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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 INTERVENERS' MOTION FOR SUMMARY JUDGMENT** 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 Interveners' motion for summary judgment:

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) ("Kobach"). 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.

Interveners seek to defeat Plaintiff's lawsuit largely by misconstruing it. They incorrectly assert that Plaintiff brings only a facial challenge to Special Order 40, ignoring Plaintiff's repeated statements, both in his Complaint and in his opposition to Defendants' demurrer, that he challenges both the policy as written and the practices and procedures implementing the policy. *See, e.g.*, Complaint at ¶¶ 1, 21, 23, 27, 36, 38, 41 and "Prayer for Relief" at ¶¶ 1 and 2; Plf's Mem. of P & A in Opp. to Defs' Dem. to Plf's Compl., filed on July 14, 2006, at 1-3, 5-6, 9-10, and 12-15. Interveners also ignore the plain text and the obvious meaning of Special Order 40, then, contrary to their own argument that Plaintiff brings only a facial challenge, assert that the LAPD's *interpretation* of the policy is undisputed. Among other shortcomings, Interveners also misconstrue Plaintiff's Complaint as putting at issue local law enforcement officers' authority to enforce and investigate violations of federal immigration laws when all that is at issue is simply sharing information officers may discover in the ordinary the course of carrying our their usual law enforcement duties.

The Court should, respectfully, consider Plaintiff's claims as he asserts them, not as Interveners try to mischaracterize them. In addition, because genuine disputes of material fact exist regarding the scope and contours Special Order 40, both as to the meaning of the policy's text and the manner in which the policy is implemented by the LAPD, summary judgment is not appropriate. Interveners' motion must be denied.

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[1] Interveners 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.

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 Interveners' Stmt. of Facts 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.

Defendants, but not Interveners, assert that officers who are investigating a person for criminal activity are not prohibited by Special Order 40 from inquiring into the person's immigration status.[2] Defs' Stmt. of Facts at Fact No. 30. Plaintiff dispute this. Plf's Resp. to Defs' Stmt. of Facts 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 (PJO Decl. Ex. H). Deputy Chief Perez "could not envision" an officer contacting 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

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[2] Defendants have admitted 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. to Interveners' Stmt. Facts at AMF No. 4.

immigration status. Paysinger Dep. at 28:4-7 (PJO Decl. Ex. G). 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 (PJO Decl. Ex. A). 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 (PJO Decl. Ex. F). 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.

Transcript of Los Angeles City Council Meeting, June 12, 2007, at 22:24-23:5 (PJO Decl. Ex. B) ("June 12, 2007 Trans.").

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 (PJO Decl. Ex. K). 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.

Declaration of Doug McIntyre at Exhibit 1, pg. 9:14-19 (PJO Decl. Ex. O).

As implemented by the LAPD, Special Order 40 generally prohibits officers from referring illegal aliens to federal immigration officials, although this fact is disputed by all of the parties. Plf's Resp. to Interveners' Stmt. Facts at Fact No. 14; Plf's Resp. to Defs' Stmt. Facts 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 (PJO Decl. Ex. I). 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 (PJO Decl. Ex. H). 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 (PJO Decl. Ex. G). 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. *Id.* 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 (PJO Decl. Ex. A). 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. Diaz Dep. at 44:23-45:14, 47:10-48:14, and 50:15-25 (PJO Decl. Ex. F). However, Deputy Chief

Diaz told the Los Angeles City Counsel, "One of my functions in the police department is to constantly remind the public that, in fact, immigration status is not an issue that is -- that we generally pursue as a matter of course." June 12, 2007 Transcript at 9:14-22 (PJO Decl. Ex. B). "Immigration issues by themselves are not a concern for the police department." *Id.* at 15:17-19; *see also id.* at 35:25-36:7 ("if [persons in the community] believe that by contacting the police they were going to be questioned about their immigration status, that they were going to be referred to immigration, people would shut down and simply not report things . . . ."). During his deposition, Deputy Chief Diaz 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 (PJO Decl. Ex. F). 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. *Id.* 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") (PJO Decl. Ex. E). 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 "'regulations issued by and under the authority of . . . the City of Los Angeles through its Police Department." Plf's Resp. to

Interveners' Stmt. Facts at AMF No. 6. In sworn interrogatory answers, Defendants later admitted that "[t]he report accurately summarizes the implementation of Special Order 40." *Id.*

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. to Interveners' Stmt. Facts 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. to Interveners' Stmt. Facts 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.*

III. ARGUMENT.

A. Standards Governing Summary Judgment.

From commencement to conclusion, a party moving for summary judgment 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. Interveners' "Facial" Challenge Argument Has No Merit.

Interveners' initial argument tries to impose on Plaintiff the burden that a plaintiff making a facial challenge to the constitutionality of a statute or ordinance must satisfy. Plaintiff does not challenge a statute or ordinance, however. 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 the U.S.

and California Constitutions declare that federal law is supreme (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 both supremacy clauses and are preempted by federal law. None of the cases on which Interveners rely concern statutory, supremacy clause, or preemption challenges to administrative policies, practices, or procedures. Interveners' case law is inapposite.

Nor do any of Interveners' 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," as Interveners imply. Interveners' Mem. at 5 (citing, *California Family Bioethics Council v. California Inst. for Regenerative Med.*, 147 Cal. App. 4th 1319, 1339 (2007) (emphasis original)). He seeks to enjoin the continued expenditure of taxpayer funds in furtherance of an illegal policy, both as it is written and as it is applied in practice. 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 Interveners 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. Interveners 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. Interveners compare apples to oranges.

Finally, even if Interveners 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 Special

Order 40. Interveners' argument ignores the case law they cite in their own memorandum. Interveners' Mem. at 5 (citing *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1086-87, 1089 (1995)). 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 kind 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).

Interveners' Stmt. Facts at Fact No. 11. 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 officials 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 as well. 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 Interveners present any such reconciliation. Their bald assertion that there is no conflict between the text of Special Order 40 and the statutes does not make it so. The policy is unlawful on its face.[3]

Interveners also argue, however, that the LAPD's "*interpretation*" of Special Order 40 is such that it does not address communication with federal immigration officials, let alone prohibit it or restrict it. Interveners' Mem. at 9. How something is *interpreted*, and thus how it is *applied*, is not the type of inquiry that is made in a facial challenge to the constitutionality of a statute or ordinance, although, again, Plaintiff disputes that the "facial" versus "as applied"

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[3] 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.

distinction even applies to his statutory challenge to the expenditure of taxpayer funds on Special Order 40 and the LAPD's practices and procedures implementing this policy.[4] Rather, it is the type of inquiry undertaken in an "as applied" constitutional challenge instead. *Tobe*, 9 Cal. 4th at 1084.

Nonetheless, genuine disputes of material fact preclude entry of summary judgment. First, Plaintiff disputes Interveners' assertion of what constitutes "police action." Plf's Resp. to Interveners' Stmt. of Facts at Fact No. 12. Plaintiff submits that 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 asking federal immigration officials about a person's immigration status. Plf's Resp. to Interveners' Stmt. of Facts. at AMF No. 13. In fact, providing information to another law enforcement agency is a "legitimate" police action. *Id.* at 14. Second, the parties dispute the scope and contours of Special Order 40 and how the LAPD implements this policy through various practices and procedures. Plf's Resp. to Interveners' Stmt. of Facts at Fact No. 13. Third, the parties dispute whether Special Order 40 does prohibit officers from communicating with federal immigration officials. Plf's Resp. to Interveners' Stmt. of Facts at Fact No. 14. Because there are genuine disputes about these basic facts, summary judgment is not appropriate.

Interveners also are wrong with respect to their interpretation of section 1373. It is Interveners, not Plaintiff, that ignore the plain language of the statute when they disregard its express declaration that no local government or governmental entity or official may prohibit or "*in any way restrict*" the sharing of information about a person's citizenship or immigration status. 8 U.S.C. §1373. Interveners focus solely on the statute's "sending to, or receiving from" language, but that is only one part of the statute. Congress obviously meant the words "*in any*

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[4] Interveners provide no authority to support the proposition that administrative policies, or practices or procedures implementing those policies, are afforded the same interpretive deference afforded to statutes and ordinances enacted by legislatures and other representative bodies, or that the doctrine of constitutional avoidance applies to administrative policies, practices, and procedures.

way restrict" to have some meaning when it included them in section 1373. Otherwise, it would not have written them into the statute. Clearly, Congress meant to ban not only prohibitions on the exchange of information between state and local governments and federal immigration officials, but also policies and practices that present any kind of restriction on such exchanges of information.[5] Prohibiting officers from asking an individual or a third party about the individual's immigration status is a substantial restriction on officers' ability to share such information with federal immigration authorities. "Don't Ask, "Don't Tell" policies and practices such as Special Order 40 substantially restrict the universe of information that officers otherwise would be able to convey to federal immigration officials. Put another way, if officers cannot "ask" someone about his or her immigration status, then they certainly are limited in their ability to "tell" such information to federal immigration officials.

Also erroneous is Interveners' argument that, implicit in Plaintiff's legal challenge to Special Order 40 and the practices and procedures arising thereunder, is the false notion that sections 1373 and 1644 grant local police officers the authority to inquire into a person's immigration status. Interveners' Mem. at 11-16. Nothing about Plaintiff's legal arguments requires local police officers have or be granted any authority that they do not already possess. It is beyond question that, police officers, in the ordinary course of carrying out their law

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[5] While Plaintiff agrees that the language of section 1373 is clear, he does not "unnecessarily resort[]" to the statute's legislative history, as Interveners contend. Interveners' Mem. at 11-12. Rather, Plaintiff cites to the legislative history of both sections 1373 and 1644 in furtherance of his preemption argument, namely, to assist in demonstrating that Special Order 40 and the practices and procedures arising thereunder are preempted by federal law because they stand as obstacles "to the accomplishment and execution of the full purposes and objectives of Congress." *See De Canas v. Bica*, 424 U.S. 351, 354, 363 (1976). The legislative history of these statutes helps to demonstrate Congress' "full purposes and objectives." Reference to the legislative history of the statute is entirely proper. At the same time, the statutes' legislative history also confirms the intent behind the plain language of the statute. Interveners' assertion that "[t]here is no record that the statute's impact on measures like Special Order 40 . . . was even considered by Congress" is wrong as well. *See* Kobach, 69 Albany Law Review at 206 ("Congress, concerned that such policies might proliferate, enacted two separate provisions designed to smooth the way for closer cooperation with state and local law enforcement, while preventing future sanctuary policies.").

enforcement duties, may generally ask questions of an individual, ask to examine an individual's identification, and request to search his or her luggage without having any basis for suspecting the individual of wrongdoing. *Muehler v. Mena*, 544 U.S. 93, 101 (2005). In *Muehler*, the U.S. Supreme Court held that officers did not need reasonable suspicion to ask someone her name, date and place of birth, or immigration status. *Id.* In fact, implicit in Interveners' argument is the erroneous assumption that local police officers require some additional authority to do what they do every day, which is interact with the public.[6]

The "comprehensive" statutory scheme to which Interveners make reference (Interveners' Mem. at 2-16), which they describe as "regulating the investigation, interrogation, search, detention, and arrest of persons residing in the United States without proper authorization" (*id.* at 13), actually proves the erroneousness of Interveners' argument. In contrast to the various sections of the Immigration and Nationality Act cited by Interveners, including 8 U.S.C. §§ 1103, 1252c, 1324(c), 1357, and 1357(g), all that sections 1373 and 1644 address is information sharing. Sections 1373 and 1644 do not purport to govern the "investigation, interrogation, search, detention, and arrest of persons in the United States without proper authorization." They merely prohibit restrictions on the free flow of information between state and local governments, entities, and officials and federal immigration officials so that federal immigration officials charged with enforcing federal immigration laws may do so more effectively.

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[6] Such ordinary interaction with the public does not mean that officers may stop and question persons solely on the basis of racial or ethnic appearance, as Interveners' erroneously contend. *See* Interveners' Mem. at 11, n.12. The LAPD's policy prohibiting racial profiling would appear to address such concerns in any event. Plf's Resp. to Interveners' Stmt. of Facts at AMF No. 16. Nor does the fact that Congress may have preserved illegal aliens' eligibility for certain public services, such as police protection, mean that it also guaranteed illegal aliens the right to receive such services without fearing that their status will be discovered. *Id.* at 16, n.15.

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 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.

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 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 Attorney General of California 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 8 U.S.C. §§ 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 1997 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*"). 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 completely consistent with, not preempted by, 8 U.S.C. §§ 1373 and 1644.

Nonetheless, Interveners argue that Penal Code § 843b is preempted by this same comprehensive federal scheme. Interveners' Mem. at 18-20. 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 precisely this same type of information. Stated another way, Interveners assert that a federal statutory scheme that seeks to promote the voluntary sharing of information between local, state, and federal law enforcement agencies preempts a state statute that seeks to achieve these same ends. Such a conclusion would be unfounded.

Moreover, in so arguing Interveners fail to give effect to the Court's clear statements in *League II* regarding cooperation between state officials and federal immigration officials being required in some instances and its admonition that nothing in its ruling should be interpreted as prohibiting such cooperation. They simply ignore this important limitation that the Court placed on its own ruling. They also ignore the fact that the Court in *League II* does not appear to have considered the passage of IIRIRA. *See, e.g.*, *League II*, 997 F. Supp. at 1251-52. Section 834b is not a "dead letter" because of a 1995 ruling that does not reflect subsequent, substantial changes in the federal statutory scheme at issue. Rather, Interveners' arguments, and the LAPD's policy and practices, are frozen in time in the pre-PRWORA and pre-IIRIRA era.

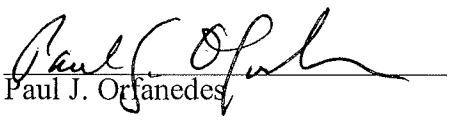
IV. CONCLUSION.

For the foregoing reasons, Plaintiff respectfully requests that Interveners' motion for summary judgment 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 INTERVENERS' MOTION FOR SUMMARY JUDGMENT

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
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Los Angeles, CA 90012

Belinda Escobosa Helzer, Esq.
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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