CASE NO. B209913

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

HAROLD P. STURGEON,
Plaintiff and Appellant,

v.

WILLIAM J. BRATTON, *et al.*,
Defendants and Respondents,

and

BREAK THE CYCLE, *et al.*,
Interveners and Respondents.

ON APPEAL FROM THE FINAL JUDGMENT OF THE
CALIFORNIA SUPERIOR COURT, COUNTY OF LOS ANGELES
CASE NO. BC 351646
THE HONORABLE ROLF M. TREU

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Counsel hereby discloses, pursuant to Cal. Rule of Court 8.208, that the following entities or persons may have an interest in this case:

Plaintiff-Appellant Harold P. Sturgeon

Defendant-Respondent William J. Bratton (in his official capacity as Chief of Police of the Los Angeles Police Department)

Defendant-Respondent John Mack (in his official capacity as a member of the Board of Police Commissioners)

Defendant-Respondent Shelly Freeman (in her official capacity as a member of the Board of Police Commissioners)

Defendant-Respondent Alan J. Skobin (in his official capacity as a member of the Board of Police Commissioners)

Defendant-Respondent Andrea Sheridan Ordin (in her official capacity as a member of the Board of Police Commissioners)

Defendant-Respondent Anthony Pacheco (in his official capacity as a member of the Board of Police Commissioners)

Defendant/Intervener-Respondent Break the Cycle

Defendant/Intervener-Respondent Los Jornaleros

Defendant/Intervener-Respondent El Comite de Jornaleros

Defendant/Intervener-Respondent Instituto de Educacion Popular del Sur de California

Attorneys for Plaintiffs-Appellants

Attorneys for Defendants-Respondents

Attorneys for Defendants-Interveners

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I. INTRODUCTION AND STATEMENT OF THE CASE

Plaintiff-Appellant ("Plaintiff") brings this taxpayer challenge to what is commonly referred to as "Special Order 40," the Los Angeles Police Department's administrative policy regarding illegal aliens, and practices and procedures implementing that policy.

The Los Angeles Police Department ("LAPD") adopted Special Order 40 in 1979. Clerk's Transcript ("CT") at 000008. The policy expressly prohibits LAPD officers from initiating "police action with the objective of discovering the alien status of a person." *Id.* It also expressly prohibits officers from making arrests for "illegal entry" in violation of Title 8, Section 1325 of the United States Code. *Id.* Under the LAPD's unwritten practices and procedures that implement Special Order 40, LAPD officers also are generally prohibited from inquiring about a person's immigration status or reporting such information to federal immigration authorities. CT at 000009-10.

Plaintiff, a taxpayer and resident of the City of Los Angeles, initiated this action on May 1, 2006 under Section 526a of the Code of Civil Procedure, which authorizes taxpayers to challenge expenditures of public funds. CT at 000005-21. Plaintiff's Complaint alleges 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, and is preempted by federal law. *Id.* Plaintiff seeks an injunction prohibiting the LAPD from expending taxpayer resources to enforce, maintain, or otherwise carry out the provisions of Special Order 40 and the practices and procedures arising thereunder. *Id.* at 00005 and 000014-15. Plaintiff also seeks a judgment declaring that Special Order 40 and the practices and procedures arising thereunder are unlawful. *Id.*

Defendants initially demurred to the Complaint, but the trial court denied Defendants' demurrer on July 27, 2006. CT at 000066-67. After Defendants answered, Interveners sought and received permission to join the litigation on the side of Defendants.[1] CT 000068-81. Thereafter, Plaintiff undertook substantial discovery into the manner in which the LAPD has implemented Special Order 40 since the administrative policy was adopted in 1979. The trial court oversaw and monitored this discovery.

In March 2008, both Defendants and Interveners moved for summary judgment. CT 000147-148 and 000463-467. In addition to

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[1] All four Interveners admit to assisting and/or representing "undocumented" aliens. CT at 000077-78. Interveners Los Jornaleros, El Comite de Jornaleros, and El Instituto de Educacion Popular del Sur de California apparently seek to protect illegal aliens' ability to obtain unlawful employment while remaining undetected by federal immigration enforcement officials.

asserting that there was no genuine dispute of material fact about the manner in which the LAPD has implemented the policy in practice, Defendants and Interveners also argued, despite Plaintiff's express claims in his Complaint that he challenged both Special Order 40 and the LAPD's practices and procedures implementing Special Order 40, and despite the substantial discovery that had taken place regarding these practices and procedures, that Plaintiff's lawsuit was a "facial" challenge to the text of Special Order 40 only. In his opposition, Plaintiff demonstrated that his Complaint encompassed more than a challenge to the written policy only and that a "facial vs. as applied" distinction simply did not apply to challenges to administrative policies and practices in any event. Plaintiff also demonstrated, in the alternative, that his Complaint properly asserted both a "facial" and an "as applied" challenge and that a genuine dispute of material fact existed about the LAPD's specific, unlawful applications of Special Order 40 in practice.

After substantial discovery had taken place concerning the LAPD's practices and procedures under Special Order 40, and on the eve of a long-scheduled trial, the trial court granted Defendants' and Interveners' motions for summary judgment, crediting the argument that Plaintiff's Complaint asserted a facial challenge to the text of Special Order only and that

Plaintiff could not demonstrate that the policy posed a total and fatal conflict with the federal statutes at issue. CT at 001950-001959. The trial court thus declined to even consider whether genuine disputes of material fact existed regarding the practices and procedures implementing Special Order 40 that Plaintiff had identified in his Complaint and in his summary judgment oppositions. *Id.* Following the entry of a final judgment in Defendants' and Interveners' favor on July 8, 2008, Plaintiff filed a timely notice of appeal. CT at 001960-1966.

II. FACTUAL BACKGROUND

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. CT at 000591 and 000608. 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. CT at 000592 and 000608-609. 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. CT at 000592 and 000609.

Although Defendants asserted in the trial court that officers who are investigating a person for criminal activity are not prohibited by Special Order 40 from inquiring into a person's immigration status, Plaintiff disputes this. CT at 000549. Defendants nonetheless admit that, if an officer were to contact federal immigration officials for no other reason than to inquire about a person's immigration status, he or she would be violating Special Order 40. CT at 000592 and 000609. This admission was confirmed in discovery. LAPD Deputy Chief Police Mark Perez testified, "Generally, yes . . . We are prohibited from inquiring about immigration status." CT at 001144. This general prohibition applies to making inquiries to federal immigration authorities as well. 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. CT at 001147. The single exception identified by Deputy Chief Perez was if an officer encountered a previously deported, violent offender. CT at 001148-50.

Assistant Chief Earl Paysinger testified to a slightly different, but nonetheless restrictive practice. Although, according to Assistant Chief Paysinger, Special Order 40 does not prohibit officers from inquiring about

a person's immigration status if the person has been arrested or lawfully detained, in his thirty years of experience with the LAPD, he has never known an officer to inquire about anyone's immigration status. CT 001099. Nor did he know of an officer ever contacting federal immigration officials to inquire about a person's immigration status. CT at 001099-1100.

Deputy Chief Gary Brennan testified to yet another slightly different, but nonetheless restrictive practice. 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. CT at 000666. 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 under the policy. CT at 000664-665. 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." CT at 000676. "Generally it is not done."[2] *Id.* Deputy Chief Brennan also was very clear that officers were

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[2] In 2002, the Immigration and Naturalization Service ("INS") became Immigration and Customs Enforcement ("ICE").

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.

CT at 000677.

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." CT 000983-984. According to Deputy Chief Diaz, officers may inquire about a person's immigration status "[i]f its not strictly prohibited." CT at 000992. 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. CT at 000991-992. 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. CT at 000963; *see also* CT at 000990. 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.

CT at 000751-752.

Police Chief Bratton agrees with Deputy Chief Perez's description of the LAPD's practice. 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." CT at 001253. 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.

CT at 001409.

The practices implemented by the LAPD under Special Order 40 also generally prohibit officers from reporting illegal aliens to federal immigration officials, although these practices are disputed by the parties. CT at 000524-525, 000533, 000607. 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." CT at 001183. 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. CT at 001150. 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. CT at 001102. 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. CT at 001103.

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." CT 000678. 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. CT at 000675. As with inquiries about a person's immigration status, Deputy Chief Brennan

testified that in practice 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. CT at 000675 and 000682-683. 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. CT at 000672-674 and 000682-683. He was not aware of any other specific circumstances where federal immigration officials would receive such notification. CT at 000666-667 and 000682-683. Deputy Chief Brennan acknowledged that, in practice, the LAPD only makes information about arrestees' place of birth available to federal immigration authorities and even that minimal information is provided through the Los Angeles County Sheriff's Office, not directly through the LAPD. CT at 000666-667 and 000669. He also acknowledged that there is no procedure for notifying federal immigration officials about illegal aliens who are arrested or detained, but not booked. CT at 000669-670.

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. CT at 000997-998, 001000-1001, and 001003. However, Deputy Chief Diaz told the Los Angeles City Council, "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." CT at 000738. "Immigration issues by themselves are not a concern for the police department." CT at 000744; *see also id.* 000764 ("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. CT at 001001-1002 and 001005-1006. The only instance in which, according to Deputy Chief Diaz, it would be inconsistent with LAPD practice under 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. CT at 001013-1014. 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. CT at 001031-1032 and 001045-1046. Like Deputy Chief Brennan, Deputy Diaz acknowledged that, in practice, the LAPD only makes information about arrestees' place of birth available to federal immigration authorities. CT at 000972-974 and 001022.

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"). CT at 000927. 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" and was "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." CT at 000593 and 000610. 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.

CT at 000594 and 000611. 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." CT at 000594-595 and 000611 (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."

CT at 000595 and 000612. These even more restrictive practices and procedures, which go beyond the text of Special Order 40 itself, are directly at issue in this lawsuit. CT at 000005, 000009 and 000013-15.

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 and the LAPD's practices and procedures arising thereunder, 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." CT at 000595 and 000612. Then-Assistant Chief Gascon also acknowledged confusion about Special Order 40, at least on the part of certain officers. CT at 000595-596 and 000612. 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 practices through "folklore" or word of mouth. CT at 000596 and 000613. 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. Standard of Review.

In reviewing an order granting summary judgment, an appellate court "must assume the role of the trial court and redetermine the merits of the motion." *Santillan v. Roman Catholic Bishops* (2008) 163 Cal.App.4th 4, 8. Specifically:

> In doing so, [the appellate court] must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented.

CT at 0000606. Stated another way, the appellate court's "task is to review the facts presented below, independently determine their effect as a matter of law and independently review the trial court's determination of questions of law." *Moerman v. California* (1993) 17 Cal.App.4th 452, 456. Under this standard of review, there can be no doubt that the trial court's decision granting summary judgment in favor of Defendants and Interveners should be reversed.

B. Taxpayer Standing Under California Law.

It is undisputed that section 526a of the Code of Civil Procedure grants standing to taxpayers to challenge expenditures of public funds. The statute provides, in relevant part:

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a . . . city . . . may be maintained against any officer thereof . . . by a citizen resident therein . . . who . . . within one year before the commencement of the action, has paid, a tax therein.

Code Civ. Proc. § 526a. "The primary purpose of this statute, originally enacted in 1909, is to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement." *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-68 (internal quotation marks and citation omitted). "California courts have consistently construed section 526a liberally to achieve this remedial purpose." *Id.* at 268.

C. The Trial Court Erred in Applying a "Facial vs. As Applied" Analysis to Plaintiff's Challenge to the Lawfulness of A Local Administrative Policy And Unwritten Practices Implementing That Policy.

A plaintiff may challenge the constitutionality of a *statute* or *ordinance* by demonstrating that the text of the *statute* or *ordinance* "inevitably pose[s] a present total and fatal conflict with applicable

constitutional prohibitions." *Pacific Legal Found. v. Brown* (1981) 29 Cal.3d 168, 180-81. Such "facial" challenges have been described as "the most difficult challenge to mount successfully." *U. S. v. Salerno* (1987) 481 U.S. 739, 745. "Indeed, it has been said that a statute will be upheld against facial attack if a court can conceive of a situation in which the statute could be applied without entailing an inevitable collision with, and transgression of, constitutional provisions." *In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 49 (*citing People v. Harris* (1985) 165 Cal.App.3d 1246, 1255-26).

An "as applied" challenge to the constitutionality of a statute or ordinance requires a plaintiff to demonstrate that he or she suffers from some "impermissible present restraint or disability" as a result of the manner or circumstance in which a facially valid statute or ordinance has been applied. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084. An "as applied" constitutional challenge also may be brought against the "future application of [a] statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past." *Id.* An "as applied" challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the

application deprived the individual to whom it was applied of a protected right." *Id.* Regardless of whether they are considered "facial" or "as applied," what such challenges have in common is that they contest the constitutionality of *statutes* or *ordinances*, neither of which is at issue here. Special Order 40 and the even more restrictive, unwritten practices and procedures by which the LAPD has implemented Special Order 40 most definitely are not statutes or ordinances.

In the lower court, Defendants and Interveners incorrectly characterized Plaintiff's taxpayer lawsuit as a facial challenge to the constitutionality of a statute or ordinance. CT at 000095-97 and 000197. It is not. Plaintiff does not challenge the constitutionality of any statute, ordinance, or other duly enacted legislative pronouncement. Plaintiff's Complaint asserts that the LAPD's administrative *policy* regarding immigration status and the unwritten practices and procedures adopted by the LAPD in implementing this *policy* violate two federal statutes, 8 U.S.C. §§ 1373 and 1644. Because these statutes are federal statutes, they are the supreme law of the land under both the U.S. Constitution and the California Constitution. U.S. Const., art. VI, cl. 2.; Calif. Const. art. III, § 1. Thus, in addition to violating federal law directly, Plaintiff's Complaint asserts that

Special Order 40 and the practices and procedures by which the LAPD has implemented this policy also are preempted by federal law.

The trial court's ruling was erroneous because Plaintiff's lawsuit plainly does not challenge the constitutionality of any statute, ordinance, or other duly enacted legislative pronouncement. By crediting Defendants' and Interveners' incorrect characterization of Plaintiff's Complaint, the trial court imposed on Plaintiff one of the most difficult burdens any plaintiff must overcome -- demonstrating that under no circumstances can a statute or ordinance be constitutional.

There are many good reasons why courts give greater deference to statutes and ordinances than to administrative policies and practices. Not the least of these is that statutes and ordinances are the legislative pronouncements of the people's duly elected representatives. As the Supreme Court of California has declared:

> In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal constitution is clear and unquestionable, we must uphold the Act. Thus, wherever possible, we will interpret a statute as consistent with applicable constitutional provisions, seeking to harmonize Constitution and statute.

California Housing Finance Agency v. Elliott (1976) 17 Cal.3d 575, 594 (internal citations omitted). The deference afforded to legislative

enactments undoubtedly stems from the plenary law-making authority of the people's elected representatives and concerns about separation of powers. *See, e.g., Pacific Legal Found.*, 29 Cal.3d at 180. This deference reflects the conviction that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of our Nation's laws." *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 610-11. Again, Plaintiff's Complaint does not challenge any *law*, but instead challenges an administrative *policy* and the practices arising thereunder. There is no authority dictating that the same deference afforded to laws should be afforded to local administrative policies or unwritten practices.

Indeed, the Supreme Court of California has differentiated between challenges to legislative enactments and challenges to mere policies in its case law. In *Arcadia Unified School Dist. v. State Dep't of Educ.* (1992) 2 Cal.4th 251, the Supreme Court of California specifically distinguished the plaintiff's challenge to the constitutionality of a section of the Education Code from a challenge to the constitutionality of a school board policy in another case: "It is important to recognize that the challenged act here is a legislative act. As a result, this situation is fundamentally different from that in *Hartzwell v. Connell* (1984) 35 Cal.3d 899." *Arcadia Unified School Dist.*, 2 Cal.4th at 260. At least twice, the Court expressly noted that there

was no statutory authorization for the school board policy at issue in *Hartzwell. Arcadia Unified School Dist.*, 2 Cal.4th at 260 n.7 and 261. The Court reiterated: "As noted earlier, [Ed. Code § 39807.5] is a legislative enactment; it is our duty to uphold it unless its constitutionality is clear and unquestionable." *Id.* (*citing California Housing Finance Agency* 17 Cal.3d at 594. While the Court in *Arcadia Unified School District* analyzed the plaintiff's challenge to the constitutionality of Ed. Code § 39807.5 as a "facial" challenge," it undertook neither a "facial" nor an "as applied" analysis in finding the school policy at issue in *Hartzwell* to be unconstitutional. Simply put, the "facial vs. as applied" distinction does not apply to challenges to administrative policies or practices. Such challenges are, in the words of the Supreme Court of California, "fundamentally different" from challenges to a statute or ordinance. *Arcadia Unified School Dist.*, 2 Cal.4th at 260. The trial court thus erred in subjecting Plaintiff's federal statutory challenge to Special Order 40 and the practices and procedures arising thereunder to the stringent requirements of a constitutional challenge to a duly enacted statute or ordinance. The trial court placed a greater burden on Plaintiff than the law requires or permits.

This conclusion is confirmed by a review of several other taxpayer challenges to administrative policies and practices. Again, no "facial vs. as

applied" analysis was undertaken in *Hartzwell*, nor were the plaintiffs in that case required to satisfy the substantial burden of demonstrating that under no set of circumstances could the school policy at issue in that lawsuit pass constitutional muster.

The same is true of *White v. Davis* (1975) 13 Cal.3d 757, in which a taxpayer challenged the LAPD's practice of conducting covert intelligence gathering activities at the University of California at Los Angeles. In finding that the practice not only inhibited the exercise of freedom of speech and assembly but also abridged the rights to due process of law and privacy, the Court did not require the taxpayer-plaintiff in *White* to demonstrate that under no set of circumstances could such practices be lawful. No "facial vs. as applied" distinction was made, nor was any such analysis undertaken.

Likewise in *Wirin v. Parker* (1957) 48 Cal.2d 890, a taxpayer challenged an LAPD practice of using concealed microphones to conduct surveillance operations. The Court reversed a judgment in favor of the LAPD and issued an injunction prohibiting the use of the equipment, finding that the practice violated the U.S. and California Constitutions. Again, no "facial" or "as applied" analysis was conducted by the Court. No showing was made by the plaintiff that the use of such equipment would be

unlawful under any circumstance. Indeed, it appears the parties to the lawsuit even stipulated that in only some instances, "but not in all of them," did the LAPD fail to obtain the consent of a person who either had an interest in the property where the surveillance was taking place or was present during the surveillance. 48 Cal.2d at 892. The plaintiff was found to be entitled to an injunction nonetheless.

In *Wirin v. Horrall* (1948) 85 Cal.App.2d 497, a taxpayer sought to enjoin an LAPD practice of using "police blockades" to stop persons entering or exiting a designated area without obtaining a search warrant, and, in some instances, searching persons entering or exiting the area without obtaining a search warrant. 85 Cal.App.2d at 500. In reversing the trial court's dismissal of the taxpayer's challenge to this practice, the Court of Appeal did not require the plaintiff to demonstrate that under no set of circumstances could the use of police blockades ever be lawful. No "facial vs. as applied" distinction was made, nor was any such analysis was undertaken. The matter was not even addressed.

Most recently, in *Fonseca v. Fong* (2008) 167 Cal.App.4th 922, *modified and reh'g denied* (Cal. App. 1st Dist., Nov. 17, 2008) 2008 Cal. App. LEXIS 2771, a taxpayer challenged the San Francisco Police Department's policies, procedures, and practices relating to Health & Safety

Code § 11369, which requires that, when a person is arrested for certain, enumerated drug offenses and there is reason to believe the arrestee is not a U.S. citizen, the arresting agency is required to notify federal immigration authorities of the arrest. Health & Saf. Code § 11369. Again, no distinction was made between "facial vs. as applied" challenges to the police department's policies, procedures and practices. Nor was the plaintiff required to satisfy the requirements of either a "facial" or an "as applied" challenge.

Like the plaintiffs in *Hartzwell*, *White*, *Wirin v. Parker*, *Wirin v. Horrall*, and *Fonseca*, Plaintiff challenges a local policy and local practices, not any statute or ordinance. Plaintiff's challenge also is largely based on statutory, not constitutional, grounds. Like the plaintiffs in *Hartzwell*, *White*, *Wirin v. Parker*, *Wirin v. Horrall*, and *Fonseca*, Plaintiff should not have been required to satisfy the requirements of either a "facial" or an "as applied" challenge to the constitutionality of statute, ordinance, or other duly enacted legislative pronouncement.

In reaching its erroneous conclusion that Plaintiff had to demonstrate there were no set of circumstances under which the text of Special Order 40 could ever be lawful, the trial court relied almost exclusively on *Tobe v. City of Santa Ana, supra.* While *Tobe* sets forth the law regarding "facial

vs. as applied" challenges to the constitutionality of a statute or ordinance, it is inapposite. *Tobe* does not concern a challenge to a local policy much less an unwritten local practice.

Rather, *Tobe* concerned a challenge to a legislative enactment, specifically, a city ordinance that was alleged to be unconstitutional. Its discussion of "facial vs. as applied" challenges to statutes and ordinances has no bearing on Plaintiff's statutory challenge to a local administrative policy and the unwritten practices and procedures implementing that policy. Nor does it stand for the proposition that a taxpayer cannot challenge an unwritten local practice or procedure without satisfying the more rigorous requirements of a challenge to the constitutionality of a statute, ordinance, or other legislative enactment, or that, because a local administrative policy is committed to writing, a plaintiff challenging that policy must satisfy these same requirements. Indeed, imposing these additional, substantial burdens on a taxypayer challenging a local administrative policy or practice, written or unwritten, frustrates the remedial purpose of section 526a and is contrary to the liberal interpretation customarily given to section 526a. *Blair*, 5 Cal.3d at 267-68.

D. Even If a "Facial" Analysis Were Applied Properly, the Text of Special Order 40 Violates Federal Law.

Even if Plaintiff's Complaint were to be construed as a "facial" challenge to the text of Special Order 40 only, and Plaintiff continues to dispute that it should be so construed or so limited, it nonetheless is clear that, on its face, Special Order 40 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).

CT at 000331 and 000606. 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.

On its face, the first sentence of the policy completely prohibits officers from taking any action to discover a person's immigration status. Obviously, this includes requesting or receiving such information from federal immigration authorities. It is directly contrary to both federal statutes.

Because Special Order 40 prohibits officers from initiating *any* police action to discover a person's immigration status however, officers may not take any action to discover such information from any other sources either. The federal statutes at issue are very broad, however. They make unlawful not only any restrictions on requesting or obtaining information about a person's immigration status from federal immigration authorities, but also any restrictions on the sharing of such information with

federal immigration authorities. Officers may not be restricted "in any way" from sending information to federal immigration authorities about a person's immigration status. 8 U.S.C. § 1373(a). Congress obviously meant the words "*in any way*" 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 make unlawful not only complete 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. If an officer is prohibited from initiating any action to discover a person's immigration status, then that officer is substantially restricted in his or her ability to share such information with federal immigration authorities. Simply put, if officers can't ask, they can't tell. There 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. On its face, the policy is totally and fatally in conflict with federal law.[3]

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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, so long as they are authorized by state law, is a substantial

In this regard, the trial court erred when it found that "Special Order 40 neither mentions nor refers to" communications with federal immigration officials about a person's immigration status. CT 001957. It plainly does. It bans such communications when it prohibits the initiation of any police action to discover a person's immigration status. A police officer who contacts another law enforcement agency to obtain information clearly constitutes "police action," and such contacts clearly are prohibited by Special Order 40 when the purpose of the contact is to discover a person's immigration status.[4] The fact that Special Order 40 also prohibits other types of "police action," such as asking a person directly about his or her immigration status or asking a third party about a person's immigration status,[5] does not mean that officers are free to contact federal immigration

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restriction on officers' ability to provide information about a person's immigration status to federal immigration officials.

[4] What constitutes "police action" also is a disputed question of fact. CT at 000203 and 000606. Plaintiff submits that the term "police action" includes an officer of 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. CT at 000613. Providing information to another law enforcement agency is a "legitimate" "police action." CT at 000614.

[5] As Plaintiff already has demonstrated, theses prohibitions violate the federal statutes because, by prohibiting officers from acquiring information about a person's immigration status, the LAPD substantially restricts officers' ability to share such information with federal immigration officials.

officials whenever they wish to discover a person's immigration status without violating the policy. A policy that, on its face, prohibits a broad range of activity obviously prohibits all of the specific activities that fall within that range.

The trial court also erred when it found that the text of Special Order 40 "does not order that a police officer, once s/he has made an otherwise lawful arrest may not send or receive immigration information." CT at 001957. While it is correct that the policy on its face does not purport to regulate the sending of information to federal immigration authorities about a person's immigration status -- although, in practice, the LAPD prohibits the sending of information as well -- the face of the policy clearly prohibits LAPD officers from receiving such information from federal immigration authorities if an officer initiates a contact with federal immigration officials to discover person's immigration status. Obviously, if an officer is prohibited from initiating a police action to discover a person's immigration status, such as contacting federal immigration officials to inquire about the person's status, then the officer is substantially limited in his or her ability to receive information about that person's status from federal authorities. The trial court's finding merely begs the question, "Under what circumstances did the officer receive the information?" If it was in

response to the officer's inquiry to federal immigration officials, the officer has violated the policy on its face.

Nor does the text of the policy condition any inquiry into a person's immigration status on an officer making an otherwise lawful arrest, as the trial court's ruling implies. CT at 001957. The written policy does not contain this or any other limitation on when an officer may initiate a police action to discover a person's immigration status. In this same regard, the text of the policy does not prohibit an officer from initiating a police action *solely* to discover a person's immigration status. The word "solely" does not appear anywhere in the text of the policy. Rather, the policy as written is a blanket prohibition on officers *ever* initiating such an inquiry, either after a lawful arrest, during the course of a pending criminal investigation, or under any other circumstances. To conclude, as the trial court did, that an exception exists for when officers have made a lawful arrest requires looking beyond the text of the policy to the manner in which the policy is implemented, an undertaking that not only is outside the scope of any "facial" challenge," but, in this instances, involves disputed questions of fact.

Finally, it is irrelevant that the two federal statutes at issue do not "compel the initiation of a police action only for the purpose of determining

a person's immigration status" or "**require** the police officers to communicate with the Immigration and Naturalization Service," as the trial court noted. CT at 001957 (emphasis original). The statutes forbid any restrictions on the free flow of information, and it is precisely this free flow of information that Special Order 40 substantially restricts, if not completely prohibits, on its face.[6]

Because there is no set of circumstances under which the LAPD may restrict an officer from inquiring about a person's immigration status without the violating Title 8, Sections 1373 and 1644, Special Order 40 is unlawful on its face and the trial court erred in granting summary judgment.

E. The Trial Court Erred in Finding Plaintiff's Complaint Did Not Include an "As Applied" Challenge.

Again, even assuming that a "facial vs. as applied" analysis applies to challenges to written administrative policies or unwritten local practices, and Plaintiff continues to assert that it does not, the trial court erred in concluding that Plaintiff brought only a "facial" challenge to Special Order 40. The only authority the trial court cited in reaching this conclusion was

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[6] Significantly, as discussed *infra*, the legislative history of 8 U.S.C. § 1373 makes clear that the statute is specifically intended to foster a "cooperative effort between all levels of government" and the "acquisition, maintenance, and exchange of information" between different levels of government.

Tobe. However, the trial court read *Tobe* too narrowly and failed to take into account key aspects of Plaintiff's Complaint and the compelling evidence Plaintiff submitted as part of his opposition to Defendants' and Interveners' summary judgment motions.

In *Tobe*, the Court found the plaintiffs in that case had standing as taxpayers to challenge a municipal ordinance alleged to violate the rights of homeless persons.[7] Although the plaintiffs in *Tobe* alleged that they had been convicted under the ordinance and expected to be convicted again in the future, they did not identify the circumstances of their past arrests or otherwise challenge the ordinance as applied to themselves or any other specific persons. *Tobe*, 9 Cal.4th at 1086. Rather, the plaintiffs in *Tobe* sought to enjoin enforcement of the ordinance generally. *Tobe*, 9 Cal.4th at 1086-87. In concluding that the plaintiffs had asserted a facial challenge to the ordinance only, the Court found at least three issues to be significant. First, the Court found that plaintiffs "did not seek relief from constitutionally impermissible applications or methods of enforcing the ordinance," but instead sought to enjoin "*any* application of the ordinance to *any* person in *any* circumstance." *Tobe*, 9 Cal.4th at 1087 (emphasis

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[7] The ordinance at issue prohibited "camping" and the storage of personal property, including camping equipment, in designated public areas within the City of Santa Ana. *Tobe*, 9 Cal.4th at 1069.

original). Second, the Court found that the plaintiffs neither "identified the particular application of the law to be enjoined" nor "demonstrate[d] a pattern of unconstitutional enforcement." *Tobe*, 9 Cal.4th at 1086 and 1089. Third, the Court found that the plaintiffs "did not create a factual record on which an injunction limited to improper applications of the ordinance could have been fashioned." *Tobe*, 9 Cal.4th 1087, 1089.

The trial court read *Tobe* too narrowly and looked at the first of these three issues only in concluding that Plaintiff had not brought an "as applied" challenge to Special Order 40. The trial court found, "Plaintiff seeks herein to prevent **any** application of the order since he contends the order itself is in conflict with federal law, and thus subject to the Supremacy Clause of the United States Constitution."[8] CT 001955 (emphasis original). In point of fact, Plaintiff's Complaint makes clear that Plaintiff challenges both Special Order 40 and the manner in which the LAPD has applied

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[8] The trial court also noted that Plaintiff did not concede the validity of Special Order 40 "for purposes of testing its application" of the policy. CT at 001955. Of course, there is nothing that precludes a plaintiff from asserting both "facial" and "as applied" challenges as alternative legal theories in the same complaint. Presenting alternative legal theories is a common practice, and asserting one theory does not foreclose a plaintiff from asserting another legal theory in the alternative. It should not have foreclosed Plaintiff from asserting an "as applied" challenge here.

Special Order 40. By way of example, paragraph 36 of Plaintiff's Complaint alleges:

> Special Order 40, as codified, published, and republished in successive versions of the LAPD Manual, **and the policies, procedures, and practices arising thereunder as implemented by the LAPD**, contravene federal law, including but not limited to the Supremacy Clause of the U.S. Constitution and 8 U.S.C. § 1373(a), as well as various provisions of California law. Special Order 40 **and the policies, procedures, and practices arising thereunder as implemented by the LAPD**, also stand as an obstacle to the accomplishment and execution of the full purposes and objectives of federal law governing illegal immigration and the detection and apprehension of undocumented aliens. Therefore, Special Order 40 **and the policies, procedures, and practices arising thereunder as implemented by the LAPD**, are unlawful and void, and the LAPD must be prohibited from expending any further taxpayer funds or taxpayer-financed resources to enforce, maintain, or otherwise carry out in any manner the provisions of Special Order 40 or **the policies, procedures, and practices arising thereunder as implemented by the LAPD.**

CT at 000013-14 (emphasis added). Paragraph 38 of Plaintiff's Complaint similarly alleges:

> An actual controversy has arisen between Plaintiff and Defendants. Plaintiff contends that Special Order 40 **and the policies, procedures, and practices arising thereunder as implemented by the LAPD**, contravene and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of federal law, including but not limited to the Supremacy Clause of the U.S. Constitution and 8 U.S.C. § 1373(a), and further contravenes various provisions of California law, and therefore is unlawful and void . . . .

CT at 000014 (emphasis added). Paragraph 41 of Plaintiff's Complaint likewise asserts:

> Plaintiff seeks injunctive relief prohibiting Defendants from expending taxpayer funds or taxpayer-financed resources, including their own time or the time of other LAPD officers, employees, or officials, to enforce, maintain, or otherwise carry out Special Order 40 **and the policies, procedures, and practices arising thereunder as implemented by the LAPD**.

Id. (emphasis added). In addition, Plaintiff's prayer for relief seeks the following relief:

> . . . A declaration that Special Order 40 **and the policies, procedures, and practices arising thereunder as implemented by the LAPD, are unlawful and void**;
>
> . . . The Court issue permanent injunctive relief prohibiting Defendant from expending taxpayer funds or taxpayer-financed resources, including their own time or the time of other LAPD officers, employees, or officials, to enforce, maintain, or otherwise carry out Special Order 40 **and the policies, procedures, and practices arising thereunder as implemented by the LAPD**;

CT at 000015 (emphasis added). Plaintiff's Complaint contains at least three additional references to the fact that he challenges not only Special Order 40 itself, but also the unlawful manner in which Special Order 40 has been applied by the LAPD. CT at 000005-15 (Complaint at paras. 1, 27, and 39).

In addition, and unlike in *Tobe*, Plaintiff's Complaint contains specific references to the unlawful manner in which Special Order 40 has been implemented. Plaintiff's Complaint expressly alleges that, in practice, Special Order 40 is even more restrictive than as written. CT at 000009 (Complaint at para. 21). The Complaint also quotes from a 2001 report to the Board of Police Commissioners by the Rampart Independent Review Panel that identifies specific, unlawful applications of the policy by the LAPD:

> As articulated by LAPD officials to members of the Panel, the Department's written policies and procedures resulting from Special Order 40 are more restrictive than as written in the Department's Manual. **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.
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> * * *
>
> Indeed, as articulated, the procedures are more restrictive than as written. **First, LAPD officers are not supposed to ask individuals suspected of criminal offenses, crime victims, or witnesses, about their immigration status. Second, in practice LAPD officers do not notify the INS of the arrest of an illegal alien.** Only after a person has been arrested, arraigned, and held in the county jail pending prosecution will his or her alien status be investigated by the INS, and that is in cooperation with the Los Angeles County Sherif, not the LAPD . . .

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

CT at 000009-10 (Complaint at para. 21) (emphasis added).

Plaintiff's responses to Defendants' and Interveners' respective summary judgment motions also are replete with evidence setting forth specific, unlawful applications of Special Order 40 by the LAPD. *See generally* CT at 000501-507; 000622-628. Plaintiff's responses demonstrate that, during the course of discovery, Defendants 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. CT at 000501 and 000622. Plaintiff also presented evidence demonstrating that, under Special Order 40, officers generally do not inquire about a person's immigration status unless the person's status is "germane" to an investigation, such as when conducting an investigation into a human smuggling operation. CT at 000501-502 and 000622-623. One deputy chief "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 with the LAPD, could not recall a single instance in which an LAPD officer had made such an inquiry. CT at 000501and 000622-623. The assistant chief, who has thirty years of experience with the LAPD, did not know of an LAPD officer ever contacting federal immigration officials to inquire about a person's immigration status. CT at 000501-502 and 000623. Likewise, officer generally do not ask witnesses, victims, or members of the public about their immigration status. CT 000502 and 000623.

Plaintiff's responses also demonstrate that, during the course of discovery, Defendants admitted that LAPD officers generally do not refer illegal aliens to federal immigration officials "as a matter of policy or practice given that immigrations status is not a subject of the work that LAPD officers do." CT at 000503 and 000624. Plaintiff also presented evidence demonstrating that, under Special Order 40, officers generally do not report illegal aliens to federal immigration officials unless as part of a human smuggling investigation or a gang-related investigation, or if an officer encounters a previously deported, violent offender. CT at 000503-05 and 0006240626. The assistant chief was not aware of any circumstances in which LAPD officers had reported victims, witnesses, suspects, or arrestees to federal immigration officials. CT at 000504 and

000625. Plaintiff also demonstrated that officers do not notify federal immigration officials about the arrest of an illegal aliens even where the arrestee's status is known. CT at 000504-505 and 000625-26. Rather, the only information the LAPD makes available to federal immigration officials is an arrestee's place of birth, and even this notification is accomplished through the Los Angeles County Sheriff's Office, not the LAPD. *Id.*

Moreover, Plaintiff's responses also demonstrate that, during the course of discovery, Defendants admitted that the Rampart Independent Review Panel's 2001 report "accurately summarized the implementation of Special Order 40." CT 000505-506 and 000626. The report, which had been excerpted partially in Plaintiff's Complaint and which set forth the manner in which the LAPD has applied Special Order 40 in practice, 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." CT at 000506 and 000627 (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. The 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.

Id.

The allegations of the Complaint and the voluminous evidence presented by Plaintiff in his summary judgment oppositions amply set forth specific, unlawful applications of Special Order 40 by the LAPD. These same allegations and evidence also describe specific, unlawful applications to be enjoined and demonstrate a pattern of unlawful applications. They also create an ample factual record on which an injunction could be fashioned. Because the trial court read *Tobe* too narrowly, however, it failed to consider these allegations and the voluminous evidence presented by Plaintiff in response to Defendants' and Interveners' summary judgment motions. Indeed, the trial court's ruling does not even mention, much less address, the allegations in the Complaint identifying the unlawful manner in which the LAPD has applied Special Order 40 or Plaintiff's substantial submissions on summary judgment demonstrating, at a minimum, the

existence of numerous disputes of material fact about specific, unlawful applications of the policy. The trial court also failed to consider the full scope of the relief requested by Plaintiff, which expressly requests relief from the manner in which Special Order 40 has been implemented by the LAPD.

If the trial court had analyzed all of the factors considered by the Court in *Tobe*, it would have found Plaintiff in fact had perfected an "as applied" challenge. In *Tobe*, *supra*, the Court noted that there actually 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 harmed "as a result of the manner or circumstances in which the statute or ordinance has been applied;" and (2) challenges that seek "an injunction against the future application of a statute or ordinance in the allegedly impermissible manner in which it is shown to have been applied in the past." *Tobe*, 9 Cal.4th at 1084. The *Tobe* Court also referred to this second type of "as applied" challenge as requiring a "pattern" of unlawful applications. *Id.* at 1085 and 1089. Plaintiff's lawsuit can be construed as asserting both types of "as applied" challenges to Special Order 40.

With respect to the first type of "as applied" challenge, Plaintiff clearly is being harmed by the manner in which the LAPD is implementing Special Order 40. Plaintiff's tax dollars are being spent on a policy that is being applied by the LAPD in a manner that violates federal law. This is the essence of a taxpayer challenge. At a minimum, Plaintiff demonstrated the existence of genuine disputes of material fact about these applications.

With respect to the second type of "as applied" challenge, both Plaintiff's Complaint and in his summary judgment submissions clearly set forth and a "pattern" of unlawful applications of the policy. *Tobe*, 9 Cal.4th at 1085. This includes the applications of Special Order 40 that were pled in Plaintiff's Complaint and were demonstrated in Plaintiff's substantial submissions on summary judgment.

Especially when contrasted with the complete failure of the petitioners in *Tobe* to plead, much less prove any specific instances of allegedly impermissible enforcement of the municipal ordinance at issue in that matter, Plaintiff's Complaint alleges specific, unlawful applications of Special Order 40, and Plaintiff's summary judgment submissions provide compelling evidence that, at a minimum, establish the existence of genuine disputes of material fact about specific, unlawful applications of Special Order 40. It was error under the circumstances for the trial court to find

Plaintiff had not asserted an "as applied" challenge to Special Order 40 and to enter summary judgment in favor of Defendants and Interveners as a result.

F. The Trial Court Erred in Finding No Preemption under Federal Law.

Separate and apart from whether Special Order 40 and the LAPD's practices and procedures implementing the policy violate 8 U.S.C. §§ 1373 and 1644 is whether Special Order 40 and these same practices and procedures are preempted by federal law. The trial court erred in finding no federal preemption.

The U.S. Supreme Court has declared that "the power to regulate immigration is unquestionably exclusively a federal power." *De Canas v. Bica* (1976) 424 U.S. 351, 354. Consequently, federal law preempts state or local governmental actions 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 any state or local governmental actions where "Congress has unmistakably so ordained" such a result. *De Canas*, 424 at 356; *see also Michigan Canners & Freezers Assoc. v. Agricultural Marketing and Bargaining Bd.* (1984) 467 U.S. 461, 469 ("*Michigan Canners*"). Finally, federal law preempts

state or local governmental actions 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, state and local action is preempted if it conflicts with federal law, making compliance with both the state or local action and federal law impossible. *Michigan Canners*, 467 U.S. at 469. Preemption applies to state and local policies and practices, as well as to state and local law and ordinances. *Toll v. Moreno* (1982) 458 U.S. 1 (overturning state university policy of denying in-state tuition to domiciled, legal non-immigrant aliens).[9]

Plaintiff does not assert that Special Order 40 and the LAPD's practices and procedures implementing the policy 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 LAPD's practices and procedures implementing the policy are preempted under both the "second" and "third" *De Canas* tests, namely, because 8 U.S.C. §§ 1373 and 1644 constitute unmistakable federal mandates requiring the free flow

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[9] Conspicuously absent from *Toll* is any effort to analyze the plaintiffs' lawsuit as either a "facial" or an "as applied" challenge to the University's policy. *Toll* thus provides further support for Plaintiff's argument that the law makes no such distinction with respect to challenges to policies.

of information regarding persons' immigration status and because Special Order 40 and the LAPD's practices applying Special Order 40 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) (emphasis added). 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 Transp. v. Superior Ct.* (1996) 47 Cal.App.4th 852, 856. 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 LAPD's practices and procedures implementing Special Order 40 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 these same practices also run afoul of the "third" *De Canas* test, as they 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 had 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 laws. *See* 75 Ops. Cal. Atty. Gen. 270, 275-77 (1992) (internal citations and quotations omitted) (emphasis added). Moreover, as one commentator has noted:

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

Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Albany Law Review 179, 181 (February 2006). State and local law enforcement officers are "the eyes and ears of law enforcement across the United States." *Id.* at 183. Federal immigration officers simply cannot cover the same ground (*id.*), and Congress obviously recognized the substantial benefits to the enforcement of federal immigration that could result from the free flow of information between local, state, and federal law enforcement officials and sought to promote this voluntary sharing in enacting Title 8, Sections 1373 and 1644.

The trial court erred in finding no preemption under either the "second" or "third" *De Canas* tests and granting summary judgment in favor of Defendants and Interveners. With respect to preemption under the "second" *De Canas* test, the trial court determined:

> [H]ad Congress wanted to unmistakeably ordain preemption in the area of arrest, it could have required that it exclusively would decide the circumstances under which an arrest may or may not be made based solely on immigration status.

CT at 001958. With regard to the "third" *De Canas* test, the trial court concluded:

> [T]he purposes are indeed full and open communication, as posited by Plaintiff, but not a **mandate** that the policy officer communicate. S/he may or may not do so, but may not be restricted by his/her agency from communication. Special Order 40 does not prohibit or restrict such communication.

Id. (emphasis original). In so ruling, the trial court completely disregarded that portion of Special Order 40 that prohibits officers from initiating a police action to discover a person's immigration status, which, as Plaintiff has demonstrated, clearly includes a prohibition on officers contacting federal immigration authorities to discover such information. The trial court also disregarded the substantial evidence submitted by Plaintiff demonstrating that, in practice, officers generally are precluded from reporting information about a person's immigration status to federal immigration officials. As with its reading of *Tobe* regarding whether

Plaintiff had asserted an "as applied" challenge, the trial court's focus was too narrow. At a minimum, Plaintiff demonstrated that genuine disputes of material fact exist concerning the LAPD's application of Special Order 40 and, consequently, summary judgment should have been denied.

G. The Trial Court Erred in Finding Special Order 40 Does Not Violate 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 by which the LAPD has implemented Special Order 40 violate 8 U.S.C. §§ 1373 and 1644, Special Order 40 and these practices and procedures also violate the California Constitution as well. The trial court thus erred in granting summary judgment in favor of Defendants and Interveners in this regard as well.

Finally, the trial court also erred in finding Penal Code § 834b preempted by federal law. CT at 001959 (citing *League of United Latin Am. Citizens v. Wilson* (1995 C.D. Cal.) 908 F. Supp. 755 ("*League I*")).[10]

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[10] An opinion of a federal trial court is not controlling, although it is worthy of respect. *Fonseca* 167 Cal.App.4th at 933.

This particular provision of the Penal Code was enacted in 1994, when voters in the State of California passed Proposition 187. It states, in pertinent part:

> (a) Every law enforcement agency in California shall fully cooperate with the United States Immigration and Naturalization Service regarding any person who is arrested if he or she is suspected of being present in the United States in violation of federal immigration laws.
>
> * * *
>
> (c) Any legislative, administrative, or other action by a city, county, or other legally authorized local government entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.

Penal Code § 834b(a) and (c). It also requires that law enforcement agencies in California 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. Penal Code § 834b(b)(1).

In *League I*, a federal court enjoined enforcement of various provisions of Proposition 187, including Penal Code § 834b, finding that the provisions were preempted by a comprehensive federal statutory scheme regulating immigration. However, *League I* was decided one year prior to the enactment of 8 U.S.C. §§ 1373 and 1644. In addition, the federal court

in *League I* revisited its ruling in 1997 in light of the passage of PRWORA, which created 8 U.S.C. § 1644. *League of United Latin Am. Citizens v. Wilson* (1997 C.D. Cal.) 997 F. Supp. 1244 ("*League II*"). While the federal 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]."[11] *League II*, 997 F. Supp. at 1252 n.9.

Nonetheless, the trial court found Penal Code § 834b to be preempted by federal law, citing *League I*. CT at 001959. It did so despite the fact that federal law was revised subsequent to *League I* and in a manner that seeks to promote the same type of cooperation and information sharing that Penal Code § 834b seeks to promote. The trial court's finding of preemption not only fails to take into account subsequent developments in the law, but it also fails to give any effect to the federal court's admonition in *League II* that nothing in its ruling should be interpreted as prohibiting cooperation with federal immigration officials. *See, e.g.*, *League II*, 997 F. Supp. at 1251-52. Indeed, the trial court's ruling does not

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[11] The federal court does not appear to have considered the subsequent passage of IIRIRA, which created 8 U.S.C. § 1373.

even address *League II.* Under the circumstances, summary judgment should not have been granted in Defendants' and Interveners' favor on the grounds that Penal Code § 834b continues to be preempted by federal law.

IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the judgment of the trial court be reversed and this matter be remanded for further proceedings.

Dated: January 7, 2009

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CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

I certify that pursuant to Rule 8.204(c)(1), the attached brief is proportionally spaced, has a typeface of 13 points or more and contains 13,093 words.

Dated: January 7, 2009

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PROOF OF SERVICE BY MAIL

Sturgeon v. Bratton, et al., Appellate Case No. B209913

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I am employed by Judicial Watch, Inc. 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 January 7, 2009, I served the interested parties in the above-referenced action with foregoing document described as:

APPELLANT'S OPENING BRIEF

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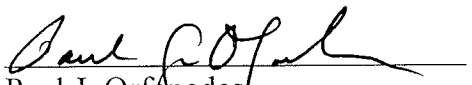

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