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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

CYNTHIA CERLETTI,

Plaintiff,

v.

VICKI HENNESSY, in her Official Capacity as Sheriff of the City and County of San Francisco.

Defendant.

Case No.: CGC-16-556164

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S DEMURRER TO SECOND AND THIRD CAUSES OF ACTION IN FIRST AMENDED COMPLAINT

Reservation No.: 07280911-04

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TABLE OF CONTENTS

BACKGROUND 1

I. THE COURT SHOULD ASSUME SHERIFF HENNESSY'S DIRECTIVE KEEPS IN PLACE HER PREDECESSOR'S PROHIBITION ON COMMUNICATING IMMIGRATION STATUS INFORMATION TO ICE 1

II. THE FIRST AMENDED COMPLAINT 1

ARGUMENT 2

I. THE FIRST AMENDED COMPLAINT IS SUFFICIENT UNDER CCP § 526A 2

II. FEDERAL PREEMPTION 4

A. Standard of Review 4

B. The Demurrer To The Second Cause Of Action Based On Express Preemption Should Be Denied 6

1. Sections 1373 and 1644 6

2. *Steinle* Order 9

C. The Demurrer To The Third Cause Of Action Based On Implied Preemption Should Be Denied 9

1. The Sheriff's Restrictions Are An Obstacle To The Accomplishment Of A Clear Congressional Purpose 10

2. The Sheriff's Restrictions Are An Impermissible Local Classification Of Aliens and Regulation of Immigration 12

III. THE TENTH AMENDMENT IS NOT A BAR TO DENYING THE DEMURRER 15

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
567 U.S. 387, 132 S. Ct. 2492 (2012) .....

Ariz. Dream Act Coalition v. Brewer,
855 F.3d 957 (9th Cir. 2017).....

BFP v. Resolution Trust Corp.,
511 U.S. 531 (1994).....

Blair v. Pitchess,
5 Cal. 3d 258, 268 (1971) .....

Blank v. Kirwan,
39 Cal. 3d 311, 318 (1985) .....

Bologna v. City and County of San Francisco,
192 Cal. App. 4th 429 (2011) .....

City of New York v. United States,
179 F.3d 29 (2d Cir. 1999).....

Crandon v. United States,
494 U.S. 152 (1990).....

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

Demore v. Kim,
538 U.S. 510 (2003).....

Diop v. ICE/Homeland Security,
656 F. 3d 221 (3rd Cir. 2011) .....

Dowhal v. SmithKline Beecham Consumer Healthcare,
32 Cal. 4th 910 (2004) .....

Garcetti v. Superior Court,
49 Cal. App. 4th 1533 (1996) .....

Harisiades v. Shaughnessy,
342 U.S. 580 (1962).....

Herzberg. v. County of Plumas,
133 Cal. App. 4th 1 (2005) .....

Hines v. Davidowitz,
312 U.S. 52 (1941) .....

Hispanic Interest Coalition v. Governor of Ala.,
691 F.3d 1236 (11th Cir. 2012) .....

In re Farm Raised Salmon Cases,
42 Cal. 4th 1077 (2008) .....

LiMandri v. Judkins,
52 Cal. App. 4th 326 (1997) .....

Lockheed Martin Corp. v. Continental Ins. Co.,
134 Cal. App. 4th 187 (2005) .....

Marshall v. Gibson, Dunn & Crutcher,
37 Cal. App. 4th 1397 (1995) .....

New York v. United States,
505 U.S. 144 (1992) .....

Pacific Legal Foundation v. Brown,
29 Cal. 3d 168 (1981) .....

People v. Pieters,
52 Cal. 3d 894 (1991) .....

Plyler v. Doe,
475 U.S. 202 (1982) .....

Printz v. United States,
521 U.S. 898 (1997) .....

Quelimane Co. v. Stewart Title Guarantee Co.,
19 Cal. 4th 26 (1998) .....

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) .....

Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) .....

Steinle v. City and County of San Francisco,
230 F. Supp.3d 994 (N.D. Cal. 2017) .....

Sturgeon v. Bratton,
174 Cal. App. 4th 1407 (2009) .....

Taschner v. City Council,
31 Cal. App. 3d 48 (1973)

Tobe v. City of Santa Ana,
9 Cal. 4th 1069 (1995)

Toll v. Moreno,
458 U.S. 1 (1982)

United States v. Atlantic Research Corp.,
551 U.S. 127 (2007)

Viva! Intern. Voice for Animals v. Adidas Promotional Retail Operations, Inc.,
41 Cal. 4th 929 (2007)

Wood v. A. Wilbert's Sons Shingle & Lumber Co.,
226 U.S. 384 (1912)

Statutes

8 U.S.C. § 1226(c)

8 U.S.C. § 1226(c)(1)

8 U.S.C. § 1226(c)(2)

8 U.S.C. § 1226

8 U.S.C. § 1227

8 U.S.C. § 1373

8 U.S.C. § 1644

Other Authorities

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Black's Law Dictionary 253 (5th ed. 1979)

Exec. Order 13768, § 5, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017)

Omnibus Consolidated Appropriations Act 1997, Pub. L. 104-208, §§ 133, 642 (1996)

Opinion, 75 Ops. Cal. Att'y Gen. 270 (1992), 1992 Cal. AG LEXIS 43

BACKGROUND

I. THE COURT SHOULD ASSUME SHERIFF HENNESSY'S DIRECTIVE KEEPS IN PLACE HER PREDECESSOR'S PROHIBITION ON COMMUNICATING IMMIGRATION STATUS INFORMATION TO ICE.

Sheriff Hennessy contends that her April 11, 2016 directive does not contain any express restriction on sharing citizenship or immigration status information with ICE. *See* Mem. of P&A in Support of Sheriff Hennessy's Demurrer to Second and Third Causes of Action in First Amended Complaint ("Def's MPA") at 3. On demurrer, however, the court assumes all facts alleged in the complaint are true, along with all facts that may be implied or inferred from those expressly stated. *See Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985). The FAC alleges Sheriff Hennessy's directive keeps in place her predecessor's prohibition on communicating citizenship or immigration status information to ICE. *See* Sheriff Hennessy's Request for Judicial Notice ("Def's RFJN"), Ex. A (FAC) ("FAC") ¶ 25. Indeed, Sheriff Hennessy concedes "[t]he 2016 Directive does not mention citizenship or immigration status." Def's MPA at 3. Thus, the Court must assume as true that Sheriff Hennessy's directive keeps in place her predecessor's prohibition on communicating citizenship or immigration status information to ICE.[1]

II. THE FIRST AMENDED COMPLAINT.

Cerletti's original complaint sought to enjoin Sheriff Hennessy from expending taxpayer funds on "policies and/or practices" that prohibit or restrict SFSD personnel from sharing immigration-related information with federal immigration officials. Compl. ¶ 1. Sheriff Hennessy demurred, stating five times in her brief that Cerletti had not specified which policies or practices were preempted by federal immigration law. *See* Mem. of P&A in Support of Sheriff Hennessy's Demurrer 2/17/17 at 1, 4, 7. Judge Richard Ulmer agreed, sustaining the demurrer with leave to amend:

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[1] Sheriff Hennessy alleges "it 'does not limit staff from providing information required or authorized by state law . . . and federal law.'" Def's MPA at 3. However, she does not assert "federal law" refers to Sections 1373 and 1644. Neither statute requires or authorizes any information be provided to ICE; they only prohibit obstacles to sharing information. *See also Opinion*, 75 Ops. Cal. Att'y Gen. 270 (1992), 1992 Cal. AG LEXIS 43 *14, n.9 (holding that despite similar language in an ordinance, "[i]t is the ordinance's creation of an 'obstacle' to the objectives of Congress that is impermissible . . . A direct conflict with a federal or state statute or regulation presents a separate and distinct basis for the preemption of a local ordinance.).

> As defendant points out, plaintiff fails to plead which "policies and/or practices" are supposedly preempted by 8 U.S.C. §§ 1373, 1644 or "stand as obstacles" to congressional purposes and objectives. (Cmplt. para. 1, 43, 48.) Specificity is critical in a facial challenge such as this, as plaintiff "must establish" that the particular "policies and/or practices" "inevitably pose a present total and fatal conflict with section 1373."

Def's RFJN, Ex. C (internal citations omitted).

Cerletti thereafter filed a first amended complaint. The FAC eliminates all generic references to the "policies and/or practices" that caused Judge Ulmer to sustain the earlier demurrer. In her FAC, Cerletti now focuses exclusively on Sheriff Hennessy's restrictions on communications with federal immigration officials about the citizenship, immigration status, and release of criminal aliens in SFSD's custody. FAC ¶¶ 1, 33, 38, 43. The FAC still claims that Sheriff Hennessy's restrictions are expressly or impliedly preempted by federal law. *Id.* Cerletti's first and second causes of action allege that restrictions on information sharing are expressly preempted by two federal statutes, 8 U.S.C. §§ 1373 and 1644. Cerletti's third cause of action alleges that restrictions on sharing release information – information about the date, time, and place certain priority criminal aliens will be released from SFSD's custody – are impliedly preempted by a third federal statute, 8 U.S.C. § 1226(c), and by the Immigration and Naturalization Act ("INA") generally. *Id.*

Sheriff Hennessy demurs to the second and third causes of action. Her demurrer does not challenge whether the FAC states a valid claim for declaratory and injunctive relief; it argues the merits of Cerletti's preemption claims and contends that Sheriff Hennessy's information-sharing restrictions are neither expressly nor impliedly preempted as a matter of law. Def's MPA at 3-4.

ARGUMENT

I. THE FIRST AMENDED COMPLAINT IS SUFFICIENT UNDER CCP § 526A.

While Sheriff Hennessy expends a lot of energy making substantive arguments, the sole issue on demurrer is whether the facts pleaded, if true, state a valid cause of action. *See Garcetti v. Superior* Court, 49 Cal. App. 4th 1533, 1547 (1996); *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 339 (1997). Whether a plaintiff can prove the allegations of a complaint does not concern the reviewing court. *See Quelimane Co. v. Stewart Title Guarantee Co.* 19 Cal. 4th 26, 47 (1998).

To state a claim under Code of Civil Procedure ("CCP") § 526a, a plaintiff must allege he or she has paid taxes to a city, county, or town within the one-year period before the filing of the action and that the defendant is an officer or agent of the city, county, or town and is expended public funds illegally. *Id.*; *see also Herzberg. v. County of Plumas*, 133 Cal. App. 4th 1, 23-24 (2005). The mere expending of a paid, public official's time performing unlawful or unauthorized acts is an illegal expenditure of taxpayer funds that may be enjoined under CCP § 526a, and it is immaterial that the amount of the expenditure is small or that the illegal expenditure will permit a savings of tax funds. *See Blair v. Pitchess*, 5 Cal. 3d 258, 268 (1971).

Cerletti has alleged all facts necessary to state a claim under CCP § 526a. FAC ¶¶ 4, 5, and 22-31. She alleges she paid property and other taxes to the City and County of San Francisco ("CCSF") within the one year period before filing this action, and that Sheriff Hennessy is a CCSF official and is expending CCSF taxpayer funds and taxpayer-financed resources illegally. *Id.* Because Sheriff Hennessy's demurrer challenges Cerletti's second and third causes of action only, the case will continue regardless of the demurrer's outcome. Regarding the second and third causes of action, the demurrer does not argue that facts as alleged by Cerletti fail to state a claim for violation of CCP §526a. Rather, it challenges whether Sheriff Hennessy's expenditures of taxpayer funds and taxpayer-financed resources are illegal, which is a merits question.

"Strictly speaking, a demurrer is a procedurally inappropriate method for disposing of a complaint for declaratory relief." *Lockheed Martin Corp. v. Continental Ins. Co.*, 134 Cal. App. 4th 187, 221 (2005); *Taschner v. City Council*, 31 Cal. App. 3d 48, 57 (1973). It has been noted:

> 'In brief, the object of declaratory 'relief' is not necessarily a beneficial judgment; rather, it is a determination, favorable or unfavorable, that enables the plaintiff to act with safety. This theory has prevailed, and the rule is now established that the defendant cannot, on demurrer, attack the merits of the plaintiff's claim. The complaint is sufficient if it shows an actual controversy; it need not show that plaintiff is in the right.'

Id. quoting 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading § 831, p. 289. Because Sheriff Hennessy's demurrer does not dispute whether counts two and three of the FAC properly state claims under CCP § 526a, but only disputes the illegality of the challenged expenditures – the "merits of [the] controversy" – it is not a proper demurrer and must be denied.

II. FEDERAL PREEMPTION

A. Standard of Review

Sheriff Hennessy contends the Court must presume any restrictions she imposes on SFSD personnel sharing release information with ICE are not preempted. Def's MPA at 6. Her contention is erroneous because immigration is not an area States have traditionally regulated or a field States have historically occupied. *See Toll v. Moreno*, 458 U.S. 1, 10 (1982) (authority to regulate immigration and matters concerning aliens in or seeking to enter the U.S. is vested in the Federal Government); *De Canas v. Bica*, 424 U.S. 351, 354 (1976). Control of immigration is a "fundamental sovereign attribute." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Immigration policy "is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power," and "so exclusively entrusted to the political branches" of the National Government as "to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1962).

The cases cited by Sheriff Hennessy are not immigration cases. Def's MPA at 5. *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077 (2008) involved the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 et seq. and, in particular, whether the FDCA preempted plaintiffs' class action alleging grocery stores sold artificially colored farmed salmon without disclosing to consumers the use of color additives in violation of the Sherman Food, Drug, and Cosmetic Law, Health & Saf. Code, §§ 109875 et seq. In *Viva! Intern. Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal. 4th 929 (2007), plaintiff nonprofit organization sued defendant retailer for engaging in an unlawful business practice by importing and selling athletic shoes made from kangaroo leather, and the issue was whether California Penal Code § 630o, which declares unlawful the importation for commercial purposes, sale, or possession with intent to sell dead body parts of specified endangered species, was preempted by the federal Endangered Species Act, 16 U.S.C. §§ 1531 et seq. The courts in both cases applied a presumption against preemption because the state law in each case was within the state's historic police powers. *See In re Farm Raised Salmon Cases*, 42 Cal. 4th 1088 (consumer protection law); *Viva! Intern. Voice for Animals*, 41 Cal. 4th at 938 (out-of-state wildlife law).

"But a law that regulates an area of traditional state concern can still effect an impermissible regulation of immigration." *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957, 972 (9th Cir. 2017) (discussing five examples including two U.S. Supreme Court cases).

In addition, Sheriff Hennessy cites *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069 (1995) for the proposition that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. Def's MPA at 5. However, *Tobe* was not a preemption case, but rather involved a facial challenge by homeless persons to the constitutionality of a local ordinance banning camping in designated public places and the proper application of the vagueness doctrine. *Tobe*, 9 Cal. 4th at 1107. Sheriff Hennessy cites *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407 (2009) for the proposition that a local law enforcement policy is entitled to the same deference accorded a facially-challenged statute. Def's MPA at 6. Such deference, however, appears only in the court's discussion of a facial challenge to the constitutionality of Los Angeles Police Department Special Order 40, not in its treatment of Sturgeon's preemption claim. *Id.* at 1419-1420. Moreover, *Sturgeon* did not involve restrictions on voluntarily sharing inmate release information or other communications with ICE, as the court stated: "SO40 does not address communication with ICE; it addresses only the initiation of police action and arrests for illegal entry." *Id.* at 1421. Regarding such restrictions, *Sturgeon* declared, "[i]t cannot seriously be disputed that *Congress's objective in enacting section 1373 was to eliminate any restrictions on the voluntary flow of immigration information* between state and local officials and ICE; indeed, the express language of section 1373 does just that." *Id.* at 1423 (emphasis added).

The supremacy clause grants Congress the power to preempt state law. *See Arizona v. United States*, 567 U.S. 387, 399 (2012); *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 269 (2004). There is no one universal preemption formula or rule. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). One recent decision states the rule as follows:

> Traditionally, federal law preempts state law when: (1) Congress expressly includes a preemption provision in federal law; (2) states attempt to "regulat[e] conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance"; or (3) state law conflicts with federal law, either because "compliance with both federal and state regulations is a

physical impossibility" or "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Ariz. Dream Act Coalition, 855 F.3d at 971 (internal citations omitted).

B. <u>The Demurrer To The Second Cause Of Action Based On Express Preemption Should Be Denied</u>.

1. Sections 1373 and 1644.

Sections 1373 and 1644 bar restrictions on voluntary communications with ICE. The bar applies to all types of immigration-related information, including information concerning release dates and times of aliens in custody of law enforcement agencies. Both statutes are directed by their title at communication between government agencies and ICE, and their content bans prohibiting, or in any way restricting, the two-way flow of information regarding not only citizenship but also immigration status, a broad term obviously capable of embracing any essential immigration-related communication between local officials and ICE, including knowledge about not just the presence, but also the whereabouts, and activities of removable aliens. *See e.g.*, Black's Law Dictionary 253 (5th ed. 1979) (defining communication as "[i]nformation given; the sharing of knowedge by one with another"); *id.* at 676 (describing immigration as "[t]he coming into a country of foreigners for purposes of permanent residence"); *id.* at 1264 (defining status as "[s]tanding; state or condition . . . [t]he legal relation of individual to rest of the community"). The First Appellate District has accorded these statutes the same meaning. *See Bologna v. City and County of San Francisco*, 192 Cal. App. 4th 429, 438 (2011) ("section 1373(a) invalidates all restrictions on the voluntary exchange of immigration information . . . ."); *see also Sturgeon*, 174 Cal. App. 4th at 1423 ("Congress's objective in enacting section 1373 was to eliminate any restrictions on the voluntary flow of immigration information . . . the express language of section 1373 does just that."); *Hispanic Interest Coalition v. Governor of Ala.*, 691 F.3d 1236, 1248 (11th Cir. 2012) ("Sections 1373 and 1644 . . . require Alabama to provide immigration-related information to the federal government . . . and prohibit Alabama from restricting this transfer of information."). Indeed, a SFSD official's knowledge of a removable alien inmate's release date and time is a classic example of information about an

individual's presence, whereabouts, and activities that Congress intended to be shared with ICE.

Sheriff Hennessy's interpretation of these statutes – and it's only an interpretation – is that "Congress sought to prevent local restrictions on local officials' communications with ICE, but only insofar as those communications concerned an individual's citizenship or immigration status." Def's MPA at 7 (emphasis deleted). She isolates these terms from the statute and structure of the federal scheme and assigns to them her own restricted meaning: "Information about an individual's citizenship or immigration status means just that: information about the country or countries of which that individual is a citizen (including whether that individual is a citizen of the United States), and about whether, and how, that individual is lawfully present within the United States." *Id.* at 8. From there, Sheriff Hennessy argues that a "communication to ICE about the date and time at which the specified individual is expected to be released [from custody] – addresses a subject on which Sections 1373 and 1644 are silent." *Id.* She then assigns the communication an even narrower meaning – for example, "next Tuesday, July 15, at 2 p.m." – and argues that such specifics are not a communication about anyone's citizenship or immigration status. *Id.* On that logic, she concludes sections 1373 and 1644 do not preempt her restrictions.[2]

Sheriff Hennessy's interpretation does not withstand scrutiny. First, her formulation of the term "immigration status" relies on aliens' presence in the United States. How is ICE to determine whether aliens are present in the United States if she sets them free without first giving notice of their release to ICE? They could be anywhere! Second, the fact that Sheriff Hennessy lends restrictive meaning to the term "immigration status" highlights its ambiguity. Third, it does not aid the inquiry to suggest Congress could have added release dates and times to the text. Congress also could have used Sheriff Hennessy's formulation to limit the types of information it intended to regulate. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("That the statute

[2] Sheriff Hennessy contends that "[i]n a facial challenges such as this, Cerletti bears the burden of showing that defendant's alleged policies and practices 'pose a present total and fatal conflict with section[s] 1373 [or 1644]; a mere hypothetical conflict is insufficient.'" Def's MPA at 8 n.4 (*quoting Sturgeon*, 174 Cal. App. 4th at 1420). Cerletti has not brought a facial challenge; her claims are based on federal preemption. *See and compare e.g.*, *Dowhall*, 32 Cal. 4th at 923-24 (preemption) with *Pacific Legal Foundation v. Brown*, 29 Cal. 3d 168, 180-81 (1981) (facial). Also, the FAC eliminates all references to "policies and practices."

could have expressly included the phrase 'former employees' does not aid our inquiry. Congress also could have used the phrase 'current employees.'").

Sheriff Hennessy's formulation also ignores the larger context of Sections 1373 and 1644. "[W]e do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' *People v. Pieters*, 52 Cal. 3d 894, 899 (1991) *citing Clean Air Constituency v. State Air Resources Bd.*, 11 Cal. 3d 801, 814 (1974). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341.

The object and policy of Sections 1373 and 1644 are clear and undisputed: "Congress has long sought to encourage full and open communication between state and local agencies and federal immigration officials," and "to remove obstacles to such communication." FAC ¶ 10. The legislative history of these provisions and subsequent case law confirm this clear congressional purpose and objective. *Id.* ¶ 13 (*citing Arizona*, 567 U.S. at 411) ("Consultation between federal and state officials is an important feature of the immigration system."). Indeed, the entire scheme of the INA demonstrates a clear intent to promote information sharing and consultation between state and local law enforcement agencies and federal immigration officials. *Id.* (*citing Arizona*, 567 U.S. at 412) (*quoting* 8 U.S.C. § 1357g(10)(A)).

Significantly, sections 1373 and 1357(g)(10) were enacted at the same time, *see Omnibus Consolidated Appropriations Act 1997*, Pub. L. 104-208, §§ 133, 642 (1996), and the two provisions should be read consistently. *See Wood v. A. Wilbert's Sons Shingle & Lumber Co.*, 226 U.S. 384, 389 (1912) (separate parts of the same enactment are read to not conflict and construed such that "each should have its proper application distinct from and harmonious with that of the other."). When these statutes are read together, Section 1373 ensures that no external restriction on the communications between government entities will prevent state and local officers from cooperatively assisting federal officials under Section 1357(g)(10). *See also Arizona*, 567 U.S. at 410 (cooperation under federal law includes "allow[ing] federal immigration

officials to gain access to detainees held in state facilities" and "*responding to requests for information about when an alien will be released from their custody.*") (emphasis added).

2. *Steinle* Order

Sheriff Hennessy relies on *Steinle v. City and County of San Francisco*, 230 F. Supp.3d 994 (N.D. Cal. 2017), a federal district court order on a motion to dismiss Kate Steinle's family's wrongful death lawsuit, for the proposition that Sections 1373 and 1644 do not apply to ICE's requests for release information. Def's MPA at 9. This court is not bound by the *Steinle* court's narrow reading of Section 1373 in that context, and *Steinle* is distinguishable in any event. The plaintiffs did not argue the term "immigration status" includes release date and time information. The court also noted there was no federal preemption claim: "Although [the Steinles] note the California Attorney General's position in passing, neither the complaint nor their opposition brief argues that the March 13 [Mirkarimi] memorandum or any portion of Chapter 12H violates the Supremacy Clause of the United States Constitution." *Steinle*, 230 F. Supp.3d at 1007, n.6.[3]

The *Steinle* court also deviated from sound principles of statutory construction to avoid having to consider Section 1373's legislative history, which does not support the court's position. As a result, it viewed the provision in isolation and did not consider the broader context of either the statute as a whole or the statutory scheme of which it is a part. The First Appellate District examined Section 1373 and held that "section 1373(a) invalidates all restrictions on the voluntary exchange of immigration information." *See Bologna*, 192 Cal. App. 4th at 438; *see also Sturgeon*, 174 Cal. App. 4th at 1423 ("Congress's objective in enacting section 1373 was to eliminate any restrictions on the voluntary flow of immigration information . . . .").[4]

C. <u>The Demurrer To The Third Cause Of Action Based On Implied Preemption Should Be Denied</u>.

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[3] In a 1992 opinion, the California Attorney General held that the supremacy clause preempts a city from prohibiting its officers and employees from cooperating with federal immigration investigations or gathering or disseminating information regarding immigration status. *See Opinion*, 75 Ops. Cal. Att'y Gen. 270, 277 (1992), 1992 Cal. AG LEXIS 43 *14.

[4] Citing *Sturgeon*, Sheriff Hennessy suggests "in examining whether a local law enforcement agency's directive violates Section 1373 and/or 1644, those statutes are applied according to their plain language." Def's MPA at 10. But as she concedes, *Sturgeon* emphasized SO40 says nothing about communication with ICE, and thus does not implicate Section 1373. *Id.*

Cerletti's third cause of action under CCP § 526a alleges Sheriff Hennessy is expending taxpayer funds and taxpayer resources illegally by restricting, if not prohibiting, SFSD personnel from sharing release information about deportable criminal aliens in SFSD custody. FAC ¶ 43. Cerletti contends these restrictions are illegal because they are impliedly preempted by federal law. *Id.* More specifically, she claims the restrictions are an obstacle to the accomplishment of a clear congressional purpose and constitute an impermissible classification of aliens and regulation of immigration. *Id.* The former is a "conflict" preemption claim, and the latter is a "field" preemption claim. Whether Cerletti can prove her implied preemption claims are beyond the scope of a demurrer. *See Quelimane Co.*, 19 Cal. 4th at 47; *LiMandri*, 52 Cal. App. 4th at 339; *Garcetti*, 49 Cal. App. 4th 1547. Because Cerletti has alleged all the facts necessary to state a claim under CCP § 526a, Cerletti's third cause of action withstands Sheriff Hennessy's demurrer.

1. <u>The Sheriff's Restrictions Are An Obstacle To The Accomplishment Of A Clear Congressional Purpose</u>.

Sheriff Hennessy misconstrues, or at least misperceives, Cerletti's implied preemption claim. Unlike Cerletti's first and second causes of action, Cerletti's third cause of action is not based on sections 1373 or 1644. It is based on Congress' unambiguous intent that certain deportable criminal aliens held by law enforcement agencies ("LEAs") such as the SFSD be taken into custody by federal immigration official upon their release by the LEAs.[5] 8 U.S.C. § 1226(c). Covered aliens include those who have committed, *inter alia*, an aggravated felony, certain controlled substance offenses, certain firearms offenses, or two or more "crimes of moral turpitude." 8 U.S.C. § 1226(c)(1). Congress has mandated that these deportable criminal aliens be taken into immigration custody when released by LEAs "without regard to whether the alien is released on parole, supervised release, or probation and without regard to whether the alien may be arrested or imprisoned again for the same offense." *Id.* Congress was so concerned about these particular criminal aliens being released into the general population that it required they be

[5] Sheriff Hennessy's assertion that Cerletti does not cite any section of the INA other than sections 1373 and 1644 is incorrect. Paragraph 14 of the FAC cites section 1226(c) FAC at para. 14. The FAC also cites two other sources of federal laws, an federal executive order and a federal regulation, and invokes the INA generally. *Id.* ¶¶ 7, 14-15.

held without bond or conditional parole under all but a few, very limited circumstances as determined by the Attorney General. *See generally* 8 U.S.C. § 1226(c)(2); *see also Demore v. Kim*, 538 U.S. 510 (2003). It even precluded judicial review of covered aliens' non-constitutional challenges to their detention. 8 U.S.C. § 1226(e); *Demore*, 538 U.S. at 516-17.

The U.S. Supreme Court upheld the constitutionality of section 1226(c) in *Demore.* The Court found Congress was "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore*, 538 U.S. at 513. According to the Court, "Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with the increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518. According to another court, "Section 1226(c) was intended to remedy this perceived problem by ensuring that aliens convicted of certain crimes would be present at their removal proceedings and not on the loose in their communities, where they might pose a danger." *Diop v. ICE/Homeland Security*, 656 F.3d 221, 231-32 (3rd Cir. 2011) (*citing Demore*, 538 U.S. at 519 and 531 (Kennedy, J., concurring)). Not only has the constitutionality of the statue been affirmed by the nation's highest court, but Congress' purpose and intent in enacting the provision is unmistakably clear.[6] *Demore*, 538 U.S. at 531.

Sheriff Hennessy's refusal to share basic information about the release of deportable criminal aliens in her custody – the date, time, and place of their scheduled release – plainly frustrates Congress' clear purpose in enacting section 1226(c). By refusing to share release information, Sheriff Hennessy allows deportable criminal aliens in her custody – aliens Congress plainly intended to be detained upon release from the custody of LEAs such as SFSD – to escape federal immigration officials' grasp. Her restrictions enable aliens who have committed aggravated felonies or other crimes deemed sufficiently serious by Congress to warrant detaining them and denying them bond or conditional parole to remain at large pending removal. Not only might such persons pose a further danger to the community – which was one of Congress' main

[6] The Court reiterated that, over the years, it had "firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable as applied to citizens." *Demore*, 538 U.S. at 522.

concerns – but federal immigration officials must spend additional time and resources and assume unnecessary risk to themselves, the aliens, and others locating and apprehending them.

Cerletti does not assert Sheriff Hennessy must detain a deportable criminal alien any longer than she would absent section 1226(c). The statute requires federal immigration officials, not LEAs, to detain the alien. And of course, federal immigration officials must have probable cause for determining that a particular individual is a deportable criminal alien. The alien's detention by federal immigration authorities also must satisfy all substantive and procedural requirements of federal law. Sharing release information also does not impose any significant or undue burden on Sheriff Hennessy. A simple phone call or email advising that a deportable criminal alien sought by a federal immigration official will be released from County Jail #1 at 10:30 a.m. on September 12, 2017 would likely suffice. Sheriff Hennessy's restrictions on sharing release information about deportable criminal aliens stand as an obstacle to the accomplishment of the clear goal articulated by Congress when it enacted section 1226(c).

2. <u>The Sheriff's Restrictions Are An Impermissible Local Classification Of Aliens and Regulation of Immigration</u>.

Sheriff Hennessy's restrictions on sharing release information also are impliedly preempted by the INA, which occupies the field for purposes of classifying aliens and regulating immigration. The INA creates numerous classifications of aliens and gives federal immigration officials exclusive authority to determine whether an alien is removable. Section 1227 identifies multiple classes of deportable aliens, and section 1226 governs apprehension and detention of aliens pending decisions on their removal. *See* 8 U.S.C. §§ 1226 and 1227. As already demonstrated, section 1226(c) requires certain deportable criminal aliens be detained by federal immigration officials upon their release by LEAs. Section 1226(a) gives the Attorney General discretion to arrest and detain other aliens pending decisions on their removal. It also gives the Attorney General discretion to release an alien, other than a criminal alien classified in section 1226(c), on bond or conditional parole. A January 2017 federal executive order also classifies and prioritizes criminal aliens for removal. *See* Exec. Order 13768, § 5, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017); FAC ¶ 15. Not content with these federal classifications, Sheriff Hennessy has

developed her own classifications of criminal aliens different from those set forth in the INA and Executive Order 13768. FAC ¶ 27. Sheriff Hennessy's classifications are similar, but not identical, to the classifications set forth in CCSF's Sanctuary City law. *Id.* ¶¶ 18-21 and 27.

"The States enjoy no power with respect to the classification of aliens." *Plyler v. Doe*, 475 U.S. 202, 225 (1982). The power to classify aliens for immigration purposes is "committed to the political branches of the Federal Government." *Id.* Federal authority to regulate liens derives not from one specific federal law or network of laws, but from various sources, including the Federal Government's power to establish uniform rules of naturalization, its power to regulate commerce with foreign nations, and its broad authority over foreign affairs. *See Ariz. Dream Act Coalition*, 855 F.3d at 972 (*citing Toll v. Moreno*, 458 U.S. 1, 10 (1982)). Supreme Court precedent explains that "neither a clear encroachment on exclusive federal power to admit aliens nor a clear conflict with a specific congressional purpose" is required in order for federal law to preempt state regulations of immigrants." *Id.* (*quoting Toll*, 548 U.S. at 11 n.16)). "To be sure, not all state regulations touching on immigration are preempted." *Id.* Permissible state regulations include those that mirror federal objectives and incorporate federal immigration classifications." *Plyler*, 475 U.S. at 225-26. But even a state law that "regulates an area of traditional state concern can still effect an impermissible regulation of immigration." *Ariz. Dream Act Coalition*, 855 F.3d at 973.

The court in *Arizona Dream Act Coalition* found the INA occupied the field of immigration classifications and impliedly preempted the State of Arizona's independent classification of who is authorized under federal law to be in the United States. *See Ariz. Dream Act Coalition*, 855 F.3d at 964, 975. At issue was an attempt by Arizona to deny drivers licenses to "Deferred Action for Childhood Arrival" ("DACA") recipients. Under the program, created by federal executive order, aliens brought to the United States as children are permitted to remain for a period of time as long as they meet certain conditions. *Id.* Arizona rejected DACA recipients' applications for drivers' licenses – an area of traditional state concern – concluding that they lack proof of authorized, lawful presence. *Id.* The court found Arizona had impermissibly created its own immigration classifications and was regulating immigration. *Id.* at 973. It held that the

State's refusal to recognize DACA recipients' status "necessarily embodies the State's independent judgment that recipients of DACA are not authorized to be present in the United States." *Id.* (internal quotations and citations omitted). "[B]y arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design . . . despite the fact that 'States enjoy no power with respect to the classification of aliens.'" *Id.* (*quoting Plyler*, 457 U.S. at 225).

Sheriff Hennessy has done the same thing here. She is classifying criminal aliens according to her own design, not the federal government's design. She has rejected the INA's classifications of deportable criminal aliens to be transferred to the custody of federal immigration officials under section 1226(c) and replaced the INA's classifications with her own. She also has rejected the classifications of potentially removable criminal aliens set forth in sections 1226(a), 1226(c), and 1227 and Executive Order 13768 and supplanting them with her own. And by refusing to provide release information, she is allowing criminal aliens to avoid apprehension and detention by federal immigration officials, in effect setting her own priorities for which criminal aliens should be removed from the United States. Her classifications and refusal to provide release information about criminal aliens "necessarily embodies" the same type of impermissible, independent judgment on immigration the Court rejected in *Ariz. Dream Act Coalition.* In short, Sheriff Hennessy is encroaching on the exclusive federal authority to create immigration classifications and impermissibly regulating immigration just like Arizona did in the DACA case. *Ariz. Dream Act Coalition*, 855 F.3d at 971 (concluding that "Arizona's policy encroaches on the exclusive federal authority to create immigration classifications and so is displaced by the INA."). The INA has already "occupied the field," however, and Sheriff Hennessy's restrictions on providing release information is impliedly preempted.

Finally, Sheriff Hennessy's "surplusage" argument lacks merit. The implied preemption arguments underlying Cerletti's third cause of action are not dependent on sections 1373 and 1644. Just because Congress expressly preempted restrictions on communications about citizenship and immigration status, including release information, in sections 1373 and 1644 does not mean refusing to provide release information is not an obstacle to accomplishing the clear

congressional purpose behind section 1226(c). It also does not mean Sheriff Hennessy's restrictions on sharing release information are not impermissible local classifications or regulations of immigration. Sections 1373 and 1644 are not "redundant surplusage" in any event. They are clarifying. Statutory language that clarifies another provision is not superfluous. *United States v. Atlantic Research Corp.*, 551 U.S. 127, 138 (2007). "It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity." *Id.* Sheriff Hennessy's "surplusage" argument has no bearing in an implied preemption analysis.

III. THE TENTH AMENDMENT IS NOT A BAR TO DENYING THE DEMURRER.

Sheriff Hennessy's Tenth Amendment argument is a red herring. Def's MPA at 2, 12-13. Her refusal to share release information will not result in an unconstitutional commandeering of CCSF resources. Sections 1373 and 1644 bar restrictions on the voluntary sharing of information; they do not mandate sharing. At least one court has rejected her Tenth Amendment argument. *See City of New York v. United States*, 179 F.3d 29, 31-35 (2d Cir. 1999). Also, neither *Printz v. United States*, 521 U.S. 898 (1997) nor *New York v. United States*, 505 U.S. 144 (1992) arose in the context of immigration, a unique federal power, and their holdings cannot be superimposed on an immigration case. Federal power in immigration is preeminent, if not plenary. The Tenth Amendment states, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people. U.S. Cons., amend. X. The Constitution delegates immigration power to the federal government. The Tenth Amendment does not bar finding the restrictions here illegal.

CONCLUSION

For all of the foregoing reasons, Sheriff Hennessy's demurrer should be overruled.

Dated: August 28, 2017

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