it does for individuals and families who live in all other apartments)

1 has prevented DPH from reliably contacting SRO residents, which has slowed,
2 complicated and otherwise hindered the treatment of its patients, all at increased
3 expense to DPH and the City.

4 d. Mail containing essential health information sometimes does not reach SRO
5 residents at all. By failing to deliver mail to SRO residents in a secure and reliable
6 manner, Defendants have prevented DPH and county hospitals from communicating
7 information that is vital to preventing the spread of infectious diseases to a segment of
8 the San Francisco population. Thus, Defendants' policy places all San Francisco
9 residents at increased risk of the spread of infectious disease.

10 e. The City's ability to prevent unsafe or unsanitary conditions at SROs is also
11 hampered because the Postal Service has entrusted mail delivery to SRO management
12 and desk clerks in contravention of its own regulations. Knowing the importance of
13 mail delivery to SRO residents, management at SROs and desk clerks often use their
14 unchecked ability to withhold mail to retaliate against residents who report unsafe
15 conditions to the City. For instance, after unsafe and unsanitary conditions at the SRO
16 caused a long-term resident to become ill, her husband reported the SRO to the San
17 Francisco Department of Building Inspection. After the San Francisco Department of
18 Building Inspection required the SRO to remedy the unsafe conditions, the husband and
19 wife stopped receiving their mail. Because of this and other examples of retaliation,
20 SRO tenants reasonably fear that their mail will be withheld from them if they report
21 unsafe or unsanitary conditions to the City. Therefore, unsafe conditions go unreported
22 and the City's ability to protect public health is impeded.

23 f. SRO landlords have refused to install further individual, locked mailboxes
24 pursuant to a San Francisco ordinance because the Postal Service refuses to deliver to
25 them. Until the controversy between San Francisco and the Postal Service is settled,
26 San Francisco is also harmed because it is hindered in enforcing its own laws.

27 10. The Central City SRO Collaborative ("SRO Collaborative") is an association
28 established to organize, advocate for, and support SRO tenants in San Francisco's Central City

1 neighborhoods, including the Tenderloin and South of Market. Founded in 2001, the SRO
2 Collaborative has for years worked to improve mail security and privacy for SRO tenants. The SRO
3 Collaborative, along with other organizations, worked closely with San Francisco elected officials to
4 draft and enact the San Francisco Ordinance that requires SRO owners to install locked mailboxes for
5 each of their residential units and to otherwise improve living conditions for SRO tenants.

6 11. The San Francisco Tenants Union ("Tenants Union") has been established for over 36
7 years, and provides information, counseling and advice to San Francisco tenants, including SRO
8 tenants, as well as advocacy and lobbying for tenants' rights at the state and local level. The Tenants
9 Union's members include SRO tenants whose rights have been violated by the Postal Service's
10 discriminatory delivery policy.

11 12. The Housing Rights Committee of San Francisco ("HRCSF") has been established for
12 28 years to educate and organize tenants, including SRO tenants, in San Francisco to secure habitable
13 and affordable housing. HRCSF provides counseling and advice to tenants about their rights, and
14 organizes tenants associations in buildings to improve conditions for residents and to fight unlawful
15 evictions. HRCSF's members include SRO tenants whose rights have been violated by the Postal
16 Service's discriminatory delivery policy.

17 13. Defendant United States Postal Service is an independent establishment of the
18 Executive Branch of the United States government. Pursuant to 39 U.S.C. § 403, the Postal Service is
19 charged with the responsibility for maintaining an efficient and reliable mail delivery system that
20 provides the types of mail service necessary to meet the needs of all different categories of mail and
21 mail users.

22 14. Defendant John E. Potter is the Postmaster General of the United States. He is
23 responsible for all postal operations in the United States. He is sued solely in his official capacity.

24 15. Defendant Michael Daley is the Postal Service's Vice President of Area Operations for
25 the Pacific Area, including California. He is responsible for all postal operations in California,
26 including mail processing and distribution and customer service and administrative operations. He is
27 sued solely in his official capacity.
28

1 19. Many SRO residents have also lost the opportunity to receive state or federal benefits
2 because they did not receive notices informing them of their eligibility until it was too late to claim the
3 benefits. "Adam" relates that he did not receive a letter informing him that he qualified for Section 8
4 housing. Because he did not receive the letter, he did not respond and thus lost his housing benefits.
5 He was returned to the end of the multi-year waiting list for Section 8 housing.

6 20. The Postal Service's refusal to deliver mail to individual, locked mailboxes for SRO
7 residents has also significantly interfered with their ability to receive adequate health care and has
8 even put other San Franciscans at risk of infectious disease. A few years ago, for example, the San
9 Francisco Department of Public Health ("DPH") sent "David" a letter informing him that he had tested
10 positive for Hepatitis C, a blood-borne infectious disease that affects the liver. David did not receive
11 that letter and thus did not learn that he had Hepatitis C until over a year later when, while seeking
12 services from another agency, he by happenstance noticed a copy of the letter from DPH in his file.
13 Hepatitis C is contagious. It is sometimes curable if treatment begins early, and early treatment is
14 important to avoid cirrhosis, liver cancer, and liver failure. But because David did not learn of his
15 diagnosis for over a year, he was unable to take precautions to avoid spreading the disease to others,
16 and he lost the significant advantages of prompt treatment. And even after learning of his diagnosis,
17 David has missed doctor's appointments and other health information because of the unreliable mail at
18 his SRO. In addition to the harm to his health, David worries that letters containing his Hepatitis C
19 diagnosis or other sensitive medical information may have been opened by a desk clerk or someone
20 else at his SRO, thus exposing health information that David has a right to keep private.

21 21. "Paul," another long-term SRO resident, has also been unable to obtain critical medical
22 care because the Postal Service's unjustifiable mail delivery policy for SROs results in so much lost
23 and stolen mail. Soon after he moved into his SRO, Paul was diagnosed with terminal cancer.
24 Although his very survival depends on his ability to access medical care and communicate with his
25 doctors, Paul frequently does not receive appointment notices or other treatment-related
26 correspondence from his doctors. To his great distress, due to unreliable mail service, Paul lost his
27 Medi-Cal coverage during his treatment because he did not receive, and thus did not respond to, a
28 notice mailed to him. Without medical health insurance, Paul had difficulty obtaining necessary

1 medical care. As a result, the City has been forced to step in and provide his medical care at great
2 public expense.

3 22. Numerous SRO residents, most without knowing it, have also lost irreplaceable letters
4 from loved ones because of the Postal Service's unreliable method of delivering mail to SROs.
5 Particularly for individuals who do not have a phone or whose relatives live in foreign countries, the
6 mail provides the only realistic means of staying in contact. "Michael" reported that he never received
7 the last letter his mother sent to him before she died. "Andy" lost contact with his only daughter
8 because he did not receive (and therefore did not respond to) her letters, and when he did find her, she
9 refused to acknowledge him. Other SRO residents describe feeling involuntarily cut off from relatives
10 in foreign countries because it is too expensive to call and they only sporadically receive the letters
11 that their family members send.

12 23. Many SRO residents live with disabilities that make it difficult for them to receive mail
13 delivered to a desk clerk or to the lobby of an SRO. For instance, "Joan" has a disability that makes
14 climbing and descending stairs painful so she attempts to minimize the number of trips she makes
15 from her unit on the top floor to the lobby. Because the Postal Service refused to deliver her mail to a
16 private, secure mailbox, she is frequently forced to walk up and down the stairs to retrieve her mail
17 under threats from management that, if she does not collect her mail every single day during certain
18 hours, the SRO manager will return it to the Postal Service marked "Return to Sender." If the Postal
19 Service would deliver her mail to a secure, individual mailbox, she could retrieve her mail less
20 frequently and suffer less pain.

21 24. The Postal Service's mail delivery policy has also caused tenants' privacy to be violated.
22 SRO residents sometimes receive their mail already opened. In addition, residents have reported
23 finding their own mail or the mail of other residents open in the trash of the SRO manager or desk
24 clerk. Other residents found their mail blowing down the street or have watched helplessly as their
25 mail is stolen by someone walking by the SRO because the Postal Service has left the mail in an
26 unsecure location where it can easily be carried off by thieves or blown away by the wind.

27 25. "Jacob's" privacy was violated when the Postal Service delivered his mail to the SRO
28 rather than to him. Jacob's SRO raises a tenant's rent when he or she begins receiving SSI or other

1 public benefits. In May 2008, Jacob was approved for Supplemental Security Income ("SSI") benefits
2 for disabled adults. Although he never received notice in the mail that he was approved for SSI, his
3 rent was raised from \$318 to \$493 soon after letter of acceptance was mailed. On information and
4 belief, the management of Jacob's SRO learned that he was approved for benefits before Jacob knew
5 because management opened and read his SSI acceptance letter rather than giving it to him.

6 26. Residents with health conditions fear that SRO owners, desk clerks or other residents
7 will learn or have learned private details about their health and medical history by reading their mail.
8 Other residents fear exposure of their private information and refrain from joining controversial groups
9 or associations believing that, if their mail were read by others at their SRO or others in the
10 neighborhood, the resident would likely face retaliation or harassment based on his or her beliefs.

11 27. To reduce the hardships caused when SRO residents do not receive their mail, in 2006
12 the City enacted the Residential Hotel Mail Receptacle Ordinance ("Ordinance"), codified at S.F.
13 Admin. Code § 41E.3. The Ordinance requires owners of SROs to install separate mail receptacles for
14 each residential unit. The Ordinance also provides that SRO owners are responsible for "making
15 arrangements with the United States Postal Service for the installation of these receptacles and
16 delivery of mail thereto." Admin. Code § 41E.3.

17 28. After the enactment of the Ordinance, a number of SRO owners installed individual
18 mail boxes as required, and the Postal Service began delivering mail to individual residents at those
19 SROs. SRO residents whose mail is delivered to private, locked mailboxes almost universally report a
20 vast improvement in the actual receipt of their mail.

21 29. Despite the importance of individual mail delivery for SRO residents, on December 18,
22 2008, San Francisco Postmaster Noemi Luna sent a letter to the Department of Building Inspection
23 announcing that the Postal Service would no longer deliver mail to individual mail receptacles in
24 SROs effective January 5, 2009. According to the Postmaster, it would be cheaper for the Postal
25 Service to cut back its mail delivery services to SRO residents. She did not indicate that other
26 apartment buildings would also be subject to the cutbacks. Also, although the Postal Service had been
27 delivering mail to individual boxes at some San Francisco SROs for years and provides individualized
28 mail delivery to SROs in other cities, Luna for the first time asserted that delivering mail to individual

1 SRO residents in San Francisco is contrary to Postal Service regulations contained in the Domestic
2 Mail Manual ("DMM") and the Postal Operations Manual ("POM"). Luna further claimed that San
3 Francisco's Ordinance is preempted to the extent that it attempts to frustrate or interfere with the
4 operations of the Postal Service.

5 30. Postmaster Luna's assertion that postal regulations somehow prohibit the Postal Service
6 from delivering mail to individual locked mail receptacles at San Francisco SROs is baseless. To the
7 contrary, postal carriers are required to deliver mail to individual mail boxes in "apartment houses," a
8 Postal Service category that encompasses SROs. The Postal Operations Manual defines "apartment
9 houses" to include all "residential building[s] containing apartments or units occupied by different
10 addressees (regardless of whether the building is an apartment house, a family hotel, residential units,
11 or business units in a residential area and regardless of whether the apartments or units are owned or
12 rented)" as long as the building has (1) at least three units; (2) a common building entrance; (3) a
13 common street address; (4) mail receptacles approved by the Postal Service; (5) one mailbox per
14 apartment; and (6) mailboxes at a central location readily accessible to the carrier. POM 631.45.
15 SROs are clearly "residential units," and they satisfy every other requirement for "apartment houses."
16 Accordingly, under its own regulations, the Postal Service is required to provide individual mailbox
17 delivery. Plaintiffs are not aware of any other sort of apartment house that has been denied individual
18 delivery other than the SRO apartment houses, whose tenants have the fewest resources and are least
19 able to fight back against arbitrary and discriminatory governmental decision-making.

20 31. The Postal Service's decision to deny mail delivery to individual SRO residents—while
21 continuing to provide individual mailbox delivery to all other apartments in the City—is
22 discriminatory, irrational and violates SRO residents' right to equal protection under the law.

23 32. Because the right to send and receive mail is a fundamental aspect of the freedom of
24 speech protected by the First Amendment, Defendants' decision to deny reliable mail delivery to SRO
25 residents also violates SRO residents' and Plaintiff City's rights to free speech. Defendants' desire to
26 save money cannot justify cutting SRO residents off from any reliable means to receive mail from
27 family, friends, the government, medical health providers or others who want to communicate with the
28 SRO residents.

1 33. Delivering mail to SRO residents in a manner that allows private mail to be handled
2 and read by others without the addressee's consent violates SRO residents' free association and privacy
3 rights. SRO residents—like all other residents of San Francisco—have the right to receive their mail
4 without the prying eyes of their landlords, desk clerks, or their neighbors.

5 34. Finally, by asserting that a San Francisco Ordinance requiring SROs to install
6 mailboxes that comply with postal regulations is preempted, the Postal Service has created an actual
7 controversy concerning the enforceability of San Francisco's Ordinance and thus has hindered San
8 Francisco's ability to apply its own laws. San Francisco requires a speedy resolution of this
9 controversy so that it can continue to enforce its laws for the benefit of its residents.

10 **FIRST CLAIM FOR RELIEF**
11 **(EQUAL PROTECTION)**

12 35. Plaintiffs reallege and hereby incorporate ¶¶ 1-34 above.

13 36. The Fifth Amendment to the United States Constitution guarantees all persons the right
14 to equal protection under the law.

15 37. Defendants' mail delivery policy denies SRO residents equal protection of the law by
16 denying them the same mail delivery service enjoyed by residents of other apartments. Individuals
17 who live in buildings classified by Defendants as "apartment houses," regardless of whether those
18 buildings are an "apartment house, a family hotel, residential units, or business units in a residential
19 area," are entitled to receive mail delivery to personal and private mailboxes. Although SROs are
20 apartments under the Postal Service's own regulations, Defendants arbitrarily and irrationally deny
21 SRO residents the same personal and private mail delivery that other apartment residents receive.

22 38. Defendants have further violated SRO residents' equal protection rights by withdrawing
23 mail service only from the low-income, elderly and disabled residents of SROs while continuing to
24 provide full service to San Francisco's wealthier residents who enjoy greater resources. This unequal
25 treatment is unreasonable and lacks any rational basis.

26 39. Plaintiffs have no remedy at law for deprivation of their Equal Protection rights.

**SECOND CLAIM FOR RELIEF
(FREE SPEECH)**

40. Plaintiffs reallege and hereby incorporate ¶¶ 1-39 above.

41. The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . ." To promote the free exchange of ideas, the First Amendment protects both the right to send and the right to receive mail.

42. Defendants' refusal to deliver mail to private, locked mailboxes for SRO residents violates the residents' rights to freedom of speech guaranteed by the First Amendment to the United States Constitution by depriving SRO residents of any realistic and reliable means of receiving mail. In addition, because Defendants' policy also causes mail sent by the City to be lost, stolen or opened by someone other than the addressee, Defendants' policy also burdens the City's right to communicate to SRO residents.

43. Plaintiffs have no remedy at law for deprivation of these First Amendment rights.

**THIRD CLAIM FOR RELIEF
(FREEDOM OF ASSOCIATION)**

44. Plaintiffs reallege and hereby incorporate ¶¶ 1-43 above.

45. The First Amendment to the United States Constitution protects the freedom of association.

46. Defendants' refusal to deliver mail to locked, private mailboxes for SRO residents impermissibly burdens SRO residents' freedom of association. By delivering mail in a manner that knowingly and routinely makes private mail available to be handled and read by others without the addressee's consent, the Postal Service chills SRO residents' ability to form private intimate and expressive associations.

47. Defendants' mail delivery method compels SRO residents involuntarily to disclose their memberships in organizations and other private associations because it knowingly facilitates their neighbors', landlord's and desk clerks' opportunity to see and read SRO residents' private correspondence.

1 48. Defendants' mail delivery policy and the resulting disclosure of SRO residents' private
2 associations have caused SRO residents to face harassment, threats and retaliation.

3 49. Plaintiffs have no adequate remedy at law for deprivation of these First Amendment
4 rights.

5 **FOURTH CLAIM FOR RELIEF**
6 **(RIGHT TO PRIVACY)**

7 50. Plaintiffs reallege and hereby incorporate ¶¶ 1-49 above.

8 51. The United States Constitution guarantees the right to privacy for all persons.

9 52. SRO residents have a legally protected right to receive private mail correspondence.

10 53. SRO residents have a reasonable expectation of privacy in the contents of their mail.

11 54. By failing to deliver mail to locked, individual mail receptacles for each SRO
12 residence, the Postal Service knowingly causes SRO residents' privacy to be violated. This invasion of
13 privacy causes great harm to SRO residents.

14 55. The Postal Service could deliver mail in a manner that is less burdensome to SRO
15 residents' privacy interests by placing mail in individual, locked mailboxes for each SRO resident.

16 56. Plaintiffs have no remedy at law for deprivation of their constitutional right to privacy.

17 **FIFTH CLAIM FOR RELIEF**
18 **(DECLARATORY RELIEF)**

19 57. Plaintiffs reallege each and hereby incorporate ¶¶ 1-56 above.

20 58. An actual controversy has arisen and now exists between Plaintiffs and Defendants
21 concerning their respective rights and duties in that Plaintiffs contend that the Ordinance is not
22 preempted, whereas Defendants have asserted that the Ordinance is preempted under federal law and
23 postal regulations.

24 59. Plaintiffs desire a judicial determination that the Ordinance is consistent with federal
25 law and regulations, and a declaration that the Ordinance is not preempted.

26 60. A judicial declaration is necessary and appropriate at this time so that San Francisco
27 may ascertain whether its Ordinance complies with federal law and whether it may legally enforce its
28

1 Ordinance requiring SROs to provide mailboxes that comply with Postal Service regulations for mail
2 delivery.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiffs demand judgment against Defendants on each and every claim.

5 Plaintiffs respectfully ask the Court to:

6 1. Declare that Defendants' refusal to deliver mail to individual SRO residents violates
7 SRO residents' right to equal protection under the United States Constitution;

8 2. Declare that Defendants' refusal to deliver mail to individual SRO residents violates the
9 First Amendment to the United States Constitution;

10 3. Declare that Defendants' refusal to deliver mail to individual SRO residents violates
11 SRO residents' right to privacy under the United States Constitution;

12 4. Declare that S.F. Administrative Code § 41E, being consistent with federal law and
13 regulations, is not preempted under the Supremacy Clause of the United States Constitution;

14 5. Preliminarily and permanently enjoin the Defendants from continuing to refuse to
15 deliver mail to individual, locked mail receptacles for SRO residents;

16 6. Award Plaintiffs their costs and expenses, including reasonable attorneys' fees
17 necessarily incurred in connection with this action; and

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7. Grant such other and further relief as this Court may deem just and proper.
Plaintiffs demand a jury trial.

Dated: May 5, 2009

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HOUSING RIGHTS COMMITTEE OF SAN
FRANCISCO

5 ADR

JS 44 (Rev. 12/07) (and rev 1-16-08)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

<p>I. (a) PLAINTIFFS</p> <p>City and County of San Francisco, Central City SRO Collaborative, San Francisco Tenants Union and Housing Rights Committee of San Francisco</p>	<p>DEFENDANTS</p> <p>United States Postal Service, John E. Potter, Michael Daley, Noemi Luna</p>
<p>(b) County of Residence of First Listed Plaintiff San Francisco (EXCEPT IN U.S. PLAINTIFF CASES)</p>	<p>County of Residence of First Listed Defendant Washington, DC (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.</p>
<p>(c) Attorney's (Firm Name, Address, and Telephone Number)</p> <p>Office of the City Attorney City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, California 94102-4682</p>	<p>Attorneys (If Known)</p> <p>United States Attorney's Office Northern District of California 450 Golden Gate Avenue, 9th Floor San Francisco, CA 94102-3495</p>

E-filing

ADR

JCS

<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table style="width:100%;"> <tr> <td style="width:33%;">Citizen of This State</td> <td style="width:10%;"><input type="checkbox"/> 1</td> <td style="width:10%;"><input type="checkbox"/> 1</td> <td style="width:33%;">Incorporated or Principal Place of Business In This State</td> <td style="width:10%;"><input type="checkbox"/> 4</td> <td style="width:10%;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4														
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5														
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6														

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES						
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<p>PERSONAL INJURY</p> <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<p>LABOR</p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<p>LABOR</p> <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<p>LABOR</p> <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157	<p>PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<p>SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<p>FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

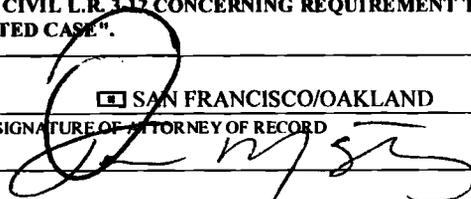
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 42 U.S.C. s. 1983 (Constitutional Claims); 28 U.S.C. 2201

Brief description of cause:
 Constitutional claims arising under the United States Constitution and claim for declaratory relief

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** **CHECK YES only if demanded in complaint:** **JURY DEMAND:** Yes No

VIII. RELATED CASE(S) IF ANY PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY) SAN FRANCISCO/OAKLAND SAN JOSE

DATE: May 5, 2009 SIGNATURE OF ATTORNEY OF RECORD: 

009-1964-JCS