

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

COMPLAINT OF THE CITY
AND COUNTY OF SAN FRANCISCO

)
)
)

Docket No. C2011-2

**OPPOSITION TO POSTAL SERVICE'S MOTION
TO STAY PROCEEDINGS**

INTRODUCTION

The Commission should reject the Postal Service's request to stay this proceeding on abstention grounds. The Postal Service wrongly contends that (1) the regulatory claim brought by San Francisco is duplicative of constitutional claims brought by Complainant City and County of San Francisco ("San Francisco") and other Plaintiffs in the U.S. District Court for the Northern District of California (the "District Court litigation"), and (2) San Francisco's litigation conduct supports abstention of this action in favor of the District Court.

First, abstention is not appropriate here because the claims in San Francisco's complaint before the Commission involve different claims from those at issue in the District Court litigation. San Francisco raises regulatory issues here that it did not (and could not) raise in the District Court litigation.

Second, even if these suits were identical, this case also lacks the factors necessary to apply the rarely-invoked abstention doctrine. Contrary to the Postal Service's suggestion, nothing San Francisco has represented before the Commission or the District Court requires abstention. San Francisco never suggested to anyone that it intended to forego a complaint to the Commission. San Francisco merely informed the District Court that it was not

pursuing regulatory claims there, since regulatory claims must be pursued before the Commission.

Similarly, there is nothing exceptional about the fact that San Francisco moved to stay the District Court litigation pending the resolution of its complaint here by the Commission. Indeed, San Francisco forthrightly disclosed its interest in a stay of the District Court case to the Commission. SF Complaint at p. 15. The District Court chose not to stay that case. San Francisco is unaware of any law (and the Postal Service cites no law) suggesting that the Commission should stay a meritorious complaint involving the Postal Service's erroneous interpretation of its regulations simply because a District Court chooses not to stay litigation on *different* constitutional claims resulting from Postal Service activities based on its erroneous interpretation of its regulations. Nothing about the abstention doctrine suggests that the Commission should do anything other than allow San Francisco's complaint here to proceed in parallel with litigation on different claims in the District Court case.

ARGUMENT

I. Abstention is Inappropriate Because the Litigation in the Northern District of California Does Not Involve the Same Claims as those Before the Commission

In an effort to stop the Commission from exercising its proper jurisdiction, the Postal Service invokes the rarely-used doctrine of abstention. Abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959)). When a court abstains, it stays or dismisses an action rightly before it so that the dispute may be resolved in another forum addressing substantially identical issues. *See id.*

To abstain from an action, a court must be confident that the parallel proceeding *will fully adjudicate the claims in both actions*. See, e.g., *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983) (“a stay is as much a refusal to exercise federal jurisdiction as a dismissal. When a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all.”).

The Postal Service’s request here runs afoul of this most basic rule of abstention. Specifically, the Postal Service explicitly concedes that the Commission will need to adjudicate San Francisco’s regulatory claims *after* Plaintiffs’ constitutional claims are resolved in the Northern District of California. See Mot. to Stay at p. 12. Given this concession, it would be a “serious abuse of discretion” for the Commission to abstain to hear San Francisco’s complaint. *Mercury Constr. Corp.*, 460 U.S. at 28.

Abstention is only appropriate where two proceedings are “parallel.” The parties, legal claims, and issues in each case must be substantially identical. See, e.g., *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307 (3rd Cir. 2009) (“substantially identical claims [and] nearly identical allegations and issues”); *AAR Intern., Inc. v. Nimelias Enterprises S.A.*, 250 F.3d 510, 518 (7th Cir. 2001) (“Suits are parallel if substantially the same parties are litigating substantially the same issues simultaneously in two fora.”) (quotation marks and citation omitted). To invoke abstention, it is critical that “only truly duplicative proceedings be avoided. When the claims, parties, or requested relief differ, deference may not be appropriate.” *Complaint of Bankers Trust Co. v. Chatterjee*, 636 F.2d 37, 40 (3rd Cir. 1980).

This case does not present the situation where a party has filed the same claims in two different forums. *See, e.g., Am. Int'l Underwriters (Philippines), Inc. v. The Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988). San Francisco's regulatory claims before the Commission are fundamentally different from its constitutional claims in the District Court litigation. By statute, this Commission is the only appropriate venue for San Francisco to raise a challenge to the Postal Service's interpretation of Postal Service regulations. *See Currier v. Potter*, 379 F.3d 716, 725 (9th Cir. 2003) (citing 39 U.S.C. § 101, *et seq.*). Indeed, the Postal Service has repeatedly told the District Court that it cannot hear and is not hearing a regulatory challenge. *See Mot. to Stay at Exh. 2*, p. 11-12. The District Court agrees, as does San Francisco. *See Mot. to Stay at Exh. 1*, p. 5 ("Nevertheless, the Court need not determine, pursuant to *Currier*, whether claims under Section 403(c) may be adjudicated in federal court because Plaintiffs do not assert statutory claims here. Their claims are constitutional ones.").

The plaintiffs in the District Court litigation, including San Francisco, never filed a regulatory claim there. Instead, Plaintiffs in the District Court litigation claim that the Postal Service's regulations, even if they are being properly interpreted in regard to San Francisco SROs, violates a set of constitutional rights -- equal protection, freedom of speech, freedom of association, and the right of privacy derived from the First and Fourth Amendments. As San Francisco has explained to the District Court,

[a]lthough the Postal Service's failure to follow its own regulations is powerful evidence of the irrationality of its actions, whether or not the Postal Service has "correctly" construed its regulations (which is the subject of pending litigation before the Postal Regulatory Commission) neither determines the outcome of the constitutional inquiry nor does it provide the Postal Service a defense. *See Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923).

Exh. A, Plaintiffs' Opposition to Postal Service's Motion for Summary Judgment at pp. 9-10.

The different claims at issue in the District Court litigation bring with them different legal burdens. Here, the question of whether the Postal Service's interpretation of its regulations is discriminatory is the touchstone of the Commission's inquiry under 39 U.S.C. § 403(c). By contrast, Plaintiffs' equal protection claims in the District Court litigation will require more than a showing of discrimination; they call for factual showings that the Postal Service's policies of discrimination lack a rational basis as applied to San Francisco SROs; Plaintiffs' freedom of speech claim involves an analysis of the relevant forum and the reasonableness of the Postal Service's restrictions on speech as a constitutional matter; and so on. Thus, unlike the reasonable accommodation issue central to both proceedings in *Key v. U.S. Postal Service* (cited by the Postal Service on page 10 of its motion), the standards and legal burdens important to resolve the actions before the Northern District of California and the Commission are different. 31 M.S.P.R. 197 (1986).

The fact that the PRA requires San Francisco's claims be split between two forums demonstrates that the claims are, in fact, legally distinct. Courts will refuse to invoke abstention where, as here, the plaintiff could not raise its claims in the competing forum. *See Bass v. Butler*, No. C.A. 98-4112, 1999 WL 391483, at *3 (E.D. Pa., May 3, 1999) (rejecting invitation to abstain because claims in the two actions were not the same and plaintiff had no opportunity to raise § 1983 claim in concurrent workmen's compensation action).

The Postal Service all but acknowledges that San Francisco's claims before the Commission are different from those pending before the District Court. Mot. to Stay at 11-12. The Postal Service then wrongly contends that legal distinctions between the claims before the Commission and the District Court are somehow "illusory" because "both can apparently rely upon [the] factual record generated [in the district court]." Mot. to Stay at 12. Of course,

distinct legal claims often rely on the same factual record. The law does not suggest that abstention is appropriate where an overlapping “factual record” can be used to support multiple different legal claims. Abstention is used to avoid situations in which the same claim would necessarily be litigated in different jurisdictions. That is not the case here.

II. San Francisco’s Litigation Conduct Does Not Support Abstention

Courts apply several factors when determining whether to abstain from one of two substantially identical suits. These factors include the inconvenience to the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained. *Colorado River*, 424 U.S.at 818. Contrary to the Postal Service’s argument, nothing about San Francisco’s conduct before the Commission or before the District Court supports abstention.

First, San Francisco’s complaint before the Commission is not “forum shopping.” Under the PRA, the Commission is the only forum where San Francisco may pursue its challenge that the Postal Service has erroneously interpreted its regulations. *See Currier*, 379 F.3d at 725. The PRA mandates that San Francisco must pursue its regulatory challenge separately from its constitutional claims; San Francisco is following the law and is not intentionally engaging in “piecemeal” litigation. San Francisco cannot “shop” for a forum when only one forum is available for its claim. This is therefore not like the situation in *Continental Insurance*, cited by the Postal Service (Mot. to Stay at 8), where the plaintiff attempted to take advantage of more lenient discovery rules by filing a suit with identical claims in another court.

Second, the fact that San Francisco filed its complaint before the Commission after it filed its constitutional claims along with co-plaintiffs in the District Court is not does not support abstention here either. The Postal Service cites no case to support its contention that the timing of filing complaints involving different legal claims is relevant to abstention and San Francisco is not aware of one.

Third, San Francisco never “disavowed any statutory and regulatory claims” in the Northern District of California. *See* Mot. to Stay at 4. The plaintiffs in the District Court litigation told that court they were not pursuing a regulatory claim before *that court* -- because the PRA vests *this Commission* with jurisdiction over a regulatory claim. *See* Exh. B, Plaintiffs’ Opposition to Postal Service’s Motion to Dismiss at pp. 13-14. San Francisco never suggested anywhere that it would waive a regulatory claim before this Commission. The Postal Service’s suggestion to the contrary is wrong.

Fourth, it is worth noting that the parties have already completed discovery in the District Court litigation and, as the Postal Service appears to acknowledge, that discovery can be used to streamline proceedings before the Commission. San Francisco does not believe significant additional discovery is necessary to resolve its regulatory claims here. *See* SF Complaint at ¶¶ 49-52. Thus, the most time-consuming and often most contentious phase of litigation has already been completed.

Finally, the Postal Service all but overlooks the potential prejudice to San Francisco if the Commission were to invoke the abstention doctrine here. San Francisco’s complaint raises legitimate and troubling claims. The Postal Service is discriminating against some of San Francisco’s most vulnerable residents. San Francisco acknowledges the Postal Service’s budget difficulties. Discrimination, however, is anathema to the Postal Service’s statutory mandate. 39 U.S.C. § 403(c). The Postal Service must fulfill its mission without discrimination. It must find non-discriminatory ways in which to address budget concerns.

CONCLUSION

For the foregoing reasons, the Commission should decline the Postal Service’s invitation to invoke the rarely used abstention doctrine to refuse to consider San Francisco’s claims.

Dated: October 9, 2011

By: //s// Michael Markman

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 19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 20 **SAN FRANCISCO DIVISION**

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Civil Case No.: 3:09-cv-01964-RS (EDL)

**PLAINTIFFS' OPPOSITION TO
DEFENDANT UNITED STATES
POSTAL SERVICE'S MOTION FOR
SUMMARY JUDGMENT**

Date: October 13, 2011
Time: 1:30 p.m.
Dept: Courtroom 3, 17th Floor
Judge: Honorable Richard Seeborg

TABLE OF CONTENTS

1

2 INTRODUCTION..... 1

3 STATEMENT OF FACTS4

4 I. Single Room Occupancy (“SRO”) Buildings and Their Residents4

5 II. The City’s Classification of SRO Rooms 5

6 III. Mail Delivery At SROs 5

7 IV. The Impact of Single-Point Delivery for SROs 8

8 ARGUMENT 9

9 I. This Court Has Subject Matter Jurisdiction 9

10 II. Plaintiffs Have Standing 10

11 A. Plaintiffs’ Injury in Fact 10

12 1. Injury to the City 10

13 2. Injuries to the Organizational Plaintiffs 11

14 B. Plaintiffs’ Injuries are Fairly Traceable to the Postal Service’s

15 Refusal to Allow Centralized Delivery for SROs 12

16 C. Plaintiffs’ Injuries Are Redressable by Centralized Delivery 13

17 III. Triable Issues Of Fact Preclude Summary Judgment On Plaintiffs’ Equal

18 Protection Claim..... 14

19 A. SRO Tenants And Tenants At Other Multi-Unit Residential

20 Buildings Are Similarly Situated For Purposes Of Mail Delivery 15

21 B. The Postal Service Lacks A Rational Basis for Its

22 Discrimination Against SRO Residents 17

23 1. Cost Savings Is Not A Rational Basis For Discriminating

24 Against SRO Residents 18

25 2. SRO Residents Are Not More Transient Than Residents Of

26 Other Multi-Unit Residential Housing In The City 19

27 3. Maintaining Uniformity And Stability In A Manner

28 Inconsistent With The Postal Service’s Own Regulations Is

Not A Rational Basis..... 20

IV. Delivering Mail To SRO Residences By Single-Point Delivery Violates

The First Amendment 21

A. City Delivery is the Relevant Forum 21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. Single-Point Delivery Is Not Reasonable As Applied To SRO Residents In San Francisco 22

C. Single-Point Delivery To SRO Buildings Frustrates The Purpose of City Delivery 22

V. The Postal Service’s SRO Policy Violates Plaintiffs’ And SRO Residents’ Fourth Amendment Rights 24

CONCLUSION 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
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TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| FEDERAL CASES | |
| <i>Bolling v. Sharpe</i> 347 U.S. 497 (1954) | 14 |
| <i>City of Cleburne v. Cleburne Living Ctr.</i> 473 U.S. 432 (1985) | 14, 15 |
| <i>Cogswell v. City of Seattle</i> 347 F.3d 809 (9th Cir. 2003)..... | 22, 23, 24 |
| <i>Council of Ins. Agents & Brokers v. Molasky-Arman</i> 522 F.3d 925 (9th Cir. 2008)..... | 10 |
| <i>Currier v. Potter</i> 379 F.3d 716 (2004) | 9, 21, 22 |
| <i>Downen v. Warner</i> 481 F.2d 642 (9th Cir. 1973)..... | 10 |
| <i>Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.</i> 204 F.3d 149 (4th Cir. 2000)..... | 10 |
| <i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)</i> 528 U.S. 167 (2000) | 11, 13 |
| <i>Gilbert v. Nat’l Transp. Safety Board</i> 80 F.3d 364 (9th Cir. 1996)..... | 10 |
| <i>In re Levenson</i> 587 F. 3d 925 (9th Cir. 2009)..... | 19 |
| <i>Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton</i> 422 F.3d 490 (7th Cir. 2005)..... | 12 |
| <i>Lazy Y Ranch Ltd. v. Behrens</i> 546 F.3d 580 (9th Cir. 2008)..... | 18, 19 |
| <i>Lockary v. Kayfetz</i> 917 F.2d 1150 (9th Cir. 1990)..... | 14 |
| <i>Lujan v. Defenders of Wildlife</i> 504 U.S. 555 (1992) | 10 |

1 *Nat’l Audubon Soc’y, Inc. v. Davis*
 2 307 F.3d 835 (9th Cir. 2002)..... 12

3 *Renee v. Duncan*
 4 623 F.3d 787 (9th Cir. 2010)..... 13

5 *Reno v. Flores*
 6 507 U.S. 292 (1993)..... 9

7 *Richardson v. Belcher*
 8 404 U.S. 78 (1971)..... 16

9 *Rust v. Sullivan*
 10 500 U.S. 173 (1991)..... 9

11 *San Francisco Baykeeper v. W. Bay Sanitary Dist.*
 12 2011 WL 1990637 (N.D. Cal. May 23, 2011) 12

13 *Sioux City Bridge Co. v. Dakota County*
 14 260 U.S. 441 (1923)..... 10

15 *Smith v. Pac. Prop. & Dev. Corp.*
 16 358 F.3d 1097 (9th Cir. 2004)..... 12

17 *Squaw Valley Dev. Co. v. Goldberg*
 18 375 F. 3d 936 (9th Cir. 2004) *overruled in part on other grounds by*
 19 *Action Apartment Ass’n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020
 20 (9th Cir.2007)..... 14

21 *Stanton v. Stanton*
 22 421 U.S. 7 (1975)..... 15

23 *Toll Bros., Inc. v. Township of Readington*
 24 555 F.3d 131 (3d Cir. 2009)..... 12

25 *U.S, ex rel. Milwaukee Social Democratic Pub. Co. v. Burlison*
 26 255 U.S. 407 (1921)..... 24

27 *U. S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*
 28 453 U.S. 114 (1981)..... 24

U.S. v. Anton
 547 F.2d 493 (9th Cir. 1976)..... 25

U.S. v. Davis
 461 F.2d 83 (5th Cir. 1972)..... 25

U.S. v. Jacobsen
 466 U.S. 109 (1984)..... 24

1 *U.S. v. Van Leeuwen*
 2 397 U.S. 249 (1970) 24

3 *Veterans for Common Sense v. Shinseki*
 4 644 F.3d 845 (9th Cir. 2011)..... 11

5 *Village of Willowbrook v. Olech*
 6 528 U.S. 562 (2000) 14, 15

7 **CALIFORNIA STATUTES**

8 Cal. Civil Code § 1940.1 16

9 Cal. Civil Code § 1940(b)(1) 16

10 **OTHER STATE STATUTES**

11 Residential Hotel Conversion and Demolition Ordinance (“HCO”) 5, 7

12 Residential Mail Receptacle Ordinance (the “Mailbox Ordinance”)..... 5, 6, 7

13 **OTHER AUTHORITIES**

14 S.F. Planning Code § 101.1 16

15 S.F. Fire Code § 4603.4.1 16

16 Fed. R. Civ. P. 56(d) 14

17
 18
 19
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 23
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TABLE OF CITATIONS

| SOURCE | Cited As |
|--|-----------------|
| <u>DECLARATIONS</u> | |
| Declaration of Timothy D. Adams | Adams Decl. |
| Declaration of Mark P. Berkman in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment | Berkman Decl. |
| Declaration of Sanford Birnbach | Birnbach Decl. |
| Declaration of Jeff Buckley in Opposition to Defendant's Motion for Summary Judgment | Buckley Decl. |
| Declaration of Prince Bush | Bush Decl. |
| Declaration of Ryan M. Buschell in Support of Plaintiffs' Request for Judicial Notice | Buschell Decl. |
| Declaration of Steven L. Collier in Support of Plaintiffs' Opposition to Defendant's for Summary Judgment | Collier Decl. |
| Declaration of Kelly P. Finley in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment | Finley Decl. |
| Declaration of Paul Groth in Opposition to Defendant's Motion for Summary Judgment | Groth Decl. |
| Declaration of Daniel Hal | Hal Decl. |
| Declaration of Peter Jacobson in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment | Jacobson Decl. |
| Declaration of Walter James | James Decl. |
| Declaration of Dan R. Jordan | Jordan Decl. |
| Declaration of L. Masae Kawamura | Kawamura Decl. |

| | | |
|----|---|-----------------|
| 1 | Declaration of Daniel Kelly in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment | Kelly Decl. |
| 2 | | |
| 3 | Declaration of Jonas G. Puceta | Puceta Decl. |
| 4 | | |
| 5 | Declaration of Randy Shaw in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment | Shaw Decl. |
| 6 | | |
| 7 | Declaration of Sarah Shortt in Opposition to Defendant's Motion for Summary Judgment | Shortt Decl. |
| 8 | | |
| 9 | Declaration of Roberta Josepha Snyder | Snyder Decl. |
| 10 | | |
| 11 | | |
| 12 | <u>REPORTS ATTACHED TO DECLARATIONS</u> | |
| 13 | Expert Report of Mark P. Berkman (Exhibit A to the Berkman Decl.) | Berkman Report |
| 14 | Expert Report of Paul Groth (Exhibit A to the Groth Decl.) | Groth Report |
| 15 | | |
| 16 | Expert Report of Peter Jacobson (Exhibit A to the Jacobson Decl.) | Jacobson Report |
| 17 | Expert Report of Randy Shaw (Exhibit A to the Shaw Decl.) | Shaw Report |
| 18 | | |
| 19 | <u>DEPOSITION TRANSCRIPTS ATTACHED TO DECLARATIONS</u> | |
| 20 | Transcript of Deposition of Dan Bernardo (Exhibit D to Finley Decl.) | Bernardo Tr. |
| 21 | Transcript of Deposition of Krista Gaeta (Exhibit C to Finley Decl.) | Gaeta Tr. |
| 22 | | |
| 23 | Transcript of Deposition of Dean J. Granholm (Exhibit M to Finley Decl.) | Granholm Tr. |
| 24 | | |
| 25 | Transcript of Deposition of Theodore Gullicksen (Exhibit Q to the Finley Decl.) | Gullicksen Tr. |
| 26 | | |
| 27 | Transcript of Deposition of Peter A. Jacobson (Exhibit B to the Jacobson Decl.) | Jacobson Tr. |
| 28 | | |

| | | |
|----|--|--------------|
| 1 | Transcript of Deposition of Stephen Landi (Exhibit J to the | |
| 2 | Finley Decl.) | Landi Tr. |
| 3 | Transcript of Deposition of Noemi Luna (Exhibit N to the | |
| 4 | Finley Decl.) | Luna Tr. |
| 5 | Transcript of Deposition of John Patrick Mallery (Exhibit P to | |
| 6 | the Finley Decl.) | Mallery Tr. |
| 7 | Transcript of Deposition of Belinda Lou Olson (Exhibit B to | |
| 8 | the Finley Decl.) | Olson Tr. |
| 9 | Transcript of Deposition of Robert Reed (Exhibit G to the | |
| 10 | Finley Decl.) | Reed Tr. |
| 11 | Transcript of Deposition of Raj Sanghera (Exhibit I to the | |
| 12 | Finley Decl.) | Sanghera Tr. |

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INTRODUCTION

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2 This case is about the United States Postal Service's arbitrary refusal to deliver mail to the
3 mailboxes of some of Plaintiff City and County of San Francisco's ("the City's") most vulnerable
4 residents. Single Room Occupancy or "SRO" buildings are low-rent multi-unit residential
5 buildings that serve as permanent living spaces. Residents frequently survive on tight resources,
6 and many receive government assistance (including from the City's General Assistance ("G.A.")
7 program). Before 2006, a number of SROs had individual locking mailboxes for residents, and
8 the Postal Service delivered the mail to each box ("centralized delivery").

9 In 2006, in an effort to address community concerns about lost and stolen mail at other
10 SROs that received a single bundle of mail for the entire building ("single-point delivery"), the
11 City enacted an ordinance requiring SRO owners to install individual locking mailboxes for their
12 residents. As mailboxes were installed, the Postal Service began delivering the mail to them.
13 That all changed, however, in December 2008, when the Postmaster for San Francisco announced
14 a new approach to mail delivery for SROs. Under the Postal Service's new policy, if an SRO
15 installs individual mailboxes for its residents, the Postal Service flatly refuses to put the mail in
16 them. Instead, the Postal Service simply drops all the mail using single-point delivery.

17 The Postal Service's new policy discriminates against SRO residents in violation of the
18 Constitution's equal protection guarantees. It violates the free speech protections of the First
19 Amendment. And it violates the rights to freedom of association and privacy. Substantial
20 evidence supports each of Plaintiffs' claims, defeating summary judgment.

21 ***First***, the Postal Service is discriminating against SRO residents by delivering mail
22 differently than it does to other multi-unit residential buildings in the City. For the vast majority
23 of multi-unit residential buildings, the Postal Service will at least evaluate the physical
24 characteristics of the building to determine if it meets the requirements for centralized delivery.
25 Not so for SROs.

26 There is no reasonable basis for the Postal Service to treat SROs differently from any other
27 multi-unit residential building in the City. Virtually nothing is known of the actual basis for the
28 Postal Service's discriminatory policy, since the Postal Service has tried to shield evidence about

1 its policy shift by invoking the attorney-client privilege. The Postal Service’s primary rationale
2 offered for its discrimination against SROs is that the discrimination saves money. That rationale,
3 however, does not pass constitutional muster. While eliminating government services for
4 disfavored groups will always save money, the law requires a rational basis for the *classification*
5 *itself*, not just for the government action. Here, the Postal Service cannot demonstrate that
6 treating SROs differently from other multi-unit residential buildings is rationally related to the
7 goal of saving money. The cost of delivery to SROs is no higher than to other multi-unit
8 residential buildings.

9 The Postal Service’s suggestion that its regulations mandate discrimination against SROs
10 because they are “hotels” is a hotly contested question of fact. The evidence is that SROs are not
11 “hotels” in any traditional sense, as they do not cater to tourists. Rather, SROs provide permanent
12 homes for San Franciscans, many of whom have lived in their SRO for years or even decades.
13 Further, the Postal Service’s argument is not even consistent with its own regulations. Indeed, the
14 regulation setting out the qualifications for multi-unit residential buildings to receive centralized
15 delivery specifically prohibits discrimination based on the label assigned to such buildings. All
16 multi-unit residential buildings with “residential units” (including “family hotels”) qualify for
17 centralized delivery if they have the right physical characteristics. The evidence shows that SROs
18 are multi-unit residential buildings comprised of “residential units.” The evidence also establishes
19 that SRO-type buildings were called “family hotels” back when the Postal Service established its
20 regulations for city delivery.

21 *Second*, the Postal Service is limiting access to the mail in violation of the First
22 Amendment. The Postal Service wrongly contends that its limitations are permissible given the
23 nature of the forum at issue. But, the Postal Service has identified the wrong forum for purposes
24 of the First Amendment analysis. The forum cannot be defined as “centralized delivery to SROs,”
25 as the Postal Service contends. “Centralized delivery” is a delivery method—not a forum.
26 Instead, the proper forum is “city mail delivery.” The Court should evaluate whether the Postal
27 Service’s conduct is unreasonable in light of that forum’s purpose—the safe and secure delivery
28 of the mail directly to the addressee in an urban environment. The evidence is that single-point

1 delivery to SROs is not safe and secure, is not delivery directly to the addressee, and has resulted
2 in an array of harms.

3 *Third*, the Postal Service’s SRO policy infringes the freedom of SRO residents to
4 associate, which is intertwined with their reasonable expectations of privacy in their mail. The
5 evidence shows the Postal Service drops all the mail at a single point. Sometimes it leaves the
6 mail with a building manager or desk clerk, and at other times it leaves the mail unattended in a
7 bundle in a common area. SRO residents are often left to sift through the bundle of mail.
8 Residents have no privacy—they know that their neighbors have easy access to their mail and
9 they have access to their neighbors’ mail as well. The Postal Service has no basis to eliminate the
10 reasonable expectation of privacy that those living in multi-unit residential buildings enjoy simply
11 because a building has the label “SRO,” “residential hotel,” or “family hotel.”

12 This case is much more than a dispute over convenience. The Postal Service’s refusal to
13 sort and deliver mail to locked boxes for SRO residents compromises both the privacy and
14 security of residents’ mail, exposing it to prying eyes and careless (or sticky) hands. The
15 consequences to residents can be severe. Affected SRO residents report that critical mail
16 containing financial assistance, requirements and forms for maintaining benefits eligibility, and
17 personal medical information never arrives. This in turn harms the City, which bears the burden
18 of reevaluating and reestablishing needlessly discontinued benefits as well as a real risk to public
19 health when it cannot reliably alert SRO residents to needed medical care or possible exposure to
20 an outbreak of infectious disease.

21 The Postal Service’s motion reduces to a debate about the weight of the evidence,
22 precluding summary judgment. There is, however, one exception—standing. All the evidence
23 supports the conclusion that Plaintiffs have standing to assert their claims, and Defendant’s
24 motion does not identify any factual dispute about standing. This case should proceed to trial.

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STATEMENT OF FACTS

I. Single Room Occupancy (“SRO”) Buildings and Their Residents.

SROs are multi-unit residential buildings, sometimes called residential or family hotels,¹ that serve as permanent homes for their residents. *See* Dkt. No. 291, Ex. T-72 at CCSF 005617 (“An SRO is a home.”); Groth Report ¶¶ 51, 56; Kelly Decl. ¶ 4; Shaw Report 6. They typically consist of small individual rooms often less than 150 feet square, and residents usually share kitchen and bathroom facilities. Shaw Report 4.

SROs have long been the most affordable housing option available in the City for many economically disadvantaged populations, including the elderly, single women, unskilled workers, and racial minorities. *See* Groth Report ¶¶ 4, 14, 38, 40; Kelly Decl. ¶¶ 4-5.

SRO residents are among the poorest citizens in the City and often rely exclusively on government aid to survive. Kelly Decl. ¶¶ 6-7; Shaw Report 7. Supplemental Security Income (SSI), CalWorks, and/or San Francisco G.A. recipients typically have just enough income to reside in these SROs. Kelly Decl. ¶¶ 7-8. By contrast, a studio apartment on average will cost more than \$1,000 per month. Shaw Report 7. SROs generally do not require a security deposit, so low-income residents do not need to have savings to move into an SRO. Groth Report ¶ 52; Shaw Report 7. Because SRO residents typically spend a large portion of their government assistance on rent, they have little money left over and generally do not maintain bank accounts, do not qualify for credit cards, and do not have cellular telephones or internet service. Kelly Decl. ¶¶ 7- 8; Shaw Report 7.

SRO tenants typically live in their SRO for a year or more, and are neither transient nor homeless. Groth Report ¶ 56; Kelly Decl. ¶ 11; Shaw Report 7. In 2011, a survey by the City’s Human Services Agency (“HSA”) revealed that 69% of the SRO residents it served had been living in their SRO for two years or more. Kelly Decl. ¶ 17. The average occupancy at SROs

¹ Many SROs date back to the 1906 earthquake, when they were built as inexpensive housing for workers coming to rebuild San Francisco. Shaw Report at 4. Others began as mid-priced hotels, housing a variety of residents including families, and many managers advertised their facilities as “family hotels” that served as long-term residences. Groth Report ¶¶ 16-17.

1 managed by the Tenderloin Housing Clinic is over three years. Shaw Report 6.

2 **II. The City’s Classification of SRO Rooms.**

3 SRO buildings consist of residential units, and are not “hotels” in the modern, tourist-
4 oriented sense. Groth Report ¶¶ 16-18, 40, 41-43; Shaw Report at 6. To preserve this critical
5 housing stock for its lowest-income residents, in 1981, the City enacted the Residential Hotel
6 Conversion and Demolition Ordinance (“HCO”). Buschell Decl. ¶ 5, Ex. D. The HCO protects
7 residential hotel rooms from demolition or conversion to tourist use by setting a baseline for the
8 number of “residential” SRO rooms. It required registration of all SRO rooms as either
9 “residential” or “tourist” rooms based on how each room was used on September 23, 1979. Any
10 room that, on that day, had been occupied by a resident for 32 days or more was classified as a
11 residential unit. All other rooms were classified as “tourist.” Shaw Report 4. SROs are classified
12 as group housing, not hotels, under San Francisco’s Planning Code. Buschell Decl. ¶ 6, Ex. E;
13 Shaw Report 5. A residential room *cannot be rented for tourist use* without complying with the
14 HCO, and so all of the certified residential rooms under the HCO have been residential since at
15 least 1979. Shaw Report 4-5.

16 **III. Mail Delivery At SROs.**

17 In 2006, the City enacted the Residential Mail Receptacle Ordinance (the “Mailbox
18 Ordinance”), which requires SRO owners to install separate mail receptacles for each residential
19 unit in the building and to “mak[e] arrangements with the United States Postal Service for the
20 installation of these receptacles and delivery of mail thereto.” Buschell Decl. ¶ 7, Ex. F. The
21 purpose of the Mailbox Ordinance was to enable SRO residents to receive their mail in a secure
22 manner, eliminating the host of problems that resulted from single-point delivery. Buckley Decl.
23 ¶ 4; Shaw Report 7.²

24
25 _____
26 ² Approximately 172 SROs in the City have installed individualized locking mailboxes and receive
27 centralized mail delivery. Buckley Decl. ¶ 5. Numerous other SROs have installed mailboxes but
28 do not receive centralized delivery. Snyder Decl. ¶ 12; Stewardson Decl. ¶ 13; Finley Decl. ¶¶ 6, 7,
Exs. E, F. Many other SROs would install individualized locking mailboxes if the Postal Service
would provide delivery to them. Shaw Report at 7.

1 Plaintiffs reasonably expected when enacting the Mailbox Ordinance that centralized
2 delivery would be provided to SROs. Indeed, Postal Operations Manual (“POM”) section 631.45
3 provides for mail delivery to individual mailboxes in a “residential building containing apartments
4 or units occupied by different addressees (*regardless* of whether the building is an apartment
5 house, a *family hotel, residential units*, or business units in a residential area and regardless of
6 whether the apartments or units are owned or rented),” so long as the building has three or more
7 residential units, a common entrance, a common address, and a Postal Service approved bank of
8 mailboxes installed at a central, accessible location. Buschell Decl. ¶ 8, Ex. G (POM § 631.45).
9 This definition expressly acknowledges that some hotels are residential and are among the
10 buildings that qualify for centralized delivery, provided they meet structural requirements.³
11 Section 631.45 further provides that building management need not install individualized
12 mailboxes if it has arranged for mail “to be delivered at the office or desk for distribution by its
13 employees”; that choice resides solely with building management. *Id.*

14 Further, even before the enactment of the Mailbox Ordinance, the Postal Service converted
15 many SROs from single-point delivery to centralized delivery. Reed Tr. 109:19-111:1. This
16 process accelerated after the City enacted the Mailbox Ordinance, and more SRO owners began to
17 install locking mailboxes for their residents. Finley Decl. ¶ 9, Ex. H; Sanghera Tr. 128:13-130:23.
18 Residents at the SROs that were “converted” report that mail delivery is significantly more
19 reliable and secure under centralized delivery than it was under single-point delivery. Adams
20 Decl. ¶ 8; Bush Decl. ¶ 6; Hal Decl. ¶ 7-10; James Decl. ¶¶ 5, 8-9.

21 On December 18, 2008, however, progress came to an abrupt halt. San Francisco
22 Postmaster Noemi Luna sent a letter to the City’s Department of Building Inspection announcing
23

24 ³ The Postal Service contends that Section 631.45 does not “control whether a building is
25 determined to be an apartment.” Granholm Decl. ¶ 26. This contention cannot be squared with a
26 Postal Bulletin announcement amending that section “to clarify the definition of an apartment.”
27 Buschell Decl. ¶ 2, Ex. A. The Postal Service further contends that satisfying the conditions in
28 Section 631.45 does not create an entitlement to centralized delivery. Granholm Decl. ¶ 26. In the
Federal Register, however, the Postal Service described the same set of regulations governing
delivery service as “containing detailed rules of entitlement to particular methods of postal delivery
in business areas and residential housing.” Buschell Decl. ¶ 3, Ex. B; *see also* Landi Tr. 117:15-17.

1 that the Postal Service would no longer deliver mail to individual mail receptacles in SROs
 2 effective January 5, 2009. Finley Decl. ¶ 12, Ex. K (the “Luna Letter”). The letter states “it
 3 would not be prudent for the Postal Service to continue to work with SRO owners on compliance
 4 with [the Mailbox Ordinance],” that it “will not offer individual mail receptacle delivery to
 5 additional SROs,” and that it “will be rescind[ing] individual delivery that was extended to any
 6 SRO within the past 90 days.” *Id.* at US000017. Since December 2008, the Postal Service has
 7 denied requests for centralized delivery at SROs regardless of the physical characteristics of these
 8 buildings, and regardless of whether the buildings qualify for centralized delivery under POM
 9 Section 631.45. Finley Decl. ¶¶ 9, 13; Exs. H, L; Granholm Tr. 161:21-162:12; Sanghera Tr.
 10 180:1-22.

11 The process by which the Luna Letter was written is shrouded in some mystery due to
 12 assertions of privilege. But what is clear is that the Postal Service’s decision was not based on
 13 any analysis of actual costs, resources, or characteristics of SROs. Landi Tr. 533:18-534:6; Luna
 14 Tr. 112:22-113:7; Sanghera Tr. 230:18-231:16. Indeed, the Postal Service lacks any evidence
 15 suggesting that centralized delivery for SRO buildings in the City would be any more expensive
 16 than providing centralized delivery to the SROs that already get centralized delivery, or to the
 17 many hundreds of multi-unit residential buildings in the City that receive centralized delivery.
 18 The evidence also reflects a substantial dispute concerning whether the Postal Service’s refusal to
 19 deliver mail to SROs would save or instead actually lose substantial sums of money for the Postal
 20 Service. Berkman Report ¶¶ 17-24. There is no indication that the Postal Service actually
 21 evaluated the cost of its change before implementing it, let alone looked at the question in a non-
 22 arbitrary way. Landi Tr. 533:18-534:6; Luna Tr. 112:22-113:7; Sanghera Tr. 230:18-231:16.

23 At present, 296 SROs in the City receive single-point mail delivery. Finley Decl. ¶ 16, Ex.
 24 O. 167 SROs currently receive centralized delivery. *Id.* Of the 296 SROs that receive only
 25 single-point delivery, 173 have a Certificate of Use under the HCO requiring that 100% of their
 26 rooms be rented to permanent residents.⁴ There are at least another 57 SROs that operate as fully

27 ⁴ This is based upon a comparison of the SROs receiving single point delivery with their
 28 Certificates of Use under the HCO. Collier Decl. ¶¶ 2-8, Ex. 1.

1 residential. Even though their Certificate of Use would theoretically permit some tourist rentals,
2 these buildings are only renting rooms to permanent residents. Buckley Decl. ¶ 7.

3 **IV. The Impact of Single-Point Delivery for SROs.**

4 Single-point delivery for SROs is less secure than delivery of the mail to individual locked
5 boxes. Jacobson Report ¶ 44; Finley Decl. ¶ 2, Ex. A at 27-28. Mail dropped at SROs through
6 single-point delivery is frequently lost, misplaced, withheld, or stolen. Adams Decl. ¶¶ 3, 5-6;
7 Birnbach Decl. ¶ 3; Bush Decl. ¶ 4; Mallery Tr. 27:20-28:16; Hal Decl. ¶¶ 4-5; Puceta Decl. ¶¶ 3-
8 5; Snyder Decl. ¶ 2; Stewardson Decl. ¶ 5. This is not surprising—single-point delivery practices
9 have resulted in large quantities of mail left on the floor or on tables in the building entry or lobby,
10 or even outside. Birnbach Decl. ¶ 4; Jacobson Tr. 71:19-22; Jordan Decl. ¶ 8; Shaw Report 9.
11 Often, anyone who happens to walk into (or by) an SRO can access the mail for the entire
12 building. Jacobson Tr. 72:20-73:3; Stewardson Decl. ¶ 4. Even where building management does
13 take custody of the mail, the evidence reflects lapses in security and privacy, with building
14 management delivering mail to the wrong residents, opening residents' mail, or even withholding
15 mail from residents. Bush Decl. ¶ 4; Birnbach Decl. ¶¶ 3, 7; Hal Decl. ¶ 7; Jordan Decl. ¶ 4;
16 Snyder Decl. ¶¶ 8, 10. These problems are inherent in the single-point delivery method and are
17 the root cause of this dispute. Jacobson Report ¶¶ 41-44.

18 The record reflects numerous specific examples of the harm caused by use of single-point
19 delivery to multi-unit residential buildings:

20 Lost benefits checks: SRO residents who rely on governmental assistance do not receive
21 the checks on which they depend for necessities, including rent. Adams Decl. ¶ 5; Mallery Tr.
22 27:20-28:16; Puceta Decl. ¶ 7; Snyder Decl. ¶ 2.

23 Lost City benefits information resulting in terminated benefits: Residents can lose benefits
24 when they do not receive program forms and other mail. Hal Decl. ¶ 5. The City's HSA recently
25 conducted a survey of SRO residents and 14% of respondents reported that they had their public
26 benefits, such as G.A. and food stamps, discontinued when mail from these programs did not
27 reach them. Kelly Decl. ¶ 17. Eleven percent of respondents had to go to a program office to
28 have benefits restored. *Id.* This cycle imposes a burden on the agencies administering these

1 programs, *id.* at ¶ 18, and organizations like plaintiff Housing Right Committee, who have to
2 expend resources in assisting residents to reapply for benefits. Shortt Decl. ¶¶ 3, 5.

3 *Harms to the health of SRO residents and the public:* Missing mail has resulted in SRO
4 residents missing appointments, not being able to fill prescriptions for medication, and not being
5 aware of diagnoses. Adams Decl. ¶ 6; Birnbach Decl. ¶¶ 10-11; Bush Decl. ¶ 5; Mallery Tr. 64:1-
6 22, 69:9-22; Puceta Decl. ¶ 5. The public at large also faces increased risk of infectious disease
7 outbreaks when DPH cannot reach SRO residents with information concerning their exposure to
8 infectious diseases. Kawamura Decl. ¶¶ 5-6.

9 *Exposure of private information to neighbors:* Personal communications can (and do)
10 easily fall into others' hands. Building managers sometimes may open mail addressed to SRO
11 residents to learn about their health, finances, or personal lives. Jordan Decl. ¶¶ 4-5.

12 *Loss of personal mail:* Some SRO residents have curtailed their use of the mail to
13 communicate with friends and family due to the lack of mail security. Snyder Decl. ¶ 10. Others
14 have lost touch with family who tried unsuccessfully to contact them through the mail.
15 Puceta Decl. ¶ 9. Still others have not been informed of important life events. Bush Decl. ¶ 4.

16 ARGUMENT

17 **I. This Court Has Subject Matter Jurisdiction.**

18 The Postal Service renews jurisdictional arguments already rejected by the Court once
19 before on a motion to dismiss. Dkt. No. 28. The Postal Service asserts that Plaintiffs' claims are
20 "regulatory" and cannot be considered by this Court in light of the 2006 Postal Accountability and
21 Enhancement Act. But Plaintiffs' claims are not "regulatory"; they are constitutional. *Id.*; see
22 *Currier v. Potter*, 379 F.3d 716, 726 (9th Cir. 2004).⁵ Plaintiffs claim that the Postal Service
23 violates constitutional guarantees when it denies centralized delivery to SRO residents. Although
24 the Postal Service's failure to follow its own regulations is powerful evidence of the irrationality
25 of its actions, whether or not the Postal Service has "correctly" construed its regulations (which is
26

27 ⁵ Of course, regulations are often a subject of constitutional claims. See, e.g., *Reno v. Flores*, 507
28 U.S. 292, 299-300 (1993); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991).

1 the subject of pending litigation before the Postal Regulatory Commission) neither determines the
 2 outcome of the constitutional inquiry nor does it provide the Postal Service a defense. *See Sioux*
 3 *City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923). This Court has subject matter
 4 jurisdiction.⁶

5 **II. Plaintiffs Have Standing**

6 Plaintiffs have standing. They (a) are suffering an “injury in fact” that is “concrete and
 7 particularized” and “actual or imminent,” (b) the injury is “fairly traceable” to the Postal Service’s
 8 insistence on single-point delivery to SROs, and (c) the injury is “likely” to be “redressed by a
 9 favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). All that the
 10 Article III injury-in-fact element requires is “*an identifiable trifle*” of harm. *Council of Ins.*
 11 *Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (emphasis added)
 12 (quoting *United States v. Students Challenging Regulatory Agency*, 412 U.S. 669, 689 n.14
 13 (1973)); *see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156
 14 (4th Cir. 2000) (stating that the injury in fact standard “is one of kind and not of degree”).

15 **A. Plaintiffs’ Injury in Fact**

16 **1. Injury to the City**

17 Single-point delivery at SROs causes concrete injury-in-fact to the City because it imposes
 18 additional costs on the City’s benefits programs. Many SRO residents count on the City’s G.A.
 19 program for survival. Kelly Decl. ¶ 7; Shaw Report 7-8. When checks do not reach residents,
 20 they must contact the City for replacements and, if they do not act quickly, may lose benefits. Hal
 21 Decl. ¶¶ 4-5; Kelly Decl. ¶¶ 18-19; Mallery Tr. 27:20-28:16; Snyder Decl. ¶ 2. Sadly, this
 22 appears to happen with some regularity. *See supra* Statement of Facts, § IV. Likewise, lost
 23 medical correspondence from City agencies causes harm to those agencies. Kawamura Decl. ¶ 7.

24 The problem caused (in whole or in part) by the Postal Service imposes costs on City
 25 agencies, which must work with residents to reissue checks, reinstate benefits, or rectify the harm

26 _____
 27 ⁶ Contrary to the Postal Service’s argument (previously rejected by the Court), Plaintiffs need not
 28 administratively exhaust their constitutional claims. *See Gilbert v. Nat’l Transp. Safety Board*, 80
 F.3d 364, 367 (9th Cir. 1996); *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973).

1 caused by lost medical documents. One former SRO resident testified he had to endure the
2 “rigmarole” of obtaining replacement G.A. checks on at least eight separate occasions. Mallery
3 Tr. 28:3-16, 29:17-30:3, 31:16-32:13, 33:1-21, 34:14-19; *see also* Puceta Decl. ¶ 7.

4 The work the City must perform when the forms and benefits it sends through the mail are
5 not received has concrete financial costs. With respect to the G.A. program, for example, the cost
6 to reinstate benefits within a “grace period” is \$36.35; if benefits lapse entirely the average cost
7 rises to \$63.33. Kelly Decl. ¶ 20. Similar costs arise when SRO residents on food stamps or
8 Medi-Cal do not receive what the City sends them. Kelly Decl. ¶ 22.

9 In addition, the City’s public health providers, including the Department of Public Health
10 (“DPH”), public health clinics, and San Francisco General Hospital, rely on the U.S. Mail to
11 communicate with patients. Kawamura Decl. ¶ 3. When individuals with communicable diseases
12 do not receive mail from DPH, the costs to DPH increase due to medical complications of
13 untreated diseases, additional cases of infections, and DPH staff having to locate infected
14 individuals. Kawamura Decl. ¶¶ 5-7. Critical divisions within DPH, such as the Tuberculosis
15 Control Section, have had their work complicated when mail does not reach SRO residents.
16 Kawamura Decl. ¶ 7. This evidence is more than sufficient to establish standing.

17 **2. Injuries to the Organizational Plaintiffs.**

18 The Organizational Plaintiffs have suffered injury in fact because of the lack of secure and
19 reliable mail delivery at SROs. The San Francisco Tenants Union (“SFTU”) counts numerous
20 SRO residents as members. Gullicksen Tr. 19:9-20:18; Finley Decl. ¶ 19, Ex. R. SFTU members
21 have lost benefits, missed medical treatments, suffered from a lack of basic privacy, and fallen out
22 of touch with loved ones. Stewardson Decl. ¶ 4; Puceta Decl. ¶¶ 4-5, 7, 9. Accordingly, SFTU
23 has standing. *See Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC)*, 528 U.S. 167, 180-81
24 (2000) (holding organization may assert claims on behalf of its members); *Veterans for Common*
25 *Sense v. Shinseki*, 644 F.3d 845, 874 (9th Cir. 2011) (granting organizations standing because
26 their members had suffered injuries in fact).

27 The Central City SRO Collaborative and the Housing Rights Committee suffer injury
28 through the “(1) frustration of [their] organizational mission[s]; and (2) diversion of [their]

resources to combat” the ill effects of single-point delivery. *See Smith v. Pac. Prop. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). These organizations are devoted to improving conditions at SROs. Buckley Decl. ¶ 3; Shortt Decl. ¶¶ 2, 5, 6. They played an instrumental role in organizing grass-roots support for the installation of individual locking mailboxes at SROs and the Mailbox Ordinance, and in advocating for SRO residents harmed by the lack of secure mail delivery. Buckley Decl. ¶¶ 4, 6; Shortt Decl. ¶¶ 3-6.

B. Plaintiffs’ Injuries are Fairly Traceable to the Postal Service’s Refusal to Allow Centralized Delivery for SROs.

The mail delivery problems at SROs are “fairly traceable” to the Postal Service’s refusal to provide centralized delivery. To establish this link, “an indirect causal relationship will suffice.” *San Francisco Baykeeper v. W. Bay Sanitary Dist.*, 2011 WL 1990637, at *23 (N.D. Cal. May 23, 2011) (quoting *Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 142 (3d Cir. 2009)). “[T]he plausibility of the links that comprise the chain [of causation]” is what matters – not “the length of the [causation] chain.” *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) (citation omitted).

Here, the evidence shows that single-point delivery leads to mail being left unattended, being distributed to the wrong residents, and/or being lost or stolen. Birnbach Decl. ¶ 4, 7; Bush Decl. ¶ 4; Hal Decl. ¶ 7; Jacobson Tr. at 71:19-22, 72:20-73:3; Jordan Decl. ¶¶ 4-5; Snyder Decl. ¶¶ 8, 10. The connection between single-point delivery and the delivery problems at SROs receiving that mode of delivery is no “hypothetical or tenuous” link; it is supported by the evidence and the Postal Service has not and cannot “challenge its plausibility.” *See Nat’l Audubon Soc’y*, 307 F.3d at 849. Finally, the “intervening acts of third parties” do not defeat standing. *See Toll Bros.*, 555 F.3d at 142 (stating that the causal connection for standing “need not be as close as the proximate causation needed to succeed on the merits of a tort claim”); *see also Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 500 (7th Cir. 2005) (“[A] plaintiff does not lack standing merely because the defendant is one of several persons who caused the harm.”). Whether SRO employees contribute to unreliable mail delivery is immaterial—the injury starts with the Postal Service, and Plaintiffs have standing to sue.

1 **C. Plaintiffs’ Injuries Are Redressable by Centralized Delivery.**

2 Plaintiffs’ proposed remedy—requiring the Postal Service to provide centralized delivery
3 to all SRO buildings that structurally qualify for it—would remedy Plaintiffs’ injuries. “Plaintiffs
4 need not demonstrate that there is a ‘guarantee’ that their injuries will be redressed by a favorable
5 decision.” *Renee v. Duncan*, 623 F.3d 787, 797 (9th Cir. 2010). Plaintiffs need only show that it
6 is “likely” that the harm will be redressed. *Laidlaw*, 528 U.S. at 169. Here, SRO residents
7 uniformly testify that once their buildings were switched from single-point delivery to centralized
8 delivery, mail delivery became more reliable and secure. Adams Decl. ¶ 8; Bush Decl. ¶ 6; Hal
9 Decl. ¶¶ 7-10; James Decl. ¶¶ 5, 8-9.

10 The Postal Service’s counter-intuitive argument—that centralized delivery to individual
11 locking boxes will not “reduce the incidence of mail theft or mis-delivery” at SROs—does not
12 defeat standing. Dkt. No. 290 at 16. First, the Postal Service speculates that because building
13 owners may have keys to centralized mailbox units, SRO management could open residents’
14 mailboxes and steal their mail even with centralized delivery. *Id.* at 16-17. Even if this theory
15 had evidentiary support (which it does not), it addresses one very specific type of intentional
16 misconduct. The evidence shows that delivering the mail to secure individualized mailboxes
17 would reduce the incidents of mail being unintentionally lost or mis-delivered—commonplace
18 occurrences at SROs receiving single-point delivery. *See, e.g.*, Bush Decl. ¶¶ 4-5; Hal Decl. ¶ 7.

19 Second, the Postal Service relies on testimony from a Postal Service Inspector that asks the
20 Court to infer that dropping at a single unsecured location is more secure than placing the mail
21 into individual locked mailboxes. Rickher Decl. ¶¶ 5-6.⁷ The Inspector concludes that there are
22 more complaints from SROs receiving centralized delivery than from those receiving single point
23 delivery, but this information is of limited (if any) utility because it does not account for the

24 _____
25 ⁷ The Postal Service’s assertion that centralized delivery is no more secure than single point
26 delivery contradicts the Postal Service’s own regulatory fact-finding and the regulations
27 themselves. The entire purpose of what became POM § 631.45 was to stop mail theft in apartment
28 houses. Buschell Decl. ¶ 4, Ex. C. As the First Assistant Postmaster General explained, “[t]here
have been almost innumerable cases of depredations in apartment houses due to the small,
inadequate, and unsafe boxes being left unlocked or with the mail protruding through the hole so
that it becomes subject to larceny. It is to obviate this . . . that this order is issued.” *Id.*

1 varying sizes of SROs.⁸ Rather, it compares the number of complaints against the number of SRO
 2 buildings, not against the number of residents living in those buildings. This basic methodological
 3 error renders the conclusion unreliable, and the conclusion, which should be inadmissible given its
 4 flaws, does not rebut Plaintiffs' evidence. Adams Decl. ¶ 8; Bush Decl. ¶ 6; Hal Decl. ¶ 7-10;
 5 Jacobson Report ¶ 41; James Decl. ¶¶ 5, 8-9.

6 **III. Triable Issues Of Fact Preclude Summary Judgment On Plaintiffs' Equal Protection**
 7 **Claim.**

8 Plaintiffs challenge the Postal Service's SRO policy as arbitrary and irrational
 9 discrimination in violation of the equal protection principle of the Fifth Amendment. *See Bolling*
 10 *v. Sharpe*, 347 U.S. 497, 499 (1954). Equal protection "is essentially a direction that all persons
 11 similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.
 12 432, 439 (1985). It is violated when the state intentionally treats one group differently than
 13 another similarly situated group without a rational basis for the distinction in treatment. *See*
 14 *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Equal protection also forbids the state
 15 from relying on proffered justifications that are factually false. *See Squaw Valley Dev. Co. v.*
 16 *Goldberg*, 375 F. 3d 936, 946 (9th Cir. 2004) *overruled in part on other grounds by Action*
 17 *Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025 (9th Cir.2007).⁹

18 In this case, whether SRO tenants are similarly situated to tenants in other multi-unit
 19 residential buildings for purposes of mail delivery is a hotly disputed question of fact, as is the
 20 rationality and factual accuracy of the various *post hoc* rationalizations that the Postal Service has
 21

22 ⁸ For example, the 180-unit Delta Hotel, which receives centralized delivery, had four complaints in
 23 the Financial Crimes Database (FCD). Lee Decl. Ex. HH-83. The Haveli Hotel (located across the
 street from the Delta) receives single point delivery, has only 16 rooms, and unsurprisingly
 registered no complaints in the FCD. Lee Decl. Ex. HH-83.

24 ⁹ *See also Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) ("Although a water moratorium
 25 may be rationally related to a legitimate state interest in controlling a water shortage, [plaintiffs]
 have raised triable issues of fact surrounding the very existence of a water shortage"). Defendant's
 26 privilege assertions to date have barred discovery relating to Postal Service discussions that led to
 the new SRO policy. Whether the Postal Service knew or objectively should have known of the
 27 lack of a rational basis for its new policy could be the subject of additional deposition discovery
 pursuant to Fed. R. Civ. P. 56(d), if the Court concludes that this factual dispute should be resolved
 28 before denying the Postal Service's summary judgment motion. *See* Finley Decl. ¶ 20.

1 offered in support of its SRO policy.¹⁰ These disputes can only be resolved at trial.

2 **A. SRO Tenants And Tenants At Other Multi-Unit Residential Buildings Are**
 3 **Similarly Situated For Purposes Of Mail Delivery.**

4 SRO residents are similarly situated to residents in apartment buildings for purposes of
 5 centralized mail delivery. “A classification . . . ‘must rest upon some ground of difference having
 6 a fair and substantial relation to the object of the legislation, so that all persons similarly
 7 circumstanced shall be treated alike.’” *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (quoting *Royster*
 8 *Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

9 In *Cleburne*, for example, plaintiffs successfully challenged an arbitrary distinction drawn
 10 between permissible uses in an “Apartment House District,” which included most types of group
 11 housing (among them, interestingly, both “apartment houses” and “apartment hotels”), but
 12 required a special use permit for “hospitals for the feeble-minded,” a category into which it placed
 13 plaintiffs’ proposed group home for 13 mentally retarded adults. *Cleburne*, 473 U.S. at 436 n.3 &
 14 437. The Court observed, “singling out the retarded for special treatment [in some circumstances]
 15 reflects the real and undeniable differences between the retarded and others.” *Id.* at 444. But in
 16 the context of residential building uses, the Court could discern no relevant distinction between
 17 the unfavorably classified group home as compared to freely permitted uses that related to the
 18 purposes of the zoning laws. *See, e.g., id.* at 449-450 (“It is true that they suffer disability not
 19 shared by others; but why this difference warrants a density regulation that others need not
 20 observe is not at all apparent.”).

21 As in *Cleburne*, here the Postal Service does not draw any distinction between SROs and
 22 other multi-unit residential buildings that makes SROs a non-arbitrary classification for purposes
 23 of mail delivery. For the purpose of mail delivery, SROs are similarly situated to other apartments
 24 that receive centralized delivery. SROs in San Francisco are residential buildings in which tenants

25 _____
 26 ¹⁰ The intentional discrimination element of Plaintiffs’ equal protection claim is established beyond
 27 dispute in the Luna Letter, in which the Postal Service intentionally denies SRO residents
 28 centralized mail delivery because they are SRO residents. *See Village of Willowbrook*, 528 U.S. at
 564-65 (explaining that intentional difference in treatment satisfies intentional discrimination
 requirement of an equal protection claim, regardless of lack of subjective animus or ill will).

1 rent single rooms. Groth Report ¶ 5-8; Shaw Report 4, 6. Historically, some SROs were labeled
 2 as “family hotels,” since they had shared bathrooms used by families. Groth Report ¶¶ 8, 16-17.
 3 SRO rooms differ from studios in higher income apartment buildings only in that the tenants
 4 typically share communal bathrooms and/or kitchens and SROs tend to house the City’s most
 5 vulnerable residents (the poor, disabled, and elderly). Shaw Report 4. Otherwise, like other
 6 apartment dwellers, many SRO residents have leases that govern the rights and duties of the
 7 resident and property owners. Gaeta Tr. 55:9-11. SRO residents are eligible to receive and enjoy
 8 all the legal protection for tenants under state and municipal law as other apartment dwellers.¹¹

9 The Postal Service’s assertions to the contrary fail. First, the Postal Service argues that the
 10 label applied to SROs should matter, arguing that SROs are hotels. Dkt. No. 290 at 8. But “[a]
 11 statutory discrimination between two like classes cannot be rationalized by assigning them
 12 different labels.” *Richardson v. Belcher*, 404 U.S. 78, 83 (1971). Whether or not SROs are
 13 properly labeled “hotels,” the differences between SROs and other multi-unit residential buildings
 14 have no bearing on mail delivery since both kinds of buildings seeking centralized delivery will
 15 have more than three residential units, a common entrance and address, and a bank of identical
 16 mailboxes, the only factors that matter for the purposes of mail delivery. *See* Buschell Decl. ¶ 8,
 17 Ex. G (POM § 631.45). Indeed, the Postal Service’s regulations establish that “family hotels” are
 18 qualifying “residential units” entitled to centralized delivery, thus demonstrating that the label
 19 “hotel” alone is not determinative of the appropriate method of mail delivery. *Id.*

20 Nor does it matter whether the City also calls the buildings “hotels” for its various
 21 municipal purposes.¹² The characteristics of residential rooms of interest to the City when
 22 inspecting or taxing buildings, for instance, have no bearing on the characteristics relevant to the
 23 proper method of mail delivery, as the Postal Service even admits. Olson Decl. ¶ 6. Thus, the
 24

25 ¹¹ *See* Cal. Civil Code § 1940(b)(1) & § 1940.1; San Francisco Rent Ordinance § 37.2(r)(1).

26 ¹² These include, for example, identifying and enforcing various building code provisions
 27 applicable specifically to residential hotels because of the unique fire danger posed by the
 28 combination of older wiring and high demand (S.F. Fire Code § 4603.4.1), zoning for density or
 particular uses (e.g., S.F. Planning Code § 101.1), and undertaking efforts to preserve the SRO
 housing stock by dramatically restricting conversion and demolition (S.F. Admin. Code Chap. 41).

1 Postal Service’s attempted reliance on the City’s use of the word “hotel” to justify its own
2 classification scheme simply misses the mark.

3 Second, the Postal Service also maintains that SROs are not similarly situated to
4 apartments because there is a separate postal delivery regulation, POM § 615.2, that allows single-
5 point delivery to schools and hotels. Section 615.2 does not apply to SROs, which are not tourist
6 hotels. Instead, SROs are “residential units” or “family hotels” within the meaning of Section
7 631.45 and have the physical characteristics required by Section 631.45. *See* Jacobson Report ¶
8 31; *cf.* Landi Tr. 460:10-461:2; Reed Tr. 189:25-191:12.

9 Finally, the Postal Service points out that some SROs have mixed uses. Regardless of
10 whether some SROs have mixed uses, 173 SROs receiving single point delivery have a Certificate
11 of Use as 100% residential. Buckley Decl. ¶ 9. Moreover, under POM § 631.45, an SRO with
12 some residential units is nevertheless a “residential building” containing “residential units,” and
13 qualifies for centralized delivery. The Postal Service’s refusal to deliver mail to individual
14 mailboxes in these mixed use SROs is still discriminatory. Summary judgment is precluded
15 because material factual disputes exist as to whether SRO residents are generally transient (they
16 are not), whether SROs cater to tourists (they do not), and whether SRO residents can sign leases
17 (they do).

18 **B. The Postal Service Lacks A Rational Basis for Its Discrimination Against SRO**
19 **Residents.**

20 The Postal Service denies the same service to SRO residents that it provides to residents of
21 virtually any other multi-unit residential building (excluding prisons, school dormitories, hospital,
22 senior care facilities, and military bases, which have never qualified for centralized delivery). The
23 Postal Service’s actual basis to deny centralized delivery to SRO residents is unclear due to the
24 assertion of the attorney-client privilege. The evidence does show, however, that the decision was
25 not based on any analysis of the actual costs, resources, or characteristics of the SROs. Landi Tr.
26 533:18-534:6; Luna Tr. 112:22-113:7; Sanghera Tr. 230:18-231:16.

27 The Postal Service offers three *ex post facto* rationales for why its new policy of
28 discrimination is reasonable. Those three pretexts — reducing costs, the transiency of the SRO

1 population, and maintaining uniformity and stability in its delivery operation — do not establish
2 that the Postal Service’s conduct is rational.

3 **1. Cost Savings Is Not A Rational Basis For Discriminating Against SRO**
4 **Residents.**

5 The Postal Service’s primary justification for discriminating against SRO residents is
6 because it wants to save money. Dkt. No. 290 at 20, 22. Cost savings alone, however, cannot be
7 a rational basis for discrimination. One could say that literally any discrimination in providing
8 more limited services to a selected sub-group will result in cost savings.

9 The potential to abuse “cost savings” as a rationale for all forms of discrimination in
10 providing services is why the law requires a rational basis for *the classification itself*, and *not* just
11 for the governmental action. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008). In
12 *Lazy Y*, the Court considered a bidding dispute in which a conservationist organization’s bid was
13 rejected. The defendants’ proffered rational basis was saving on administrative costs. The Court
14 held that, while saving money is a rational governmental purpose in some cases, “it simply does
15 not offer a basis for treating conservationists differently from other bidders.” *Id.* at 590. Indeed,
16 where “costs only matter in some cases – i.e., where the high bidder is a conservationist,” the
17 desire to save money alone is not a rational basis for the discrimination. *Id.*

18 Here, as in *Lazy Y*, the Postal Service’s asserted goal to save money by providing single
19 point rather than centralized delivery only matters in some cases, *i.e.*, where the building is
20 classified as an SRO. There is no evidence to suggest that the Postal Service denies centralized
21 delivery to apartment houses that want it, or even to new buildings or other new delivery points.
22 Instead, the evidence shows that the Postal Service can and will allow a certain type of delivery
23 that would actually be *more expensive*—just not when SRO buildings are concerned. Bernardo
24 Tr. 93:11-94:7; Luna Tr. 137:11-139:1. The Postal Service does not (and cannot) say that
25 centralized delivery to SRO residents is more expensive than providing centralized delivery for
26 residents of any other type of multi-unit residential building in the City.

27 The Postal Service’s discriminatory classification of SROs also fails because saving
28 money “does not provide a rational basis for that policy if the policy is, as a cost-saving measure,

1 drastically underinclusive.” *In re Levenson*, 587 F. 3d 925, 933 (9th Cir. 2009); *Lazy Y Ranch*,
 2 546 F. 3d at 590. Because the Postal Service would save more money via a non-discriminatory
 3 approach to all multi-unit residential buildings rather than just refusing to deliver mail to the
 4 mailboxes of the urban poor, cost is not a rational basis for *the classification* at issue in this case.
 5 See *In re Levenson*, 587 F. 3d at 933 (“There is no rational relationship between the sex of an
 6 employee’s spouse and the government’s desire to limit its employee health insurance outlays; the
 7 government could save far more money using other measures, such as by eliminating coverage for
 8 all spouses, or even every fifth or tenth spouse.”).

9 Finally, even if cost savings were a permissible rational basis here (and it is not), the
 10 parties dispute whether denial of central delivery to SRO buildings saves money. Berkman
 11 Report ¶¶ 17-24. The Postal Service focuses only on the question of cost savings, and forgets
 12 almost entirely about sources of revenue. An economic analysis of mail delivery indicates that by
 13 allowing only single-point delivery for SRO buildings the Postal Service is actually giving up on a
 14 revenue stream. *Id.* ¶ 17. In fact, the Postal Service’s discriminatory policy is costing the Postal
 15 Service hundreds of thousands of dollars per year. *Id.*

16 **2. SRO Residents Are Not More Transient Than Residents Of Other** 17 **Multi-Unit Residential Housing In The City.**

18 The Postal Service wrongly asserts that its different treatment of SRO residents might be
 19 rational because SRO residents are “transient,” and it would be a “delivery nightmare” to provide
 20 centralized delivery to SROs.¹³ Dkt. No. 290 at 23. The Postal Service offers no statistics
 21 comparing the duration of residency of SRO residents to the duration of residents of other types of
 22 multi-unit residential housing.

23 Even if “transience” were a factor that the Postal Service used to assess whether a building
 24 qualifies for centralized delivery (and it is not), the Postal Service’s suggestion that SRO residents

25
 26 ¹³ The alleged concern that it would be a “delivery nightmare” is belied by the fact that the Postal
 27 Service already provides centralized delivery to nearly 200 SROs in San Francisco and has
 28 provided no evidence that they experienced any noticeable problems with centralized delivery to
 those SRO buildings.

1 are “transient” is contradicted by the actual evidence. Groth Report at 3. The average length of
 2 residence for many SRO residents is over 3 years. Kelly Decl. ¶ 17; Shaw Report at 6. Just like
 3 residents of a typical apartment house, SRO residents move or change rooms, and some stay for
 4 under a year.¹⁴ SROs provide permanent homes for many of San Francisco’s low income
 5 residents.¹⁵

6 Finally, in an effort to argue SRO residents have a lesser “commit[ment] to the building,”
 7 the Postal Service tries to establish that SROs residents are transient because SRO residents
 8 generally need not pay a security deposit or sign a lengthy lease like some apartment dwellers.
 9 Dkt. No. 290 at 21. The evidence, however, establishes exactly the opposite. Security deposits
 10 and long-term leases often function as barriers to permanent housing for the very poor. Groth
 11 Report ¶ 52. Removing these barriers creates access to housing and encourages stability and
 12 permanence—not transience. *See* Shaw Report 4.

13 **3. Maintaining Uniformity And Stability In A Manner Inconsistent With** 14 **The Postal Service’s Own Regulations Is Not A Rational Basis.**

15 Lastly, the Postal Service wrongly contends that providing single-point delivery to SROs
 16 “will maintain uniformity and stability in its delivery operations.” Dkt. No. 290 at 23. Far from
 17 maintaining uniformity and stability, however, the Postal Service’s approach to SROs is
 18 destroying uniformity in the way in which the Postal Service delivers mail to multi-unit residential
 19 buildings in the City. Some buildings remain qualified to receive centralized delivery; others,
 20 based on an arbitrary “SRO” label, will not. Prior to 2006, the Postal Service had granted
 21 centralized delivery to dozens of SROs. Finley Decl. ¶ 16, Ex. O; Reed Dep. 109:19-111:1.
 22 Between 2006 and 2008, the Postal Service converted more SROs from single-point delivery to
 23 centralized delivery. *Id.* But then the Postal Service withdrew centralized delivery from SROs that

24 _____
 25 ¹⁴ A minority of SROs make some rooms available to non-permanent residents. *See* Collier Decl.
 26 Ex. 1. The existence of such “mixed use” buildings, however, does not provide any rational basis
 27 for excluding the 100% residential SROs from centralized delivery. Nor does it provide a rational
 28 basis for excluding the permanent residents in mixed use buildings from centralized delivery.

¹⁵ *See* Adams Decl. ¶ 3 (8-year resident); Birnbach Decl. ¶ 1 (8-year resident); Bush Decl. ¶ 1 (8-
 year); James Decl. ¶ 1 (7-year resident); Jordan Decl. ¶ 1 (7-year resident); Mallery Tr. 16:4-7 (12-
 year resident), Snyder Decl. ¶ 1 (5-year resident); Stewardson Decl. ¶ 1 (6-year resident).

1 had been converted within 90 days from the Luna Letter and refused to provide centralized
 2 delivery to the remaining SROs based solely on the date the request for conversion was submitted.
 3 The Postal Service’s new policy of discrimination is neither consistent with, nor rationally related
 4 to maintaining uniformity and stability in delivery operations.¹⁶

5
 6 **IV. Delivering Mail To SRO Residences By Single-Point Delivery Violates The First Amendment.**

7 “It is axiomatic that restrictions upon the mail system implicate the First Amendment.”
 8 *Currier v. Potter*, 379 F.3d 716, 727 (9th Cir. 2004). Both senders and recipients of mail possess
 9 an enforceable First Amendment right of access to the postal system. *Id.* (citations omitted).
 10 When government conduct limits that access, courts reviews the challenged policy using a forum
 11 analysis. *Id.* The Court will (1) determine the relevant forum; (2) decide whether that forum is
 12 traditional, limited, or nonpublic; and (3) apply the appropriate level of scrutiny based on that
 13 classification. *Id.* In its motion, the Postal Service fails to correctly identify the relevant forum
 14 or that forum’s purpose. These flaws taint its First Amendment analysis.

15 **A. City Delivery is the Relevant Forum.**

16 Plaintiffs challenge the Postal Service’s use of single-point delivery as it is applied to SRO
 17 residents in the City. This challenge arises in the forum of city-wide mail delivery. The Postal
 18 Service wrongly argues that the relevant forum is only “centralized delivery to SRO hotels in San
 19 Francisco.” Dkt. No. 290 at 18. Plaintiffs, however, do not challenge the constitutionality of
 20 centralized delivery; centralized delivery is the proposed *remedy*. The Postal Service’s error in
 21 identifying the forum has the odd result of excluding from the analysis the very conduct (*i.e.*,
 22 single-point delivery to multi-unit residential buildings) that burdens Plaintiffs’ First Amendment
 23 rights.

24
 25
 26 ¹⁶ The Postal Service has argued that its regulations prevent “conversions” of SROs, meaning that a
 27 method of mail delivery, once established, must continue in perpetuity. But changing the mode of
 28 delivery is not the same as “conversion.” *Cf.* POM 643.1, POM 631.6. In any event, there is a
 triable issue of fact because the Postal Service actually does change the mode of delivery at various
 buildings once use changes—just not for SROs. *See* Jacobson Report at ¶¶ 25, 52.

1 “City delivery” is the relevant forum.¹⁷ By evaluating city delivery as the forum, this
 2 Court should weigh whether the Postal Service’s decision to use single-point instead of
 3 centralized delivery is reasonable. *Currier* supports using city delivery as the relevant forum. In
 4 *Currier*, two homeless plaintiffs challenged a “general delivery” policy that forced them to travel
 5 to a main post office location rather than a more accessible branch office. *Currier*, 379 F.3d. at
 6 726. The court did not define the forum in terms of the relief sought, which would have been
 7 “general delivery to branch offices,” and instead held that the relevant forum was the “general
 8 delivery service” as a whole. *Id.* at 727-28. Similarly, this Court should not confine its analysis to
 9 what is simply a *method* of effecting delivery and not a forum.

10 **B. Single-Point Delivery Is Not Reasonable As Applied To SRO Residents In San**
 11 **Francisco.**

12 In a nonpublic forum, government restrictions violate the First Amendment when they are
 13 unreasonable or discriminate based on viewpoint. *Currier*, 379 F.3d at 730. “The reasonableness
 14 of a governmental restriction limiting access to a nonpublic forum must be assessed ‘in light of the
 15 purpose of the forum and all of the surrounding circumstances.’” *Cogswell v. City of Seattle*, 347
 16 F.3d 809, 817 (9th Cir. 2003) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473
 17 U.S. 788, 789 (1985)). Here, the Postal Service does not articulate the purpose of the forum. The
 18 Postal Service makes no showing of how single-point delivery to SRO buildings is reasonable in
 19 light of the forum’s purpose—regardless of whether the Postal Service’s definition of the forum or
 20 Plaintiffs’ more accurate definition is used.

21 **C. Single-Point Delivery To SRO Buildings Frustrates The Purpose of City**
 22 **Delivery.**

23 The evidence shows that single-point delivery to SRO buildings is unreasonable given the
 24 purpose of the forum of city mail delivery. As the primary method by which most Americans
 25 receive their mail, the purpose of city delivery is to safely and securely transport the mail from the
 26 post office to its intended recipients. *See Landi Tr.* 94:1-3; *Granholtm Tr.* 132:15-16, 134:25.

27 ¹⁷ *See Landi Decl.* ¶ 3 (“City delivery refers to what most people would be familiar with as the
 28 uniformed letter carrier delivering mail in urban and suburban settings.”).

1 Single-point delivery is not reasonable where it frustrates this purpose of city delivery. SROs are
2 multi-unit residential buildings, and single-point delivery in these environments is not secure. *See*
3 *supra* Statement of Facts, § IV.

4 An expensive study or statistical analysis is not necessary to prove that single-point
5 delivery is less secure than centralized delivery for SRO residents.¹⁸ *See* Dkt. No. 290 at 11.
6 Expert testimony and the testimony of SRO residents serves as evidence that single-point delivery
7 is a problem. Jacobson Report ¶¶ 40-43, 46; Shaw Report 9; *see also supra* Statement of Facts, §
8 IV. And residents who have received mail under both methods agree that centralized delivery
9 drastically improves the reliability of service and increases their access to the postal system.
10 Adams Decl. ¶ 8; Hal Decl. ¶ 8; Bush Decl. ¶ 6; James Decl. ¶ 5.

11 Neither of the Postal Service's two stated rationales for requiring single-point delivery
12 support a finding of reasonableness. First, the Postal Service points to potential cost savings. But,
13 as noted, the Postal Service lacks any evidence that centralized delivery costs more at SROs than
14 at other residential buildings. Additionally, whether the Postal Service's policy would save
15 anything in the aggregate is a hotly contested fact issue. *See* Berkman Report ¶¶ 17-24.

16 Further, a policy that restricts access to the postal system cannot be "reasonable" under the
17 First Amendment simply because it is less expensive than an alternative. Taken to its logical
18 extreme, this would mean the Postal Service could immediately cease all delivery to even-
19 numbered San Francisco addresses without running afoul of the First Amendment. The law
20 requires that the restricted access be balanced with the purpose of the forum and all the
21 surrounding circumstances. *See, e.g., Cogswell*, 347 F.3d at 817.

22 Second, the Postal Service wrongly argues that single-point delivery to SRO residences is
23 reasonable because they share some characteristics with hotels, which get single-point delivery.
24 Dkt. No. 290 at 20-21. The purpose of the forum is safe and secure delivery to multi-unit

25 ¹⁸ The statistics cited by the Postal Service (Dkt. No. 290 at 11), even if true, are incomplete and
26 misleading because the Postal Service improperly assumes that all lost or stolen mail is reported to
27 the Postal Service through FCD complaints and that SRO residents are just as likely to report
28 delivery issues as more sophisticated mail recipients. The Postal Service also ignores that many
SRO residents have stopped using the mail to receive important documents given the certainty of
mail loss or theft. *See* Synder Decl. at ¶ 6; Jordan Decl. at ¶ 6.

1 residential buildings. The nature and character of the use of an SRO—as a permanent,
 2 inexpensive residence for some of our most vulnerable citizens—is not served by dropping the
 3 mail at an unsecured location at the front of the building or by requiring those residents to sift
 4 through a box of mail for the entire building.¹⁹

5 **V. The Postal Service’s SRO Policy Violates Plaintiffs’ And SRO Residents’ Fourth
 6 Amendment Rights.**

7 Plaintiffs and SRO residents (including the members of SFTU) have a reasonable
 8 expectation of privacy in their mail. “Letters and other sealed packages are in the general class of
 9 effects in which the public at large has a legitimate expectation of privacy.” *U.S. v. Jacobsen*, 466
 10 U.S. 109, 114 (1984); *U.S. v. Van Leeuwen*, 397 U.S. 249, 251 (1970). The right to communicate
 11 privately through the mail is also protected under the First Amendment. “The use of the mails is
 12 almost as much a part of free speech as the right to use our tongues” *U.S. ex rel. Milwaukee*
 13 *Social Democratic Pub. Co. v. Burlison*, 255 U.S. 407, 437 (1921) (J. Holmes, dissenting); *U. S.*
 14 *Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 126 (1981).

15 Here, the Postal Service does not appear to dispute that SRO residents’ privacy and
 16 association rights are burdened because single-point delivery allows SRO residents’ private mail
 17 to be viewed, opened, read, and discarded by SRO management, other SRO residents, and indeed
 18 anyone who happens to come into an SRO lobby. Instead, the Postal Service asserts that it has no
 19 duty to protect the privacy of SRO residents by delivering mail to individual locked boxes, and
 20 argues that its delivery obligations are complete when it drops off mail in a lobby or gives it to a
 21 third party desk clerk, whether or not the mail ultimately reaches its intended recipient. *Olson Tr.*
 22 *48:7-14*. The public, however, has a reasonable expectation that mail deposited will be delivered
 23 to the address on the letter. *U.S. v. Davis*, 461 F.2d 83, 88 (5th Cir. 1972). Items sent in the mail
 24 remain in the custody of the postal system, and continue to be “mail,” until the material is

25 _____
 26 ¹⁹ The Postal Service’s argument that this Court cannot find a First Amendment violation unless it
 27 is prepared to say that it is not “rational” to treat hotels differently than apartments, *see* Dkt. No.
 28 290 at 21, misapplies the law. Restrictions to a nonpublic form must be more than “rational.” The
 restriction must be ***reasonable in light of the purpose of the forum and the surrounding***
circumstances. *Cogswell*, 347 F.3d at 817. If a postal policy restricts access to a forum, that
 restriction must be reasonable regardless of how regulations classify the recipient’s residence.

1 delivered to the *address specified by the sender or returned to the sender*. *U.S. v. Anton*, 547
2 F.2d 493, 495 (9th Cir. 1976). “[T]he duty of the Postal Service, accompanied with a concomitant
3 authority, over that piece of mail continues to exist while the mail matter remains in the
4 possession of the person who has received the misdelivery. . . . the misdelivered letter continues in
5 the custody of the postal service, and therefore remains in the “mail,” until it has been returned to
6 the sender or delivered to its addressee.” *Davis*, 461 F.2d at 89. The Postal Service’s obligations
7 do not end when it drops off a bag of mail in a lobby.

8 Next, the Postal Service argues that SRO residents are subject to numerous invasions of
9 their privacy and association rights so the Postal Service need not safeguard those rights. But
10 even if the Postal Service’s description of the burdens on SRO residents were accurate (which it is
11 not),²⁰ the Postal Service is not excused from its constitutional obligations merely because SRO
12 residents’ rights are burdened in other ways.

13 Finally, the Postal Service asserts that there is no evidence that centralized delivery “would
14 eliminate the risk of mail security breaches.” Dkt No. 290 at 24. But, again, substantial evidence
15 shows that the privacy and security of the mail would greatly improve with centralized delivery.
16 *Adams Decl.* ¶ 8; *Bush Decl.* ¶ 6; *Hal Decl.* ¶¶ 7-10; *James Decl.* ¶¶ 5, 8-9. Centralized delivery
17 would prevent management and other residents from learning the identity of the sender. It would
18 prevent non-criminal access to the mail by anyone other than the addressee. For purposes of the
19 Fourth Amendment, the issue is not merely that the mail is delivered to an unlocked location, but
20 also that the recipient’s mail is not delivered to the recipient, often requiring residents to sort
21 through each other’s mail to find their own. These problems create multiple disputes of material
22 fact underlying Plaintiffs’ privacy claims.

23 CONCLUSION

24 For the foregoing reasons, Plaintiffs ask that the Court deny the Postal Service’s motion
25 for summary judgment.

26
27
28 ²⁰ The Postal Service misreads the “Hotel Visitor Policy” as the City restricting visitors to SROs. In fact, it restricts landlords’ ability to impose such restrictions. *See* Dkt. No. 288 at 122-23.

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Dated: September 22, 2011

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 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

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 5

 I. THE LEGAL STANDARD DOES NOT TOLERATE DEFENDANTS’
 UNSUPPORTED FACTUAL CONTENTIONS. 5

 II. THE CITY HAS STANDING IN ITS OWN RIGHT BASED ON ITS OWN
 INJURY IN FACT. 6

 III. THE ASSOCIATIONAL PLAINTIFFS HAVE STANDING. 7

 A. The Harms Alleged In The Complaint Are Caused By Defendants Mail
 Delivery Policy. 7

 B. The Harms Alleged In The Complaint Are Redressable. 9

 IV. THE PLAINTIFFS ARE NOT REQUIRED TO EXHAUST THEIR
 CONSTITUTIONAL CLAIMS. 10

 V. THE CITY IS ENTITLED TO DECLARATORY RELIEF 14

 VI. THE INDIVIDUAL DEFENDANTS SHOULD NOT BE DISMISSED. 15

CONCLUSION 17

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Federal Cases

Allen v. Wright
468 U.S. 737 (1984).....7

Arpin v. Santa Clara Valley Transp. Agency
261 F.3d 912 (9th Cir. 2001)8, 9

Ashcroft v. Iqbal
129 S.Ct. 1937 (2009).....5

Chiron Corp. v. Advanced Chemtech, Inc.
869 F. Supp. 800 (N.D. Cal. 1994).....14

City of Rohnert Park v. Harris
601 F.2d 1040 (9th Cir. 1979)6

City of Sausalito v. O’Neill
386 F.3d 1186 (9th Cir. 2004)6

Currier v. Potter
379 F.3d 716 (9th Cir. 2004)10, 11, 12, 13

Exxon Mobil Corp. v. Allapattah Servs.
545 U.S. 546 (2005).....5

Friends of the Earth v. Laidlaw Envtl. Servs.
528 U.S. 167 (2000).....9

Hal Roach Studios, Inc. v. Richard Feiner & Co.,
896 F.2d 1542 (9th Cir. 1989)14

Hart v. Massanari
266 F.3d 1155 (9th Cir. 2001)13

Hernandez v. Campbell
204 F.3d 861(9th Cir. 2000)10

In re Multidistrict Vehicle Air Pollution M.D.L. No. 31
481 F.2d 122 (9th Cir. 1973)6

Johnson v. Riverside Healthcare System
534 F.3d 1116 (9th Cir. 2008)6

La Reunion Francaise SA v. Barnes
247 F.3d 1022 (9th Cir. 2001)5

1 *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*
 422 F.3d 490 (7th Cir. 2005)8

2 *LeMay v. Postal Serv.*
 3 450 F.3d 797 (8th Cir. 2006)12, 13

4 *Loyd v. Paine Webber, Inc.*
 5 208 F.3d 755 (9th Cir. 2000)8

6 *Lujan v. Defenders of Wildlife*
 504 U.S. 555 (1992).....5, 6, 7

7 *Monell v. New York City Dep't. of Social Servs.*
 8 436 U.S. 658 (1978).....16

9 *Nat'l Audubon Soc'y, Inc. v. Davis*
 307 F.3d 835 (9th Cir. 2002)8

10 *Poore v. Simpson Paper Co.*
 11 566 F.3d 922 (9th Cir. 2009)10

12 *Simon v. E. Ky. Welf. Rights Org.*
 13 426 U.S. 26 (1976).....7

14 *Spokane Indian Tribe v. United States*
 972 F.2d 1090 (9th Cir. 1992)14, 15

15 *The Enterprise, Inc. v. Bolger*
 16 774 F.2d 159 (6th Cir. 1985)13

17 *United States v. Yakima Tribal Court*
 18 806 F.2d 853 (9th Cir. 1986)15

19 *Warth v. Seldin*
 422 U.S. 490 (1975).....7

20 *Zucco Partners, LLC v. Digimarc Corp.*
 21 552 F.3d 981 (9th Cir. 2009)5

22 **Federal Statutes**

23 28 United States Code
 Section 220114

24 39 United States Code
 25 Section 101 *et seq.*10
 Section 403(c)10, 11, 12, 13
 26 Section 366211, 12
 Section 3662(a)12

27

28 Postal Accountability Enhancement Act (“PAEA”)
 (Pub.L. 109-435, Dec. 20, 2006, 120 Stat. 3198)10, 11, 12

Federal Rules of Civil Procedure

1 Rule 12(b)(1).....5
2 Rule 12(b)(6).....5

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4
5
6
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INTRODUCTION

1
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.

22
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.

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
 history of tampering with the mail.

27 ⁸ Defendants also rely on the unsubstantiated assertion that the Postal Service delivers mail to
 28 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.”
 26 *Currier*, 379 F.3d at 722.

27 ¹⁰ Defendants quite properly refrain from arguing that the Postal Service’s concession is the
 28 basis of the court’s holding. As the *Currier* panel opinion’s author has elsewhere explained, although
 “[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 ¹¹ Defendants make much of this name change, claiming that it signals a new era for the
27 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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28 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.

