NEWS RELEASE

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U.S. Postal Service's delivery discriminates against SRO tenants, federal appeal contends

Appeal by City, tenant groups seeks trial on 2008 policy shift by S.F. Postmaster distinguishing thousands of local SRO residents from other apartment dwellers

SAN FRANCISCO (Nov. 5, 2013)—A 9th Circuit U.S. Court of Appeals panel will hear arguments this morning on whether the U.S. Postal Service is violating federal constitutional guarantees and its own regulations because of a 2008 local policy change that arbitrarily deprives San Francisco residents of single room occupancy hotels, or SROs, of secure and reliable mail delivery.

At issue before the three-judge panel is whether an Oct. 25, 2011 trial court ruling for summary judgment in favor of the U.S. Postal Service should be reversed. Such a ruling would allow a trial to proceed on multiple disputes involving a 2008 policy decision by San Francisco Postmaster Noemi Luna that distinguishes a large majority of San Francisco's estimated 30,000 SRO residents from all other apartment dwellers for purposes of mail delivery. Luna's controversial policy shift has meant that nearly two-thirds of the city's SRO residents now have their mail dumped in a single, often unsecured location—known as "single-point delivery"—as opposed to being sorted and delivered to individual mailboxes as they are for other mail recipients. In a Dec. 18, 2008 letter to city officials, Luna blamed the change on "current fiscal shortages." The policy was challenged in a federal lawsuit filed on May 5, 2009 by San Francisco City Attorney Dennis Herrera and a coalition of tenant advocacy organizations. The Central City SRO Collaborative, the San Francisco Tenants Union, and the Housing Rights Committee of San Francisco are represented by the Tenderloin Housing Clinic as co-plaintiffs in the litigation. The law firm of Winston Strawn is also representing the plaintiffs and arguing the appeal.

SROs are so named because residents typically rent a single room with shared access to bathroom and other facilities. They are home to some of San Francisco's most economically disadvantaged residents, including seniors, the disabled and low-income individuals and families, some of whom receive supportive services in their residential environment. The San Francisco Postmaster's discriminatory policy of denying centralized mail delivery to the large majority of SRO residents in

[MORE]

the city has inflicted a host of serious harms on residents and public services, according to evidence submitted in the case by tenant advocates and Herrera's office. A survey of SRO residents by the Human Services Agency of San Francisco found that fully 14 percent of respondents reported losing such public benefits as General Assistance and food stamps when mail from the programs failed to reach them. Numerous declarations filed in the case document instances in which SRO residents in San Francisco failed to receive critical benefits checks; saw benefits terminated for failure to answer inquiries they never received; missed medical appointments and risked having private medical information disclosed to others.

"There is no legal basis for the U.S. Postal Service to discriminate against SRO residents as a cost-cutting measure," said Herrera. "The factual and legal disputes in this case are both too serious and too numerous to justify the trial court's decision to grant of summary judgment. I'm hopeful that the appellate court will reverse the District Court ruling, so a case with serious implications for tens of thousands of San Franciscans can be properly resolved at trial. I am very grateful to the Central City SRO Collaborative, the Tenderloin Housing Clinic, the San Francisco Tenants Union, and the Housing Rights Committee of San Francisco for their leadership on the issue and for partnering with us in this important litigation."

Such discriminatory mail delivery practices violate a number of constitutional guarantees, according to the original complaint filed on May 5, 2009, including equal protection, free speech, freedom of association, and the right to privacy, according to complaint. The federal lawsuit also charged that the delivery policy shift violates the U.S. Postal Service's own regulations.

The case is: *City and County of San Francisco et al v. U.S. Postal Service* (U.S. 9th Circuit Court of Appeals Nos. 12-15473 and 12-15490).

# # #

Nos. 12-15473, 12-15490

In the

United States Court of Appeals

for the

Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff-Appellant,
and
CENTRAL CITY SRO COLLABORATIVE; SAN FRANCISCO TENANTS UNION; HOUSING RIGHTS COMMITTEE OF SAN FRANCISCO,
Plaintiffs-Appellants,

v.

UNITED STATES POSTAL SERVICE; JOHN E. POTTER; MICHAEL DALEY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Hon. Richard Seeborg, District Court Judge
No. 3:09-cv-01964-RS

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CORPORATE DISCLOSURE STATEMENT

Appellant Central City SRO Collaborative is a collaboration between three organizations, the Tenderloin Housing Clinic, the Mental Health Association of San Francisco and Conard House, and the Tenderloin Housing Clinic is its fiscal sponsor. It is not incorporated and is not a separate legal entity. Its staff is employed and paid by the Tenderloin Housing Clinic, which is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. Appellant San Francisco Tenants Union is a non-profit organization under section 501(c)(4) of the Internal Revenue Code. Appellant Housing Rights Committee of San Francisco is an unincorporated association whose fiscal sponsor is The San Francisco Study Center, Inc. Appellants Central City SRO Collaborative, San Francisco Tenants Union, and Housing Rights Committee of San Francisco do not issue stock, and thus no parent corporation or any publicly traded corporation owns 10% or more of their stock.

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STATEMENT OF JURISDICTION

The appeal arises from a January 6, 2012 final judgment under Federal Rule of Civil Procedure 54 of the United States District Court for the Northern District of California. [Plaintiffs' Record Excerpts ("RE") 1-6.] The judgment followed the District Court's October 25, 2011 Order granting summary judgment to Defendant United States Postal Service ("USPS") and dismissing all claims of Plaintiffs City and County of San Francisco, Central City SRO Collaborative, San Francisco Tenants Union, and Housing Rights Committee of San Francisco (collectively, "Plaintiffs") [RE 7-28], and the District Court's January 6, 2012 Order denying Plaintiffs' motion to alter the summary judgment Order. [RE 1-6.]

The District Court had federal question jurisdiction under 28 U.S.C. § 1331, as Plaintiffs' claims arise under the First and Fifth Amendments of the United States Constitution. This Court has jurisdiction under 28 U.S.C. § 1291. Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B), Plaintiffs timely filed their Notice of Appeal on March 6, 2012. [RE 33-34.] Plaintiffs timely filed this Opening Brief pursuant to the 14-day extension granted on May 14, 2012.

STATEMENT OF ISSUES PRESENTED

(1) Did the District Court err in concluding that no triable issues of fact existed regarding whether USPS is denying equal protection to certain SRO residents through its arbitrary refusal to deliver mail to some (but not all) SROs in the more reliable manner that it delivers mail to similarly situated apartment residents?

(2) Did the District Court improperly engage in the wrong legal analysis with respect to the forum, and draw inferences in favor of USPS in granting summary judgment that were improper at the summary judgment stage to defeat Plaintiffs' First Amendment claim against USPS?

STATEMENT OF THE CASE

This case involves the right of San Francisco's poor to receive reliable mail delivery from Defendant United States Postal Service ("USPS"). Some 4% of San Francisco's population lives in single room occupancy buildings ("SROs")—inexpensive ***permanent*** living quarters, generally for those who cannot afford pricier apartments or homes. People who live in SROs are not homeless. They are not transients. Rather, they are simply people living check-to-check. And for these people, delivery of the mail—government benefit checks, personal medical information, messages from family and friends—is just as critical (or perhaps even more critical) as it is to the more affluent.

Since 2008, however, the mail for most SRO residents has been dumped in a single location ("single-point delivery"), as opposed to being sorted and placed in individual mailboxes ("centralized delivery")—which is standard for other individuals. Single-point delivery has caused a host of terrible consequences: many SRO residents never receive critical benefits checks; many have had benefits terminated for failure to answer inquiries they never received; many miss medical appointments or have their private medical information disclosed to others; and many have lost touch with family or friends because—lacking the wherewithal to purchase phones, computers, or internet service—the lack of reliable mail delivery deprives them of their only means of long-distance communications.

In 2006, in an effort to resolve these issues and address community concerns regarding lost and stolen mail at SROs based on single-point delivery, the City enacted an ordinance requiring SRO owners to install individual locking mailboxes for their residents. As mailboxes were installed, USPS began delivering the mail to them—alleviating the problems just described. In 2008, however, USPS decided that residents of SROs were no longer entitled to centralized delivery, and should be relegated back to the single mail dump. No matter that the SRO otherwise qualified under USPS's own regulations, USPS effectively implemented a new policy arbitrarily withholding from SROs conversion to centralized mail delivery.

Although SRO residents are indistinguishable from other multi-unit building residents for purposes of mail delivery, this new USPS policy did not apply across the board to all multi-unit building residents. Indeed, it applied only to discriminate against ***some*** SROs—those that had not had individual mailboxes installed under the ordinance more than 90 days before the policy took effect, and those that USPS had already converted to centralized delivery within the prior 90 days. For those SROs that had not met this arbitrary cutoff, USPS decided that it would dump all mail for the entire building at the front desk or in the lobby or on the street, and hope that SRO workers or SROs residents would see that it was properly delivered.

USPS says its decision to treat SRO residents like tourist hotel guests instead of like permanent residents was primarily based on one expediency *i.e.*, a desire to save money. But under settled equal protection law, where the government advances "cost savings" as the basis for its policy, the policy cannot survive rational-basis review where it is underinclusive—as here, where similarly situated apartment dwellers (and even some SROs) are not subject to its effect. While saving money can sometimes justify treating one classification of people differently from others, the savings cannot be founded upon an arbitrary ground—it must be related to the classification itself. Here it is not.

The parties agree that USPS's classification—the basis on which it denied certain services to some while granting them to others—is essentially "those who live in SROs" versus nearly all other residential USPS customers in multi-unit buildings (apartment dwellers, etc.). People who fall into the first category, according to USPS, are not entitled to have their mail delivered to their own mailboxes; people in the latter category are. The parties also agree that USPS's decision to discriminate between these two categories is subject to rational-basis review. Beyond this, however, the parties are at odds, both on the law and, critically, on the facts. Thus, summary judgment was improper.

To survive rational-basis review, USPS must demonstrate that the distinction it draws between SROs and other multi-unit buildings, including apartments, is

rationally related to its reason for treating the tenants of these types of residences differently. The District Court was wrong to grant summary judgment in favor of USPS here given the clear disputed material facts underlying the inquiry. The parties' experts dispute whether and to what extent it actually costs less to dump mail at a single-point at an SRO. The parties dispute USPS's assertion that physical differences between SRO units and other types of apartment units has anything to do with their reason for discriminating (to save money). Is it more expensive, for some reason, to deliver mail to individual mailboxes at an SRO than an apartment building? Is it more expensive to deliver mail to some SROs (those grandfathered to receive individualized service) while others are denied this service? USPS cannot make this required showing—it never even tried.

The Order dismissing Plaintiffs' case—following USPS's lead to some extent but also ruling on grounds that the agency never made—determined that USPS's classification and discrimination was rationally based on the following three "facts": (1) that SROs are taxed like hotels (for which single-point mail delivery is appropriate); (2) that SROs "physically resemble" hotels, not apartments because SROs typically have shared bathroom and kitchen facilities; and that (3) SRO tenants are (allegedly, but this is hotly disputed) "more transient" than apartment dwellers. As discussed below, however, even setting aside the factual disputes, none of these alleged distinctions relate to USPS's alleged

purpose in discriminating, which is the proper analysis. Moreover, the District Court granted summary judgment to USPS despite the District Court's recognition at oral argument that there are disputed issues with regard key facts underlying this classification.

The City of San Francisco's ordinance seeking to protect its citizens, and providing a mechanism for SROs to install individual mailboxes so that SRO residents can receive individualized delivery, has been cast aside by USPS. Plaintiffs here, the City and County of San Francisco (the "City") and several non-profit organizations dedicated to vindicating the rights of these SRO residents—Central City SRO Collaborative, San Francisco Tenants Union, and Housing Rights Committee of San Francisco—are entitled to their day in court. The District Court's Order got it wrong on the law, and ignored that there are disputed issues of fact. Accordingly, this Court should reverse and remand for further proceedings on Plaintiffs' equal protection and First Amendment claims.

STATEMENT OF FACTS

A. The Creation And Responsibilities Of USPS

USPS was created in 1970, when Congress passed the Postal Reorganization Act ("PRA"), 39 U.S.C. § 201. Congress directed USPS to establish and oversee "an efficient system of collection, sorting, and delivery of the mail nationwide." 39 U.S.C. § 403(b)(1). Congress also gave USPS the right to create specific "classifications, rates, and fees" as needed, but expressly prohibited "any undue or unreasonable discrimination among users of the mails." 39 U.S.C. § 403(c). [RE 8.]

B. Single-Point v. Centralized Mail Service

In San Francisco, USPS uses both "centralized" and "single-point" delivery methods to deliver the mail. Centralized delivery is the usual service experienced by the vast majority of apartment and home dwellers, as well as some SROs. [RE 517-18(¶29), 197-98.] Under this method, mail for individuals residing in specific units is sorted and delivered by USPS to individual mailboxes for each residential unit. [RE 514-16.] For example, mail addressed to John Doe would go to a mailbox designated for John Doe; it would not be left in a bag with the mail of potentially hundreds of other residents of a building.

With single-point delivery, by contrast, the mail is not sorted and delivered into individual mailboxes assigned to units within a building. *Id.* Rather, the mail for an entire building is deposited together at a single location (a lobby desk, for

example), on the assumption that a non USPS employee will sort and deliver the mail. [RE 548.]

C. SRO Buildings And Their Residents

SROs are multi-unit residential buildings, sometimes called residential or family hotels, that serve as permanent homes for their residents. [RE 97, 499(¶51), 501(¶56), 467(¶4), 545.] They typically consist of small individual rooms, often less than 150 feet square, and residents usually share kitchen and bathroom facilities. [RE 543.]

Roughly 4% of San Francisco's population—some 30,000 people—reside in SROs. [RE 8(2:20-21)]. 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. [RE 477(¶4), 478(¶7), 493(¶39), 494(¶40), 467(¶¶4-5).]

SRO residents are among the poorest citizens in the City and often rely exclusively on government aid to survive. [RE 467-68(¶¶6-7), 546.] Supplemental Security Income (SSI), CalWorks, and/or San Francisco G.A. recipients typically have just enough income to reside in these SROs. [RE 467-68 (¶¶7-8).] These residents cannot afford the average cost of more than $1,000 per month for a studio apartment. [RE 546.] SROs generally do not require a security deposit, so low-income residents do not need to have savings to move into an SRO.

[RE 499-500(¶52), 546.]

SROs are not tourist hotels—they are residential units occupied by San Francisco citizens who consider SROs their homes. SROs do not generally function like hotels, as they are not primarily used for vacations and business trips; people live there on a long-term basis. Accordingly, critical mail such as benefits checks, medical information, and family correspondence that is not commonly sent to guests at hotels are sent, through the mail, to SRO residents. [RE 657-58(¶5), 645-46(27:20-28:16), 682(¶7), 685(¶2). Because SRO residents typically spend a large portion of their government assistance on rent, they generally have little money left over. [RE 467-68(¶¶7-8), 546.] SRO residents rarely maintain bank accounts, qualify for credit cards, or have cellular telephones or internet service. *Id.* Thus, reliable mail delivery is especially critical to SRO residents.

The evidence demonstrates that SRO residents are, for purposes of the relevant inquiry, indistinguishable from apartment dwellers. Plaintiffs submitted evidence that SRO tenants typically live in their SRO for years and are neither transient nor homeless. [RE 501(¶56), 468(¶11), 546.] 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. [RE 469-70(¶17).] The average occupancy at SROs managed by the Tenderloin Housing Clinic is over three years. [RE 545.] Indeed, many SRO residents live in their SRO unit for

many years, or even decades. [RE 657(¶3)(8-year resident), 661(¶1)(8-year resident), 666(¶1)(8-year resident), 674(¶1)(7-year resident), 677(¶1)(7-year resident), 644 (16:4-7)(12-year resident), 685(¶1)(5-year resident), 690(¶1)(6-year resident).] Although USPS argues that SRO residents are more "transient" than other residents of apartment buildings, USPS submitted *no* evidence of the "transience" rates of apartment dwellers, or any evidence that demonstrates that permanent residents of SROs are any more "transient" than residents of apartment buildings. Nor has USPS submitted any evidence to suggest SROs and other apartment buildings differ in terms of the volume or type of mail delivered. Indeed, USPS did not submit any evidence to suggest that there are any differences between SROs and apartment buildings that relate to mail delivery.

D. The City's Classification Of SRO Rooms

San Francisco's Planning Code classifies SROs as group housing, not hotels. [RE 483-84(¶¶16-18), 494-95(¶¶40-43), 544-45.] In 1981, to preserve this critical housing stock for its lowest-income residents, the City enacted the Residential Hotel Conversion and Demolition Ordinance ("HCO"). [RE 170-193.][1] The HCO required registration of all SRO rooms as either "residential" or "tourist" rooms

[1] USPS argued below that its regulations prevent "conversions" of SROs, meaning that a method of mail delivery, once established, must continue in perpetuity. But changing the mode of 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 USPS actually does change the mode of delivery at various buildings once use changes—just not for SROs. [RE 515(¶25), 525-26(¶52).]

based on how each room was used on September 23, 1979. [RE 175, 177.] Any room that, on that date, had been occupied by a resident for 32 days or more was classified as a residential unit. *Id.* All other rooms were classified as "tourist." [RE 543.] The HCO protects residential hotel rooms from demolition or conversion to tourist use by setting a baseline for the number of "residential" SRO rooms. [RE 188-89.] A residential room cannot be rented for tourist use without complying with the HCO, so all of the certified residential rooms under the HCO have been residential since at least 1979. [RE 543-44.]

Before 2008, USPS characterized SROs as "family hotels," entitling these citizens to residential status triggering centralized delivery. [RE 478-79(¶8), 483-84(¶16-17), 197-98, 519(¶31); cf. RE 385-86(460:10-461:2), 358-60(189:25-191:12).] But USPS changed its policy with respect to mail delivery to SROs in 2008, paving the way for USPS to discriminate between SROs and other apartment dwellings. [RE 478-79(¶8).]

E. The Harms Caused by Single-Point Delivery For SROs

Plaintiffs also submitted ample evidence demonstrating—or at least creating a material factual dispute concerning—the obvious point that single-point delivery is less secure than delivery to individual locked boxes. [RE 523(¶44), 287-89.] Not surprisingly, mail dropped at SROs through single-point delivery is frequently lost, misplaced, withheld, or stolen. [RE 657-58(¶¶3,5-6), 659(¶3), 666(¶4), 645-

46(27:20-28:16), 670(¶¶4-5), 681(¶¶3-5), 685(¶2), 690(¶5).] Plaintiffs submitted evidence showing that single-point delivery practices have resulted in large quantities of mail left on the floor, on tables in the building entry, or even outside. [RE 661(¶4), 532(71:19-22), 677(¶8), 548.] In fact, anyone who happens to walk into (or by) an SRO can typically access the mail for the entire building. [RE 533-34(72:20-73:3), 690(¶4).]

Even where building management takes custody of the mail, the evidence reflects lapses in security and privacy, with building management delivering mail to the wrong residents, opening residents' mail, or even withholding mail from residents or requiring them to sign over their assistance checks for rent and other charges. [RE 666 (¶4), 661(¶¶3, 7), 670(¶7), 677(¶4), 686(¶¶8,10).] SRO residents who rely on governmental assistance have also failed to receive the checks on which they depend for necessities, including rent. [RE 657-68(¶ 5), 645-46(27:20-28:16), 682(¶7), 685(¶2).] Others did not receive—and therefore failed to respond to—benefits program forms and related mail, which likewise results in lost benefits. [RE 670(¶5).]

Plaintiffs submitted numerous declarations and deposition transcripts from individuals who have suffered serious harm as a result of single-point delivery to SROs. John Patrick Mallery—a resident who lived in the same SRO room for over *twelve years*—provides just one example of how devastating the consequences of

single-point mail delivery can be. [RE 643-54.] As he testified at his deposition, there were *at least eight separate times* he was supposed to receive his benefits check and did not, requiring him to obtain eight "emergency checks" to replace the lost checks. [RE 647-50(29:3-32:8).] Even more disturbing, he did not learn of a critical, life-threatening health diagnosis until months after it was sent, which led to prolonged treatments and increased medical costs. [RE 653-54(64:3-22; 69:5-22).][2]

The City's HSA recently conducted a survey of SRO residents, and 14% of respondents reported that they had their public benefits, such as G.A. and food stamps, discontinued when mail from these programs did not reach them. [RE 469-70(¶17).] Eleven percent of respondents had to go to a program office to have benefits restored. *Id.* This in turn burdens the agencies administering these programs, [RE 470(¶18)], and organizations like plaintiff Housing Rights Committee, which have to expend resources in assisting residents to reapply for benefits. [RE 569-70(¶¶3, 5).] In addition to this most basic and critical issue of maintaining benefits—the very means by which SRO residents pay their rent—

[2] This appeal is not directed to other types of (non-SRO) buildings that are not hotels, but receive "single-point delivery," such as assisted-living facilities, prisons, and college dorms. Those types of housing are not covered under POM § 631.45. Further, those types of housing involve an institution that has assumed some custodial responsibility over the residents. Consequently, these institutional custodians take more interest and are in a distinct position from those at SRO front desks to ensure reliable mail delivery to its residents.

there are other serious problems with single-point delivery:

SRO residents and the public have suffered harms to their health as a result of USPS's discrimination: Missing mail has resulted in SRO residents missing appointments, not being able to fill prescriptions for medication, and not being aware of diagnoses. [RE 658(¶6), 662(¶¶10-11), 666-67(¶5), 653-54(64:1-22, 69:9-22), 681(¶5).] The public at large also faces increased risk of infectious disease outbreaks when DPH cannot reach SRO residents with information concerning their exposure to infectious diseases. [RE 566-67(¶¶5-6).]

SRO residents have had sensitive private information disclosed to neighbors: Personal communications can (and do) easily fall into others' hands. Building managers sometimes open mail addressed to SRO residents to learn about their health, finances, or personal lives. [RE 677(¶¶4-5).]

SRO residents have lost personal mail: Some SRO residents have curtailed their use of the mail to communicate with friends and family due to the lack of mail security. [RE 686(¶10).] Others have lost touch with family who tried unsuccessfully to contact them by mail. [RE 682(¶9).] Still others have not been informed of important life events. [RE 666(¶4).]

These problems are inherent in the single-point delivery method and are the root cause of this dispute. [RE 522-23(¶¶41-44).]

F. Mail Delivery At SROs

Recognizing the harms caused by single point delivery at SROs, the City in 2006 enacted the Residential Mail Receptacle Ordinance (the "Mailbox Ordinance"), which requires SRO owners to install separate mail receptacles for each residential unit in the building and to "mak[e] arrangements with [USPS] for the installation of these receptacles and delivery of mail thereto." [RE 195.] The purpose of the Mailbox Ordinance was to enable SRO residents to receive their mail in a secure manner, eliminating the host of problems that resulted from single-point delivery. [RE 563(¶4), 546.]

Approximately 172 buildings in the City classified as SROs have installed individualized locking mailboxes and receive centralized mail delivery. [RE 563-64(¶5).] Numerous other SROs have installed mailboxes but do not receive centralized delivery. [RE 686-87(¶12), 691(¶13), 639-41, 352.] Many other SROs would install individualized locking mailboxes if USPS would provide delivery to them. [RE 546.]

When enacting the Mailbox Ordinance, Plaintiffs reasonably expected that centralized delivery would be provided to all SROs. Indeed, USPS Postal Operations Manual ("POM") § 631.45 provides for mail delivery to individual mailboxes in a "residential building containing apartments or units occupied by different addressees (regardless of whether the building is an apartment house, a

family hotel, residential units, or business units in a residential area and regardless of whether the apartments or units are owned or rented)"—so long as the building has three or more residential units, a common entrance, a common address, and a USPS approved bank of mailboxes installed at a central, accessible location. [RE 197-98.]

This definition expressly acknowledges that some hotels are residential and are among the buildings that qualify for centralized delivery, provided they meet structural requirements. Section 631.45 further provides that building management need not install individualized mailboxes if it has arranged for mail "to be delivered at the office or desk for distribution by its employees," but that choice resides solely with building management. *Id.*

Further, even before the enactment of the Mailbox Ordinance, USPS converted many SROs from single-point delivery to centralized delivery, thus suggesting that even USPS agreed that SROs could qualify for centralized delivery [RE 355-57(109:19-111:1).] This process accelerated after the City enacted the Mailbox Ordinance, and more SRO owners began to install locking mailboxes for their residents. [RE 370-72(128:13-130:23).] Residents at these "converted" SROs report that mail delivery is significantly more reliable and secure under centralized delivery than it was under single-point delivery. [RE 658(¶8), 667(¶6), 670-71(¶¶7-10), 674-75(¶¶5, 8-9).]

On December 18, 2008, however, progress came to an abrupt halt. San Francisco Postmaster Noemi Luna sent a letter to the City's Department of Building Inspection announcing that, effective January 5, 2009, USPS would no longer deliver mail to individual mail receptacles in SROs. [RE 392-94.] The letter states that "it would not be prudent for [USPS] to continue to work directly with SRO owners on compliance with [the Mailbox Ordinance]," that it "will not offer individual mail receptacle delivery to additional SROs," and that it "will be ...rescind[ing] individual delivery that was extended to any SRO within the past 90 days." [RE 393.] Since then, USPS has denied requests for centralized delivery at SROs regardless of the physical characteristics of these buildings, and regardless of whether the buildings qualify for centralized delivery under POM Section 631.45. [RE 363-67, 636-37, 401-02(161:21-162:12), 373(180:1-22).] Unlike other types of residential buildings which USPS evaluates on a building by building basis to determine the appropriate method of mail delivery, USPS categorically excludes SROs regardless of the residential nature of the building or any physical characteristics of the building.

The decision-making process leading to the Luna Letter has been withheld based on USPS's claims of privilege, but it is clear that USPS's decision was not based on any analysis of actual costs, resources, or characteristics of SROs. [RE 388-89(533:18-534:6), 406-07(112:22-113:7), 376-77(230:18-231:16).] There is

no indication that USPS actually evaluated the cost of its policy change before implementing it, let alone looked at the question in a non-arbitrary way. *Id.* Indeed, the evidence reflects a substantial dispute concerning whether USPS's refusal to deliver mail to SROs would result in cost savings—or instead actually cause USPS to *lose* substantial money. [RE 428-37(¶¶ 17-24).] USPS's decision to target some SROs, refusing to provide them the same centralized mail delivery other multi-unit building residents receive, in conflict with its own regulations and authorizing statute, is arbitrary.

Currently, 296 of 463 SROs in the City (64%) receive single-point mail delivery (RE 411-20.); the remaining 167 SROs (36%) receive centralized delivery. *Id*. Of the 296 SROs that receive only single-point delivery, 173 have a Certificate of Use under the HCO requiring that 100% of their rooms be rented to permanent residents. At least another 57 SROs operate as fully residential. [RE 564(¶7).] Even though their Certificate of Use would theoretically permit some tourist rentals, these buildings are only renting rooms to permanent residents. *Id.*

G. The District Court Acknowledged Factual Disputes But Then Improperly Granted Summary Judgment

After an intense discovery period with 48 depositions revealing numerous material factual disputes between the parties, USPS moved for summary judgment on all claims. [RE 35-64.] The parties submitted conflicting expert reports as to, among other things, the costs of switching all SROs in San Francisco to centralized

delivery. [RE 21(15:9-21).]

During the summary judgment hearing on October 13, 2011, the District Court acknowledged that whether SROs were properly classified as hotels—an issue it viewed as critical—involved disputed factual questions. [RE 31-32.] Indeed, the District Court stated to USPS's counsel that once USPS started 'down this road' of articulating factors in support of its classification of SROs as hotels not worthy of centralized delivery, there were numerous questions of fact:

> Because …i[f] the question as presented to me ... is an SRO property classified as a hotel or as an apartment? [If] [t]hat were the question then there's disputed issues of fact.

[RE 32.]

Less than two weeks later, on October 25, 2011, the District Court concluded that there were no material factual disputes to preclude summary judgment in favor of USPS, thereby disposing of all of Plaintiffs' claims. While the District Court set forth the proper standards for summary judgment and expert evidence in its Order, it then proceeded to disregard those standards in finding no factual disputes – in a case with a record filled with them.

In its Order, the District Court summarized the three reasons that USPS cited to justify treating SROs as hotels for purposes of mail delivery:

(1) the City treats SROs as hotels by both taxing and regulating them as such;

(2) SROs physically resemble hotels, not apartments; and

(3) SRO tenants are more transient than apartment dwellers.

[RE 25.] But the Order fails to resolve any of the disputes of fact concerning these factors, or explain how these factors justify the discriminatory classification made by USPS between apartment residents and SRO residents. Instead, the District Court tacitly accepted USPS's proffered explanation for its classification of SROs as hotels for mail delivery, disregarding Plaintiffs' argument and evidence disputing each purported factor (and its relevance to the equal protection and First Amendment analysis). *Id.*

The District Court's also acknowledged in its Order numerous factual disputes in the record:

- "The parties dispute whether SROs should be classified as hotels or residences for purposes of mail delivery," [RE 8];
- "The parties debate the benefits and costs of single-point versus centralized delivery," [RE 8];
- "USPS disputes this residence classification," [RE 9];
- "The parties dispute exactly how many SROs currently receive single-point versus centralized delivery," [RE 11(n.2)];

- "Plaintiffs' expert asserts that [USPS's] calculations are inaccurate because they fail to account for certain revenue offsets . . ." [RE 23(n.6)].

But the District Court improperly declined to credit any of these as material factual disputes as sufficient to defeat USPS's motion for summary judgment.

To dispose of Plaintiffs' equal protection claim, the District Court applied its own interpretation of USPS's centralized delivery regulation (POM § 631.45), concluding that POM § 631.45 allows USPS the discretion to refuse to approve the "installation and maintenance of [] mail receptacles" where USPS does not wish to provide centralized delivery. [RE 25.] The District Court's interpretation of POM § 631.45 was not advanced by USPS in moving for summary judgment, and is contrary to the spirit of the regulation.[3] But, in any event, the District Court missed the point. Even if USPS has the discretion to deny centralized delivery where appropriate, USPS cannot exercise that discretion in any arbitrary, or irrationally discriminatory manor. The District Court skipped the fundamental analysis regarding USPS's discrimination—namely, whether there are disputed factual questions about whether USPS treating SRO residents differently than apartment residents, and instead like hotel guests, for no good reason, violates equal

[3] The District Court later entered final judgment and denied Plaintiffs' motion to alter the judgment to strike reference to the District Court's assertion that USPS complied with its internal regulation given that this issue was not briefed or argued by USPS in its motion. [RE 1-6.]

protection. The District Court thus declined to undertake the proper constitutional analysis—whether USPS's classification, or its application of its regulation thereof, was constitutional, especially considering that it was being used to arbitrarily discriminate against certain SRO residents.

With respect to the First Amendment, the District Court applied the forum of the remedy of centralized service (instead of the proper forum of what is being challenged as unconstitutional, City delivery), and based its entire analysis upon USPS's proffered "cost-savings" rationale, despite the material disputes in the record about what costs are actually being saved, if any. [RE 19-21.] The District Court also ignored the well established law cited by Plaintiffs that holds that the government cannot rely on a cost-savings rationale where it is drastically underinclusive, as it is here. [RE 225-26.]

The District Court correctly found that Plaintiffs had standing to assert their claims. [RE 13-18.] The District Court also acknowledged in its Order that "[t]he numerous affidavits submitted by [P]laintiffs demonstrate that the single-point method of delivery leads to benefits checks and public notices being misplaced." [RE 17.] But then, even in spite of the factual disputes and despite the acknowledged harm, the District Court concluded that "substantively the undisputed facts demonstrate the absence of any constitutional violation." [RE 7.]

SUMMARY OF THE ARGUMENT

The decision below rests on the judgment that USPS acted rationally in denying centralized mail delivery to some 64 percent (but not all) of the SROs in San Francisco, treating them as akin to tourist *hotels* for purposes of mail delivery. At a bare minimum, however, disputed questions of material fact surround those issues—which USPS itself has identified as critical to its classification of SROs as hotels—requiring reversal of summary judgment for USPS.

As a matter of law, USPS cannot arbitrarily decide to spend resources to ensure safe and reliable mail delivery to certain SRO residents and apartment residents through centralized delivery, while denying the same rights and access to mail to other SRO residents. This is especially true when the discrimination is based on an arbitrary classification likening SROs to tourist hotels—a classification that is divorced from reality and any rational basis relating to mail delivery. Indeed, the arbitrary nature of USPS's actions here is confirmed by the fact that those actions conflict with USPS's own authorizing statute—which prohibits "any undue or unreasonable discrimination among users of the mails" (39 U.S.C. § 403(c))—and with USPS Postal Operations Manual § 631.45, which provides for mail delivery to individual mailboxes in any "residential building containing apartments or units occupied by different addressees (regardless of whether the building is an apartment house, a family hotel, residential units, or

business units in a residential area and regardless of whether the apartments or units are owned or rented)."

USPS's policy relies on an arbitrary classification to cut off centralized delivery service to only certain multi-unit residents—in violation of equal protection. In defense of its classification—which grants full centralized service to all apartments and 36 percent of SROs in San Francisco, but denies such service to the balance of SROs, which are similarly situated in every relevant respect—USPS's points to alleged "costs savings." But to satisfy "rational basis" scrutiny, the reason for the cost savings cannot be unrelated to or independent of the classification itself. In other words, without evidence of a real cost difference between delivering to SROs and apartments, or between delivering to some SROs and not others, providing centralized delivery only to *some* SROs is by definition arbitrary.

In any event, the parties' experts disagree as to whether USPS's new policy provided any cost savings, let alone whether there was a cost savings from one "type" of building to the other. There are other disputed factual issues as well, including whether SRO residents are "more transient" than apartment dwellers. Where USPS itself said that SRO residents' alleged transience was one of its reasons for cutting off centralized delivery service, a factual dispute on this issue is by definition material and precludes a grant of summary judgment.

USPS's policy also violates SRO residents' First Amendment rights. It is well established that restrictions to mail access can impact free speech. Under a proper analysis, a court determines whether a "reasonable limitation" within that particular forum has been adopted. Applied to the proper forum of City delivery here, this Court should consider whether the classification within the forum of City delivery is reasonable. And under this analysis, for largely the same reasons that USPS's policy fails equal protection review, it fails free speech scrutiny as well. Instead, USPS advocated, and the District Court applied, the more narrow forum of centralized delivery. But centralized delivery is not the forum; it is the proposed remedy. The access that Plaintiffs are seeking requires this Court to look beyond the reasonableness of single-point delivery to SRO residents in isolation, and instead look to the reasonableness of providing single-point delivery to some SRO residents and centralized delivery to other SRO residents and apartments. Here again, there are at a minimum factual disputes that entitle Plaintiffs to have their claims proceed to trial.

The District Court's Order granting summary judgment for USPS must be reversed.

STANDARD OF REVIEW

Orders granting summary judgment are reviewed *de novo*. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir.1986); Fed. R. Civ. P. 56. Thus, this Court

must reverse unless, viewing the evidence in the light most favorable to Plaintiffs, "there is no genuine dispute as to any material fact," such that USPS "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). As demonstrated below, Plaintiffs presented sufficient evidence to establish triable issues of fact as to whether SROs are rationally distinguishable from apartments and other SROs for mail delivery purposes, precluding an award of summary judgment to USPS.

ARGUMENT

I. Because SRO Tenants Are Similarly Situated To Tenants Of Other Multi-Unit Residential Buildings, USPS's Classification Of SROs As Hotels Must Have Some Relation To Its Mail Delivery Policy

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via the Fifth Amendment's Due Process Clause, *Bolling v. Sharpe*, 347 U.S. 497 (1954), requires that similarly situated persons be treated the same way. And the right of equal protection is violated when the state intentionally treats one group differently from another similarly situated group without a rational basis for the difference in treatment. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). If a class distinction is drawn—*i.e.,* a "classification" of one group is made in order to

deny some right or privilege to that class alone—then the classification itself must be rationally related to some legitimate state interest and not arbitrary. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (invalidating an arbitrary distinction between permissible use permits in "Apartment House District.") Indeed, USPS is expressly prohibited from classifying mail recipients in a manner that would cause "any undue or unreasonable discrimination among users of the mails," which should expressly inform the inquiry into what is rational. 39 U.S.C. § 403(c).

Under equal protection, "[a] classification ...'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Furthermore, under rational-basis review,[4] "a [] decision to act on the basis of [perceived] differences" is constitutional only if the "distinguishing characteristics [are] relevant to [the government's] interests." *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003) (quoting *Bd. of Trs. v. Garrett*, 531 U.S. 356, 366-67 (2001)). Equal protection likewise forbids the state from relying on proffered justifications that are factually false. *See Squaw Valley Dev. Co. v. Goldberg,* 375 F. 3d 936, 946 (9th Cir. 2004) *overruled in part*

[4] The parties agree that rational basis review applies in this case.

on other grounds by Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1025 (9th Cir. 2007).

Therefore, to pass rational-basis review, USPS's decision to treat some SRO residents differently from residents of other apartment buildings—and from those SROs that still receive centralized delivery—must be based on some relevant characteristic that not only distinguishes between the two groups but also is fairly and substantially related to USPS's stated policy objective of achieving cheaper mail delivery. *Stanton*, 421 U.S. at 14. USPS must have had some rational reason to single out a subset of 64% of SRO residents in particular to bear the burden of accomplishing its underlying objection of saving money. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1509 (9th Cir. 1990) (reversing summary judgment on an equal protection claim because "although the [government's] objective of preserving a habitat … is rational, it may not be rational to single out this parcel to provide it" and a factual dispute remained as to whether it was). It cannot do so—particularly on this record, which contains many disputed issues of material fact.

In its Order granting summary judgment, the District Court, citing *Lazy Y Ranch v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008), acknowledged that "the law requires a rational basis for the classification itself, and not just for the government action. … USPS needs to demonstrate it had a reasonable basis for classifying

SRO residents differently from other multi-unit building tenants, not just for deciding to provide different delivery methods to each group." [RE 24(18:24-28).] Yet the District Court did not actually undertake this analysis. Instead, it ruled that USPS had proven a rational basis for its actions, because using single-point delivery at SROs "can 'reasonably be viewed to further the asserted purposes' of reducing costs and maintaining operational efficiency." [RE 26(20:5-6).]

But this reasoning plainly proves to much. Using single-point rather than centralized delivery ***anywhere*** would accomplish this purpose, but without question it would be arbitrary for USPS to adopt a policy under which it would deliver to every other building, or to some neighborhoods and not others. Cutting services that way would definitely result in a cost-savings—but not one related to the classification. The SRO/apartment classification, for the purpose stated by USPS, is just as arbitrary and irrational here. USPS could no sooner decide not to deliver to low income apartments in Compton while maintaining delivery to apartments in Beverly Hills than it can legally treat SROs differently from apartments and other SROs in the City of San Francisco.

The validity of USPS classification here rests on whether the cost of delivering mail to SROs is different from the cost of delivering mail to other similarly situated, multi-unit residential buildings that receive centralized delivery, thus justifying USPS's decision to save money by ceasing delivery to only a subset

of SROs. But as common sense and the evidence that was before the District Court show, SROs are indistinguishable from apartments for purposes of mail delivery, and that reasoning applies *a fortiori* to USPS's decision to treat some SROs differently from other SROs. Moreover, the tenants of SROs are essentially indistinguishable from apartment dwellers as well—except that SRO tenants tend to be poor.

USPS's decision to use single-point delivery for some SROs and centralized delivery for other SROs, apartments, and all other dwellings in which permanent residents live is thus entirely arbitrary—not rationally related to any legitimate government purpose.

II. Cost-Savings Is Not A Proper Rationale To Justify Its Classification

USPS's arbitrary and discriminatory classification of SROs also fails because saving money "does not provide a rational basis for [its] policy if the policy is, as a cost-saving measure, drastically underinclusive." *In re Levenson*, 587 F.3d 925, 933 (9th Cir. 2009) (citing *Lazy Y Ranch*, 546 F.3d at 590).

In *In re Levenson,* this Court "disposed of quickly" an attempt to justify a discriminatory policy prohibiting same-sex spouses from receiving health benefits as "cost-savings" where there was "no rational relationship between the sex of an employee's spouse and the government's desire to limit its employee health insurance outlays." *Id.* at 932-33. As this Court noted, "the government could

save far more money using other measures, such as by eliminating coverage for all spouses, or even every fifth or tenth spouse." *Id* at 933.

So too here. Setting aside the disputed facts regarding whether its policy produces any cost savings at all, USPS could save "far more money" by eliminating centralized mail service to all apartment dwellers.[5] Because USPS would save more money via a non-discriminatory approach to all multi-unit residential buildings rather than just refusing to deliver mail to the mailboxes of the urban poor, cost is not a rational basis for the classification at issue in this case. *See In re Levenson*, 587 F. 3d at 933.

In *Lazy Y Ranch*, this Court upheld an equal protection challenge when the defendant state officials proffered a cost-savings rationale for a policy, but had not rationalized the ***classification*** at issue—exactly as USPS has done here. 546 F.3d at 589. The plaintiffs alleged that it was the high bidder for a ranch lease, yet denied the lease due to the ranch's status as a conservationist. The defendants' proffered rational basis was saving on administrative costs. The Court held that, while saving money can be a rational governmental purpose in some cases, "it simply does not offer a basis for treating conservationists differently from other bidders." *Id.* at 590. Indeed, where "costs only matter in some cases – i.e., when

[5] This Court has noted that "the government could eliminate postal service altogether if it so wished." *Currier v. Potter*, 379 F.3d 716, 729 (9th Cir. 2003). This would also arguably save more costs and would not be arbitrary like the classification of SROs as hotels at issue here.

the high bidder is a conservationist," the desire to save money alone is not a rational basis for the discrimination. *Id.*

That is precisely the case here. Even assuming that cost-savings is a proper rationale for certain USPS policies, USPS has not offered a rational basis for treating SROs differently from other apartment dwellers, let alone from the 34 percent of San Francisco SROs who receive centralized mail delivery. Instead, "costs" only matter whether the building is an SRO. Indeed, there is no evidence that USPS denies centralized delivery to apartment buildings or to any new buildings that want it. Only SROs face such discrimination. And this is to say nothing of the factual disputes here over whether there are cost-savings *at all*—*e.g.,* whether such savings exist, would be *de minimis*, etc. In granting summary judgment to USPS, the District Court improperly weighed the credibility of competing expert opinions on this issue.

USPS's classification is also analogous to the classification struck down in *City of Cleburne*. The plaintiffs there challenged a zoning ordinance that barred using land in an "Apartment House District" for "hospitals for the ...feeble-minded." 473 U.S. at 436-37. The classification at issue included most types of group housing (among them, notably, both "apartment houses" and "apartment hotels"). *Id*. at 436 n.3 & 437. The ordinance distinguished between group homes for the mentally handicapped, which were required to have special use permits, and

other group homes, which were not. *Id*. While recognizing "real and undeniable" differences between the mentally handicapped and others, the Court nonetheless found the distinction drawn by the ordinance to be unconstitutional on the ground that the differences were "irrelevant" to the city's stated interests. *Id*. at 444, 448; *see, e.g., id.* at 449-450 ("It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent.").

Likewise here, the differences cited by USPS to justify distinguishing SROs from apartments must be relevant to the purported government interest—the cost of delivering the mail. But none of the three grounds cited by the District Court (taxation, physical resemblance and transience) to grant summary judgment was relevant to USPS's stated interest in cost cutting (the costs of which are disputed by the parties' experts).

Furthermore, the District Court below did not appropriately credit Plaintiffs' evidence, discounting clear disputes of fact surrounding USPS's characterization of SROs. This is evident in the transcript from the hearing on summary judgment. [RE 31-32.] Indeed, the District Court flatly acknowledged that if it engaged in actual analysis of the essential question—whether the distinctions drawn are rational and relevant to the interest espoused—then it would be forced to confront disputed factual issues. *Id.* The District Court explicitly stated that with respect to

the question "is an SRO property classified as a hotel or as an apartment?" there were "disputed issues of fact." *Id.* Indeed that ***is*** the question here, or is at least fundamentally related to the question here: Is an SRO properly classified as a hotel or an apartment in a manner that is not underinclusive and relevant to cost-savings? The District Court recognized that this question necessarily involved disputed issues of fact, and yet that is the question USPS asked itself in determining that SRO residents should receive single-point delivery. There are at the very least factual disputes surrounding whether USPS' decision, based on this question, was arbitrary. The District Court's grant of summary judgment should thus be reversed.

III. USPS's Proffered Reasons For Its Discrimination Raised Disputed Factual Questions And Do Not Rationalize The Classification Of SROs As Hotels For Mail Delivery

The District Court accepted USPS's argument that the underlying objective for its discriminatory policy—the legitimate government interest driving it to provide fewer services to SRO residents than it provides to residents of other apartment complexes—was that "of increasing operational efficiency and minimizing its operational costs." [RE 24(18:16-17).] Under rational-basis review, however, the District Court could find USPS's discrimination justified only if it found that undisputed differences between residents of SROs and residents of other apartment buildings were relevant to the underlying objective of

increased efficiency and reduced costs in mail delivery. *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1195 (9th Cir. 2008) (finding rational basis only where the "distinguishing characteristics" cited by the government are "relevant to [the] interests" cited by the government).

In this regard, the District Court based its ruling on three differences cited by USPS to justify its discrimination: "(1) the City treats SROs as hotels by both taxing and regulating them as such; (2) SROs physically resemble hotels, not apartments [in that some have communal kitchens and bathrooms]; and (3) SRO tenants are more transient than apartment dwellers." [RE 25(19:9-11).] Strikingly, however, none of these differences distinguishes SROs from apartments—let alone other SROs—in any way that is relevant to cost-savings or efficiency in mail delivery.

1. Taxation And Physical Resemblance Have No Bearing On Mail Delivery.

Under rational-basis review, the mere fact that groups can be distinguished by citing certain differences does not in itself mean a discriminatory policy is constitutional. *Lazy Y Ranch*, 546 F.3d at 589 (sustaining equal protection challenge where the defendant had not rationalized the ***classification*** at issue). The cited differences between the groups must, at a minimum, be relevant to the government policy's purpose. *City of Cleburne*, 473 U.S. at 441-42 (arbitrary distinction drawn with respect to apartment housing use permits for mentally

handicapped found unconstitutional because distinction not rationally tied to purpose of ordinance.) And here USPS's cited differences between SROs and apartments are irrelevant for purposes and costs of mail delivery.

Consider taxation. Whether the City taxes hotels and SROs at a higher (or lower) rate than apartments has no bearing on whether it costs more, or is less efficient, to deliver the mail to hotels and SROs than to apartments. The District Court could conclude otherwise only by measuring cost against the baseline of not providing the service at all—rather than the proper baseline of the cost of providing the service to apartments.

It is likewise with "physical resemblance." How hotels and SROs look compared to apartments is irrelevant to the cost of delivering the mail. Indeed, when accomplished by centralized rather than single-point delivery, doing so requires "viewing" only one room in the building—the building where the mailboxes are housed. Resting its decision on such an arbitrary factor ignores USPS duty evaluate what type of mail delivery is appropriate for the residents. A bank of individual mailboxes is a bank of individual mailboxes, whether in an SRO or an apartment building.

These purported differences are thus irrelevant to USPS's interest in efficient and cost-effective mail delivery and cannot satisfy rational basis review as a matter of law. Indeed, that there is no reasoned response to this fact is evidenced

by the fact that USPS has offered none.

The District Court also acknowledged that USPS's argument is premised on the notion that "SROs have the physical and cultural attributes of a hotel." [RE 9 (3:1-2).] But again, USPS has not shown how the physical characteristics of SROs differ from apartments in a way that is relevant to cost-savings or efficiency in mail delivery, and in all events Plaintiffs countered USPS's assertions about physical characteristics with evidence of their own. [RE 519(¶31); *cf.* RE 385-86(460:10-461:2), 358-60(189:25-191:12).] As to the "cultural attributes" of SROs and hotels, Plaintiffs submitted evidence showing that, insofar as cultural attributes are even relevant to mail delivery, SROs are more akin to apartments than hotels. [RE 215-16.]

The fact that SROs have communal kitchens or bathrooms—the physical characteristics that, USPS says, distinguish them—is neither relevant to nor influential on the cost or efficiency of mail delivery. Mailboxes are mailboxes. Disturbingly, moreover, this notion essentially discriminates against poorer residents with less living space for no good reason. Indeed, the physical differences between SROs and other multi-unit residential buildings have no bearing on mail delivery since both kinds of buildings seeking centralized delivery have more than three residential units, a common entrance and address, and a bank of identical mailboxes, the only factors that matter for the purposes of mail

delivery. POM § 631.45. The SRO residents having less overall space cannot serve a rational basis to justify USPS's arbitrary classification. The fact that apartment residents might pay more, have more space, pay a security deposit and actually sign longer lease terms all still have nothing to do with the right to receive safe and reliable mail delivery or the cost of such delivery.

For purposes of mail delivery, the tenants of SROs are no different than tenants of apartment complexes or SROs that receive centralized delivery. Plaintiffs submitted evidence showing that there are significant differences between the kind of mail being delivered to tenants of SROs and mail delivered to guests at hotels. [RE 215-16, 657-58(¶5), 645-46(27:20-28:16), 682(¶7), 685(¶2).] Plaintiffs showed that SRO tenants receive medical correspondence, social welfare benefits, and other benefit and support payments and information. *Id.* Guests at hotels do not typically receive these kinds of materials. Unlike the majority of USPS's evidence, Plaintiffs' evidence on this point is directly relevant to the issue of mail delivery. Yet the District Court wrongly disregarded this evidence.

2. The "Transience" Of SRO Residents Is Also A Factual Question

The "equal protection clause protects individuals from being singled out to bear the burden of governmental efforts at remedying perceived societal ills." *Wedges/Ledges of California, Inc. v. City of Phoenix, Az.,* 24 F.3d 56, 67 (9th Cir. 1994) (citing *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1509 (9th Cir.

1990)). As this Court has recognized, where there is a dispute of fact on the question of why the burdened class has been singled out to remedy the ill, and the use of the characteristic like "transience" is concerning in its own right, summary judgment is not appropriate.

In *Del Monte Dunes*, for instance, this Court reversed a grant of summary judgment on an equal protection claim, holding that under rational-basis review, even assuming the legitimacy of the purpose, summary judgment was inappropriate where genuine issues of material fact remained as to why the targeted class was singled out to bear the burden. 920 F.2d 1496, 1509 (9th Cir. 1990).[6] There, this Court found that the City's stated purpose of preserving a habitat for certain wildlife was rational, but it might *not* be rational to put the burden of preservation only on certain citizens. *Id.* Because the question whether the City's determination to burden only certain citizens was rational depended on disputed factual issues, this Court ruled that summary judgment should not have been granted and reversed. *Id.*

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[6] Though *Del Monte Dunes* concerns a "class of one" equal protection claim, this does not change the applicability of its analysis in this case. "[T]he number of individuals in a class is immaterial for equal protection analysis." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 n.* (2000) (holding that allegations of irrational and wholly arbitrary treatment, even without allegations of improper subjective motive, were sufficient to state a claim for relief under equal protection analysis). Indeed, the Court in *Wedges/Ledges of California, Inc.* cited this exact premise from *Del Monte Dunes* in concluding that the ban in that case—affecting a class consisting of a large number of individuals—"implicated equal protection concerns." *Wedges/Ledges of California, Inc.,* 24 F.3d at 67.

So too here. USPS's decision to burden only economically disadvantaged SRO residents—and even then, only 64 percent of that class—rather than other SRO residents and more affluent apartment dwellers, makes the classification suspect on its face. *See also, Cleburne,* 473 U.S. at 450 (mentally handicapped individuals targeted without rational basis). Moreover, where there are factual questions as to the justification for disparate treatment of similarly situated groups within the same classification,[7] summary judgment should not be granted. *See Alpha Delta Chi-Delta v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011) (reversing summary judgment on a free speech claim because "the record d[id] not adequately explain why some official student groups at San Diego State appear[ed] to have membership requirements that violate[d] the school's nondiscrimination policy" and others did not).

Further, even assuming there were not contested facts regarding transience (which there are), USPS cannot and should not be permitted to look at barriers most commonly relating to socioeconomic status to withhold services provided to similarly situated citizens like those in apartments. "The rule of law, evenly applied to ...the poor as well as the rich, is the great mucilage that holds society together." *Papchristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (holding

[7] It is particularly random and arbitrary that some SRO residents get centralized service while others do not based solely on the earlier timing of those requests and installations. When individual mailboxes were installed or improved have no bearing on how much it costs to deliver mail to SROs.

unconstitutional ordinance containing archaic classification "vagrancy").

Even assuming, *arguendo*, that the issue of resident transience has any relevance to the interest of cost-savings in mail delivery (it does not), whether or not SRO residents are "transient" was and remains sharply contested. [RE 226-27 (19:17-20:12), 469-70 (¶17), 478 (¶7), 550-61.] Plaintiffs submitted significant evidence to refute USPS's allegation of "transience," demonstrating that most SRO residents stay in the same SRO for many years. [RE 469-70(¶17), 545.][8] USPS submitted *nothing* to counter with any rates for how long an apartment dweller stays in apartments on average.

Instead, USPS appeared to rest its analysis on the fact that SRO residents *can* stay for a minimum of 32 days. [RE 48(9:8-10).] But the fact that an SRO resident *could* legally leave after 32 days is irrelevant in the face of evidence that they infrequently do so. *Id*. USPS presented no competent evidence whatsoever to even counter Plaintiffs' evidence, such as how many apartment residents lease month to month, or how many break leases even when in longer term leases. On this question, while USPS presented no evidence, Plaintiffs quite clearly raised a triable issue precluding summary judgment.

Indeed, Plaintiffs presented specific evidence that SRO residents are not

[8] [See RE 657(¶3)(8-year resident), 661(¶1)(8-year resident), 666(¶1)(8-year), 674(¶1)(7-year resident), 677(¶1)(7-year resident), 644(16:4-7)(12-year resident), 685(¶1)(5-year resident),690(¶1)(6-year resident).]

transient, showing that 69% of SRO residents served by the Human Services Agency had been living in their SRO for two years or more. [RE 469-70(¶17).] The average occupancy at SROs managed by the Tenderloin Housing Clinic was over three years. [RE 545.] They also noted that the average stay for tenants in SROs is three years or more. *Id.* And many live in the same SROs for much longer. [RE 657(¶3), 661(¶1), 666(¶1), 674(¶1), 677(¶1), 644(16:4-7), 685(¶1), 690(¶1).]

Conversely, USPS presented ***no*** statistics comparing the duration of residency of SRO residents to the duration of residents of other types of multi-unit residential housing. [RE 35-64.] For purposes of summary judgment, Plaintiffs' evidence must be credited as true; the only question for the court is whether there is a material disputed fact. The District Court granted summary judgment by avoiding the central issue of the relevance of the ***distinctions*** USPS draws to ***costs***—the basis on which USPS justifies its discrimination—and, in so doing, improperly avoided this material factual dispute.

USPS has also alleged that residents of SROs do not put down security deposits or have leases, as do some apartment dwellers. But this too is disputed. Plaintiffs proffered evidence indicating that requirements for security deposits and long-term leases often function as barriers to permanent housing for the typical residents at SROs (who are impoverished), and that the lack of such requirements

in SROs actually encourages stability and permanence, not transience. [RE 499-500(¶52), 543-545.] Plaintiffs presented sufficient evidence to at the very least create triable issues of fact that SRO residents are not more transient than other apartment dwellers.

IV. The District Court's Determination That USPS Was Not Violating Its Own Regulation Was Not Dispositive Of The Equal Protection Inquiry

The District Court did not perform the proper analysis in granting summary to USPS. Instead, it advanced its own theory as to why there was no equal protection violation, setting up a USPS regulation as a straw man, and then concluding that USPS did not violate its own regulation and therefore did not violate the Constitution. This analysis cannot support affirmance.

In essence, USPS's regulation at issue, POM 631.45, defines residential buildings that receive centralized delivery as "apartments or units occupied by different addressees (regardless of whether the building is an apartment house [or] a family hotel, residential unit . . .)" The District Court determined that USPS did not violate this regulation because it had the discretion to withhold centralized delivery until "installation and maintenance" of the mail receptacles is approved by USPS, and therefore it somehow did not violate SRO residents' constitutional rights.

The District Court missed the point. Even if USPS has some discretion

under POM 631.45, it still cannot exercise that discretion in an arbitrary way without violating the equal protection clause. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (ordinances based on arbitrary distinctions are invalid under equal protection). Thus, the District Court was still required to consider whether the classification exclusion of SROs from centralized delivery made sense, and whether SROs could be excluded from the delivery method used for similarly situated apartment buildings and some other SROs solely on the basis of cost savings. [RE 25.] The District Court simply was wrong when it concluded that, because USPS could withhold its approval of mail receptacles, the court need not consider whether centralized service approval was being denied arbitrarily in violation of the equal protection clause.[9]

Whether USPS violated its own regulation is not dispositive of the constitutional issues presented here.[10] Indeed, USPS ignored its own ability to

[9] Focusing narrowly on whether the technical violation of withholding approval was permitted, the District Court concluded that USPS had presented "legitimate reasons for treating SROs as hotels ***under POM***" because that decision could "reasonably be viewed to further the asserted purpose[s]" of reducing costs and maintaining operational efficiency. [RE 26.]

[10] USPS did not argue in its motion for summary judgment that the District Court should determine whether it violated Section 631.451(b). Yet the District Court still proceeded to decide this question that was never briefed, coming up with a new argument to justify its decision. But the District Court's attempt to avoid the true constitutional questions must be reversed. Indeed, it is of no matter that a regulation arguably builds in a mechanism to allow USPS to carry out its discrimination by arbitrarily withholding mailbox approval and thus preventing

approve receptacles for certain SRO residents and instead declined even consider SROs for centralized delivery based solely on their classification as SROs. The approval built into the regulation was put in place to ensure receptacles were installed properly. It was *not* intended as a means to randomly select populations of citizens that would not be permitted to receive mail by centralized delivery no matter what, merely based upon an irrational classification that they are similar to tourist hotels when the proffered similarities have nothing to do with the cost of delivering or right to receive reliable access to mail.

V. The District Court Improperly Assessed Expert Testimony, Determining That There Were No Disputed Issues Of Fact Despite A Legitimate "Battle Of The Experts"

"Expert opinion evidence is itself sufficient to create a genuine issue of disputed fact sufficient to defeat a summary judgment motion." *Thomas v. Newton Int'l Enterprises*, 42 F.3d 1266, 1270 (9th Cir. 1994) (holding district court abused its discretion by granting summary judgment where expert declarations conflicted as to a material fact). As this Court has stated, "[i]f testimony conflicts so 'that a result other than the district court's conclusion is possible,' [the circuit court] must reverse because 'neither an appellate court nor a trial court are permitted to weigh the evidence, pass upon credibility, or speculate as to the ultimate findings of

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conversion to centralized delivery. *City of Cleburne*, 473 U.S. at 446. The District Court was still required to analyze the Constitutional question presented about whether there were factual disputes about whether the arbitrary classification violates equal protection.

fact.'" *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316 (9th Cir. 1986) (quoting *Dalke v. Upjohn Co.*, 555 F.2d 245, 248 (9th Cir. 1977).

Even though the District Court acknowledged in its Order granting summary judgment the well-established rule that "at the summary judgment stage it is not for the court to weigh the credibility of the evidence or balance the expert testimony" [RE 23(17:2-3)], it went on to make precisely those types of impermissible determinations in granting summary judgment. The District Court impermissibly weighed the evidence in the parties' conflicting expert reports, made credibility determinations, and concluded as a matter of law that USPS's restriction of the First Amendment free speech rights of SRO residents is reasonable. [RE 22-23.] Plaintiffs' expert reports—far from conclusory documents based on "speculation"—withstand much greater scrutiny than is necessary at the summary judgment stage. These expert reports create a host of genuine issues of material fact that make this case ripe for trial.

1. The Expert Reports Were Admissible And Not Excluded.

The Federal Rules of Evidence permit experts wide latitude in the scope and substance of their testimony. *Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461, 1469 (9th Cir. 1990) (reversing summary judgment where factual issues remained) (*rev'd on other grounds in Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992)). Because Rules 402, 702, 704, and 705 of the Federal

Rules of Evidence permit experts to testify in the form of an opinion where the expert's specialized knowledge may assist the trier of fact, this Court has acknowledged that parties bear an exceedingly low burden when offering expert testimony at the summary judgment stage. *See Vigman,* 908 F.2d at 1469; *Bulthuis,* 789 F.2d at 1317.[11] Indeed, expert evidence withstands the judiciary's minimal scrutiny so long as 1) the expert is competent to proffer the testimony; and 2) the expert's factual basis is stated. *Id*. at 1318.

In *Bulthuis*, the plaintiff filed an action against the seven pharmaceutical companies that had manufactured a drug during her mother's pregnancy under theories of strict liability, negligence, and breach of implied warranty. 789 F.2d at 1316. The plaintiff supplied the expert affidavits of several doctors that her mother's ingestion of the drug caused the plaintiff to develop cancer. *Id*. The defendants moved for summary judgment, which the district court granted. *Id*. This Court reversed the district court. *Id* at 1319. This Court reasoned that the statement by the plaintiff's doctor that changes in the plaintiff's tissue were

[11] The *Bulthuis* Court also reasoned that, because Rule 705 of the Federal Rules of Evidence allows an expert to "testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data unless the court requests otherwise," and the district court did not request further factual information, the plaintiff should have been afforded the opportunity to proffer additional testimony. *Bulthuis*, 789 F.2d at 1317-18. The District Court claims that it struck the "proper accommodation" between Fed. R. Evid. 705 and Fed. R. Civ. P. 56. *Id.* at 1318. Thus, should the Court find that Plaintiffs' expert reports fail for one reason or another, Plaintiffs should be afforded the opportunity to provide the district court with further information as requested.

"commonly seen in DES exposed offspring and rarely seen in non-DES exposed individuals" was a statement of fact sufficient to draw a reasonable inference that the plaintiff's mother had in fact ingested DES during her pregnancy with the plaintiff. *Id.* at 1317. Because the expert was qualified to testify as an expert and the factual bases of the expert's opinions were stated, the affidavit withstood summary judgment.

Similarly, in *Thomas v. Newtson Int'l Enterprises*, the plaintiff brought a negligence action against the defendant after suffering an injury on the defendant's vessel. 42 F.3d at 1268. The plaintiff's theory was that the circumstances that caused her injury were an unreasonably dangerous condition. *Id* at 1270. The defendant moved for summary judgment. *Id.* The district court granted the motion even though the plaintiff supplied an expert declaration which stated that, in the expert's experience, the conditions on the vessel were unreasonably dangerous. *Id*. at 1268–69.

This Court reversed. *Id* at 1272. In holding that the district court's exclusion of the plaintiff's expert declaration constituted an abuse of discretion, this Court in *Thomas* reasoned that because the expert met Fed. R. Evid. 702's standard of possessing a "minimal foundation of knowledge, skill, and experience," and because the expert's opinion contradicted the defendant's assertions, the declaration should have been given enough credence to create

genuine issues of material fact. *Id.* at 1269–70; *see also, Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1441 (9th Cir. 1993) (reversing summary judgment where district court held one party's experts lacked credibility).

Like the experts in *Bulthuis* and *Thomas*, Plaintiffs' expert reports were prepared by experts who possess thorough knowledge of the mail delivery industry. For example, Mark Berkman, Ph.D. possesses 27 years of consulting experience and has studied the costs and benefits of the actions of regulatory bodies ranging from the EPA to OSHA, the CPSC to telecommunications. [RE 425-26(¶¶5-7).]

Moreover, Dr. Berkman possesses a B.A. in economics, an M.A. in Policy Analysis, and a Ph.D. in Public Policy Analysis. Dr. Berkman was briefed on the facts of the case, understood USPS's "cost-savings" analysis, and performed economic studies. And Dr. Berkman stated all of factual bases for his opinions. Because USPS has no basis to challenge Dr. Berkman's qualifications, and the factual bases of Dr. Berkman's opinions are clearly stated throughout his report, the District Court should have accepted Dr. Berkman's conclusion that "USPS has not made any reasonable showing of its costs, nor that refusing to provide centralized delivery service to San Francisco SROs will reduce its costs." [RE 425(¶2).]

Peter Jacobson is similarly qualified. Mr. Jacobson served as Chief

Technology Officer and Senior Vice President for USPS. He also served as the Vice President of Postal Systems for two large corporations. Moreover, Mr. Jacobson was provided the documents produced by USPS, deposition testimony of Defendant's employees, and other publicly available studies and reports. Mr. Jacobson's 40 year experience in the mailing industry and intimate understanding of this case more than qualify him as an expert. In light of his qualifications and his thorough study of USPS's objectives, the District Court should have accepted his conclusion that "USPS's mission of 'universal service' extends to SRO residents and ...[that] centralized delivery is the proper mode of delivery for SROs." [RE 508(¶2).]

The District Court did not exclude, and indeed had no basis to exclude, Plaintiffs' expert opinions. Because the experts are competent and qualified to testify and the factual bases of their opinions are clearly stated throughout their reports, the mere fact that their opinion refutes Plaintiffs' theory of reasonableness should have been sufficient to defeat summary judgment.

2. The Expert Reports' Created Material Issues Of Fact Sufficient To Defeat Summary Judgment

To withstand summary judgment, a nonmoving party need only establish that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As the Supreme Court has stated, "[c]redibility determinations, the weighing of the

evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 255. In its Order, the District Court admitted that there exist serious disputes over USPS's business acumen in choosing single-point delivery. [RE 9-10.] But in its analysis of the reasonableness of USPS's decision to chill the speech of San Francisco's working poor, the District Court gave complete credence to USPS's deeply flawed "cost-savings" argument. [RE 20-22.]

In light of the bright line prohibitions imposed upon courts at the summary judgment stage, and given the liberal nature of the Federal Rules of Evidence on expert testimony, to defeat summary judgment the nonmoving party need only make the minimal showing that 1) the expert is competent to give an expert opinion; and 2) the factual basis for the opinion is stated in the affidavit. *Bulthuis*, 789 F.2d at 1318; *see generally Schroeder v. Owens-Corning Fiberglass Corp.*, 514 F.2d 901 (9th Cir. 1975) (noting that summary judgment is especially inappropriate where the trial court needs the assistance of expert in order to make findings of fact). The District Court went beyond that here.

In fact, the District Court determined that USPS's "cost-savings" analysis trumped the expert testimony proffered by Plaintiffs' experts. [RE 21-23.] But only those expert reports lacking any factual foundation whatsoever may be discounted or excluded, allowing a court to determine that there is no disputed

issue of fact.[12] The District Court made no such finding here, nor could it, as Plaintiffs' expert reports explicitly state, with great detail, the factual bases for the conclusions drawn. [RE 430-37.] Because Plaintiffs' expert's opinions and conclusion refute the reasonableness of USPS's "cost-savings" rationale as applied to SRO residents, they create genuine issues of material fact.

By omitting Plaintiffs' evidence that centralized delivery could actually save USPS money, the District Court impermissibly weighed the evidence and based its holding on prohibited credibility determinations. *See generally Conn v. City of Reno*, 591 F.3d 1081, 1100 (9th Cir. 2011) (*vacated on other grounds by City of Reno, Nev. v. Conn*, 131 S.Ct. 1812 (2011) in light of *Connick v. Thompson*, _ U.S. _, 131 S.Ct. 1350 (2011)) ("We cannot affirm the grant of a motion for summary judgment where, as here, each side has garnered substantial evidence in support of its position, and important facts ...remain in dispute.").

In *Goldman v. Standard Ins. Co.,* the plaintiff applied for disability insurance through a program approved by the State Bar of California but was denied by the defendant. 341 F.3d 1023, 1025 (9th Cir. 2003). The plaintiff brought suit under various federal and state civil rights and unfair competition

[12] While in its reply in support of its motion for summary judgment, USPS argued in a footnote that "Plaintiffs' expert economist's opinions lack foundation or any basis," the District Court did not discount any of the expert declarations as lacking foundation, but instead improperly made conclusions and deductions about which expert statements to believe. [RE 21-23.]

statutes. *Id*. at 1025-26. The defendant moved for summary judgment, alleging that its decision to deny the plaintiff coverage was reasonable as a matter of law. *Id*. at 1034. The plaintiff supplied two expert declarations that refuted the defendant's assertions that its actions were reasonable. *Id.* at 1035. One expert simply declared that "nothing in his clinical experience, research or the professional literature" supported the defendant's claim. *Id*. at 1035. Moreover, both declarations "directly challenged the validity of [the defendant's] studies" by, *inter alia*, noting faults in the defendant's methodologies. *Id*. And one expert posited that the defendant would not have to "increase prices dramatically" if it undertook the plaintiff's preferred method of insurance application processing. *Id.*

This Court reversed the district court's grant of summary judgment even though the experts did not conduct their own original research or provide explicit details as to how they arrived at their conclusions. *Id*. at 1035-36. This Court reasoned that, because the proffered expert declarations called into question the reasonableness of the defendant's behavior, genuine issues of material fact appropriate for trial remained. *Id*. at 1036 ("Who is correct in this battle of experts is not for us to decide. We do conclude, however, that [plaintiff's] expert evidence is sufficient to deny [defendant] summary judgment . . .").

The expert reports here supply far more factual details than the declarations in *Goldman* that defeated summary judgment. For example, as discussed *supra*,

the 42-page Berkman Report performs a host of econometric studies, discusses its methodologies, explains why USPS's "cost-savings" rationale fails to withstand even minimal examination, and questions the efficacy of USPS's expert's report. [RE 424-65.]

Similarly, the 19-page Jacobson Report provides facts and conclusions that call into question USPS's reasonableness against the backdrop of its purposes. [RE 508-526.] Thus, because the cursory opinions proffered by the experts in Goldman were held sufficient to defeat summary judgment by this Court, the expert reports here, which apply the facts of the case to standard economics and opine based on thorough review of the applicable regulations, must similarly defeat summary judgment. Even if one assumes that the District Court were correct to state, as it did, that "[s]imply because plaintiffs' expert states that USPS may not lose as much as $2 million dollars a year does not operate to defeat defendant's summary judgment motion[,]" this characterization of the Berkman report is a straw man. [RE 23(17:5-7).]

Indeed, the Berkman Report does far more than merely stating that USPS may not lose as much as it declares; it states that USPS may actually be losing money by restricting centralized mail to SROs. [RE 433(¶20).] As the report clearly states: "USPS will not actually save money by refusing to provide centralized delivery service to SROs that do not already receive it." *Id.* After then

addressing the flaws in the methodologies of USPS's study, the report provides a table proving this conclusion. [RE 434.] Because the proffered evidence constitutes a thorough analysis of the facts at issue, directly contradicts the defendant's flawed expert report, and raises serious questions about the reasonableness of USPS's actions, Plaintiffs' expert reports raise genuine issues of material fact. *See State of California ex rel. California Dep't of Corrections v. Campbell*, 319 F.3d 1161, 1166 (9th Cir. 2003) (reversing district court's grant of summary judgment where district court did not mention majority of expert's opinion and mischaracterized opinion as speculative).

The experts' qualifications far exceed the liberal standards embedded in the Federal Rules of Evidence and this Court's jurisprudence. Further, the factual bases upon which the experts rely are clearly stated. Moreover, the experts' conclusions refute USPS's "cost-savings" justification as it pertains to the reasonableness of USPS's restriction on the SRO residents' speech. Thus, the expert reports are sufficient to create genuine issues of material fact. Accordingly, the District Court's grant of summary judgment must be reversed.

VI. The District Court Erred In Granting Summary Judgment Against Plaintiffs' First Amendment Claim

1. Restrictions In Mail Delivery Implicate The First Amendment.

"It is axiomatic that restrictions upon the mail system implicate the First

Amendment ...'The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . .'" Currier, 379 F.3d at 727 (quoting *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); *see also Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring in the judgment) ("A prohibition on the use of the mails is a significant restriction of First Amendment rights.").

Constitutional protection is not limited to those who seek to send mail; recipients of mail also have enforceable First Amendment rights. *See Lamont v. Postmaster Gen*., 381 U.S. 301, 307 (1965) (holding that requiring recipient to request in writing that "communist political propaganda" be delivered to him was an "unconstitutional abridgment of the addressee's First Amendment rights."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc*., 425 U.S. 748, 757 (1976) (acknowledging a First Amendment right to receive mailed advertising). The government may not "restrict speech in whatever way it likes." *Arkansas Educ. Television Comm'n. v. Forbes,* 523 U.S. 666, 682 (1998). Such restrictions must "be reasonable in light of the purpose of the property." *Currier*, 379 F.3d at 730.

Here, Plaintiffs contend that SRO residents' First Amendment rights have been violated because their free speech—their ability to have access to speech—has been severely curtailed by USPS's decision to use single-point delivery to their

homes.

2. The District Court Analyzed the Wrong Forum

A free speech analysis often rises or falls on how the forum in which the speech occurs is defined. This is because when a nonpublic forum is at issue, like here, the court views what is a "reasonable limitation" within that particular nonpublic forum. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985). Plaintiffs challenge USPS's use of single-point delivery as it is applied to SRO residents in the City. Thus, this challenge arises in the forum of City-wide mail delivery because City delivery is the forum to which the classification has been applied. Here, the District Court, at the urging of USPS, used the wrong forum in assessing Plaintiffs' claim, citing *Currier,* and concluding that USPS and the District Court improperly concluded that the relevant forum is only "centralized delivery to SRO hotels in San Francisco." [RE 57, 18-20.]

But the "general delivery" forum found to apply in *Currier* does not support using "centralized delivery" as the forum here. Indeed, *Currier* holds that the forum must be evaluated in light of the "purpose of the property," the purpose of the forum and all surrounding circumstances. *Currier*, 379 F.3d at 730. In *Currier,* the plaintiffs were homeless—so they lacked an address altogether, and all homeless were treated the same (unlike here, where only certain SRO residents and similarly situated apartment dwellers are receiving centralized delivery) by having

to travel to one postal office under the "general delivery" policy. But in *Currier*, this method of offering general delivery at branch post offices was not the forum considered, and neither was the mail system as a whole, but the forum was the general delivery system. *Id.* at 729-30. So even in *Currier*, the forum was broader than the proposed remedy. *Id.*

The plaintiffs in *Currier* were challenging the constitutionality of general delivery, the forum, because that is what they found too limited in geographic scope. In contrast, Plaintiffs are ***not challenging the constitutionality of centralized delivery***; centralized delivery is the proposed ***remedy.*** The access Plaintiffs are seeking requires the Court to look beyond the reasonableness of single-point delivery to SRO residents in isolation, and instead look to the reasonableness of providing single-point to some SRO residents and centralized to other SRO residents and apartment dwellers. Plaintiffs are seeking greater access to City delivery for SRO residents, and the District Court's focus solely on the remedy of centralized delivery was too narrow under *Currier*.

The District Court's error in identifying the forum resulted in excluding from the analysis the very conduct (*i.e.,* single-point delivery to multi-unit residential buildings) that burdens SRO residents' First Amendment rights. The District Court should have weighed whether USPS's decision to use single-point at certain SROs instead of centralized is reasonable—and USPS's reasons for

providing single-point to some SRO citizens and apartment residents and not other SRO residents.

3. The District Court Improperly Weighed Expert Testimony

For the reasons discussed above in Section V, the District Court's failure to weigh the expert evidence in Plaintiffs' favor as it was required to do in its reasonableness analysis, despite acknowledging the factual disputes, constitutes an impermissible disallowance of the experts' findings and conclusions. To that end, the District Court failed to conduct the proper "reasonableness" analysis appropriate for potential restraints of First Amendment speech.

CONCLUSION

The District Court correctly acknowledged that it could not resolve factual disputes on summary judgment, including conflicting expert testimony, and then proceeded to do just that, applying the law and resolving factual disputes in direct contravention to the applicable standards. Plaintiffs' claims for violations of equal protection and the First Amendment at the very least involve factual disputes about whether USPS has a rational basis and reasonable ground for its arbitrary classification of SROs as hotels to justify the discriminatory policy of denying centralized mail delivery to some SRO residents.

Accordingly, the Court should overturn the District Court's Order granting USPS's motion for summary judgment and remand the case so that the factual disputes can proceed to trial.

Dated: June 28, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13772 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font size and Times New Roman font style.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request oral argument.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs are aware of no known related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) June 28, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

s/ Erin R. Ranahan

Nos. 12-15473, 12-15490

In the
United States Court of Appeals
for the
Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff-Appellant,
and
CENTRAL CITY SRO COLLABORATIVE; SAN FRANCISCO TENANTS UNION; HOUSING RIGHTS COMMITTEE OF SAN FRANCISCO,
Plaintiffs-Appellants,

v.

UNITED STATES POSTAL SERVICE; JOHN E. POTTER; MICHAEL DALEY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Hon. Richard Seeborg, District Court Judge
No. 3:09-cv-01964-RS

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INTRODUCTION

The United States Postal Service's ("USPS's") purported rational basis for discriminating against SRO residents through inferior mail service depends on one disputed fact: whether residents of SROs are more transient than residents of apartment buildings. Only a more transient SRO population could conceivably support USPS's purported efficiency and cost-saving rationale for denying centralized delivery to SRO residents. None of the other grounds raised by USPS have any relevance to the cost of mail delivery, which USPS concedes is the critical issue. How a building is "taxed" or "advertised" [USPS Br. 37-38, 51-52] has no bearing on how much it costs to deliver mail to the building. Nor does the size or amenities of a rental unit affect delivery cost. [USPS Br. 9.]

USPS's argument fails because the evidence demonstrates that USPS's transience and cost saving justifications are a pretext for arbitrary and harmful discrimination. USPS does not exclude other types of residences from the benefits of centralized delivery based on residents' "transience." USPS did not look at or compare transience rates for any other multi-unit residential building before issuing the Luna Letter. Indeed, there is no evidence that USPS ever considers the "transience" of mail recipients in deciding whether to provide centralized delivery—even for apartments located near colleges or universities, where transience rates would likely be high. Unlike with SROs, USPS has made no

assumptions about transience to deny centralized mail delivery in buildings where the more affluent live.

USPS's cited reasons for its discrimination, including that some SRO residents share bathroom and cooking facilities, have absolutely no bearing on the costs of (or need for) mail delivery, but have everything to do with the economic status of SRO residents. USPS's differential treatment is thus based on an improper motive given SRO residents' economic disadvantage, rather than any real difference in the cost of mail service between the two classifications.[1] Moreover, while USPS's assumption might have seemed reasonable at an earlier (uneducated) time, the evidence demonstrates that SRO residents are *not* transient; most live in their units for *years*. Thus, "transience," a post-hoc discriminator applied arbitrarily by the USPS to deny services only to the poor, has no logical connection to the purported rational basis—cost savings—espoused by USPS.

USPS concedes that to defeat summary judgment, it is enough for Plaintiffs to raise triable issues of fact concerning ***either*** whether (1) the proffered basis for the classification was objectively false; ***or*** (2) that USPS acted based on an improper motive. [USPS Br. 47.] But as noted above, Plaintiffs have done both.

[1] Plaintiffs sought records regarding the basis for the classifications, though the District Court upheld USPS's privilege claims. [*See* RE 224(17:20-24).] Thus, Plaintiffs were unable to access this information that might offer further enlightenment on USPS's motive, or confirm USPS's classification was based sheer speculation. Nonetheless, it is clear that USPS's decision was not based on any analysis of actual costs, resources, or characteristics of SROs. [RE 388-89(533:18-534:6), 406-07(112:22-113:7), 376-77(230:18-231:16).]

Ignoring Plaintiffs' showing that USPS's asserted rational bases are pretextual and disputed, USPS offers a reading of this Court's and the Supreme Court's precedent that would render rational basis review meaningless. But rational basis review is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510, (1976); *Navarro v. Block*, 72 F.3d 712, 717 (9th Cir. 1995). Nor, despite USPS's selective quotations and arguments to the contrary, is this Court required to accept, without courtroom fact-finding, USPS's "speculation" about transience, when facts in the record contradict that speculation.

USPS also fails to convincingly explain how the distinction it makes ***within*** SROs is not arbitrary—it has drawn the line denying centralized mail service at 64% of SROs. USPS argues that its within-SRO line drawing is permissible "grandfathering" of units converted more than 90 days before the Luna Letter. Distinctions that arise from grandfathering are not automatically constitutional. They too must have some sound basis in both the law and reality. Here, they have neither. No evidence of "transience" supports providing mail delivery to *some* permanent SRO residents, while denying it to other, similarly situated permanent SRO residents.

It was not proper for USPS or the District Court to ***presume*** the legitimacy of USPS's asserted rational bases. Summary judgment in favor of USPS should be reversed, and this matter should proceed to trial.

ARGUMENT

I. Factual Disputes Warrant Reversing The Dismissal Of Plaintiffs' Equal Protection Claim on Summary Judgment

Irrational differential treatment gives rise to a valid claim for equal protection. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590-591 (9th Cir. 2008). Disparate treatment does not survive rational basis review if there is no logical connection between the classification and the purported state interest. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-450 (1985) (invalidating arbitrary distinction between permissible use permits in "Apartment House District."). In *Nordlinger v. Hahn*, the Supreme Court stated that equal protection "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." 505 U.S. 1, 10 (1992). That is exactly what is happening here—SRO residents are like apartment residents in all relevant respects, but are being treated differently with regard to their mail delivery based on pretextual and disputed reasons.

What Plaintiffs challenge here is not the decision to serve mail differently between apartments and hotels, but USPS's classification of SRO residents in San Francisco as hotel guests for purposes of mail delivery. In so doing, USPS has aligned 64% of SRO residents with hotel guests, instead of aligning them with residents of apartments and the 36% of SRO residents who receive centralized mail

delivery.[2] Despite disputed issues of fact about whether USPS's rationale is logically connected to the disparate treatment of 64% of SRO residents, USPS says it has no obligation to present evidence supporting the rationality of its classification—that so long as it provides an explanation, disputed issues of fact are irrelevant. The law does not support that assertion.

A. There Is A Triable Issue Concerning Whether the Postal Service's Asserted Rational Basis Is Pretextual

USPS asserts that its refusal to provide centralized delivery to *some*, but not all, SROs must be upheld because USPS has a rational basis for concluding that SRO residents are generally "transient" and therefore it would cost more to provide centralized delivery to SROs. Even if those facts were not disputed, USPS's argument fails as a matter of law for the simple reason that USPS's exclusion of some SROs based on transience is a mere pretext for discrimination. "Transience," and the additional costs associated with transience, are *not* factors USPS generally considers when determining whether to provide centralized delivery, and USPS has offered no rational basis for why these factors matter for SROs.

[2] USPS asks this Court to defer to the decision of the Postal Regulatory Commission ("PRC"), which in turn deferred to the District Court's order that is the subject of this appeal. The Court should reject that circular argument. The PRC proceeding involved distinct claims directed towards whether USPS was violating its regulations. [*See* RE 571-586.] In contrast, this lawsuit is not about whether regulations in isolation were violated, but whether classifications arbitrarily drawn by USPS, outside the context of any statute or regulation, are constitutional. The PRC does not have the authority to determine whether USPS's policy in classifying SROs like hotels for purposes of mail delivery violates equal protection and/or the First Amendment.

Lazy Y Ranch is instructive. There, this Court considered a bidding dispute where a conservationist group's bid was rejected. The defendants' proffered rational basis was cost-saving. But as this Court held, while saving money is a rational purpose, "it simply does not offer a basis for treating conservationists differently from other bidders." 546 F.3d at 590. Indeed, where "costs only matter in some cases—i.e., where the high bidder is a conservationist," the desire to save money alone is not a rational basis for discrimination. *Id.*

So too here. Cost only matters where a "transient" mail recipient lives in an SRO, not an apartment. There is no evidence that USPS excludes apartment buildings—like those providing month-to-month leases or catering to students—from the benefits of centralized delivery based on the "transience" of the residents. Indeed, there is no evidence that USPS *even considers* the alleged "transience" of building occupants when determining whether to provide centralized delivery. But USPS can and will allow a certain type of delivery that would actually be *more expensive*—just not when SRO buildings are concerned. [RE 348-349(93:11-94:7), 408-410(137:11-139:1).] Singling out SROs for different treatment—and subjecting them to different standards merely because they are SROs—violates equal protection, even if doing so furthered a rational governmental purposes. *Del Monte Dunes At Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1509 (9th Cir. 1990) (singling out one property to bear burden of remedying problems

government sought to correct violates equal protection even where government's purpose is rational).

USPS argues at length that efficiency and cost are legitimate governmental purposes. But that is undisputed. As the City and Association Plaintiffs are well aware, many governmental entities have to tighten the purse strings during difficult economic times. The desire to save money, however, does not allow governmental actors to irrationally discriminate against two similarly situated groups. *In re Levenson*, 587 F.3d 925, 933 (9th Cir. 2009). Nor can governmental actors selectively apply criteria to exclude one group from benefits routinely provided to others. *Lazy Y Ranch*, 546 F.3d at 590. By doing so here, USPS has violated the constitutional rights of SRO residents.

B. There Are Triable Issues Of Fact That Preclude Summary Judgment

It is notable that USPS spends pages upon pages assessing the weight and credibility of evidence about which it asserts there to be no triable issue of fact. Indeed, as USPS's brief confirms there are triable issues of fact with respect to at least three fundamental issues: (1) the alleged transience of SRO residents, (2) whether denying centralized delivery to SRO residents will save money, and (3) whether centralized delivery is more reliable than single-point delivery. The existence of these triable issues of material fact precludes summary judgment.

1. The Alleged "Transience" Of SRO Residents Is A Disputed Fact

USPS is simply wrong when it asserts that there is no triable dispute that SRO residents are more transient than apartment residents. Plaintiffs' evidence on the permanence of SRO residents should have precluded summary judgment. Specifically, Plaintiffs submitted evidence that:

- SRO tenants typically live in their SROs for years and are neither transient nor homeless. [RE 501(¶56), 468(¶11), 546.]
- Nearly 70% of SRO residents had been living in their SRO for two years or three years, and SRO residents commonly live in SRO units for far longer. [RE 469-70(¶17); 545; 657(¶3)(8-year resident), 661(¶1)(8-year resident), 666(¶1)(8-year resident), 674(¶1)(7-year resident), 677(¶1)(7-year resident), 644 (16:4-7)(12-year resident), 685(¶1)(5-year resident), 690(¶1)(6-year resident).]

This evidence undermines the factual underpinnings of USPS's purported belief that SRO residents are "transient."

USPS offers no evidence to the contrary. Instead, USPS claims that there are no factual disputes regarding transience because Plaintiffs' expert "admitted" in a 2009 memo that SRO residents are more transient than apartment dwellers. USPS ignores that the memo was prepared for SF-HSA Managers and City Department Representatives to provide a "starting point" for discussions about "how city departments might work together to serve SRO residents more strategically" and represented "initial efforts to understand the SRO community" [SRE 510]; and concluded that "[a]n SRO is a home...[although] an SRO is not an

ideal home, it is nonetheless a home with some degree of stability and often inexpensive rent." [SRE 510-511.]

Further, the memo does not (indeed cannot) undermine the since-developed statistical and testimonial evidence. In addition to the evidence discussed above, Plaintiffs submitted a 2011 survey (two years after the 2009 memo) that revealed that the majority of SRO residents—some 69%—stayed in the same SRO for over two years. [RE 469-70(¶17).] Two years is substantially longer than the usual lease term for an apartment. Another survey found SRO residents averaging three year stays. [RE 545-546, 501(¶56), 468(¶11).] In any event, the expert's 2009 statement is certainly not a conclusive fact that renders USPS's "speculation" that it would cost more to provide centralized delivery to SROs than apartment building immune from attack as a matter of law.[3]

Unlike the expert's report in this litigation, moreover, the memo did not cite any evidence about transience. In any event, any inconsistency in the expert's opinions goes to the weight accorded the evidence—classic fodder for cross-examination at trial, but an improper basis for a grant of summary judgment.[4]

[3] USPS has not submitted any evidence to suggest SROs and other apartment buildings differ in terms of the volume or type of mail delivered. Indeed, USPS did not submit any evidence at all to suggest that there are any differences between SROs and apartment buildings that relate to mail delivery.

[4] USPS has not attempted to demonstrate—because it cannot—that the alleged "admissions" are binding on Plaintiffs. Admissions are only binding in limited circumstances not present here. *See e.g.*, *SDV/ACCI, Inc. v. AT&T Corp*., 522 F.3d 955, 963 (9th Cir. 2008) (prior statement may be admissible evidence, but has no binding effect); *see also Sicor Ltd. v. Cetus Corp*., 51 F.3d 848, 859-860 (9th Cir.

2. Whether Single-Point Delivery Saves USPS Money Is A Contested Issue Of Fact

The parties' experts conflicted as to (1) the cost of switching all SROs in San Francisco to centralized delivery [RE 21(15:9-21)], (2) whether and to what extent it actually costs less to dump mail at a single-point at an SRO [RE 22 (16:23-25)], and (3) whether USPS's new policy provided any cost savings at all (*id.*). But, even if there were some cost savings involved when USPS provides single-point versus central delivery, there is no evidence that it costs more to provide centralized delivery to SROs than to similarly situated apartment buildings. [RE 225(18:24-26).] Even the District Court acknowledged that there were factual disputes about the "costs of single-point versus centralized delivery" [RE 9, 15], and the accuracy of USPS's calculations of costs given certain revenue offsets. [RE 23(n.6).]

The parties also dispute the number of conversions that could be required. [RE 11 (5 n.2).] Over one third of the total 499 SROs were already converted by the time the 2009 policy took place, and many were converted before the Mailbox Ordinance was enacted [RE 355-57(109:19-111:1), 546.]. USPS's exaggerated claims of a required "mass conversion" and whether the associated costs would, in reality, be *de minimis* demonstrate another factual dispute precluding summary

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1995) (statement in complaint may serve as judicial admission, but trial court must accord due weight to subsequent explanation); *Donovan v. Crisostomo*, 689 F.2d 869, 875 (9th Cir. 1982) (answers to interrogatories not binding admissions).

judgment. [*See also* RE 226, 437 (no evidence of cost increase despite conversion of 1/3 of SROs prior to 2009).]

USPS relies on *In re Apple Computer Sec. Litig*. to support the unremarkable proposition that existence of expert testimony does not *always* preclude summary judgment. 886 F.2d 1109, 1116 (9th Cir. 1989). In *Apple Computer*, the court granted summary judgment in a case concerning whether a company had publicly disclosed certain risks because, "where the evidence is as clear as that in this record" there was no need for the court to defer to the plaintiffs' "expert", as the inquiry did not require "any special competence to read the pertinent press reports" and determine the public disclosure. *Id.* at 1116. The court thus found no material question of fact would preclude judgment on that issue. *Id.* Here, by contrast, the facts about costs and transience are by no means something subject to similar verification—they remain disputed.

USPS also cites *Rebel Oil Co., Inc. v. Atlantic Richfield Co*., but the court there found that the expert assertions were "sufficient to create a genuine issue of material fact." 51 F.3d 1421, 1440-1441 (9th Cir. 1995). Nor is *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*. relevant, as the expert opinion there was found unsupportable ***after jury trial***, not on summary judgment. 509 U.S. 209, 235-236 (1993). The expert disputes here are more than sufficient to withstand summary judgment. [Plaintiffs' Opening Br. 47-56.]

Contrary to USPS's suggestion in its brief, Plaintiffs are not disputing that there is a budget crisis or claiming that saving money is not a legitimate objective. But an assertion of cost-savings does not license USPS to arbitrarily select one group, like dwellers in apartments located on particular streets or only some SRO residents, to bear the burdens associated with cost-savings. *Del Monte Dunes*, 920 F.2d at 1509. Indeed, "even assuming the legitimacy" of the government's purpose, SRO residents may not be "singled out to bear the burden of remedying the problem" USPS seeks to fix. *Id.* As USPS acknowledges, the line drawn between the two groups must be supported by a cost-savings rationale that is not proven to be objectively false. Because Plaintiffs have presented evidence to show that USPS's rationale is objectively false, summary judgment was improper.

3. Whether Centralized Delivery Provides More Reliable Mail Delivery Is A Contested Issue Of Fact

USPS fails to acknowledge the realities of the delivery problems certain SRO residents experience, when their neighbors—including other SRO residents and apartment dwellers—are getting their mail delivered in a more reliable manner. Instead, USPS asserts that delivering mail in bulk to the lobby of a building is just as secure—if not more secure—than providing centralized delivery. [USPS Br. 15, n.6, ¶2.] This argument ignores that the record below is filled with evidence, recognized by the District Court, of the problems that single-point delivery causes at SROs. [RE 17(11:15-17).] In support, USPS relies solely on the

number of official complaints made to the USPS about, which it concedes even the District Court recognized should not be given much weight. [USPS Br. 15-16, n.6. (citing RE 17, n.5).]

Further, whether USPS's complaint rate records provide an accurate assessment about mail delivery problems is questionable for poor residents—who often have reduced or no access to computers, phones, and other means of actually lodging complaints. [*See* RE 17, n.5.] Also, when residents lose benefits checks, they are likely more concerned with attempting to replace their benefits from the issuer of the check than with complaining to the postal service. It is also disputed whether USPS's complaint rates are reliable when compared to other means of documenting problems with single-point delivery. [*See* RE 13-14.] Thus, at the very least, this is another disputed fact warranting trial, and further demonstrates that summary judgment was premature.

C. Contrary to Its Assertions, USPS Cannot Avoid Clear Factual Disputes Under Rational Basis Review

USPS would have this Court believe that rational basis review requires this Court to merely rubber stamp USPS's actions. Despite all of the evidence suggesting that USPS's purported rationale is merely a pretext for discrimination and that USPS's actions do not even advance its purported rationale, USPS suggests that courts must simply defer without allowing Plaintiffs the opportunity

to contest the relevant facts at trial. USPS's argument is inconsistent with the law, and must be rejected.

1. Rational Basis Review Is Not Toothless

Under rational basis review, the State's justification for discriminatory government action "must find some footing in the realities of the subject addressed by the legislation," *Heller v. Doe*, 509 U.S. 312, 321 (1993), and the justification must be one that could "reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). As the Supreme Court has explained, the rational basis review standard "is not a toothless one." *Mathews*, 427 U.S. at 510. Indeed, where (as here) a governmental policy "exhibits [] a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment).

Defendants cite *FCC v. Beach Communications*, 508 U.S. 307 (1993) and *Heller v. Doe*, 509 U.S. 312, 322 (1993) to argue that Plaintiffs are not entitled to rebut facts here. But neither supports USPS's contention that any conceivable rational basis is sufficient to uphold the disparate treatment, or that line-drawing by

USPS is unreviewable.[5] [USPS Br. 43.] As courts have explained: "[a]lthough... the *Heller*…court[] did state that evidence need not *necessarily* be proffered in support of the rationality of a given policy, this proposition cannot reasonably be construed to mean that, once evidence is proffered, the court has no responsibility under Rule 56 to analyze whether there is a triable issue of material fact as to the policy's rationality." *Dahl v. Sec'y of U.S. Navy*, 830 F.Supp. 1319, 1326-1327 (E.D. Cal. 1993) (emphasis original). Thus, it would be incorrect to conclude (as USPS has done here) that "whether a challenged policy is rationally related to a legitimate governmental interest is [] always a question of law." *Id.*

Indeed, even in *Heller*, the Court analyzed whether the record supported the state's assertion and evaluated whether there was a logical connection, and after conducting that analysis, found "a sufficient basis in fact" for its premise. *Heller*, 509 U.S. at 322. Similarly, in *Beach*, the Court found that the government had satisfied rational basis review, because the *undisputed* factual record supported the logical connection between the state's classification and the interests it had identified. *See* 508 U.S. at 318-320.

Additionally, both *Heller* and *Beach* involved legislative action that was presumed valid, because restraints on judicial review of legislation "preserves to the legislative branch its rightful independence and its ability to function." *Beach*,

[5] Indeed, calling a basis "rational" at the outset presumes the conclusion that there is a reasonable, objective basis in fact for the classification. But as explained herein, any such presumption is rebuttable.

508 U.S. at 307-308. But a "legislative choice" or "statutory classification" is not at issue here; neither is an official regulation or challenged statute. Instead, Plaintiffs challenge an internal 2009 agency action to cease centralized delivery to SROs and categorically classify SROs in a discriminatory manner—to arbitrarily draw the line so that SROs are classified as hotels instead of apartments for mail delivery.

Whether challenging a legislative enactment or an agency decision, a plaintiff is permitted to show facts establishing an arbitrary or irrational classification was made with no footing in reality. *Lazy Y Ranch*, 546 F.3d at 590-591 ("[O]ur circuit has allowed plaintiffs to rebut the facts underlying defendants' asserted rationale for a classification..."); *see also Lockary v. Kayfetz*, 917 F.2d 1150, 1155-56 (9th Cir. 1990) (equal protection claim survived summary judgment under rational basis review where plaintiff challenged underlying assertion of water shortage); *Navarro*, 72 F.3d at 717 (reversing summary judgment in favor of the defendants dismissing the plaintiffs' equal protection claim because classification failed rational-basis standard); *Immigrant Assistance Project of Los Angeles County Federation of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842 (9th Cir. 2002) (finding "no 'reasonably conceivable state of facts that could provide a rational basis for the classification' between similar situated students.") (citing *Heller*, 509 U.S. at 320). Indeed, this Court has consistently cited *Heller* and

Beach while nevertheless finding that a challenged classification did not survive rational basis review. *See Lazy Y Ranch*, 546 F.3d at 589.

2. While Either Objective Falseness Or Improper Motive Alone Would Suffice To Warrant Trial, Plaintiffs Have Presented Both Here

USPS asserts that there can be "no courtroom fact-finding" under rational basis review unless Plaintiffs offer evidence to suggest that USPS's proffered rational is pretextual. USPS insinuates that "pretext" means evil motive. But it does not. As USPS concedes, "[o]n summary judgment, an equal protection plaintiff ***may show pretext*** by creating a triable issue of fact that ***either:*** (1) the proffered rational basis was objectively false, ***or*** (2) the defendant actually acted based on an improper motive." (emphasis added) [USPS Br. 47] (citing *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004) *overruled in part on other grounds* by *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025 (9th Cir. 2007)). In this case, Plaintiffs have provided evidence that USPS's rationale is both: (1) objectively false; *and* (2) based on the improper motive of discriminating against (perhaps better described as lack of regard for) the poor. Either is sufficient to show pretext.

a. Summary Judgment Should Have Been Denied Based On Plaintiffs' Evidence Of Objective Falseness

Here, Plaintiffs have offered evidence that USPS's assumptions about transience—the alleged assumption that led USPS to change its mail delivery

policy towards SROs to align with hotels and with which it purports to justify it cost-savings—was objectively false. Plaintiffs presented evidence that the majority of SRO residents stay in the same place for three and often many more years. USPS's grounds for presuming SRO residents to be more transient include USPS's unsupported claim that "SRO hotels lack certain features, *i.e.*, security deposits and long-term leases, likely to discourage transience." [USPS Br. 42.] But to counter this bald assertion, Plaintiffs have proffered evidence indicating that these requirements often function as barriers to permanent housing for typical SRO residents (who are impoverished), and that the lack of such requirements in SROs actually encourages stability and permanence, ***not*** transience, because those types of financial barriers prevent SRO residents from obtaining a residence elsewhere. [RE 499-500(¶52), 543-545.] The remaining stated assumptions by USPS about the tax procedures and codes, and the manner in which an unspecified number of SROs allegedly advertise availability for short-term stays likewise do not demonstrate the overall transience of SRO residents when compared to apartment residents.

Indeed, this Court has held that equal protection forbids the state from relying on proffered justifications that are factually false. *See Squaw Valley*, 375 F.3d at 946; *Lockary*, 917 F.2d at 1155 ("Although a water moratorium may be rationally related to a legitimate state interest in controlling water shortage,

[plaintiffs] have raised triable issues of fact surrounding the very existence of a water shortage").

As the District Court explicitly recognized at the hearing on USPS's motion for summary judgment below, there are factual issues below to on whether to accept USPS classification of SROs as hotels. [RE 32.] Just like in *Lazy Y Ranch*, this Court need not accept USPS's characterizations of *what classification it made*. And there is indeed a factual record to support the conclusion that SROs are for all relevant purposes when considering mail delivery, more akin to apartments than hotels, such that a trial is warranted.

If SRO residents are not, in fact, more transient that apartment dwellers—and there is ample record evidence that they are not—then USPS's cost-savings basis is also objectively false. *See also Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (finding no logical connection between individual's ability to understand politics and individual's ownership or non-ownership of land); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding no logical connection between stimulating the agricultural economy and providing food stamps only to households containing related people); *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971) (finding, where the government had adopted policy that inability to pay was not sufficient reason to deny transcript to felony defendant, there was no logical reason that policy should not extend to misdemeanor defendant). So

necessarily, if as USPS acknowledges, its cost savings rational is based on its assumption that SRO residents are transient [USPS Br. 33-34], and transience in SROs is a myth that Plaintiffs disprove, the basis for USPS's distinction is objectively false and there is no logical connection between the classification and the objective.

3. Summary Judgment Should Have Been Denied In Light Of Plaintiffs' Evidence That USPS Considered Evidence Of Poverty In Its Decision To Provide Lesser Service To SRO Residents

In addition, the factors that USPS identifies to show that SRO residents are "transient" suggest that that the USPS's asserted rational basis is based on improper considerations. Many of the characteristics cited by USPS in support of its classification are associated with low income residents, such as size of the rooms, the need to share bathrooms and kitchens, and the physical resemblance to smaller hotel rooms. [RE 543-546.] What does the fact that these SRO residents cannot afford a separate kitchen or a larger living space have to do with their mail delivery? These reasons USPS cites to justify its discrimination—from the structural and physical resemblances to hotels to the method in which taxes are delivered—have absolutely no bearing on the need or right for a San Francisco resident to receive reliable mail delivery.

The primary distinction between SROs and apartments is that residents of the former are among the poorest citizens in the City and often rely exclusively on

government aid to survive. [RE 467-68(¶¶6-7), 546.] Otherwise, both SROs and apartments are residential buildings where tenants rent rooms. Like apartments, critical mail such as benefits checks, medical information, and family correspondence that is not commonly sent to guests at hotels, is sent—through the mail—to SRO residents. [RE 657-58(¶5), 645-46(27:20-28:16), 682(¶7), 685(¶2).]

In *City of Cleburne*, the Supreme Court found no logical connection between the purported classification and the state's reasoning for discrimination. The Court also observed, "singling out the retarded for special treatment [in some circumstances] reflects the real and undeniable differences between the retarded and others…but why this difference warrants [the challenged classification]…is not at all apparent." *City of Cleburne*, 473 U.S. at 444; 449-450. The Court concluded in remanding the case to determine whether where there was a logical connection between the classification and the state interest, that the classification "appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 450. USPS's classification here is likewise irrational.

Plaintiffs do not dispute that wealth is not a suspect class. However, under rational basis review, courts are still permitted to consider the impact of a challenged statute or policy on certain economic classes. For example, in *Craigmiles v. Giles*, the court found no rational relationship to the government's stated purpose, finding that "[n]o sophisticated economic analysis is required to see

the pretextual nature of the state's proffered explanations" for the amendment at issue. 312 F.3d 220, 228-229 (6th Cir. 2002). The court found that an amendment that protected monopoly rents by funeral directors conferred a "privilege [on] certain businessmen over others at the expense of consumers" was "not animated by a legitimate governmental purpose" and thus could not survive rational basis review. *Id*.

For the multiple reasons set forth above, USPS's proffered rational basis for excluding SRO residents from the benefits of centralized delivery is pretextual, and the judgment in favor of USPS should be vacated.

D. USPS's Grandfathering Explanation For Converting Over 1/3 of SROs Has No Application Here And Highlights USPS's Equal Protection and First Amendment Violations

USPS waits until nearly the end of its brief to finally address the clear arbitrariness in discriminating not just between most SROs and apartments, but discriminating within the SRO classification based on conversions that took place more than 90 days prior to the 2009 policy taking effect. USPS also states that this policy of not converting SROs from single-point to centralized delivery, after having converted over 30% of SROs to centralized delivery, is supposedly "longstanding" and therefore is somehow entitled to more deference. [USPS Br. 29.]

First off, USPS's policy is not "longstanding." Even ***before*** the enactment of the Mailbox Ordinance, USPS converted many SROs from single-point to centralized delivery, thus agreeing that SROs qualified for centralized delivery. [RE 355-57(109:19-111:1).] This process accelerated after the City enacted the Mailbox Ordinance, and more SRO owners began installing mailboxes for their residents. [RE 370-72(128:13-130:23).] USPS did not alter its longstanding practice of allowing SROs to convert to centralized delivery until it announced a new internal 2009 policy in the Luna Letter. [RE 392-394.]

Also, long before the Mailbox Ordinance passed, USPS's Postal Operations Manual ("POM") § 631.45 provided for mail delivery to individual mailboxes in a "residential building containing apartments or units occupied by different addressees (regardless of whether the building is an apartment house, a family hotel, residential units, or business units in a residential area and regardless of whether the apartments or units are owned or rented)"—so long as the building has three or more residential units, a common entrance, a common address, and a USPS approved bank of mailboxes installed at a central, accessible location. [RE 197-98; POM, Issue 8, 7/16/1998, http://www.npmhul310.org/manuals/POM.pdf (last visited 9/28/2012).]

This definition expressly acknowledges that some hotels are residential and are among the buildings that qualify for centralized delivery, provided they meet

structural requirements, which SROs clearly met.[6] Indeed, the evidence demonstrates that the term "family hotel" refers to what we now call "SROs." [RE 483-484 (¶¶16-17).] This is why USPS was proceeding with conversions. To now retroactively declare that all prior conversions made before the policy change "errors"—in order to shoehorn USPS's argument that it was permitted to grandfather some SROs under its 90 day error correction POM § 631.7 (USPS Br. 53)—is simply false, as there was nothing explicitly forbidding conversion of SROs to centralized delivery before, and there is still nothing forbidding it now.

Moreover, even if the policy were "longstanding," just because improper discrimination has been going on for far longer than it should have, does not immunize it from constitutional challenge. *Walz v Tax Comm'n*, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use"); *see also, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (invalidating longstanding public school segregation practices on equal protection grounds); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (invalidating longstanding public school-sponsored Bible reading practices on Establishment Clause grounds).

[6] Contrary to USPS's implications (USPS Br. 7 & 31 n.9), this case has nothing to do with dormitories, where there is a constant state of known and expected transience rates, and custodial supervision over the students assumed by the colleges and universities. Even USPS's own regulations (USPS Br. 7, POM § 631.54) provide that dorm housing involves an institution that has assumed some custodial responsibility over the residents, which leads these institutional custodians to take more interest than those at SRO front desks to ensure reliable mail delivery to its residents.

There are several reasons why grandfathering has no application here.[7] The cases USPS cited each dealt with grandfathering provisions built into the challenged statutes or regulations. They also involve situations where the grandfathered rights attached to individuals who had a demonstrated reliance interest or other particular reason supporting exemption from the new statute or regulatory scheme. *See City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (upholding grandfather clause for pushcart vendors, allowing only vendors that had continually operated for 8 years to continue); *Maldonado v. Morales*, 556 F.3d 1037, 1048 (9th Cir. 2009) (addressing provision preventing billboard advertising by landowners, but grandfathering in owners whose billboards were already in place in 1967, when the ban was enacted); *McCann v. City of Chicago*, 968 F.2d 635, 638 (7th Cir. 1992) (disparate retirement age for police force covered by new ordinance as opposed to those covered by existing bargaining agreement did not violate equal protection violation); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 178 (1980) (upholding grandfathering provision that distinguished between railroad employees with varying years of experience); *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 531-532 (6th Cir. 1998) (certain legislation

[7] It was not until this year, on April 5, 2012, that the regulation was amended to remove the parenthetical in POM § 631.45 that explicitly acknowledged that whether an addressee lived in a hotel, apartment, or "residential unit" was immaterial. But the deletion of this explanatory parenthetical statement does not mean that there is a material difference. USPS still has discretion to approve and deliver to banks of mailboxes, discretion which it is now exercising in an arbitrary way in violation of the constitution.

relating to firearms with "grandfathering" provision unconstitutional in violation of equal protection because "[t]here simply exists no rational distinction between the individual plaintiffs in this case and those persons who registered their firearms during a thirty day window in 1989 . . ."); *Spraic v. United States R.R. Ret. Bd.*, 735 F.2d 1208, 1212 (9th Cir. 1984) (analyzing grandfathering relating to railroad retiree's denial of benefits under both the Railroad Retirement and Social Security Acts). The *Spraic* court found a difference where eligibility benefits that had not already been determined were eliminated, as the legislation chose to protect those retirees who had their eligibility for duel benefits determined prior to the effective date of the act. 735 F.2d at 1212.

Grandfathering must also be rational. *See e.g., Peoples Rights Org.,* 152 F.3d at 531-532 (6th Cir. 1998) (grandfathering provision in legislation contained no rational distinction when it protected persons who registered their firearms during a thirty day window). If the purpose for policy is because SRO residents are more transient, then a grandfathering provision that treats them as less transient and therefore reliant on centralized mail delivery is not rational. Even if USPS could assert "reliance" interests in the SROs themselves and not individuals, at the very least the grandfathering should support ***all*** converted SROs prior to the policy change. Here, those SRO residents that had already been converted within the prior 90 days to the time the policy changed then had their benefits arbitrarily

yanked is situated quite differently than the plaintiff in *Spraic* who never had his dual benefits kick in. None of those cases relied on by USPS upheld the internal policies when, like here, they originally granted—then retroactively yanked them.

E. Underinclusiveness Renders USPS's Classification Irrational

Where similarly situated residents are treated differently, underinclusiveness alone can render the classification irrational. USPS's arbitrary classification of SROs also fails because cost savings is not rational where it is underinclusve. *Levenson*, 587 F.3d at 932-933 ("dispos[ing] of quickly" an attempt to justify a discriminatory policy prohibiting same-sex spouses from receiving health benefits as "cost-savings" where "the government could save far more money using other measures, such as by eliminating coverage for all spouses, or even every fifth or tenth spouse.").

To support USPS's argument that its underinclusivenss is not fatal to its classification, USPS cites *Seariver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662 (9th Cir. 2002), where this Court upheld legislation that singled out Exxon Valdez, keeping then notorious oil tanker that had severely damaged the environment from sailing the waters of Prince William Sound. *Id.* at 680. This Court found it was reasonable to single out the tanker based on the prior oil spill. *Id.* Unlike *Seariver*, there is no justification based on prior activity by SRO residents to single them out to receive inferior mail delivery service.

USPS also argues that legislatures may solve problems incrementally. [USPS Br. 55.] But the notion that the Legislature is not required to tackle all parts of a problem at once has no application here. It is well settled that USPS cannot solve a budget problem by arbitrarily selecting a certain population, presuming that population has a certain characteristic related to cost, as a means to then "incrementally" reduce costs.

II. There Are At Least Factual Issues About Whether USPS's Policy Violates The First Amendment

Where there are factual disputes about whether a reasonable limitation on speech between groups within a particular forum, summary judgment is improper. *Alpha Delta Chi-Delta v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011) (reversing summary judgment on a free speech claim because "the record d[id] not adequately explain why some official student groups … appear[ed] to have membership requirements that violate[d] the school's nondiscrimination policy" and others did not).

USPS argues it is irrelevant whether the District Court identified the proper forum. [USPS Br. 59.] Not so. The restriction on speech must be reasonable when "assessed 'in light of the purpose of the forum and all the surrounding circumstances." *Cogswell v. City of Seattle*, 347 F.3d 809, 817 (9th Cir. 2003); *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2003) (restrictions must be "reasonable in light of the purpose of the property"). Thus, to properly assess reasonableness, as

an initial matter the court must identify the correct forum and purpose of that forum.

Similar to its argument on equal protection, USPS seems to take the unfounded position that this Court should simply adopt is explanation of reasonableness without performing any meaningful review. That is not the law, and the District Court's error in identifying the forum resulted in excluding from the analysis the very conduct (*i.e.*, single-point delivery to multi-unit residential buildings) that burdens SRO residents' First Amendment rights. [Plaintiffs Opening Br. 59.] Irrespective of whether the remedy and scope of forum may be equivalent in limited circumstances, here, as in *Currier*, the proper forum is the broader City-wide mail delivery.

The District Court's determination that the forum was centralized delivery was too narrow under *Currier*. By failing to evaluate the forum in the context of City delivery here, it was easier for the District Court to dismiss the First Amendment violations because they were viewed in isolation rather than the proper context.

CONCLUSION

SRO residents are being discriminated against by USPS's refusal to provide mail delivery as it does to other similarly situated San Francisco residents. Plaintiffs have submitted enough evidence to withstand summary judgment under

rational basis review; evidence that calls into question whether the classification of treating SROs like hotels for mail delivery, based on beliefs of perceived transience, has any footing in reality. For these and the additional reasons set forth in Plaintiffs' opening brief, Plaintiffs respectfully request that the Court reverse the District Court's grant of summary judgment so this matter can be resolved at trial.

Dated: September 28, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font size and Times New Roman font style.

Dated: September 28, 2012

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) September 28, 2012.

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