

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

UNITED STATES POSTAL SERVICE,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 16-4815 WHA
)	
CITY OF BERKELEY,)	
)	San Francisco, California
Defendant.)	Thursday
)	January 11, 2018
)	10:00 a.m.

TRANSCRIPT OF PROCEEDINGS

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Official Reporter - US District Court
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FARIMAH BROWN - City Attorney
JESSICA MAR - Deputy City Attorney

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P R O C E E D I N G S

JANUARY 11, 2018

10:13 a.m.

THE CLERK: Civil action 16-4815, United States
Postal Service versus City of Berkeley.

Counsel, please approach the podium and state your
appearances for the record.

MR. SCHWARTZ: Good morning your Honor. Andrew
Schwartz for the City of Berkeley. I'm here with Stephanie
Safdi of my firm, also representing the City of Berkeley.

The City Attorney Farimah Brown is here, and Deputy City
Attorney Jessica Mar.

THE COURT: Welcome to all of you.

MS. BERMAN: Good morning, your Honor. Julia Berman
with the Department of Justice representing the Postal Service.

With me at counsel table, also with the Department of
Justice representing the Postal Service, are Jacqueline Coleman
Snead and Stewart Robinson.

And then from the Postal Service, Tom Samra and Janine
Castorina.

THE COURT: Welcome to all of you.

We're here on motions for summary judgment. I don't want
to clear the courtroom, so I hope you can talk around the
problems, but, frankly, if I have to, I'm going to say that
there is nothing in here worth keeping under seal. But you can
try to talk around these problems if you -- on the dollar

1 amounts if you wish.

2 **MR. SCHWARTZ:** Your Honor, are you on --

3 **THE COURT:** I'm also happy to just take it under
4 submission. I don't need argument.

5 Here is my problem. I -- you all agree that this was
6 about a one-third hit, one-third hit to the value, right?

7 **MS. BERMAN:** No, your Honor.

8 **THE COURT:** That's what you agree, both of you agree.
9 I saw the numbers.

10 **MS. BERMAN:** Your Honor, according to the City's
11 expert, the hit to the value was a 49 percent change in the
12 value of the property, and then the developer who would have
13 purchased the property, his testimony at his deposition -- and
14 to back up a step --

15 **THE COURT:** I don't care. What is your view of how
16 much it was diminished, 49 percent?

17 **MS. BERMAN:** Approximately that, your Honor. Our --
18 the -- so the City --

19 **THE COURT:** So it can still be sold for 51 percent,
20 right?

21 **MS. BERMAN:** That may be the case, your Honor. The
22 developer who would have bought it said that the value was --
23 and this is a quote -- destroyed. That the property is now
24 worth very little.

25 Your Honor, we would urge that as the Court considers this

1 case, that the Court keep in mind as the Supreme Court -- that
2 as the Supreme Court's analysis in the *City of Burbank versus*
3 *Lockheed* went, to consider what happens if other jurisdictions
4 follow suit. We're not just talking about the Postal Service's
5 ability to sell one isolated piece of property. We're talking
6 about an agency that has a responsibility, a universal service
7 obligation to serve the whole country and to be
8 self-sustaining.

9 The Government Accountability Office in a recent report
10 said that the financial situation of the Postal Service is such
11 that it's actually putting the mission at risk. It's
12 sustaining annual losses in the billions. And that's been the
13 case for the last ten years.

14 **THE COURT:** Just a minute. Expert retained by USPS
15 currently worth -- I can call out the numbers if you want, but
16 to me it looks like about 60 percent of what it would be worth
17 without the overlay. Your own expert.

18 **MS. BERMAN:** Yes, your Honor. That was -- that was
19 the appraiser's testimony. And then there was also a valuation
20 expert, somebody who literally wrote -- wrote the textbook on
21 commercial real estate who said, "Minimum of 30 percent and
22 possibly over 50 percent." But your Honor --

23 **THE COURT:** Meaning the hit is 30 percent or the hit
24 is 70 percent? Meaning the diminution in value?

25 I don't know what you mean by 30 percent.

1 **MS. BERMAN:** Your Honor, I -- I believe the property
2 would be worth 30 to 50 percent or more without the overlay in
3 place. But your Honor --

4 **THE COURT:** No, no. Those are apples and oranges. I
5 need a number that says what the decrease in value is as a
6 result of the overlay so that I can compare it to the other
7 numbers like that.

8 So you're giving me what -- you're telling me with the
9 overlay if we took away the overlay, the value would go up 30
10 to 50 percent. That's not the same math.

11 **MS. BERMAN:** Your Honor, I believe -- when we did the
12 math with the appraiser's numbers that was retained by the --
13 by the Postal Service, I believe it was 39 percent. And that's
14 in our papers, but --

15 **THE COURT:** What's the name of that person?

16 **MS. BERMAN:** Tim Runde.

17 **THE COURT:** That's who -- listen. That's who I'm
18 quoting, right here. Runde & Partners, expert retained by
19 USPS, estimated that the Post Office is currently worth -- I'll
20 just say X -- with the overlay, but would be worth Y without
21 the overlay. And the difference is, if you take the higher
22 number, it's about 60 percent, maybe 61 percent.

23 So you could still net 61 percent of the value without
24 the -- even with the overlay, you'll get 61 percent is what I'm
25 trying to say. That's what Runde's report said, right?

1 **MS. BERMAN:** Yes, your Honor, potentially. But, your
2 Honor, under the case law that -- a number of different cases,
3 most saliently, the *Clean Air Markets Group* case, the overlay
4 need not make it impossible, literally impossible to sell the
5 property. If it devalues the property in a way that makes --
6 that obstructs the Postal Service's ability to manage its
7 finances and the potential for a 60 percent -- for a sale at
8 only 60 percent of market value, the Court, under the Supreme
9 Court's analysis in that *City of Burbank's* case, should examine
10 that potential not just with respect to what happens if that
11 occurs in one case, but we've already seen a similar kind of
12 overlay or ordinance be put in place in another jurisdiction.
13 If this ordinance is upheld as constitutional, we can be sure
14 that other municipalities will follow suit.

15 And as we laid out in our papers, part of Congress's
16 purpose, express purpose in putting together the Postal
17 Reorganization Act was to give the Postal Service the ability
18 to cut costs and to also raise revenue and manage its
19 operations to be self-sustaining. There is a parallel between
20 the obstruction and interference through devaluation here and
21 what happened in the *Clean Air Markets Group* case, your Honor.

22 In *Clean Air Markets Group versus Pataki*, the
23 Second Circuit case that the Court relied on in the Motion to
24 Dismiss order, that case didn't have a complete ban on the sale
25 of -- in that case, it wasn't real property. It was emissions

1 allowances. The City of -- or excuse me. The State of New
2 York did not interfere with the resale of those allowances by
3 banning their sale. In fact, it wasn't even that they couldn't
4 be sold in most instances. It was interference with resale to
5 only 14 states. It was the states that were upwind of New
6 York. And for those instances of resale, there were
7 restrictions put in place by the State of New York.

8 Your Honor, that level of interference was sufficient for
9 the Second Circuit to find that that significantly devalued the
10 emissions allowances that Congress meant to be freely traded,
11 and so that interference was preempted and unconstitutional.

12 And in this case, your Honor, having done the math, the
13 restriction to 14 states, that's less than 30 percent in terms
14 of where those emissions allowances could have been sold.

15 Here, the restriction on the Postal Service's ability to
16 sell its property cuts out much more of the market. And I'll
17 refer to Professor Miller's analysis in his report. He
18 assessed that 80 percent of the potential renters or occupants
19 of the space are excluded by the overlay. Your Honor, that's
20 a -- that's substantial interference with the Postal Service's
21 ability to carry out its functions.

22 **THE COURT:** Who gave that? Say that testimony again.

23 **MS. BERMAN:** Professor Miller. That's the second
24 valuation expert to whom I referred earlier.

25 **THE COURT:** What was his point? Eighty percent what?

1 **MS. BERMAN:** The overlay restricts the market of
2 potential occupants for the property, to remove 80 percent of
3 the possibilities in the market.

4 **THE COURT:** Is it up to 80 percent or 80 percent?

5 **MS. BERMAN:** Eighty percent. Eighty percent.

6 **THE COURT:** All right. But that still leaves
7 20 percent.

8 **MS. BERMAN:** It does, your Honor, but that is a
9 substantially greater amount of interference than that which
10 was found to be unconstitutional by the Second Circuit in the
11 *Clean Air Markets Group*.

12 And some of the other -- the cases that refer to the
13 Postal Service specifically, *Town of Greenwich* and *City of*
14 *Hollywood*, where Courts have found violations of the supremacy
15 clause in terms of interference with the Postal Service opening
16 Postal Service facilities. Those aren't cases where cities
17 just said you may not open a facility. Those are situations
18 where cities imposed a permitting fee or they might have
19 required certain adjustments in the construction. They're a
20 much more diminimus form of interference.

21 Here, we have at a minimum significant interference. And,
22 your Honor, I would be remiss if I did not mention that the
23 mayor who introduced the overlay, a counsel member, assessed
24 himself that the overlay prevented the sale of the Post Office
25 building.

1 Your Honor, on those facts there cannot be a genuine
2 dispute as to whether or not the overlay has the effect of
3 preventing the building from being sold. It's not that a sale
4 is impossible. It's that an economically viable sale is
5 impossible. And this is important to the Postal Service in
6 terms of being able to manage its operations nationwide.

7 As I said, there is strong reason to believe that this is
8 going to proliferate to other jurisdictions. And that's the
9 reason why we're here seeking relief from the Court.

10 **THE COURT:** Let's hear from Berkeley.

11 **MR. SCHWARTZ:** Thank you, your Honor.

12 I think that the Court has identified the -- one of the
13 problems here, which is that there is nothing in the Postal
14 Reorganization Act that would indicate a clear and manifest
15 purpose to preempt local land use regulation that might reduce
16 the price at which the Post Office could dispose of its surplus
17 property.

18 There is nothing in the Act or evidence that the Postal
19 Service has provided that would allow the Court to create such
20 a test. There is no stopping point to that kind of test.

21 But I would like to back up and get to the -- to whether
22 that diminution in value test is even a relevant test here,
23 because the test is inability to sell. The Postal
24 Reorganization Act says you can sell your property. You're
25 authorized to sell your property. That's all it says. It

1 doesn't say anything about the conditions under which the
2 property could be sold.

3 And -- and the doubts as to the -- the, you know,
4 Congressional intent to preempt, particularly in local land use
5 regulation must be resolved against preemption.

6 So here in denying the Motion to Dismiss, the Court laid
7 out the test that is the only workable test or the only test
8 that can be -- that could be supported by the Postal
9 Reorganization Act, which is the overlay is preempted only if
10 it is effectively equivalent to a total frustration of the
11 Service's ability to dispose of its property. So a total
12 frustration --

13 **THE COURT:** Where do you get that language?

14 **MR. SCHWARTZ:** That was from Document 43 at Page 10.
15 That was the Court's order denying the City's Motion to
16 Dismiss.

17 **THE COURT:** Read it to me again. "Totally." What
18 does that say? Totally what?

19 **MR. SCHWARTZ:** (As read)

20 "Total frustration of the Service's ability to
21 dispose of its property."

22 A total frustration.

23 And in that hearing, the Court said, "Well, how much is
24 too much?" And at the end of that hearing, the Court issued
25 its order where that -- it laid out the test.

1 So what we've got is, based on a Postal Reorganization Act
2 and the test the Court laid out, it's got to be a total
3 frustration, which means you can't sell it for anything more
4 than a nominal amount.

5 Now, I -- I -- the Post Office's own expert says that with
6 the overlay, the property could be sold for a very large
7 number, and that should be the beginning and end of the inquiry
8 about preemption, we think.

9 The Service contends that the test should be reduction in
10 value and that it should be run more like a business, according
11 to the Postal Reorganization Act, but just saying that the
12 Postal Service should be run like a business is not a clear and
13 manifest statement by Congress. That the Postal Service should
14 get this wild card; anytime it wants to sell its property, it's
15 going to be exempt from local zoning.

16 The Postal Reorganization Act doesn't say that the Postal
17 Service gets to maximize its revenue from sales. Again, the
18 problem is there's no stopping point in that -- in that theory.
19 How much -- how much diminution in value is relevant? There's
20 no way that the Court could adopt a test that would address
21 this situation in any workable way.

22 There is no authority to support this wild card. The
23 *Mount Olivet* case is a good example of a situation where the
24 Court found that there is no such exemption from local zoning
25 for property that the federal government sells. The Postal

1 Service claims that it was required to withdraw the property
2 from the market after the overlay, and that's -- it wasn't
3 forced to withdraw the property. It could have sold the
4 property. According to its own appraiser, it could have sold
5 it for a lot of money and it could have, in selling the
6 property, reduced its cost, which the Postal Service says was
7 one of its objectives.

8 So the *North Dakota* case said:

9 "It is one thing to say is that the State may not
10 pass regulations which directly obstruct federal law."
11 That's not being alleged here. "It is quite another
12 to say that they cannot pass regulations which
13 incidentally raise the costs to the military."

14 That's exactly what happened in *North Dakota*, where the
15 liquor suppliers were selling liquor to the federal government
16 and raised their costs. And the Court said this is an
17 incidental impact of state regulation that applies across the
18 board to other similarly situated suppliers and that the
19 federal government doesn't get a wild card exemption from the
20 regulation.

21 And so the Service offers no standard for what would be an
22 economically viable sale. How much reduction would be enough?
23 Is it a trivial amount? Is it a large amount? In this case,
24 you know, there's -- their own appraiser indicates that there
25 would be a 39 percent reduction in the value of the property --

1 **THE COURT:** That's one witness. But there is other
2 testimony, too, along the lines of the Hudson fellow, who said
3 that he believed the overlay destroyed the Post Office and made
4 it worth very little. And then there's an email from your own
5 mayor saying that the overlay would decrease the value of the
6 Post Office, making any sale unattractive so that we may
7 prevent the sale of a public asset.

8 So there is some evidence that it's a worse hit than
9 30 percent, 31 percent, whatever that number was.

10 So what am I supposed to do at this stage? Do I have a
11 trial? I mean, how do we deal with this -- because you're
12 cherrypicking the evidence. There's other evidence that would
13 be more favorable to the Post Office than you're telling me
14 about.

15 **MR. SCHWARTZ:** I don't -- I don't agree, your Honor,
16 that I'm cherrypicking the evidence, because the City contends
17 that the test is a ban on sale, a total frustration of the
18 sale.

19 So it doesn't matter whether it's 31 percent or 39 percent
20 or 50 percent. It -- that's not a test that is -- there is no
21 legal support for that test, and it's an unworkable test. So
22 we're relying --

23 **THE COURT:** What if it's such a diminution that no
24 reasonable owner would sell it under those circumstances?
25 Let's say I decided at a trial that it was worth 20 percent,

1 and, further, that no owner would -- no reasonable owner would
2 bother to sell it at that point so that it was an effective
3 ban. There's got to be some test, even under the total
4 frustration test.

5 **MR. SCHWARTZ:** That's getting closer to the Court's
6 total frustration, but we don't have the case here. The Post
7 Office's appraiser concluded that the difference before and
8 after would be 39 percent.

9 When -- the Post Office then went out and got another
10 expert, Dr. Miller, who, when his numbers were presented fairly
11 concluded that -- based on his manipulation of Mr. Runde's
12 numbers, that the diminution in value is only 31 percent.
13 That's not what he represented in his report, but he flipped
14 the numbers and he represented the diminution as really the
15 increase.

16 So we pointed out in our papers that he flipped the
17 numbers. When you figure out what the diminution in value is
18 under Dr. Miller's analysis, it was 31 percent. So we don't
19 have that situation here.

20 **THE COURT:** This is that old deal where if you double
21 the price, it's 100 percent markup, right? Okay, but on the
22 other hand if you -- it's only a -- the original price is
23 50 percent of the second price. Is that where we're going with
24 this? With that kind of gimmick?

25 **MR. SCHWARTZ:** Yes. And Dr. Miller represented -- or

1 he misrepresented what he did in his report. Instead of -- he
2 went from a lower number to the higher number, which is going
3 to be a larger number, and he represented it as a reduction in
4 value. And so in his deposition --

5 **THE COURT:** Is that true, Ms. Berman?

6 **MS. BERMAN:** No, your Honor.

7 **THE COURT:** That the Government expert did a trick
8 like that?

9 **MS. BERMAN:** No, your Honor. To the extent
10 Mr. Miller -- or excuse me, Professor Miller recognized that
11 the language should have been different in his report, he
12 corrected it, but the -- in terms of how the difference in
13 value was measured, the City's own retained expert used the
14 same method that Professor Miller used in terms of calculating
15 the difference.

16 And I should point out Mr. Schwartz is referring to one
17 aspect of Professor Miller's analysis. He went through -- his
18 report is Exhibit 5 to our Motion to Dismiss. His report
19 contains analysis using the numbers provided by the City's
20 expert, using Mr. Runde's numbers, and then using the figures
21 he derived himself because, of course, appraisals of a property
22 can differ to some extent. And the number that he ultimately
23 came up with was not necessarily 31 percent. It was a range,
24 your Honor.

25 So on one set of numbers, 31 percent reduction in value.

1 But, your Honor, it's -- to some extent it's a distinction
2 without a difference because even if it were a 30 percent
3 value, and we're not conceding that it is a 30 percent
4 reduction. But even if that were the reduction, that is a
5 substantial reduction in the context of the Postal Service's
6 ability to manage its property.

7 **THE COURT:** But I said earlier it had to be a total
8 frustration of the Service's ability to dispose of the
9 property. Isn't that what counsel read to me? That's what I
10 said, right?

11 **MS. BERMAN:** Your Honor, yes and no. I'm glad
12 Mr. Schwartz raised that aspect of the Court's opinion. I have
13 it right here.

14 The Court did not rule that it was a complete frustration.
15 The Court actually raised a parallel to the *Clean Air Markets*
16 *Group versus Pataki* case that I was referring to earlier. And
17 the Court said that if there's -- if there is a rendering of
18 the property attractive to commercial developers and that
19 decreases its value, then there is an equivalence to what
20 happened in the *Clean Air Markets Group*.

21 The Court was looking at -- there is language about an
22 effective ban, but the Court was drawing a parallel to the
23 *Pataki* case where it wasn't actually a complete ban. It was
24 just a substantial decrease in the -- well, I shouldn't say
25 "just," your Honor. It was a substantial decrease in the value

1 of that property.

2 I'm looking at, your Honor -- it's docket entry 43 in our
3 case.

4 **THE COURT:** I don't have that up here, but is that my
5 opinion?

6 **MS. BERMAN:** Yes, your Honor.

7 **THE COURT:** Hand it up to me if you've got it so I
8 can see the wording for myself.

9 **MS. BERMAN:** Your Honor, I will apologize because it
10 contains my underlining, but it...

11 (Whereupon document was tendered to the Court.)

12 **THE COURT:** This part is good for us; this part is
13 bad for us.

14 So it doesn't say that. That's just a joke. Let me read
15 what I said.

16 **MS. BERMAN:** And --

17 **THE COURT:** Just a minute.

18 (Brief pause.)

19 **THE COURT:** Well, I don't see the phrase "total
20 frustration." Where is that?

21 **MR. SCHWARTZ:** On Page 10, your Honor, Line 8.

22 **THE COURT:** All right. Okay.

23 Okay. So I do see that. I'll read it out loud.

24 "To be clear, the USPS does not theorize that any
25 interference in the Government's efforts to sell

1 property, even material interference, would be
2 preempted by the property clause and Section 401.
3 Rather, the USPS theory is that the particular
4 interference caused by the overlay is so potent as to
5 be effectively equivalent to a total frustration of
6 the USPS's ability to dispose of its property, and
7 thus preempted by federal laws that expressly empower
8 the USPS to do just that."

9 Do you stand by what I read as what your position is?

10 **MS. BERMAN:** That is our position, your Honor, but
11 the total frustration -- it's not that the Postal Service is
12 seeking to do a fire sale of its assets just so that it doesn't
13 hold that property anymore.

14 It's a -- the total frustration is of the ability to
15 manage its resources, and Mr. Schwartz was referring to what
16 Congress set out in the Postal Reorganization Act. It's not
17 just an authorization for the Postal Service to sell its
18 property. It's a complete regulatory system under which the
19 Postal Service must be self-sufficient. Must be, as the Court
20 points out in that opinion on the next page, it must provide
21 postal services consistent with reasonable economies of -- with
22 reasonable economies.

23 And the legislative history is full of the requirement
24 that the Postal Service have the freedom to maintain and
25 operate an efficient service; that it be able to operate an

1 efficient and economical postal system and, specifically, that
2 it have the authority to control postal revenue and to control
3 the costs.

4 And the ability to right-size its operations is frustrated
5 if a city, on seeing a potentially unattractive sale coming,
6 imposes an overlay that then devalues the property and makes
7 the Postal Service, which is in a dire financial situation,
8 unable to sell the property for anything like what it's
9 actually worth.

10 **THE COURT:** But you want summary judgment on your
11 side, right?

12 **MS. BERMAN:** Yes, your Honor.

13 **THE COURT:** And they want summary judgment on their
14 side, right?

15 **MS. BERMAN:** Yes, your Honor.

16 **THE COURT:** And both of you are telling me that there
17 are no disputed facts.

18 **MS. BERMAN:** There are not, your Honor. I think that
19 the --

20 **THE COURT:** But if you lose, you would then go up on
21 appeal and say that I should not have -- I should have had a
22 trial, right? And that's what they'll say.

23 **MS. BERMAN:** Your Honor, I think the dispute is as to
24 the law, as to the way that the law applies. And I don't think
25 that it's a -- if you will, a genuine dispute if the Court

1 takes a look at the underlying case law.

2 The *Clean Air Markets Group* case that we've been talking
3 about and that the Court relied on in its opinion, it wasn't --
4 there wasn't a ban on the sale of the property in that case.
5 There was a diminishment in the value of the property by
6 restricting the potential for resale in a way that really
7 affected only less than 30 percent of the available ways to
8 resell those emissions allowances. I would really urge the
9 Court to --

10 **THE COURT:** But didn't the Second Circuit say it had
11 to eliminate virtually all?

12 **MS. BERMAN:** Your Honor, that is not what happened in
13 *Pataki*. It eliminated the ability to transfer to upwind
14 states. And, specifically, I'm looking at Pages 88 and 89 of
15 the Second Circuit's decision. All -- and the quotation is:

16 "Although Section 66K" -- that's the relevant New
17 York law -- "does not technically limit the authority
18 of New York utilities to transfer their allowances, it
19 clearly interferes with their ability to effectuate
20 such transfers."

21 And then it goes on to describe the restrictions. Those
22 are the restrictions on sales to upwind states.

23 And it says:

24 "Because such a restrictive covenant" -- the ones
25 that were described -- "indisputably decreases the

1 value of the allowances, that section clearly
2 restricts or interferes with allowance trading."

3 And here the overlay, by restricting the resale of the
4 property, clearly interferes with the Postal Service's ability
5 to manage its finances and, in particular, to dispose of not
6 just this property but potentially the bigger problem, your
7 Honor, is what happens if this proliferates nationwide, as we
8 expect it will.

9 I would also urge your Honor, notwithstanding that,
10 certainly cities have, traditionally, power in the area of
11 zoning. The cases dealing with the Postal Service's ability to
12 open Post Offices are not cases where cities have said you
13 can't open a Post Office. They are cases in which there's
14 incidental, almost, interference; a permitting fee or a
15 requirement for an inspection. Those are things that courts
16 have said impermissibly interfere. And here there may be cases
17 that are close to the line in terms of property sales.

18 Your Honor, this is not one of them. This is a case in
19 which we have a situation where the City set out with the
20 intention of preventing the sale. The mayor is on the record
21 as having said, "Using this overlay, we prevented the sale."

22 The developer who would have bought the property said the
23 value of the property is destroyed. And the Postal Service is
24 saying, consistent with all of that evidence, "Yes, this
25 impedes our ability to manage our resources."

1 **THE COURT:** Well, but this is coming back to me. I
2 remember. At the outset of the case, I specifically asked you
3 if you were alleging that a -- any interference in the
4 Government's ability to sell the property, even a material
5 interference, would be preempted. And you said, "No, no. Oh,
6 no, Judge, we're not doing that. We're not going that far.
7 It's got to be a total frustration."

8 And so I said, oh, okay. Total frustration. So then
9 that's why I wrote this in. And now you're trying to wiggle
10 off of that and say, okay, if it's enough that makes us
11 uncomfortable in the way we run the Post Office, if the
12 diminution is enough, it's material. It's -- you know, we're
13 an inefficient organization. We can't -- then -- now you're
14 trying to wiggle off the total frustration point.

15 **MS. BERMAN:** Not at all, your Honor. I want to be
16 clear about the point that I was just making.

17 What I was saying just now is that the case law, the
18 precedent regarding other Postal Service functions, like the
19 opening of post offices, the *Clean Air Markets Group* case that
20 the Court cited, the precedent would support even something
21 less than that happened in this case, or a claim even in a
22 lesser circumstance. But that's not to say that that's what
23 the Postal Service is alleging happened here.

24 We're alleging, consistent with -- consistent with the
25 mayor's own assessment of the effect of the overlay, the new

1 zoning overlay has had the effect of deterring private
2 developers from buying our historic downtown post office
3 building.

4 Your Honor, that's a quote. And there are -- that's --

5 **THE COURT:** But is that a total frustration of the
6 USPS's ability to dispose of property?

7 **MS. BERMAN:** Yes, your Honor, because it prevented in
8 the sense -- and I see that the Court is skeptical.

9 **THE COURT:** As long as there's somebody out there
10 willing to buy it for more than a fire sale, isn't that okay?

11 **MS. BERMAN:** It's not, your Honor. So to come back
12 to the two claims in this case, there's an inter-governmental
13 immunity claim and then there's a preemption claim. I'll start
14 with the preemption claim.

15 Under the supremacy clause, a city cannot frustrate the
16 purposes and objectives of Congress. And it cannot do so
17 directly or indirectly. That's clear from the case law. So
18 here, tying the Postal Service's hands so that it can't dispose
19 of its property for anything other than -- something other than
20 a fire sale price, that's not really meaningful management of
21 the Postal Service's assets, especially if viewed in the face
22 of other jurisdictions --

23 **THE COURT:** Let's say that I decided -- we hold a
24 whole trial, which is where this would be headed under your
25 theory. Let's say we have a trial and then I make a finding.

1 Okay, it went down 50 percent in value and that the Post Office
2 could actually get somebody -- there are people out there who
3 will pay 50 percent. What would your position then be?

4 **MS. BERMAN:** Your Honor, that would not be consistent
5 with Congress's intention that the Postal Service be able to
6 manage its resources.

7 **THE COURT:** Why? I don't understand why.

8 **MS. BERMAN:** Because Congress intended for the Postal
9 Service to be able to manage costs meaningfully and raise
10 revenue. And that won't happen if a city knows -- if this
11 overlay is found to be constitutional, down the road, or in the
12 immediate term even, since we know it's already happened in one
13 city, other jurisdictions will be able to impose similar
14 restrictions and then the overlay -- and then the Postal
15 Service will find itself in a position where its property, the
16 assets that it thought it had, are really worth significantly
17 less than what appears.

18 **THE COURT:** Where does it say that they've got to
19 sell it for full value?

20 I'll give you an example. When I was a kid, there was a
21 thing called "war surplus." And things that the United States
22 Army had paid, let's say, a thousand dollars for, you could buy
23 for \$12.

24 **MS. BERMAN:** Your Honor, I --

25 **THE COURT:** And the government was happy to get rid

1 of it. So why wouldn't the Post Office be just as happy to get
2 rid of it for \$12, because it's disposing of its property, just
3 like surplus property?

4 **MS. BERMAN:** So I'm glad the Court raised that
5 because the Postal Service for many reasons is different from
6 the Army. But importantly here, the Army is supported by
7 taxpayer money. And that's something for which Congress can
8 appropriate.

9 The Postal Service in the Postal Reorganization Act was
10 set up specifically to function more like a business, to be
11 self-supporting. And that means that the Postal Service's
12 ability to manage its resources, to sell its property for what
13 that property actually is worth and not have interference from
14 municipalities, it's so much more important than any -- than
15 the average government asset because the average government
16 asset is supported by U.S. taxpayer funds. That's not the case
17 here.

18 And your Honor --

19 **THE COURT:** What is your evidence at trial going to
20 be? That a 50 percent diminution frustrates the ability of the
21 USPS to do that, to -- to sell its property and so forth?

22 What's going to be your special evidence that would prove
23 the total frustration point?

24 **MS. BERMAN:** Well, your Honor, we already have
25 testimony, deposition testimony in this case that the Postal

1 Service, because of the reduction in value to the property,
2 that that's the reason why the Postal Service doesn't have it
3 on the -- doesn't have the property on the market now.

4 **THE COURT:** Well, maybe I find that's unreasonable,
5 that they've got to have a better reason than that. Well,
6 they -- if they -- they probably paid almost nothing for this
7 property to begin with. Now they -- they could still sell it
8 for a profit. I'd like to know how much profit they would make
9 even at 50 percent.

10 And then I say, How come that's not good enough? Why are
11 you holding out for more? Why is that so unreasonable? Is it
12 just going to be we -- see, if it just comes down to we could
13 get more without the overlay, you're going to lose because
14 that's not total frustration.

15 **MS. BERMAN:** But, your Honor, it's -- it's not a
16 total frustration of the sale. It's a total frustration to
17 reasonably manage Postal Service assets.

18 **THE COURT:** Why is that even -- who is the witness
19 that's going to get up here and explain to me -- if it's just a
20 point of law, then probably you're going to lose and you can
21 take it on up now.

22 But if you're going to have real witnesses here who are
23 going to come in with bleeding hearts for the Postal Service to
24 explain how -- how this has screwed their life up in the worst
25 possible way and "We can't live with this, Judge; it's a total

1 frustration and here is why" and open my eyes to the problem, I
2 would love to hear that.

3 But I don't think -- you know, if that's the way you're
4 going to try the case, let's just lose now and send you up on
5 appeal.

6 **MS. BERMAN:** Your Honor, there is a facet of the case
7 that I think our discussion so far leaves out, and that's the
8 second claim at issue, which is the intergovernmental immunity
9 claim.

10 **THE COURT:** I would like for you to tell me the
11 witnesses that you're going to have that would explain to me
12 why this would be a total frustration.

13 **MS. BERMAN:** Your Honor, that would be both witnesses
14 from the Postal Service in whose judgment this --

15 **THE COURT:** Okay. Give me a preview of what they're
16 going to say.

17 **MS. BERMAN:** They would say, your Honor, the kinds
18 of -- the discussion that we've been having; that the Postal
19 Service right now is taking steps to try to cut costs and raise
20 revenue. And one of the major initiatives that the Postal
21 Service has undertaken is through right-sizing its operations.

22 **THE COURT:** Let's say that's great. I'm going to
23 interrupt. I guess -- is this a bench trial or is this a jury
24 trial?

25 **MS. BERMAN:** It would be a bench trial, your Honor.

1 **THE COURT:** That's all right. I'm going to
2 interrupt. Even if it were a jury trial, I would interrupt and
3 I would say, "Listen. How much did you pay for this property?"

4 They'll say, "\$42."

5 And then I say, "And how much could you sell it for?"

6 And they say, "X million."

7 And I say, "Well, that sounds pretty good to me. Why
8 don't you go ahead and do that? Why is that a total
9 frustration?"

10 And then they'll say, "Oh, but we could get more."

11 And I'll say, "Yeah, but you could get a lot now. You
12 could still do a pretty good deal."

13 Why is that a total frustration? I think if that's the
14 way it comes out, you're going to lose.

15 On the other hand, if they were to say, "Hey, we made much
16 more for this property than we can sell it for now. It would
17 be selling it at a loss, and here are the impacts that would
18 have upon our financial statement," then I might say, "Okay, I
19 concede. Maybe that's a total frustration."

20 It's going to have to be something pretty -- it can't just
21 be platitudes. Come on. Don't do this to me. I can't -- I've
22 got so many cases going now. I can't waste the time on a case
23 where all I'm going to hear is lawyer argument in the form of
24 witnesses.

25 **MS. BERMAN:** But, your Honor, it's -- there's no

1 basis in the case law for the sale to be measured against the
2 cost basis, especially with an old building like this.

3 **THE COURT:** What is it, then?

4 **MS. BERMAN:** Well, your Honor, again, in the *Clean*
5 *Air Markets Group* case in the Second Circuit, we were not
6 talking about the State saying either you can't sell these
7 emissions allowances, and the State didn't say -- the State did
8 not do something that totally frustrated the ability of New
9 York utilities to resell those emissions allowances. There was
10 a significant diminishment.

11 And that is -- I'm looking at:

12 "...indisputably decreases the value of the
13 allowances and, therefore, stands as an obstacle to
14 the execution of the statute's objectives."

15 That was the metric, your Honor. It was -- the case
16 law -- in the Postal Service's assessment, which Congress
17 vested it with the authority to make in terms of what makes --
18 what is a reasonable -- what is a reasonable sale -- as the
19 Court was saying, would a --

20 **THE COURT:** Look, I don't think a -- what you're
21 telling me is this. You do it in a very good way. You're an
22 excellent lawyer. You make it sound plausible. But every time
23 I ask you the question, it comes down to, "Judge, we're going
24 to put on a Postal Service executive who is going to come in
25 and say, 'In my judgment we can't sell property and manage our

1 portfolio if we have to sell it for half of what it could
2 otherwise be sold for. Even though we would make millions and
3 millions of dollars, we can't run the company that way in my
4 opinion.'" That's what they're going to say.

5 And then you're going to make the argument, based on that,
6 that's total frustration. And that -- that's so vague. So --
7 so amorphous.

8 I just think you need something stronger than that to be
9 able to show that it's a total frustration. They could sell
10 it. They could sell it. They could sell it for -- let's say
11 it's only 30 percent. They could sell it for 30 percent of
12 what it would otherwise -- that's good money. It's in the
13 bank. The Postal Service goes and buys a lot of stamps with
14 that.

15 **MS. BERMAN:** Your Honor, so -- and that's the closest
16 thing we have in the case law, because as the mayor himself
17 said, the overlay was an innovative step by the City to block
18 the sale. So there aren't cases regarding Post Office closures
19 yet. But there are cases regarding Post Office openings, and
20 those cases don't talk about a city altogether blocking the
21 sale of a Post Office. Those cases talk about figuring out
22 where sprinkler fixtures go or light fixtures or permitting.

23 Your Honor, it's -- when Congress vested the Postal
24 Service with the ability to do these things and the opening of
25 Post Offices and the disposition of property, those things are

1 on par with each other in the postal --

2 **THE COURT:** What do the opening cases tell me?

3 **MS. BERMAN:** The opening cases have, relative to
4 what's going on here, such diminimus effect in terms of what
5 the courts are examining there and finding to be
6 unacceptable --

7 **THE COURT:** Well, give me one good example of one
8 that you think if -- if that was the case there, that you
9 automatically win here.

10 **MS. BERMAN:** Your Honor, *Postal Service versus City*
11 *of Hollywood, Florida* is a great example.

12 **THE COURT:** What happened there?

13 **MS. BERMAN:** The City was requiring a permit of
14 property, or with respect to a property that was being
15 renovated. And the lessor -- yes, the lessor and a contractor,
16 both private parties, were being asked by the City for a
17 permitting fee. The Postal Service had designed over -- or
18 excuse me -- had control over the design and the construction
19 work, and the plans were made available to the City.

20 And the -- the Court held that:

21 "If a state or local regulation intrudes or
22 interferes with activities of the federal government,
23 the supremacy clause invalidates that intrusion or
24 interference."

25 Even though all we were talking about was an inspection

1 and permitting fee, that wasn't a total frustration of the
2 ability to open a Post Office.

3 **THE COURT:** Wait, wait. And so the -- the Court
4 there said that they could ignore the local permitting thing?

5 **MS. BERMAN:** Yes, your Honor, in effect, under the --

6 **THE COURT:** Was that the Fifth Circuit? Eleventh
7 Circuit? Was it a district court or what?

8 **MS. BERMAN:** It was a district court, your Honor.
9 That was the Southern District of Florida.

10 And there is another case from the district of Connecticut
11 with similar findings called *Postal Service versus Town of*
12 *Greenwich*. Both of these are in our papers. Same result
13 there, your Honor. Any regulation of the Postal Office
14 project, whether against the property, the lessor or the
15 building contractors -- and I'll quote -- all of this was a
16 quote -- but there's a quote within the case:

17 "Stands as an obstacle to the accomplishment and
18 execution of the full purposes and objectives of
19 Congress."

20 And, again, we're not talking about something that said
21 you can't open the Post Office. Here, again, it was another
22 construction case --

23 **THE COURT:** Okay. Wait a minute. What does the City
24 of Berkeley say about the -- those opening cases? I mean, it
25 does sound like it was a small intrusion and it was thrown out

1 as unconstitutional use.

2 **MR. SCHWARTZ:** Well, these were cases, your Honor,
3 where the contractors were standing in the shoes of the Post
4 Office, and the issue was whether the regulation directly
5 regulates the Post Office, which would violate
6 intergovernmental immunity.

7 And so the issue in those cases was you're regulating an
8 act or a contract that's standing in the shoes of the Post
9 Office, and you're regulating Post Office operations. That's
10 not what's happening here.

11 Here, we're regulating the use of the property after the
12 Post Office sells it. It's an historic district, and the City
13 under its zoning power has the right to zone property to
14 protect historic resources, so it's completely different.

15 **THE COURT:** So your point is that the -- Berkeley
16 wants to regulate the commercial uses after the Post Office is
17 there, whereas in those other cases it was regulating what the
18 Post Office would be like while it was in operation.

19 **MR. SCHWARTZ:** Yes.

20 **THE COURT:** All right. What do you say to that
21 distinction?

22 **MS. BERMAN:** Your Honor, the test, under the
23 supremacy clause, is for effect. And those cases that I
24 referenced, and I'm struggling to find the specific quote.
25 It's in one of those two. The Court actually says, directly or

1 indirectly, this regulation is impermissible under the
2 supremacy clause. A municipality cannot do indirectly what it
3 is clearly not permitted to do directly.

4 The test under the Supreme Court precedent under
5 Ninth Circuit precedent is, What is the effect of the
6 challenged law? And if the effect of the challenged law
7 frustrates the objectives of Congress, then -- then that's
8 dispositive.

9 **THE COURT:** But, Ms. Berman, I need to ask you again.
10 At trial are you going to have any better evidence than just
11 your say-so --

12 **MS. BERMAN:** Absolutely, your Honor.

13 **THE COURT:** Wait, wait. Of these -- I see the
14 evidence about the diminution in value, but, nevertheless, the
15 other side makes the valid point that even under the worse
16 scenario, the Post Office could sell this for millions of
17 dollars. And what's wrong with that?

18 And so, then, are you going to have evidence that would be
19 persuasive to explain why that -- they don't want to sell for
20 millions of dollars and that that would totally frustrate the
21 statutory goals of the Postal Service?

22 **MS. BERMAN:** So two things, your Honor. And it's
23 very important to keep distinct the -- in terms of the
24 objectives of Congress, the test is not a total frustration of
25 the objectives of Congress.

1 **THE COURT:** That's what you told me earlier, what it
2 was. That's what I read, the total frustration and preemption
3 and property clause and Section 4015 of the Act. I read that
4 to you, and you said you stood by it.

5 **MS. BERMAN:** And I continue to, your Honor.

6 So the distinction is what has happened here amounted to a
7 total frustration for the Postal Service.

8 However, under the supremacy clause, under what the case
9 law says, and that's the distinction I'm drawing, the case law
10 does not require total frustration. The case law says, those
11 cases that I referred to, one of them talks about, like I said,
12 where the Postal Service puts sprinklers and how many
13 restrooms --

14 **THE COURT:** But that's an opening case.

15 **MS. BERMAN:** Your Honor, truly that's a distinction
16 without a difference, which is to say with respect to
17 preemption cases, the courts do not draw the distinction that
18 Mr. Schwartz is making in terms of standing in the shoes of the
19 Postal Service.

20 And with respect to intergovernmental immunity, there are
21 two different kinds of intergovernmental immunity claims. For
22 one of them that matters, if there's an allegation of direct
23 regulation of the government, then that requires direct
24 regulation of the government. It goes without saying.

25 But for a discrimination claim, and the Postal Service is

1 claiming in this case that the City, with the overlay,
2 discriminates against the Postal Service, that the only effect
3 on the ground is on the Postal Service.

4 Your Honor, there, there's no requirement of a unity of
5 interest or standing in the shoes of. And that's clear from
6 the Ninth Circuit's analysis in the *Boeing versus Movassaghi*
7 case. In that case, your Honor, the Court made a decision
8 based on both grounds, direct regulation and discrimination.

9 But we're alleging discrimination here, and as to the
10 discrimination part of the Court's analysis, the Court relied
11 on case law that dealt with a retiree, someone who clearly
12 wasn't standing in the shoes of the government. I'm referring
13 to *Davis versus Michigan*. That's a Supreme Court case where
14 somebody who had previously contracted with the government
15 alleged discrimination. And that was found to be improperly
16 discriminatory. And there was no analysis about is this person
17 performing a service for the government or standing in the
18 shoes of the government. Of course, he was not. He was
19 retired at the time the case was brought. The analysis was,
20 rather, was the effect of the law to put someone at a
21 disadvantage because they had been a party who dealt with the
22 government.

23 And in this case, your Honor, the allegation is, and we --
24 the uncontroverted evidence shows that the only -- the only
25 effect on the ground of the overlay was to prevent this sale.

1 Nothing else has changed on the ground, your Honor. There are
2 seven parcels that are either --

3 **THE COURT:** And screwed up one sale. One sale. But
4 there are other people out there who would buy the property.

5 **MS. BERMAN:** Well, your Honor, to return to the
6 Court's question about what evidence do we have that -- that
7 the sale has been frustrated, we have a developer who the
8 record shows is as expert as anyone in terms of the Berkeley
9 market, in terms of dealing with historic properties. And his
10 opinion was that the overlay destroyed the value of the
11 property and it's now worth --

12 **THE COURT:** But there's other evidence on this very
13 motion that, okay, that's the one guy. That's one guy who
14 wanted the property. He's got sour grapes. He wants to come
15 in. He wants to say exactly -- he wants to get this thing
16 thrown out, this overlay thrown out so that you can then sell
17 to it him for full value. So he's got a huge credibility
18 problem.

19 You know, I'm the trier of fact. I'm telling you you're
20 going to have to convince me that he's being honest when he
21 says something like that. There's other evidence that you can
22 still sell it for half. All right. So what's wrong with
23 selling it for half?

24 **MS. BERMAN:** So two things, your Honor. And,
25 respectfully, a developer who would want to purchase the

1 property presumably would want the lesser price. So it seems
2 like there would be motivation the other way.

3 But setting that aside. Your Honor, to the extent that
4 all the overlay accomplished -- and which is consistent with
5 its purpose -- all the overlay accomplished was to block the
6 sale --

7 **THE COURT:** I wouldn't say it blocked one sale.

8 **MS. BERMAN:** Well, your Honor, if --

9 **THE COURT:** And -- but it won't -- I could easily
10 find on this record it blocked that one sale, but there's other
11 people out there who would buy it for 50 percent.

12 **MS. BERMAN:** Your Honor, in terms of whether that's
13 an economically reasonable step for the Postal Service to take,
14 that is a decision that Congress clearly meant to vest in the
15 Postal Service. And the Postal Service's judgment is that an
16 economically viable sale in these conditions isn't possible.
17 And if that's been the only effect of this regulation --

18 **THE COURT:** That's their opinion. But if it's not
19 persuasive to me, too bad for them. They're going to have to
20 be up here on the stand and get cross-examined up and down.
21 And if it won't hold up because they're not -- because baloney,
22 then you're going to lose. I'm not going to just take your
23 word for it that postal -- they're going to have to be
24 convincing that it screws their organization up so bad that
25 it's a total frustration.

1 **MS. BERMAN:** But, your Honor, that -- again, that's
2 not the metric that Courts use in terms of assessing supremacy
3 clause.

4 **THE COURT:** There's very few -- look. There are so
5 few cases on this. I don't -- and you don't have a single
6 other post office case where they're trying too sell the post
7 office, right? There's not a single one. We're going to
8 invent it right here in this courtroom.

9 I wish you did have it. But you don't have it. And you
10 told me you had a total frustration theory, but -- and you
11 claim to, but every time -- no. It's just -- it's just: Oh,
12 we don't want to -- we could make a lot of money selling it for
13 half. But we'd make even more if we sold it for full value.
14 So because we want to -- we're not an efficient organization,
15 we have to -- that's not going to be persuasive. They probably
16 bought this for \$42. They could sell it for 5 million today.
17 I would say do it and move on with life and stop litigating it.

18 **MS. BERMAN:** Your Honor, with respect to the absolute
19 numbers, they really mean very little in a vacuum. The
20 question is relative to the actual value of the property, and I
21 would submit that for an organization whose very mission is at
22 risk because of its financial situation --

23 **THE COURT:** That's ridiculous. It's not at risk
24 because of this one post office.

25 **MS. BERMAN:** That's true, of course. It's not at

1 risk because of the property. It's at risk for a variety of
2 factors, just reasons described in the -- and the report, your
3 Honor, that we submitted regarding the Postal Service's
4 financial situation. We submitted the most recent 10-Q at the
5 time of our submission. But also a report from the Government
6 Accountability Office that talks about --

7 **THE COURT:** And what do they say?

8 **MS. BERMAN:** And they said, your Honor, that the
9 financial circumstances more broadly of the Post Office are
10 such that it -- that its mission is at risk, that's a
11 quotation, and that it's been in the last ten years.

12 **THE COURT:** A one percent risk? A hundred percent
13 risk? A fifty percent?

14 See, I didn't read this. I will go read it, but I want
15 you to know, this is interesting. It would be very important
16 to know if there's a line item in the Postal Service's
17 financials that say: "Sale of surplus property." And that
18 this is the way they sustain themselves now is by selling off
19 the surplus property and that it used to be they got
20 100 percent and that they're barely making ends meet. But now
21 if they have to go down to 50 percent, they're going to starve.
22 That would be a great point for you. Is that in there,
23 something like that?

24 **MS. BERMAN:** So there's not a line item about it,
25 your Honor, but there actually is specific details in the

1 Government Accountability Office's report regarding the Postal
2 Service's efforts to right-size its operations and to cut costs
3 and raise revenue, specifically through -- through the type of
4 property sale that's at issue in this case. This is not a --

5 **THE COURT:** See that? I think you're just -- you're
6 very good at this. You're very good at sliding off into
7 generalities and platitudes. And when it comes to specifics,
8 you just don't deliver.

9 Look, I've got to move on to other cases. I'm not going
10 to rule right now. I'm going to study this.

11 But if we have a trial, I want you both to be specific and
12 give me concrete things. And if it's just going to be
13 Ms. Berman coming in here and having witnesses with platitudes,
14 I don't know. You better -- you better have a stronger case
15 than that.

16 **MS. BERMAN:** One final point, if I may, your Honor?

17 **THE COURT:** Yeah.

18 **MS. BERMAN:** In the Ninth Circuit case that I cited,
19 and it's cited by the Court in the Motion to Dismiss opinion,
20 in *Boeing versus Movassaghi*, that case where it found a
21 violation of the intergovernmental immunity doctrine, and I
22 think this is plain from similar cases as well, there's not a
23 total frustration. There's not a situation where somebody is
24 saying the Government may not do the activity that it's doing.
25 It's interference. Discrimination through interference in

1 itself is sufficient to state an intergovernmental immunity
2 claim, your Honor.

3 And while our position is total frustration --

4 **THE COURT:** No, no. You told me you stood by total
5 frustration, and I read that to you and you said you stood by
6 it. Now you're wiggling off it again.

7 **MS. BERMAN:** Your Honor, it is the Postal Service's
8 assessment that it's -- that it has been completely frustrated,
9 but in terms of what amounts to a violation of the supremacy
10 clause, your Honor, we would submit that this is a textbook
11 example where the City set out to interfere with the sale of
12 the property, and that is exactly what it accomplished.

13 **THE COURT:** All right. I'm handing back to you the
14 thing I borrowed. I didn't look at what you underlined.

15 (Whereupon document was returned to counsel.)

16 **THE COURT:** All right. Hearing is over. I know I
17 didn't ask you as many questions, but I've got to move on.
18 I've got other cases, and so it's under submission.

19 You're both great lawyers. Thank you.

20 **MR. SCHWARTZ:** Thank you.

21 **MS. BERMAN:** Thank you.

22 (Proceedings adjourned.)
23
24
25

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Monday, February 19, 2018