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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

HAROLD P. STURGEON, Plaintiff, v. WILLIAM J. BRATTON, *et al.*, Defendants, and BREAK THE CYCLE, *et al.*, Interveners.	Case No. BC351646 **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION** DATE: June 10, 2008 TIME: 8:30 a.m. PLACE: Department 58 JUDGE: Honorable Rolf M. Treu ACTION FILED: May 1, 2006 TRIAL DATE: June 30, 2008

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Plaintiff Harold P. Sturgeon, by counsel, respectfully submits this opposition to Defendants' motion for summary judgment or, in the alternative, summary adjudication:

I. INTRODUCTION.

In 1979, the Los Angeles Police Department ("LAPD") adopted what essentially is a "Don't Ask, Don't Tell" policy regarding illegal aliens. Commonly referred to as Special Order 40, the policy prohibits LAPD officers from initiating police action to discover a person's immigration status. It prohibits officers from asking a person about his or her status, and it prohibits officers from asking federal immigration officials about a person's status. It also prohibits officers from making arrests for illegal entry, which is a violation of Title 8, Section 1325 of the United States Code. In practice, Special Order 40 also generally prohibits officers from providing information about a person's immigration status to federal immigration officials.

In 1996, Congress enacted two separate statutes, 8 U.S.C. §§ 1373 and 1644, to address policies such as Special Order 40. The obvious purpose of the statutes was to promote the free flow of information between federal immigration officials and state and local law enforcement agencies in order to assist federal authorities in enforcing immigration laws. As one commentator has stated:

> The assistance of state and local law enforcement agencies can also mean the difference between success and failure in enforcing the nation's laws generally. The nearly 800,000 police officers nationwide represent a massive force multiplier. This assistance need only be occasional, passive, voluntary, and pursued during the course of normal law enforcement activity. The net that is cast daily by local law enforcement during routine encounters with members of the public is so immense that it is inevitable illegal aliens will be identified.

Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Albany Law Review 179, 181 (February 2006). State and local law enforcement officers are "the eyes and ears of law enforcement across the United States." *Id.* at 183. "Federal immigration officers simply cannot cover the same ground." *Id.*

Plaintiff, a taxpayer and resident of the City of Los Angeles, brings this action pursuant to Section 526a of the Code of Civil Procedure to enjoin the LAPD from expending any additional taxpayer resources to enforce, maintain, or otherwise carry out the provisions of Special Order 40

and the practices and procedures arising thereunder.[1] Complaint at ¶¶ 1 at 41. Plaintiff's basic contention is that the LAPD's "Don't Ask, Don't Tell" policy violates 8 U.S.C. §§ 1373 and 1644. Plaintiff also seeks a judgment declaring that Special Order 40 and the practices and procedures arising thereunder are unlawful. Complaint at ¶¶ 1 and 38.

Because genuine disputes of material fact exist regarding the scope and contours of the policy, both as to the meaning of the text of the policy and the manner in which the policy is implemented by the LAPD, neither summary judgment nor summary adjudication is appropriate. As a result, Defendants' motion must be denied.

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

Prior to the adoption of Special Order 40 in 1979, it was not uncommon for LAPD officers to make an inquiry or take action when they encountered a person whose immigration status came into question. Plf's Resp. to Defs' Stmt. of Facts ("Plf's Resp.") at Add'l Mat. Fact ("AMF") No. 1. In fact, the LAPD required officers who came into contact with a person suspected of being in the United States illegally to determine the person's immigration status and notify federal immigration authorities if the person was an illegal alien. *Id.* at AMF No. 2. Such action was required even if the person was not the subject of a police investigation or a criminal charge. *Id.* The adoption of Special Order 40 changed such practices. *Id.* at AMF No. 3.

Although Defendants assert that officers investigating an individual for criminal activity are not prohibited by Special Order 40 from inquiring into the individual's immigration status, Plaintiff disputes this.[2] Plf's Resp. at Fact No. 30. Specifically, LAPD Deputy Chief Police Mark Perez testified, "Generally, yes . . . We are prohibited from inquiring about immigration status." Perez Dep. at 18:18-20. Deputy Chief Perez "could not envision" an officer contacting

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[1] Defendants make no claim that this matter is not appropriate for a taxpayer lawsuit or that Plaintiff is not a taxpayer. *See Blair v. Pitchess*, 5 Cal. 3d 258 (1971); Code Civ. Pro. 526a.

[2] Defendants admit that, if an officer were to contact federal immigration officials for no other reason than to inquire about a person's immigration status, he or she would be violating Special Order 40. Plf's Resp. at AMF No. 4.

federal immigration officials to inquire about a person's immigration status and, in his twenty-five years of experience, could not recall a single instance in which an LAPD officer had made such an inquiry. *Id.* at 21:8-23. The single exception identified by Deputy Chief Perez was if an officer encountered a previously deported, violent offender. *Id.* at 17:20-18:4, 22:16-24:23.

Assistant Chief Earl Paysinger had a slightly different view. Although, according to Assistant Chief Paysinger, Special Order 40 does not prohibit officers from inquiring about a person's immigration status if the person has been arrested or lawfully detained, in his thirty years of experience with the LAPD, he has never known an officer to inquire about anyone's immigration status. Paysinger Dep. at 28:4-7. Nor did he know of an officer ever contacting federal immigration officials to inquire about a person's immigration status. *Id.* at 28:4-29:1.

Deputy Chief Gary Brennan had yet another view. He testified that officers are not prohibited from inquiring about a person's immigration status, including asking federal immigration officials about a person's status, if the officer is conducting a criminal investigation and the person's immigration status becomes an issue in that investigation. Brennan Dep. at 20:4-11. He cited alien smuggling investigations and human trafficking investigations as two examples of circumstances under which it may be appropriate for officers to inquire into a person's immigration status. *Id.* at 18:12-19:9. He noted that, it "[w]ould be a very rare occurrence" for an LAPD officer to make an inquiry to ICE about the immigration status of a witness, victim, or member of the public." *Id.* at 30:17-23. "Generally it is not done." *Id.* Deputy Chief Brennan also was very clear that officers were prohibited from contacting federal immigration officials unrelated to a criminal investigation:

> It is inconsistent with department policy for officers to contact ICE if it's unrelated to a criminal investigation. It's inconsistent with department policy for officers to contact ICE solely to determine a person's immigration status unrelated to a criminal investigation.

Id. at 31:10-16.

Commander Sergio Diaz, now Deputy Chief Diaz, testified somewhat circularly that officers could inquire about a person's immigration status "under all circumstances that aren't initiating a police action with the objective of discovering the alien status." Diaz Dep. at 35:22-

36:4. According to Deputy Chief Diaz, officers may inquire about a person's immigration status "[i]f its not strictly prohibited." *Id.* at 39:10-11. Like Deputy Chief Brennan, Deputy Chief Diaz testified that officers may make such inquiries if the officer is undertaking a criminal investigation and the person's immigration status is germane to the investigation. *Id.* at 38:9-39:13. Like Deputy Chief Brennan, Deputy Chief Diaz also agreed that, without a "criminal nexus," Special Order 40 prohibited initiating a police action to discover a person's immigration status. Diaz Dep. at 15:15-21; *see also id.* at 37:6-13. Deputy Chief Diaz subsequently told the Los Angeles City Council, however:

> It would serve no benefit for us to ask folks what their immigration status is. In fact, Special Order 40, as we said earlier, does two things -- and the first thing that it does is strictly prohibit officers from initiating an investigation with the purpose of inves -- of discovering someone's immigrant status.

June 12, 2007 Transcript at 22:24-23:5.

Police Chief Bratton appears to agree with Deputy Chief Perez. In a "Chief's Message," published in June 2005 in an online LAPD newsletter, Chief Bratton stated that "LAPD officers are still prohibited from asking a person their immigration status." "Chief's Message," *The Beat*, June 20, 2005. He noted, however, that this prohibition does not apply to aliens who were convicted of violent felonies or other serious crimes, were deported, and have since returned to the United States. *Id.* During a March 1, 2007 radio interview, Chief Bratton similarly told KABC radio host Doug McIntyre:

> There's a great deal of misunderstanding about what happens here as it relates to immigrants in this city. The only prohibition our officers have is, when they're investigating a crime, they do not ask a person, a victim or a suspect, "Are you an illegal immigrant?" We just don't ask that.

McIntyre Decl. at Exhibit 1, 9:14-19.

As implemented by the LAPD, Special Order 40 generally prohibits officers from referring illegal aliens to federal immigration officials, although this is another fact that is disputed by the parties. Plf's Resp. at Fact Nos. 14-15, 34-36. In interrogatory responses, Defendants admitted that LAPD officers "generally would not do so as a matter of policy or practice given that the immigration status is not a subject of the work that LAPD officers do."

Defs' Resp. to Plf's 1st Am. Spec. Interrog. at Resp. No. 10. Deputy Chief Perez testified that, with the single exception of previously deported violent offenders, he was not aware of any circumstance under which an LAPD officer could refer an illegal alien to federal immigration officials. Perez Dep. at 24:16-23. Assistant Chief Paysinger testified that, under Special Order 40, officers do not report victims and witnesses to federal immigration authorities, although an exception may be made for victims and witnesses of human smuggling operations. Paysinger Dep. at 31:17-25. In his thirty years of experience with the LAPD, Assistant Chief Paysinger was not aware of any circumstance in which LAPD officers had reported victims, witnesses, suspects, or arrestees to federal immigration officials. Paysinger Dep. at 32:1-14.

Deputy Chief Brennan testified that it would be inconsistent with LAPD's policy for an officer to notify federal immigration officials about a person's immigration status "just for any purpose." Brennan Dep. at 32:5-16. He agreed that, if an officer just happened to learn, unrelated to a criminal investigation, that a person was an illegal alien, the officer would not refer that person to federal immigration officials. *Id.* at 29:6-15. As with inquiries about a person's immigration status, Deputy Chief Brennan testified that officers do not notify federal immigration officials about a person's immigration status unless they are conducting a criminal investigation and the person's immigration status is relevant to the investigation. *Id.* at 29:6-15, 36:8-37:25. Deputy Chief Brennan further testified that circumstances under which an officer could notify federal immigration officials about a person's immigration status included human smuggling investigations or gang-related investigations. *Id.* at 26:18-28:18, 36:8-37:25. He was not aware of any other specific circumstances where federal immigration officials would receive such notification. *Id.* at 20:20-21:19, 36:8-37:25. Deputy Chief Brennan acknowledged that the LAPD only makes information about arrestees' place of birth available to federal immigration authorities and that this is done through the Los Angeles County Sheriff's Office. *Id.* at 20:20-21:19, 23:8-21. He also acknowledged that there is no specific procedure for notifying federal immigration officials about illegal aliens who are arrested or detained, but not booked. *Id.* at 23:25-24:6.

Unlike any other witness, Deputy Chief Diaz testified that there was no prohibition on notifying federal immigration officials about a person's immigration status, but he also testified that, should an officer make such a notification, he or she may be subject to an inquiry.[3] Diaz Dep. at 44:23-45:14, 47:10-48:14, and 50:15-25. He cited alien smuggling cases and previously deported felons as examples of when officers could refer illegal aliens to federal immigration officials. *Id.* at 48:15-49:20, 52:25-53:9. The only instance in which, according to Deputy Chief Diaz, it would be inconsistent with Special Order 40 for an officer to refer a person to federal immigration officials was if the officer initiated a police action with the objective of discovering a person's immigration status, then subsequently notified federal immigration officials about that person. *Id.* at 60:20-61:6. Deputy Chief Diaz also testified that, as a matter of practice, the LAPD does not notify federal immigration officials about the arrest of an illegal alien even where the arrestee's illegal status is known. *Id.* at 78:14-79:12, 92:17-93:8. Like Deputy Chief Brennan, Deputy Diaz acknowledged that the LAPD only makes information about arrestees' place of birth available to federal immigration authorities. Diaz Dep. at 19:18-21:4, and 69:9-25.

Importantly, in 2000 the LAPD Board of Police Commissioners asked the Rampart Independent Review Panel to review the LAPD's compliance with Special Order 40. In February 2001, the panel issued a report entitled "A Report to the Los Angeles Board of Police Commissioners Concerning Special Order 40" ("Rampart Panel Report"). In demurring to Plaintiff's Complaint, Defendants asked the Court to take judicial notice of the Rampart Panel Report, and, in doing so, acknowledged that the report was "not reasonably subject to dispute," was "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy," and constituted "'regulation' issued by and under the authority of . . . the City of Los Angeles through its Police Department." *See* Plf's Resp. at AMF No. 6. In sworn interrogatory answers, Defendants later admitted that "[t]he report accurately summarizes the implementation of Special Order 40." *Id.*

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[3] His statement before the Los Angeles City Counsel was somewhat different, however. June 12, 2007 Transcript at 9:14-22 and 15:17-19; *see also id.* at 35:25:36:7.

The Rampart Panel Report is largely consistent with the facts developed by Plaintiff during discovery. The Rampart Panel Report summarizes its findings as follows:

> The policies and procedures articulated by the Department preclude officers from 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. Moreover, in practice, LAPD officers do not routinely notify INS about the immigration status of individuals who have been arrested.

Plf's Resp. at AMF No. 7. The Rampart Panel Report confirms that officers understand Special Order 40 to mean that, unless working as part of a federal task force, they will not have cause to contact federal immigration officials "for *any* reason, and that under no circumstance should that contact include referring an individual for deportation." *Id.* at AMF No. 8 (emphasis original). The report further confirms that:

> . . . in practice, the Department's procedures vary from the procedures originally set forth in Special Order 40 and go beyond the limited provisions of Special Order 40 that remain in the Manual. Indeed, as articulated, the procedures are more restrictive than as written."

Id. at AMF No. 9. These even more restrictive practices and procedures, which go beyond the text of Special Order 40 itself, also are at issue in this lawsuit. Complaint at ¶¶ 1, 21, 36, 38-39, and 41.

It also must be noted that, during a January 24, 2006 meeting of the LAPD Board of Police Commissioners, Commissioner Alan J. Skobin stated, with respect to Special Order 40, that "there is tremendous confusion within the Department. If you talk to 20 officers and ask them about it, you're going to get many different answers." Plf's Resp. at AMF No. 10. Then-Assistant Chief Gascon also acknowledged confusion about the policy, at least on the part of certain officers. *Id.* at AMF No. 11. In this regard, Deputy Chief Diaz testified that there was a "dearth of formal training and information about specific issues concerning Special Order 40" and that officers learn about the policy and its implementation through "folklore" or word of mouth. *Id.* at AMF No. 12. In response to a question about what officers are told regarding notifying federal immigration officials about a person's immigration status, Deputy Chief Diaz answered, "I think what they're told is, 'This is what we do. Don't waste your time with that other stuff.'" *Id.*. According to Deputy Chief Diaz, the training is "very, very scant," and "[i]t's

handled differently, almost at the whim of individual instructors at the recruit academy," Deputy Chief Diaz testified. *Id.* He also testified that there was no lesson plan for in-service training for incumbent officers either. *Id.*

Finally, much of what Defendants describe as "facts" are largely irrelevant. It is irrelevant, for example, whether LAPD works collaboratively with Immigration and Customs Enforcement ("ICE"), as Defendants allege and which Plaintiff disputes. It also is irrelevant whether, on occasion, LAPD officers have participated in multi-agency task forces to try to combat the trafficking of immigrants, placed holds on illegal aliens in LAPD's custody, or turned over illegal aliens to federal law enforcement authorities. Nor is it relevant whether ICE has been denied information or assistance it requested. At issue in Plaintiff's lawsuit are the substantial restrictions, if not outright prohibitions, the LAPD places on its officers in obtaining information about persons' immigration status and sharing such information with federal immigration authorities.

III. ARGUMENT.

A. Standards Governing Summary Judgment/Adjudication.

From commencement to conclusion, a party moving for summary judgment or summary adjudication bears the burden of persuasion that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 850 (2001); Code Civ. Proc. § 437c. A genuine issue of fact exists if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the non-moving party in accordance with the applicable standard of proof. *Aguilar*, 25 Cal. 4th at 850. In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence in the light most favorable to the non-moving party. *Id.* at 844. If the court, without weighing the evidence or inferences presented as though it were sitting as a trier of fact, concludes that the non-moving party's evidence or inferences raise triable issues of fact, it must conclude its consideration and deny the motion. *Id.* at 856.

B. Defendants' "General Laws" Argument Has No Merit.

Defendants' initial argument tries to impose additional burdens on taxpayers like Plaintiff who seek to enjoin illegal expenditures of taxpayer funds. These additional burdens have no support in California law. Therefore, Defendants' argument must be rejected.

First, Defendants rely on *Herzberg v. County of Plumas*, 133 Cal. App. 4th 1 (2000), for the proposition that taxpayers seeking to enjoin an allegedly illegal expenditure of taxpayer funds must demonstrate a "conflict with the general laws." In *Herzberg,* the Court rejected the plaintiffs' claims of illegality, then determined that, because there had been no illegality, there had been no illegal expenditure of taxpayer resources. *Id.* at 23. *Herzberg* simply does not stand for the proposition that a taxpayer seeking to enjoin an illegal expenditure of taxpayer funds must make some additional showing of a conflict with "general laws." *Id.* at 23-24.

Equally unavailing is Defendants' attempt to impose on Plaintiff the burden that a plaintiff making a facial challenge to the constitutionality of a statute or ordinance must satisfy. As an initial matter, Plaintiff does not challenge a statute or ordinance. He challenges an administrative policy and practices and procedures implementing that policy. Plaintiff also does not bring a direct constitutional challenge to Special Order 40. Rather, Plaintiff asserts that Special Order 40 and the LAPD's practices and procedures implementing Special Order 40 violate two federal statutes, 8 U.S.C. §§ 1373 and 1644. Plaintiff's constitutional challenge is of a derivative nature. Because both the U.S. and California Constitutions declare that federal law is supreme (*see* U.S. Const., art. VI, cl. 2; Cal. Const. art. III, § 1), it logically follows that Special Order 40 and the practices and procedures arising thereunder also violate these supremacy clauses and are preempted by federal law. None of the cases on which Defendants rely concern statutory, supremacy clause, or preemption challenges to policies, practices, and procedures of a police force. They are inapposite.

Nor do any of Defendants' cases stand for the proposition that a taxpayer seeking to restrain, on purely constitutional grounds, an expenditure of taxpayer funds under section 526a must make the same showings that a plaintiff, suing in his or her individual capacity, must make

when mounting a "facial" or an "as applied" challenge to the constitutionality of a statute or ordinance. Plaintiff does not seek to "enjoin *any* application of [an] ordinance to *any* person in *any* circumstance." *California Family Bioethics Council v. California Inst. for Regenerative Med.*, 147 Cal. App. 4th 1319, 1339 (2007) (quoting *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1087 (1995)) (emphasis original). He seeks to enjoin the continued expenditure of taxpayer funds in furtherance of an illegal policy. The use of section 526a to challenge the expenditure of taxpayer funds on police policies and practices has a long and firmly established heritage in California. *White v. Davis*, 13 Cal. 3d 757, 763 (1975). Yet Defendants fail to provide any authority holding that a taxpayer bringing such a challenge must satisfy the same requirements that a plaintiff bringing a "facial" or "as applied" challenge to the constitutionality of a statute or ordinance must satisfy. Defendants conflate the two types of actions without demonstrating why the requirements of a "facial" or an "as applied" constitutional challenge should apply in the context of a section 526a taxpayer lawsuit. Defendants compare apples to oranges.

Finally, even if Defendants are right in arguing that a taxpayer bringing a purely constitutional challenge to the expenditure of taxpayer funds must make a "facial" or an "as applied" showing, they are wrong when they argue that Plaintiff can bring only a "facial" challenge to Special Order 40 and the LAPD's practices and procedures implementing the police policy. Defendants' argument ignores the case law they cite in their own memorandum. In *Tobe*, the Court noted that there are two types of "as applied" challenges: (1) challenges that seek relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are being injured as a result of the manner in which the statute or ordinance is being applied; and (2) challenges that seek an injunction against the future application of a statute or ordinance to enjoin the allegedly impermissible manner in which it is shown to have been applied in the past. *Tobe*, 9 Cal. 4th at 1084. Both types of "as applied" challenges would appear to apply in a taxpayer challenge such as this. In fact, in *Tobe*, the Court noted that the plaintiffs in that case, in their capacity as taxpayers, had standing under section 526a to restrain an illegal expenditure of taxpayer funds on future enforcement of an unconstitutional ordinance

or an impermissible means of enforcement of a facially valid ordinance. *Tobe*, 9 Cal. 4th at 1086. This is precisely the type of "as applied" challenge Plaintiff brings here. Complaint at ¶¶ 1 at 41.

C. Special Order 40 Violates Federal Law.

Even if the Court were to consider Plaintiff's taxpayer challenge to Special Order 40 and the practices and procedures arising thereunder as a "facial" challenge, it is clear that Special Order 40, on its face, violates federal law. The text of the policy states as follows:

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

Defs' Stmt. of Facts at Fact Nos. 20-21. Title 8, Section 1373 of the U.S. Code provides:

> (a) In general. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government or entity or official may not prohibit, or in any way 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.
>
> (b) Additional authority of government entities. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
>
> (2) Maintaining such information.
>
> (3) Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. § 1373. Title 8, Section 1644 provides:

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

8 U.S.C. § 1644.

Obviously, prohibiting officers from contacting federal immigration to obtain information about a person's immigration status directly violates both statutes. Similarly, prohibiting officers

from inquiring about a person's immigration status substantially restricts officers' ability to share such information with federal immigration officials, and, therefore, violates both statutes. There simply is no way to reconcile the policy's express prohibition on initiating a police action to discover a person's immigration status with the federal statutes' ban on prohibiting or restricting the exchange of information about an individual's immigration status. Nor do Defendants present any such reconciliation. The policy is unlawful on its face.[4]

Nonetheless, there also is a genuine dispute of material fact about what constitutes "police action." The term "police action" includes an officer with one law enforcement agency contacting another law enforcement agency to obtain or provide information, such as an officer making an inquire of federal immigration officials about a person's immigration status. Plf's Resp. at AMF No. 13. In fact, providing information to another law enforcement agency is a "legitimate" police action. *Id.* at 14. Defendants assert that "[t]he definition of 'police action' does not include communication with ICE," but they do not provide any evidentiary support for this assertion. Defs. Mem. at 12. Defendants do assert, however, that under Special Order 40, officers are not prohibited from contacting federal immigration officials. Defs' Stmt. of Facts at Fact Nos. 14-16, 34-36. Plaintiff disputes this assertion. Plf's Resp. at Fact Nos. 14-16, 34-36. Because there is a dispute of fact about whether "police action" includes communicating and sharing information with another law enforcement agency, summary judgment is not appropriate.

Defendants' remaining arguments regarding Plaintiff's claim that Special Order 40 violates federal law all concern various applications of Special Order 40 rather than the text of the policy itself. Regardless, many if not all of the factual assertions on which Defendants rely regarding the application of Special Order 40 are in dispute. Some are just plain wrong. Others are irrelevant. For example, Plaintiff disputes Defendants' assertions that "all Special Order 40 does is prohibit police action when the sole purpose is to discover the alien status of the person" and that, in practice, Special Order 40 says nothing about contact or communication with federal

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[4] Arresting a person for unlawful entry also may constitute information about a person's immigration status. The prohibition on such arrests is a substantial restriction on officers' ability to provide information about a person's immigration status to federal immigration officials.

immigration officials. Plf's Resp. at Fact Nos. 14-16, 34-36. Plaintiff also disputes Defendants' assertion that officers may question a detained or arrested person as to his or her immigration status. Plf's Resp. at Fact Nos. 32 and 44. Given these disputes of material fact, Defendants are not entitled to summary judgment.

Defendants also are wrong in asserting that the LAPD's "implementation policies specifically provide for notification to immigration authorities in circumstances where an undocumented alien has been booked for certain offenses." Defs' Mem. at 13. Defendants provide no factual support for this assertion, nor do they refer to their statement of undisputed facts. In fact, the LAPD does not notify federal immigration officials about the arrest of an illegal alien even where the arrestee's illegal status is known. Plf's Response at AMF No. Moreover, in their statement of facts, Defendants assert only that "[t]he booking provisions in the Manual require that an arrestee's birthplace be entered on the booking form, and that an "X" be entered in the booking sheet to denote the arrestee as foreign born." Defs' Stmt. of Facts at Fact No. 23. Plaintiff does not dispute that this is the LAPD's practice. However, it is undisputed that a person's place of birth does not provide any information about his or her citizenship or immigration status. Plf's Resp. at AMF No. 15.

It also is irrelevant whether officers do or do not have an affirmative legal duty to report information about illegal aliens to federal immigration officials. Plaintiff's lawsuit concerns the LAPD's substantial restriction, if not outright prohibition, on officers exchanging information about a person's immigration status with federal immigration officials. Neither Plaintiff's lawsuit nor sections 1373 or 1644 purport to impose an affirmative duty on officers to provide such information to federal immigration officials. The federal statutes under which this lawsuit arises prohibit restrictions on the exchange of information regarding a person's immigration status. 8 U.S.C. §§ 1373 and 1644. For this same reason, it also is irrelevant whether officers are or are not precluded from responding to requests from federal immigration officials about "an individual's criminal activities or whereabouts." Defs' Mem. at 13 (citing Defs' Stmt. at 27). An individual's criminal activities or whereabouts is not the issue. Nor is the issue whether the

LAPD "routinely assists the federal government." *Id.* Again, the issue is the LAPD's restrictions on the exchange of information about immigration status.[5] Defendants cannot obtain summary judgment by presenting facts that are irrelevant.

D. Special Order 40 is Preempted by Federal Law.

Separate and apart from whether Special Order 40 and the LAPD's practices and procedures implementing Special Order 40 violate 8 U.S.C. §§ 1373 and 1644 directly is whether Special Order 40 and these same practices and procedures are preempted by federal law.

The U.S. Supreme Court has declared that "the power to regulate immigration is unquestionably exclusively a federal power." *De Canas v. Bica*, 424 U.S. 351, 354 (1976). Consequently, federal law preempts state statutes that constitute a "regulation of immigration," which is defined as any determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain. *De Canas*, 424 U.S. at 354-56. Federal law also preempts state regulatory power where "Congress has unmistakably so ordained" such a result. *De Canas*, 424 at 356; *see also Michigan Canners & Freezers Assoc., Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 ("1984) ("*Michigan Canners*"). Finally, federal law preempts state regulatory power where the state activity "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De Canas*, 424 at 363; *Michigan Canners*, 467 U.S. at 469. Stated another way, a state regulation is preempted if it conflicts with federal law, making compliance with both state and federal law impossible. *Michigan Canners*, 467 U.S. at 469.

Plaintiff does not assert that Special Order 40 and the practices and procedures arising thereunder constitute a "regulation of immigration." Thus, Plaintiff does not argue preemption under the first *De Canas* test. Plaintiff does assert that Special Order 40 and the practices and

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[5] In this regard, the "tremendous confusion" within the LAPD over Special Order 40, which Commissioner Skobin referenced at the January 24, 2006 Police Commission meeting, also substantially restricts the obtaining or sharing of information on persons' immigration status. Plf's Resp. at AMF No. 7. If officers are confused about what they may or may not do, then they are less likely to request or share information with federal immigration officials. Such confusion constitutes its own violation of sections 1373 and 1644.

procedures arising thereunder are preempted under the second and third *De Canas* tests, namely, because 8 U.S.C. §§ 1373 and 1644 constitute unmistakable federal mandates requiring the free flow of information regarding persons' immigration status and because Special Order 40 and the practices and procedures arising thereunder stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress as expressed in these statutes.

In August of 1996, the U.S. Congress enacted Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996). One month later, in September of 1996, the U.S. Congress enacted Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996). Section 434 of PRWORA, entitled "Communication between State and Local Government Agencies and the Immigration and Naturalization Service," has been codified at 8 U.S.C. § 1644. Section 642 of IIRIRA, entitled "Communication between Government Agencies and the Immigration and Naturalization Service," has been codified at 8 U.S.C. § 1373. These two provisions reflect a clear congressional intent to promote the free flow of information between state and local governments and officials and federal immigration officials regarding a person's immigration status.

The House Conference Report accompanying Section 434 of PRWORA explains:

> The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. This provision is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court 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.

H.R. Conf. Rep. No. 104-725, 383 (1996). Similarly, the Senate Report accompanying the Senate bill that became IIRIRA states that the provision:

> Prohibits any restriction on the exchange of information between the Immigration and Naturalization Service and any Federal, State, or local agency regarding a person's immigration status. Effective immigration enforcement requires a 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.

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

It is difficult to conceive of how Congress could have expressed its intent to maximize the flow of information between federal immigration officials and state and local law enforcement authorities any clearer when it enacted these statutes. Congress's use of the words "[n]otwithstanding any other provision of Federal, State, or local law" in both statutes clearly and expressly preempts any and all federal, state, or local provisions of law touching on or regulating this subject matter. *Dep't of Transportation v. Superior Court*, 47 Cal. App. 4th 852, 856 (1996). Congress has unmistakably ordained that state and local governments may not restrict their law enforcement officers' communication with federal immigration officials regarding a person's immigration status. Because Special Order 40 and the practices and procedures arising thereunder substantially restrict, if not prohibit, the exchange of such information, they are preempted by 8 U.S.C. §§ 1373 and 1644.[6]

In addition, Special Order 40 and the practices and procedures arising thereunder also stand as substantial obstacles to the accomplishment and execution of the full purposes and objectives of Congress. *De Canas*, 424 U.S. at 363. Both the House Conference Report and the Senate Report make unmistakably clear that it was Congress's purpose and objective to promote the enforcement of U.S. immigration laws and the detection and apprehension of illegal aliens by eliminating restrictions on the free flow of information between federal, state, and local officials. Even before the enactment of 8 U.S.C. §§ 1373 and 1644, California Attorney General Daniel E. Lundgren issued a formal opinion in which he concluded that policies like Special Order 40 stand as substantial obstacles to the enforcement of U.S. immigration. *See* 75 Ops. Cal. Atty. Gen. 270, 275-77 (1992) (internal citations and quotations omitted) (emphasis added). Special Order

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[6] While Defendants make repeated reference to the Immigration and Naturalization Act (*see* Defs' Mem. at 10-11), that statute was enacted in 1952 and has been amended numerous times over the years. It predates PRWORA and IIRIRA by some forty-four years. *Gates v. Superior Court*, 193 Cal. App. 3d 205 (1987) also predates both statutes by some nine years.

40 and the practices and procedures arising thereunder are preempted by federal law because Congress has "unmistakenly so ordained" and because they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." At a minimum, there are genuine disputes of material fact about the contours of Special Order 40 and how this policy is being implemented through various practices and procedures such that summary judgment must be denied.

E. Special Order 40 Violates California Law.

The California Constitution declares, "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land." Cal. Const., art. III, § 1. Because the California Constitution recognizes the supremacy of federal law and Special Order 40 and the practices and procedures arising thereunder violate 8 U.S.C. §§ 1373 and 1644, they must violate the California Constitution as well. The same disputes of fact that prevent entry of summary judgment or summary adjudication on Plaintiff's claims under sections 1373 and 1644 thus preclude entry of summary judgment on Plaintiff's claims arising under California law.

In addition, in 1994, voters in the State of California passed Proposition 187, which includes provisions that require law enforcement agencies in California to attempt to verify the citizenship or immigration status of arrestees, and, if an arrestee appears to be an illegal alien, to notify both the California Attorney General and federal immigration officials of the arrestee's apparent illegal status. These provisions subsequently were incorporated into the California law as Penal Code § 843b. One year prior to the enactment of sections 1373 and 1644, however, a federal court enjoined enforcement of various parts of Proposition 187, including Penal Code § 843b, finding that the provisions were preempted by a comprehensive federal statutory scheme regulating immigration. *League of United Latin American Citizens v. Wilson*, (C.D. Cal. 1995) 908 F. Supp. 755 (C.D. Cal. 1995) ("*League I*"). That same court later revisited its ruling in light of the passage of PRWORA. *League of United Latin American Citizens v. Wilson*, 997 F. Supp.

1244 (C. D. Cal. 1997) ("*League II*").[7] While the court declined to modify its injunction expressly, it declared: "The Court agrees that some cooperation is permitted and even required by the [PRWORA] . . . Nothing in this Court's decision should be interpreted to prohibit cooperation between state officials and the I.N.S pursuant to the [PRWORA]." *League II*, 997 F. Supp. at 1252 n.9. Penal Code § 843b is consistent with, not preempted by, sections 1373 and 1644.

Nonetheless, Defendants appear to argue that Penal Code § 843b is preempted by this same comprehensive federal scheme. Defs' Mem. at 17-19. To reach such a conclusion, however, would require a finding that Penal Code § 843b's provisions regarding verification of an arrestee's immigration status and notification to federal immigration officials of an arrestee's apparent illegal status are preempted by a comprehensive federal scheme that includes provisions requiring the voluntary exchange of this same type of information. The state and federal provisions are completely consistent, not inconsistent. It is, however, inconsistent, for Defendants to argue that Penal Code § 843b is preempted by a comprehensive federal scheme governing enforcement of immigration laws, but Special Order 40 and the practices and procedures arising thereunder are not preempted by this same scheme. If California is powerless to enact laws requiring cooperation and information sharing with the federal government on immigration issues, then certainly the LAPD does not have the power to prohibit such information sharing.[8] Consequently, Special Order 40 and the practices and procedures arising thereunder violate Penal Code § 834b as well.

F. Defendants' "Tenth Amendment" Argument Has No Merit.

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[7] It does not appear that the court considered the passage of IIRIRA in its later ruling. *League II*, 997 F. Supp. at 1251-52.

[8] The 2001 opinion of Attorney General Bill Lockyer regarding enforcement of Penal Code § 843b does little more than note the court's rulings in *League I* and *League II* and quote from 8 U.S.C. §§ 1373 and 1644. It does not attempt to analyze the status of the rulings in light of the passage of the two statutes. Defs' Mem. at 16-17, citing 84 Ops. Cal. Atty. Gen. 189 (2001).

As an initial matter, it is unclear what relief, if any, Defendants seek with their "Tenth Amendment" argument. Defendants merely raise "concerns" about a factual assertion they think Plaintiff "may argue," citing the Tenth Amendment, among other provisions.

If Defendants in fact are arguing that 8 U.S.C. §§ 1373 and 1644 violate the Tenth Amendment, then they are wrong. This precise issue was raised in a 1996 lawsuit filed by the City of New York, which had a "Don't Ask, Don't Tell" policy similar to the LAPD's Special Order 40. In affirming the dismissal of the City of New York's lawsuit, the U.S. Court of Appeals for the Second Circuit held:

> The operation of dual sovereigns thus involves mutual dependencies as well as differing political and policy goals. Without the Constitution, each sovereign could, to a degree, hold the other hostage by selectively withholding voluntary cooperation as to a particular program(s). The potential for deadlock thus inheres in dual sovereignties, but the Constitution has resolved that problem in the *Supremacy Clause*, which bars states from taking actions that frustrate federal laws and regulatory schemes. We therefore hold that states do not retain under the *Tenth Amendment* an untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs.

City of New York v. United States, 179 F.3d 29,35 (2d Cir. 1999), *cert. denied*, 2000 U.S. LEXIS 569 (Jan. 18, 2000) (internal citations omitted). In short, the Court found that the Supremacy Clause requires that federal law and federal policies trump state and local laws and policies, a legal conclusion that is not readily distinguishable from the relief Plaintiff seeks in this litigation. Defendants do not even try to argue that *City of New York* was wrongly decided. If Defendants are making some other Tenth Amendment argument, then they have failed to articulate it, much less demonstrate that it entitles them to summary judgment.

Equally without basis are Defendants' other "concerns." While Defendants baldly assert that "it is not a matter of police action for LAPD officers to question an individual about his or her immigration status" (Defs' Mem. at 15), the U.S. Supreme Court has found that questioning a person about his or her immigration status does not constitute a Fourth Amendment violation:

> We have repeatedly held that mere police questioning does not constitute a seizure. [E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage . . . Hence, the officers did not need reasonable suspicion to ask [the plaintiff] for her name, date and place of birth, or immigration status.

Muehler v. Mena, 544 U.S. 93, 101 (2005) (internal quotations and citations omitted). Plaintiff does not contend that LAPD officers may question a person about his or her immigration status *solely* because he or she does not speak English or *solely* because of a person's "ethnic appearance." Defs' Mem. at 15. The LAPD's policy prohibiting racial profiling would appear to address such concerns in any event. Plf's Resp. at AMF No. 16. Nor does Plaintiff contend that LAPD officers are "mandated" to question anyone about their immigration status. Defs' Mem. at 15. Thus, there is no basis for Defendants' "concern" that, if officers were required to question victims and witnesses about their immigration status, then the LAPD might run afoul of federal law governing the provision of certain state and local public benefits to aliens. *Id.* Likewise Plaintiff does not contend that LAPD officers have an affirmative duty to share information about a person's immigration status with federal immigration officials. Plaintiff's only contention is that the LAPD cannot prohibit or restrict its officers from acquiring information about a person's immigration status or conveying such information to federal immigration authorities. Defendants' "concerns" have no merit, and they certainly do not support entry of summary judgment in Defendants' favor.

G. Defendants' Motion for Summary Adjudication Has No Merit.

Defendants make no separate arguments in support of their motion for summary adjudication of Plaintiff's claims for declaratory and injunctive relief. Consequently, Defendants' motion for summary adjudication must be denied for the same reasons set forth above that Defendants' motion for summary judgment must be denied.

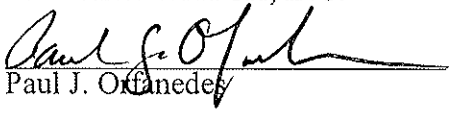
IV. CONCLUSION.

For the foregoing reasons, Plaintiff respectfully requests that Defendants' motion for summary judgment, or, in the alternative, summary adjudication, be denied in its entirety.

Dated: May 15, 2008

Respectfully submitted,

JUDICIAL WATCH, INC.

By: 
Paul J. Orfanedes

Attorneys for Plaintiff

PROOF OF SERVICE BY MAIL

I am employed in the City of Washington, District of Columbia. I am over the age of 18 and not a party to the within action. My business address is 501 School Street, S.W., Suite 500, Washington, DC 20024.

On May 15, 2008, I served the foregoing document described as:

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

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

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I caused such envelope to be deposited in the U.S. mail, with postage thereon fully prepaid, at Washington, D.C. 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 Washington, D.C. 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 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 May 15, 2008 at Washington, D.C.

DAVID F. ROTHSTEIN