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of ORIGINAL FILE
Los Angeles Superior Court

JUL 14 2006

John A. Clarke, Executive Officer/Clerk
By *[Signature]* Deputy

8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES

10 HAROLD P. STURGEON,
11
12 Plaintiff,

13 v.

14 WILLIAM J. BRATTON, in his official
15 capacity as Chief of Police of the Los
16 Angeles Police Department, and JOHN
17 MACK, in his official capacity as President
18 of the Board of Police Commissioners, and
19 SHELLEY FREEMAN, in her official
20 capacity as a member of the Board of Police
21 Commissioners, and ALAN J. SKOBIN, in
22 his official capacity as a member of the Board
23 of Police Commissioners, and ANDREA
24 ORDIN, in her capacity as a member of the
25 Board of Police Commissioners, and
26 ANTHONY PACHECO, in his official
27 capacity as a member of the Board of Police
28 Commissioners,

Defendants.

) Case No. BC351646

) **PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
DEMURRER TO PLAINTIFF'S
COMPLAINT**

) DATE: July 27, 2006
TIME: 8:30 a.m.
PLACE: Department 58
JUDGE: Honorable Rolf M. Treu

) ACTION FILED: May 1, 2006
TRIAL DATE: None Set

TABLE OF CONTENTS

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

Page

I. INTRODUCTION 1

II. SPECIAL ORDER 40 AND THE LAPD POLICIES, PROCEDURES,
AND PRACTICES ARISING THEREUNDER 1

III. ARGUMENT 6

 A. Defendants’ “General Laws” Argument Has No Merit 7

 B. Special Order 40 Violates 8 U.S.C. § 1373(a) 9

 C. Special Order 40 is Preempted by Federal Law 10

 D. Special Order 40 Violates California Law 14

IV. CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Page

1

2

3 *Blair v. Pitchess*, (1971) 5 Cal. 3d 258, 96 Cal. Rptr. 42 6, 7

4

5 *California Teachers Ass’n v. State of California*, (1999) 20 Cal. 4th 327,
84 Cal. Rptr. 2d 425 7, 8

6 *City of New York v. Reno*, (2d Cir. 1999) 179 F.3d. 29 11

7 *De Canas v. Bica*, (1976) 424 U.S. 351 10

8 *Dep’t of Transportation v. Superior Court*, (1996) 47 Cal. App. 4th 852,
55 Cal. Rptr. 2d 2 12

9

10 *Gates v. Superior Court*, (1987) 193 Cal. App. 3d 205, 238 Cal. Rptr. 592 12, 15

11 *Herzberg v. County of Plumas*, (2002) 133 Cal. App. 4th 1,
34 Cal. Rptr. 3d 588 7, 8

12 *League of United Latin American Citizens v. Wilson*, (C.D. Cal. 1995)
908 F. Supp. 755 14

13

14 *League of United Latin American Citizens v. Wilson*, (C.D. Cal. 1997)
997 F. Supp. 1244 14

15 *Marbury v. Madison*, (1803) 5 U.S. 137 3

16 *Michigan Cannery & Freezers Assoc., Inc. v. Agricultural Marketing
and Bargaining Board*, (1984) 467 U.S. 461 10, 11

17

18 *Takahashi v. Fish and Game Comm’n*, (1982) 334 U.S. 410 10

19 *Waste Management of Alameda County, Inc. v. County of Alameda*, (2000)
79 Cal. App. 4th 1223, 94 Cal. Rptr. 2d 740 7, 8, 9

20 *Wirin v. Horrall*, (1948) 85 Cal. App. 2d 497, 193 P.2d 470 7

Statutes

21

22 U.S. Const., art. VI, cl. 2 9

23

24 8 U.S.C. § 1373 (2006) *passim*

25 8 U.S.C. § 1373(a) (2006) *passim*

26 8 U.S.C. § 1373(b) (2006) 11

27 8 U.S.C. § 1373(c) (2006) 11

28 8 U.S.C. § 1644 (2006) *passim*

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

Page

Cal. Const. art. III, § 1 14
Code Civ. Pro. § 526a 1, 6, 8
Penal Code § 843b 14, 15

Miscellaneous

H.R. Conf. Rep. No. 104-75 (1996) 12, 13
S. Rep. No. 104-249 (1996) 13
75 Ops. Cal. Atty. Gen. (1992) 270 13
84 Cal. Atty. Gen. (2001) 189 15
Prop. 187, § 1 14
Prop. 187, § 4 14

1 Plaintiff Harold P. Sturgeon, by counsel, respectfully submits this opposition to
2 Defendants' demurrer to the Complaint and in response thereto states as follows:

3 **I. INTRODUCTION.**

4 Plaintiff Sturgeon, a taxpayer and resident of the City of Los Angeles, brings this action
5 pursuant to California Code of Civil Procedure ("CCP") 526a to enjoin Defendants from
6 expending any additional taxpayer resources to enforce, maintain, or otherwise carry out the
7 provisions of the Los Angeles Police Department's Special Order 40 and the policies,
8 procedures, and practices arising thereunder. Plaintiff also seeks a judgment declaring that
9 Special Order 40 and the policies, procedures, and practices arising thereunder contravene federal
10 law, including but not limited to the Supremacy Clause of the U.S. Constitution and 8 U.S.C. §
11 1373(a), as well as California law, and, therefore, are unlawful and void.

12 **II. SPECIAL ORDER 40 AND THE LAPD POLICIES, PROCEDURES, AND**
13 **PRACTICES ARISING THEREUNDER.**

14 As set forth in Plaintiff's Complaint, Special Order 40 was adopted by the Los Angeles
15 Police Department ("LAPD") and incorporated into the Los Angeles Police Department Manual
16 ("LAPD Manual") in 1979. Complaint at paras. 15-17. The LAPD Manual currently states, in
17 pertinent part:

18 Undocumented alien status in itself is not a matter for police action.

19 * * *

20 Officers shall not initiate police action where the objective is to discover the alien
21 status of a person. Officers shall neither arrest nor book persons for violation of
22 Title 8, Section 1325 of the United States Immigration Code (Illegal Entry).

23 *Id.* at para. 17, citing LAPD Manual, Vol. 1, § 390 and LAPD Manual, Vol. 4, § 264.50. Special
24 Order 40 has remained in effect at all relevant times since 1979. *Id.*

25 It cannot be reasonably questioned that a police officer who makes an inquiry about an
26 individual's immigration status or provides information about an individual's immigration status
27 to federal immigration authorities undertakes a police action. Thus, on its face Special Order 40
28 prevents officers from inquiring about the immigration status of an individual or notifying federal
immigration authorities about an alien who is in the United States illegally.

1 In this regard, in 2000 the Board of Police Commissioners asked the Rampart
2 Independent Review Panel (the “Rampart Panel”) to review the LAPD’s compliance with Special
3 Order 40 and to make recommendations regarding the LAPD’s policies, procedures, and
4 practices with respect to undocumented aliens and the LAPD’s relationship with federal
5 immigration officials. *Id.* at para. 20. In February 2001, the Rampart Panel issued a report
6 entitled “A Report to the Los Angeles Board of Police Commissioners Concerning Special Order
7 40” (“the Report”) which confirmed that, under Special Order 40, officers were being prevented
8 from inquiring about the immigration status of individuals:

9 *The policies and procedures articulated by the Department preclude officers from*
10 *asking a person about his or her alien status and from notifying the INS about a*
person’s undocumented status unless the person has been arrested.

11 * * *

12 First, LAPD officers are not supposed to ask individuals suspected of criminal
13 offenses, crime victims, or witnesses, about their immigration status.

14 Complaint at para. 21, citing Report at 2 and 5 (emphasis added). The Report also included a
15 recommendation that further confirmed the LAPD’s “Don’t Ask” policy regarding immigration:
16 “The LAPD Manual should provide, *consistent with current policies and practices*, that LAPD
17 officers are not supposed to inquire about a person’s immigration status.” Report at 18
18 (emphasis added).¹

19 Defendants attempt to challenge Plaintiff’s recitation of several of the Report’s factual
20 findings by claiming that Plaintiff “ignored” other findings in his Complaint. Defendants’
21 Demurrer to Plaintiff’s Complaint (“Demurrer”) at 11. It would appear that Defendants, not
22 Plaintiff, have ignored the clear language of the Report. For example, Defendants cite to a
23 portion of the Report that states, “[N]othing in [Special Order 40 or] the LAPD Manual actually
24 bars an officer who is investigating an individual for criminal activity other than an immigration
25 violation from asking that person about his or her immigration status and then advising INS.”
26 *Id.*, citing Report at 5. Defendants then ignore the very next sentence, which explains that the

27
28 ¹ Defendants have asked the Court to take judicial notice of the Report. Plaintiff does not
object to this request.

1 policies, procedures, and practices implemented by the LAPD under Special Order 40 are even
2 more restrictive than as articulated in Special Order 40 or the LAPD Manual:

3 Interviews with Chief of Police Bernard C. Parks and other LAPD officers
4 indicated that, in practice, the Department's procedures vary from the procedures
5 originally set forth in Special Order 40 and go beyond the limited provisions of
6 Special Order 40 that remain in the Manual. Indeed, as articulated, the procedures
7 are more restrictive than as written. *First, LAPD officers are not supposed to ask
8 individuals suspected of criminal offenses, crime victims, or witnesses, about their
9 immigration status.*

7 Complaint at para. 21, citing Report at 5 (emphasis added).

8 Defendants also cite the following sentence in the Report: "As practiced, [Special Order
9 40] precludes LAPD officers from inquiring about an individual's alien status, which does not
10 appear to be inconsistent with the federal law." Demurrer at 11, citing Report at 9. While the
11 first portion of the sentence provides further confirmation of the LAPD's "Don't Ask"
12 immigration policy, Defendants ignore the fact that the Rampart Panel's use of the qualifying
13 phrase "which does not appear to be inconsistent with the federal law" is not a statement of fact,
14 but instead a conclusion of law, and hardly a definitive one at that. "It is emphatically the
15 province and the duty of the judicial department to say what the law is" (*Marbury v. Madison*,
16 (1803) 5 U.S. 137, 177), and, while the Court may and perhaps should accept the Rampart
17 Panel's findings of fact,² it need not accept the Rampart Panel's conclusions of law. This Court,
18 rather than the Rampart Panel, must decide whether Special Order 40 and the policies,
19 procedures, and practices arising thereunder are consistent with federal and state law.

20 In addition to precluding officers from asking an individual about his or her immigration
21 status, Special Order 40 and the policies, procedures, and practices arising thereunder prohibit
22 officers from informing federal immigration officials about an individual's immigration status.
23 The Rampart Panel described this "Don't Tell" policy as follows:

26 ² In asking the Court to take judicial notice of the Report, Defendants represent that the
27 Report constitutes "facts and propositions that are not reasonably subject to dispute and [is]
28 capable of immediate and accurate determination by resort to sources of reasonably indisputable
accuracy." Defendants' Request for Judicial Notice in Support of Demurrer at 3.

1 The policies and procedures articulated by the Department preclude officers from
2 asking a person about his or her alien status *and from notifying the INS³ about a*
3 *person's undocumented status unless the person has been arrested.* Moreover, in
4 practice, LAPD officers do not routinely notify INS about the immigration status
5 of individuals who have been arrested.

6 * * *

7 Second in practice, LAPD officers do not notify the INS of the arrest of an illegal
8 alien. Only after a person has been arrested, arraigned, and held in the county jail
9 pending prosecution will his or her alien status be investigated by the INS, and
10 that is in cooperation with the Los Angeles County Sheriff, not the LAPD.

11 * * *

12 In practice, under Special Order 40 no officer should ever have cause to refer a
13 person to INS [now ICE] except as part of a task force, where an INS [now ICE]
14 warrant has been issued for illegal re-entry, or in the rare instance in which LAPD
15 officers arrest an individual engaged in alien smuggling. *LAPD officers are not*
16 *supposed to refer an undocumented person to INS if the person is merely a victim*
17 *or witness to a crime or comes into contact with the Department during a family*
18 *disturbance, during the enforcement of minor traffic offenses, or when seeking*
19 *medical treatment.*

20 Complaint at para. 21, citing Report at 2, 5-6 (emphasis added).

21 The Report contains several additional findings of fact confirming the LAPD's general
22 prohibition on officers providing information to federal immigration officials about illegal aliens:

23 Indeed, each [captain] stated that if it were called to his or her attention that an
24 officer *had* referred names [of undocumented persons] to the INS, such action
25 would be grounds for a formal inquiry and would likely be found to be improper.

26 * * *

27 [LAPD officers interviewed for the report] explained that they understood Special
28 Order 40 to mean that no LAPD officer -- unless he or she is part of a federal task
force -- will have cause to contact the INS for *any* reason, and that under no
circumstances should that contact include referring an individual for deportation.

29 * * *

30 As originally promulgated, Special Order 40 required the arresting officer to note
31 a person's undocumented status and DHD was required to notify INS. To the
32 extent, however, that this action involved the arresting or booking officer's
33 contacting INS, it is inconsistent with LAPD's current practices.

34 See Report at 12, 13 (emphasis original).

35 ³ INS, which refers to the Immigration and Naturalization Service, is now known as
36 Immigration and Customs Enforcement or "ICE."

1 Elsewhere in the Report, the Rampart Panel attempted to describe the LAPD's purported
2 justification for Special Order 40 and the policies, procedures, and practices arising thereunder,
3 but, in so doing, only provided further confirmation of the LAPD's "Don't Tell" policy:

4 To permit officers to refer undocumented persons they encounter in the course of
5 their duties to INS would allow for the possibility of arbitrary and discriminatory
6 enforcement activity targeting individuals of Hispanic descent. Special Order 40
attempts to ensure that all undocumented persons are given equal treatment under
the law.

7 See Report at 8. Whatever the LAPD's motives -- and Defendants cite several other similar
8 statements in their Demurrer -- the legality of Special Order 40 and the policies, procedures, and
9 practices arising thereunder is a separate matter.

10 Finally, as Defendants note in their Demurrer, the Report identifies some very limited
11 exceptions to the LAPD's general prohibition on officers providing information to federal
12 immigration officials about illegal aliens:

13 In practice, under Special Order 40 no officer should ever have cause to refer a
14 person to INS except as part of a task force, where an INS warrant has been issued
for illegal reentry, or the rare instance in which LAPD officers arrest an individual
engaged in alien smuggling

15 * * *

16 . . . Special Order 40 would not preclude a police officer from providing names of
17 known gang members to the INS in response to a request from the INS. Nor
18 would Special Order 40 bar LAPD participation in a task force with the INS,
19 where the INS is investigating *criminal* violations of the federal immigration laws
relating to, for example, narcotics trafficking or violent crimes. Finally, it would
20 not prevent LAPD officers from assisting the INS to arrest a particular individual
for whom a warrant had been issued.

21 * * *

22 Special Order 40 does not preclude the LAPD from responding to requests by the
23 INS for information regarding an individual's criminal activities or whereabouts,
24 or from assisting INS to execute arrest warrants for violations of the immigration
laws. Nor does Special Order 40 preclude LAPD from providing tactical
assistance when, for example, INS is planning to conduct an operation that may
have implications for public safety.

25 Report at 6 and 8 (emphasis original). Plaintiff did not ignore these findings, as Defendants
26 suggest. Rather, the Report makes clear that these limited instances are exceptions to the
27 LAPD's "Don't Ask, Don't Tell" immigration policy. The exceptions thus prove the rule.

1 Nothing in Defendants' Demurrer or the Report undermines or rebuts the allegation in
2 Plaintiff's Complaint that Special Order 40 and the policies, procedures, and practices arising
3 thereunder generally prohibit officers from asking about an individual's immigration status or
4 conveying such information to federal immigration officials.⁴ Complaint at para. 21. In fact,
5 Defendants' Demurrer and the Report confirm this important fact.

6 **III. ARGUMENT.**

7 CCP § 526(a) expressly authorizes the filing of taxpayer lawsuits. It states as follows:

8 An action to obtain a judgment, restraining and preventing any illegal expenditure
9 of, waste of, or injury to, the estate, funds, or other property of a county, town,
10 city or city and county of the state, may be maintained against any officer thereof,
11 or any agent, or other person, acting in its behalf, either by a citizen resident
12 therein, or by a corporation, who is assessed for and is liable to pay, or, within one
13 year before the commencement of the action, has paid, a tax therein.

14 In *Blair v. Pitchess*, (1971) 5 Cal. 3d 258, 267-68, 96 Cal. Rptr. 42, 48-49, the California
15 Supreme Court declared that "[t]he primary purpose of this statute [Section 526a], originally
16 enacted in 1909, is to 'enable a large body of the citizenry to challenge governmental action
17 which would otherwise go unchallenged in the courts because of the standing requirement.'" It
18 has never been the rule that "[t]he parties in suits under section 526a must have a personal
19 interest in the litigation," but rather, "no showing of special damage to the particular taxpayer has
20 been held necessary." *Blair*, 5 Cal. 3d at 269-270, 96 Cal. Rptr. at 50. "[I]t is immaterial that the
21 amount of the illegal expenditures is small or that the illegal procedures actually permit a savings
22 of tax funds." *Blair*, 5 Cal. 3d at 268, 96 Cal. Rptr. at 49. "The mere expending [of] the time of
23 the paid police officers of the city of Los Angeles in performing illegal and unauthorized acts
24 constitute[s] an unlawful use of funds which could be enjoined under section 526a." *Id.*

25 In *Blair*, taxpayers sought to enjoin Los Angeles County and Los Angeles County
26 Sheriff's Department officials from expending any time executing the provisions of California's

27 ⁴ Defendants claim that Special Order 40 allows for notification of immigration officials
28 when undocumented aliens are booked for certain offenses. Demurrer at 10, citing Special Order
40 at Procedure §§ II-IV. Defendants fail to inform the Court that this notification procedure
does not appear in the LAPD Manual and, in fact, was eliminated by Special Order 18 issued on
September 5, 1980 by Police Chief Daryl Gates. See Report at 4 & n.6.

1 “claim and delivery” law in actions to recover personal property. The taxpayers alleged that the
2 “claim and delivery” process violated the U.S. and California constitutions. The California
3 Supreme Court agreed and affirmed an injunction against the defendants. Similarly, in *Wirin v.*
4 *Horrall*, (1948) 85 Cal. App. 2d 497, 193 P.2d 470, taxpayers sought to enjoin the city of Los
5 Angeles from expending taxpayer funds to conduct “police blockades” -- a process by which
6 designated areas of the city were blocked off and all persons entering or exiting were stopped and
7 searched -- without first obtaining search warrants. The taxpayers alleged that the blockades
8 violated the U.S. and California constitutions. The trial court granted the defendants’ demurrer,
9 but the appellate court reversed, directing that the demurrer be denied.

10 In this case, like in *Blair* and *Wirin*, a taxpayer seeks to enjoin the expenditure of public
11 funds to support a police regulation -- Special Order 40 and the policies, procedures, and
12 practices arising thereunder -- that is alleged to violate federal and state, including 8 U.S.C. §
13 1373(a). Defendants’ Demurrer should be denied.

14 **A. Defendants’ “General Laws” Argument Has No Merit.**

15 Defendants appear to argue that a taxpayer seeking to enjoin an allegedly illegal
16 expenditure of taxpayer funds must demonstrate a “conflict with the general laws.” Demurrer at
17 3-5. Defendants’ argument is not at all clear, but they rely on *Herzberg v. County of Plumas*,
18 (2000) 133 Cal. App. 4th 1, 34 Cal. Rptr. 2d 588; *California Teachers Ass’n v. State of*
19 *California*, (1999) 20 Cal. 4th 327, 84 Cal. Rptr. 2d 425, and, to a lesser extent, *Waste*
20 *Management of Alameda County, Inc. v. County of Alameda*, (2000) 79 Cal. App. 4th 1223, 94
21 Cal. Rptr. 2d 740 (“*Waste Management*”) in purported support of their argument. Not only do
22 these cases not stand for the proposition that taxpayers suing under CCP § 526a must
23 demonstrate a “conflict with the general laws,” but there is there no such requirement under
24 California law.

25 *Herzberg* concerned an action by landowners who were upset over cattle trespassing on
26 their property. The landowners sued several parties, including Plumas County, under a variety of
27 legal theories, including trespass, nuisance, and a violation of civil rights. With respect to the
28 county, the landowners alleged that the county’s open range ordinance was an unconstitutional

1 taking of their property. It does not appear anywhere in the *Herzberg* decision, however, that the
2 landowners attempted to assert a claim based on their status as taxpayers. Rather, they sued the
3 county and the other defendants for injuries they allegedly suffered in their individual capacities,
4 not as taxpayers seeking to enjoin the expenditure of public funds. The Court, in addressing the
5 landowners' "taxpayer" claim, held:

6 Plaintiffs' complaint contains no specific allegations regarding the expenditures
7 sought to be enjoined in this action. The fourth cause of action contains only
8 general allegations and legal conclusions, which are not sufficient to support a
9 taxpayer action.

10 *Herzberg*, 133 Cal. App. 4th at 23 n.15, 34 Cal. Rptr. 3d at 604 n.15. Simply put, the landowners
11 in *Herzberg* failed to plead the requisite elements of a lawsuit under CCP 526a. By contrast,
12 Plaintiff clearly has pled that taxpayer funds are being spent to enforce, maintain, and otherwise
13 carry out the provisions of a government regulation that he alleges is illegal. *See, e.g.*, Complaint
14 at paras. 18, 23-27 and 36. Plaintiff's Complaint clearly states a claim under CCP § 526a.

15 Equally unavailing to Defendants is the California Supreme Court's decision in
16 *California Teachers Ass'n*. In that case, a teacher challenged the constitutionality of a fee-
17 shifting provision in the California Education Code. As Defendants note, the case sets forth the
18 legal standard for a facial challenge to the constitutionality of a statute or ordinance. It does not
19 even attempt to address a taxpayer challenge to the expenditure of public funds under CCP
20 526(a). The case has no relevance to this lawsuit.

21 Finally, rather than demonstrating that Plaintiff's Complaint should be dismissed, *Waste*
22 *Management* actually confirms that Plaintiff's case should proceed. *Waste Management* held:

23 The purpose of this statute, which applies to citizens and corporate taxpayers
24 alike, is to permit a large body of persons to challenge wasteful government action
25 that otherwise would go unchallenged because of the standing requirement. To
26 this end, the statute has been construed liberally. Therefore, although by its terms
27 the statute applies to local governments, it has been judicially extended to all state
28 and local agencies and officials. While the statute speaks of injunctive relief,
taxpayer standing has been extended to actions for declaratory relief, mandamus,
and, in some circumstances, damages.

Regardless of the liberal construction, the essence of a taxpayer action remains an
illegal or wasteful expenditure of public funds or damage to public property. The
taxpayer action must involve an actual or threatened expenditure of public funds.

1 General allegations, innuendo, and legal conclusions are not sufficient; rather, the
2 plaintiff must cite specific facts and reasons for a belief that some illegal
3 expenditure or injury to the public fisc is occurring or will occur. Although Waste
Management alleges it is a taxpayer, it has not otherwise attempted to state
taxpayer standing within the meaning of Code of Civil Procedure section 526a

4 79 Cal. App. 4th at 1240, 94 Cal. Rptr. 2d at 752 (internal citations and quotations omitted).

5 Unlike in the complaint in *Waste Management*, Plaintiff's Complaint contains well-plead
6 allegations that public funds are being used to enforce, maintain, and otherwise carry out
7 government policies, practices and procedures that are alleged to be illegal. *See, e.g.*, Complaint
8 at paras. 18, 23-27 and 36. Defendants' Demurrer must be denied.

9 **B. Special Order 40 Violates 8 U.S.C. § 1373(a).**

10 The Supremacy Clause of the United States Constitution declares that federal law is the
11 supreme law of the land. U.S. Const., art. VI, cl. 2. It cannot be denied that Special Order 40
12 and the policies, practices, and procedures arising thereunder violate both the letter and the spirit
13 of 8 U.S.C. § 1373(a), which provides:

14 Notwithstanding any other provision of Federal, State, or local law, a Federal,
15 State, or local government or entity or official may not prohibit, or in any way
16 restrict, any government entity or official from sending to, or receiving from, the
Immigration and Naturalization Service information regarding the citizenship or
immigration status, lawful or unlawful, of any individual.

17 The LAPD has adopted what is in effect a "Don't Ask, Don't Tell" policy with respect to
18 immigration status. Under ordinary circumstances, a "cop on the beat" who suspects an
19 individual of being in the United States illegally cannot inquire about that individual's
20 immigration status: he cannot ask the individual; he cannot ask ICE; and he cannot ask a third
21 party. He cannot undertake any investigative action whatsoever. While forbidding an officer
22 from asking ICE about an person's immigration status is a direct violation of 8 U.S.C. § 1373(a),
23 forbidding an officer from asking the person or a third party about the person's immigration
24 status violates the statute as well. The statute prohibits *any* restriction on an officer's ability to
25 communicate such information to ICE. 8 U.S.C. § 1373(a). Clearly, if an officer is not free to
26 ask, then he certainly is restricted in his ability to tell. In addition, if the officer happens to know
27 or come across information about a person's immigration status, he is prohibited from sharing
28

1 that information with ICE. Thus, both aspects of the LAPD's "Don't Ask, Don't Tell" policy
2 violate 8 U.S.C. § 1373(a).

3 The fact that there may be limited exceptions to these general rules -- such as if an officer
4 happens to be participating in a task force, responding to a request from federal immigration
5 officials, assisting ICE agents in the execution of search warrants, or investigating an alien
6 smuggling operation -- is irrelevant. The statute expressly declares that local governments or
7 officials "may not prohibit or *in any way* restrict" such communication. 8 U.S.C. § 1373(a)
8 (emphasis added). Allowing such communications in very limited circumstances only highlights
9 the fact that Special Order 40 and the policies, procedures, and practices arising thereunder
10 impose substantial restrictions on officers' ability to freely convey information to federal
11 immigration officials.

12 **C. Special Order 40 is Preempted by Federal Law.**

13 Separate and apart from whether Special Order 40 and the policies, procedures, and
14 practices arising thereunder violate 8 U.S.C. § 1373(a) is whether Special Order 40 and these
15 same policies, procedures, and practices are preempted by federal law.

16 The U.S. Supreme Court has declared that "the power to regulate immigration is
17 unquestionably exclusively a federal power." *De Canas v. Bica*, (1976) 424 U.S. 351, 354. The
18 U.S. Supreme Court also has declared that, because the federal government bears exclusive
19 responsibility for immigration matters, the states "can neither add to nor take from the conditions
20 lawfully imposed by congress upon admission, naturalization, and residence of aliens in the
21 United States or the several states." *Takahashi v. Fish and Game Comm'n*, (1982) 334 U.S. 410,
22 419. Federal law preempts state regulatory power where "Congress has unmistakably so
23 ordained" such a result. *De Canas*, 424 at 356; *see also Michigan Cannery & Freezers Assoc.,*
24 *Inc. v. Agricultural Marketing and Bargaining Board*, (1984) 467 U.S. 461, 469 ("*Michigan*
25 *Cannery*") ("[I]n enacting the federal law, Congress may explicitly define the extent to which it
26 intends to pre-empt state law."). In addition, federal law preempts state regulatory power where
27 the state activity "stands as an obstacle to the accomplishment and execution of the full purposes
28 and objectives of Congress." *De Canas*, 424 at 363; *Michigan Cannery*, 467 U.S. at 469. Stated

1 another way, a state regulation is preempted if it conflicts with federal law, making compliance
2 with both state and federal law impossible. *Michigan Canners*, 467 U.S. at 469.

3 In August of 1996, the U.S. Congress enacted Section 434 of the Personal Responsibility
4 and Work Opportunity Reconciliation Act of 1996 (“PRA”), Pub. L. No. 104-193, 110 Stat. 2105
5 (1996). One month later, in September of 1996, the U.S. Congress enacted Section 642 of the
6 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“Immigration Reform
7 Act”), Pub. L. No. 104-208, 110 Stat. 3009 (1996). These two provisions reflect a clear
8 congressional intent to promote the free flow of information between state and local governments
9 and officials and federal immigration officials regarding immigration.⁵

10 Section 434 of the PRA, entitled “Communication between State and Local Government
11 Agencies and the Immigration and Naturalization Service,” has been codified at 8 U.S.C. § 1644.

12 It provides:

13 Notwithstanding any other provision of Federal, State, or local law, no State or
14 local government entity may be prohibited, or in any way restricted, from sending
15 to or receiving from the Immigration and Naturalization Service information
regarding the immigration status, lawful or unlawful, of an alien in the United
States.

16 8 U.S.C. § 1644. Section 642, entitled “Communication between Government Agencies and the
17 Immigration and Naturalization Service,” has been codified at 8 U.S.C. § 1373. Section 1373(a)
18 was quoted, in part, in Section III(B), above. *See also* 8 U.S.C. §§ 1373(b) and (c).

19 The Conference Report accompanying Section 434 of the PRA explains:

20 The conferees intend to give State and local officials the authority to communicate
21 with the INS regarding the presence, whereabouts, or activities of illegal aliens.
22 This provision is designed to prevent any State or local law, ordinance, executive
23 order, policy, constitutional provision, or decision of any Federal or State court
24 that prohibits or in any way restricts any communication between State and local
officials and the INS. The conferees believe that immigration law enforcement is
as high a priority as other aspects of federal law enforcement, and that illegal
aliens do not have the right to remain in the United States undetected and
unapprehended.

27 ⁵ One court has found that Section 642 of the Immigration Reform Act “expands” Section
28 434 of the PRA. *City of New York v. Reno*, (2d Cir. 1999) 179 F.3d. 29, 33 (rejecting 10th
Amendment challenge to both statutes).

1 H.R. Conf. Rep. No. 104-725 (1996) at 383. Similarly, the Senate Report accompanying the
2 Senate bill that became the Immigration Reform Act states:

3 Sec. 177 -- Communication between Federal, State, and local government
4 agencies, and the Immigration and Naturalization Service

5 Prohibits any restriction on the exchange of information between the Immigration
6 and Naturalization Service and any Federal, State, or local agency regarding a
7 person's immigration status. Effective immigration enforcement requires a
8 cooperative effort between all levels of government. The *acquisition, maintenance, and exchange* of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

9 S. Rep. No. 104-249 (1996) at 19-20 (emphasis added).

10 It is difficult to conceive of how Congress might have expressed its intent any clearer
11 when it enacted these statutes. Congress's use of the words "[n]otwithstanding any other
12 provision of Federal, State, or local law" in both statutes clearly and expressly preempts any and
13 all federal, state, or local provisions of law touching on or regulating this subject matter. *Dep't*
14 *of Transportation v. Superior Court*, (1996) 47 Cal. App. 4th 852, 856, 55 Cal. Rptr. 2d 2, 4.
15 Congress has unmistakably ordained that state and local governments may not restrict
16 communication between themselves and their officials and federal immigration officials.
17 Because Special Order 40 and the LAPD policies, procedures, and practices arising thereunder
18 have precisely this effect, they are preempted by 8 U.S.C. §§ 1373 and 1644.⁶

19 In addition, Special Order 40 and the polices, procedures, and practices arising thereunder
20 stand as obstacles to the accomplishment and execution of the full purposes and objectives of
21 Congress. *De Canas*, 424 U.S. at 363. Both the House Conference Report and the Senate Report
22 make unmistakably clear that it was Congress's purpose and objective to promote the
23 enforcement of U.S. immigration laws and the detection and apprehension of illegal aliens by

24
25 ⁶ To the extent Defendants try to argue to that the Immigration and Naturalization Act
26 ("INA") does not preempt Special Order 40 (*see* Demurrer at 8-9), it appears that they have failed
27 to analyze the relevant statutes. The INA was enacted in 1952 and has been amended numerous
28 times over the years. It predates the PRA and the Immigration Reform Act by some forty-four
years. Moreover, the authority on which Defendants appear to rely in making this argument,
Gates v. Superior Court, (1987) 193 Cal. App. 3d 205, 238 Cal. Rptr. 2d 592, also predates these
two federal statutes by some nine years.

1 eliminating restrictions on the free flow of information between federal, state, and local officials.
2 That provisions like Special Order 40 stand as substantial obstacles to the enforcement of U.S.
3 immigration laws and the detection and apprehension of illegal aliens was addressed by
4 California Attorney General Daniel E. Lundgren in a formal opinion issued even before the
5 enactment of 8 U.S.C. §§ 1373 and 1644:

6 [Administration of the provisions of the Immigration and Nationality Act] is
7 predicated upon the ability of the INS to detect the presence of those who are not
8 lawfully residing in this country. Congress surely did not intend that state and
9 local governments would undermine the deterrent effect of the criminal or civil
penalties contained in the Act. By giving the impression that illegal aliens may
obtain refuge from such penalties in a particular locale, the ordinance creates
localized immigration policy and dissipates enforcement of the federal laws.

10 That Congress has placed a great importance on the immigration detection effort
11 is evidenced by the criminal penalties which have been established for those who
12 assist illegal aliens in escaping detection. *This discernable congressional policy*
13 *is substantially frustrated by city ordinances impeding the right and the duty of*
14 *city officials and law enforcement personnel to report, in the course of their*
15 *official duties, possible violations of the Act to the proper federal authorities.* As
16 one of the principal collection points for legally obtainable, nonconfidential
information about persons who may be unlawfully present in this country, local
law enforcement agencies constitute an important component of the overall effort
to effectuate the civil provisions of the Act. By peremptorily removing such a
significant component from law enforcement activities, the city's ordinance stands
as an obstacle to the accomplishment and execution of the full purposes and
objectives of Congress.

17 See 75 Ops. Cal. Atty. Gen. (1992) 270, 275-77 (internal citations and quotations omitted)
18 (emphasis added).⁷ Special Order 40 and the policies, procedures, and practices arising
19 thereunder are preempted by federal law because Congress has “unmistakenly so ordained” and
20 because they “stand[] as an obstacle to the accomplishment and execution of the full purposes
21 and objectives of Congress.”

22
23
24 ⁷ Contrary to Defendants' assertion, Plaintiff's reference to this opinion in his Complaint
25 was entirely proper. Given the LAPD's broad prohibition on gathering or disseminating
26 information regarding the immigration status of individuals, Plaintiff submits that Special Order
27 40 and the policies, procedures, and practices arising thereunder are substantially similar to the
28 ordinance at issue in the opinion. Nonetheless, Plaintiff cited the opinion for its cogent and
persuasive analysis of the harmful impact local efforts to limit cooperation and communication
with federal immigration officials may have on the detection and apprehension of persons in the
United States illegally, not because the opinion addressed any particular regulatory scheme.

1 **D. Special Order 40 Violates California Law.**

2 The California Constitution declares, “The State of California is an inseparable part of the
3 United States of America, and the United States Constitution is the supreme law of the land.”
4 Cal. Const., art. III, § 1. Because the California Constitution expressly recognizes the supremacy
5 of federal law and Special Order 40 and the policies, procedures, and practices arising thereunder
6 clearly violate 8 U.S.C. § 1373(a), they violate the California Constitution as well.

7 In addition, in 1994 the State of California passed Proposition 187, the stated purpose of
8 which was to “provide for cooperation between [the] agencies of state and local government with
9 the federal government, and to establish a system of required notification by and between such
10 agencies to prevent illegal aliens in the United States from receiving benefits or public services in
11 the State of California.” Prop. 187, § 1. Penal Code 843b, which requires California law
12 enforcement personnel to cooperate fully with federal immigration officials and to attempt to
13 verify the immigration status of arrestees who are suspected of being present in the United States
14 illegally, was enacted into law as part of Proposition 187. Prop. 187, § 4.

15 Plaintiff recognizes that, one year prior to the enactment of 8 U.S.C. §§ 1373 and 1644, a
16 federal court enjoined enforcement of several provisions of Proposition 187, including Penal
17 Code § 843b, finding that the provisions were preempted by a comprehensive federal statutory
18 scheme regulating immigration. *League of United Latin American Citizens v. Wilson*, (C.D. Cal.
19 1995) 908 F. Supp. 755 (*League I*). That same federal court revisited its ruling in 1997 in light
20 of the passage of the PRA. *League of United Latin American Citizens v. Wilson*, (C.D. Cal.
21 1997), 997 F. Supp. 1244 (*League II*).⁸ While the court declined to modify its injunction
22 expressly, finding that the various provisions of Proposition 187 were part of a single state
23 regulatory scheme, it declared: “The Court agrees that some cooperation is permitted and even
24 required by the PRA . . . Nothing in this Court’s decision should be interpreted to prohibit
25 cooperation between state officials and the I.N.S pursuant to the PRA.” *League II*, 997 F. Supp.
26 at 1252 n.9. It would be more than a little ironic if Defendants were to try to argue that Penal

27 _____
28 ⁸ It does not appear that the court considered the Immigration Reform Act in this ruling.
League II, 997 F. Supp. at 1251-52.

1 Code § 843b is preempted by federal law while also arguing that federal law does not preempt
 2 Special Order 40. If California is powerless to enact its own regulatory scheme regarding
 3 cooperation and information sharing with the federal government on immigration issues, then
 4 surely the LAPD does not have such power either.⁹ Consequently, to the extent that Special
 5 Order 40 and the policies, procedures, and practices arising thereunder prohibit Los Angeles
 6 police personnel from inquiring about the immigration status of arrestees suspected of being in
 7 the United States illegally, they violate Penal Code § 834b.¹⁰

8 **IV. CONCLUSION.**

9 For the foregoing reasons, Plaintiff respectfully requests that Defendants' Demurrer be
 10 denied in its entirety.

11 Dated: July 14, 2006

By:

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21 ⁹ The 2001 opinion of Attorney General Bill Lockyer regarding enforcement of Penal Code
 22 § 843b does little more than note the court's rulings in *League I* and *League II* and quote from 8
 23 U.S.C. §§ 1373(a) and 1644. It does not attempt to analyze the status of the rulings in light of the
 passage of the two statutes. Demurrer at 10, 11, 13, citing 84 Ops. Cal. Atty. Gen. (2001) 189.

24 ¹⁰ As Defendants note, *Gates* holds that officers who legitimately come across information
 25 in the course of investigating a crime which reasonably leads them to believe an arrestee is
 26 present in the United States illegally are under no affirmative legal duty to report such
 27 information to federal immigration authorities, but may do so as a matter of comity and good
 28 citizenship. Demurrer at 10, citing *Gates*, 193 Cal. App. 3d at 219, 238 Cal. Rptr. at 600-01.
 Under Special Order 40, however, officers are prohibited from reporting such information and
 may find themselves subject to punishment if they did so. Report at 12. Thus, it would appear
 that Special Order 40 is actually contrary to *Gates*.

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2540 Huntington Drive, Suite 201, San Marino, California 91108.

On July 14, 2006, I served the foregoing document described as:

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER TO PLAINTIFF'S COMPLAINT


by placing a true and correct copy thereof in a sealed envelope addressed as follows:

Rockard J. Delgadillo, City Attorney
Michael L. Claessens, Senior Assistant City Attorney
Vibiana M. Andrade, Deputy City Attorney
Paul L. Winnemore, Deputy City Attorney
City Hall East, 7th Floor
200 North Main Street
Los Angeles, CA 90012

I caused such envelop to be deposited in the U.S. mail, with postage thereon fully prepaid, at San Marino, California. I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day, with postage thereon fully prepaid, at San Marino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 14, 2006 at San Marino, California.


CONSTANCE S. RUFFLEY