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IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

HAROLD P. STURGEON,
Plaintiff and Appellant,

v.

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

and

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

After Decision by the Court of Appeal
Second Appellate District, Division Three
Case No. B209913

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

1. Whether a taxpayer challenging the legality of a local administrative policy must satisfy the same, heavy burden that a taxpayer bringing a "facial" challenge to the constitutionality of a statute or ordinance must satisfy.

2. Whether Penal Code § 384b, enacted by California voters in 1994 as part of Proposition 187, is preempted by federal law despite the fact that the provision is entirely consistent with federal statutes enacted subsequent to *League of United Latin Am. Citizens v. Wilson* (C.D. Cal. 1995) 908 F. Supp. 755 ("*LULAC I*"), a ruling that has never been reviewed by an appellate court.

SUMMARY OF GROUNDS FOR GRANTING REVIEW

The Supreme Court of California should review this case to settle two important questions of law. First, this Court should decide whether a taxpayer challenging the legality of a local administrative policy must satisfy the same, heavy burden that a person bringing a "facial" challenge to the constitutionality of a statute or ordinance must satisfy.

While it is well established that a person bringing a "facial" challenge to the constitutionality of a statute or ordinance has the heavy burden of establishing that the legislative enactment presents a "total and

fatal conflict with applicable constitutional prohibitions," this Court has not established what burden a taxpayer challenging the legality of a local administrative policy must satisfy. Both the trial court and the Court of Appeal treated Plaintiff's challenge to the legality of a local police policy as if it were a "facial" challenge to a statute or ordinance. It is not. A challenge to the legality of a local administrative policy, much less to unwritten practices implementing that policy, does not raise the same substantial concerns about separation of powers and judicial restraint that exist when a party brings a facial challenge to the constitutionality of a duly enacted statute or ordinance. Applying a "facial versus as applied" analysis to legal challenges to local administrative policies raises the bar substantially for any plaintiff who seeks to challenge the illegal actions of local governments and local government officials in the future. In addition, treating a taxpayer's challenge to the legality of a local administrative policy as if it were a "facial" challenge to the constitutionality of a statute, ordinance, or other enactment of an elected body with legislative or plenary authority over a given subject matter also undermines the broad, remedial purpose of Code of Civil Procedure § 526a, which has long been recognized as having been enacted to enable a large body of the citizenry to challenge governmental action that otherwise would go unchallenged in the courts.

Second, this Court should decide whether Penal Code § 834b is preempted by federal law because the provision was enacted by California voters in 1994 as part of Proposition 187 and, although it was found to be preempted by federal law in *LULAC I*, that decision has never been reviewed by an appellate court and did not take into account the subsequent enactment of 8 U.S.C. §§ 1373 and 1644, which are entirely consistent with, not contrary to, the California statute.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff brings this taxpayer challenge to what is commonly referred to as "Special Order 40," the administrative policy of the Los Angeles Police Department ("LAPD") regarding illegal aliens. Plaintiff also challenges the LAPD's unwritten practices implementing that policy.

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. Clerk's Transcript ("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 to 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 in 1979 dramatically changed these practices. CT at 000592 and 000609.

The text of Special Order 40 provides: "Officers shall not initiate police action with the objective of discovering 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 000526-28. However, the unwritten practices arising under Special Order 40 are more restrictive than the text of the written policy and substantially limit communication between LAPD officers and federal immigration officials about a person's immigration status. CT at 000524-527; 531-532; 537; 594-95; 603-607; 611-21. In practice, officers generally do not ask a person about his or her immigration status, do not contact U.S. Immigration and Customs Enforcement ("ICE") to inquire about a person's immigration status, and generally do not refer known or suspected illegal aliens to ICE. *Id.* There are exceptions to this general practice for persons who are previously deported felons or involved in alien smuggling, human trafficking, or illegal gang activity, but it is the exceptions that prove the rule. *Id.* Indeed, Defendants ultimately conceded that:

> LAPD officers do not generally ask persons about their immigration status, notify ICE regarding a person's

> immigration status, or make inquiries of ICE regarding a person's immigration status. But when officers investigate crime and immigration issues arise, particularly in human trafficking and gang investigations, officers can and do appropriately question persons about their immigration status.

Respondents' Brief on Appeal at 26.

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 allegedly illegal expenditures of public funds. CT at 000005-21. Plaintiff's Complaint alleges that Special Order 40 and the LAPD's unwritten practices implementing Special Order 40 violate two federal statutes, 8 U.S.C. §§ 1373 and 1644, and are preempted by federal law. *Id.* Section 1373 states, in its most pertinent part:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government 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.

8 U.S.C. § 1373(a).[1] Section 1644 states, in its entirety:

> Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be

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[1] In 2002, the Immigration and Naturalization Service ("INS") became known as ICE.

> 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. Plaintiff's Complaint also alleges that Special Order 40 and the LAPD's unwritten practices implementing Special Order 40 violate Penal Code § 834b. 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 unwritten practices arising this local administrative policy. *Id.* at 000005 and 000014-15. Plaintiff also seeks a judgment declaring that Special Order 40 and the unwritten practices 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. CT at 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.

Plaintiff's discovery confirmed that not only do the LAPD's unwritten practices and procedures implementing Special Order 40 substantially restrict the ability of LAPD officers to *obtain* information

from federal immigration officials about a person's immigration status, but they also substantially restrict the ability of LAPD officers to *provide* information to federal immigration officials about a person's immigration status. CT at 000524-527; 531-532; 537; 594-95; 603-607; 611-21. Defendants admitted in interrogatory answers 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 001185. Defendants also admitted in interrogatory answers that, under Special Order 40, as a general matter LAPD officers do not ask federal immigration officials about an individual's immigration status "because that status is not related to their employment as local law officers" and do not contact immigration officials "with the exception of those working in task forces or specialized units." CT at 001187. Defendants further admitted in interrogatory answers that LAPD officers generally do not report known or suspected illegal aliens to ICE "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 001188.

Depositions of high-level LAPD officials further confirmed the substantial restrictions on information sharing about immigration matters imposed by Special Order 40 and the unwritten practices and procedures

implementing this administrative policy. LAPD Deputy Chief Police Mark Perez testified, "Generally, yes . . . We are prohibited from inquiring about immigration status" and confirmed that this general practice prohibits making inquiries to federal immigration authorities. CT at 001144. He "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. Deputy Chief Perez further 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 Earl Paysinger, who is effectively LAPD Police Chief William J. Bratton's second in command, testified that in his thirty years of experience with the LAPD, he has never known an officer to inquire about anyone's immigration status or contact federal immigration officials to inquire about a person's immigration status. CT at 001099-1100. Assistant Chief Paysinger further 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 001102-1103. Assistant Chief

Paysinger further testified that, in his thirty years of experience with the LAPD, he was not aware of any circumstance in which LAPD officers had reported victims, witnesses, suspects, or even arrestees to federal immigration officials. CT at 001103.

Deputy Chief Gary Brennan testified that, while an officer may inquire into a person's immigration status or ask federal immigration officials about a person's status, such inquiries are appropriate only if an officer is conducting a criminal investigation and the person's immigration status is an issue in that investigation. CT at 000664-666. He cited alien smuggling and human trafficking cases as examples of where such inquiries may be appropriate. *Id.* He also testified 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." *Id.* Deputy Chief Brennan also made very clear that officers are 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. According to Deputy Chief Brennan's testimony, "it would be inconsistent with policy for an officer to notify ICE [about a person's undocumented status] just for any purpose." CT at 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. Deputy Chief Brennan testified further 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. He identified human smuggling investigations and investigations into gang activity as examples of circumstances under which such notification could be appropriate. CT at 000672-674 and 000682-683. He could not identify any other circumstances where notification was appropriate under the LAPD's administrative policy and unwritten practices. CT at 000664-667 and 000682-683.

Deputy Chief Sergio Diaz 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.

Also during the course of discovery, Defendants admitted that a February 2001 report by the Rampart Independent Review Panel "accurately summarizes the implementation of Special Order 40." CT at 000593 and 000610. The report, entitled "A Report to the Los Angeles Board of Police Commissioners Concerning Special Order 40" ("Rampart Panel Report"), found:

> 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 also found that LAPD 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.

In March 2008, both Defendants and Interveners moved for summary judgment. CT at 000147-148 and 000463-467. Despite Plaintiff's express claims in his Complaint that he challenged both Special Order 40 and the LAPD's unwritten practices and procedures implementing Special Order 40, and despite the substantial evidence Plaintiff had submitted regarding these practices and procedures, Defendants and Interveners argued, and the trial court found, that Plaintiff had brought a "facial" challenge to the text of the administrative policy only. CT at 001950-001959. Because it considered only the text of the policy, the trial court simply disregarded the substantial evidence Plaintiff had presented regarding the LAPD's unwritten practices arising under the policy. 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.

The Court of Appeal affirmed on June 16, 2009. *Sturgeon v. Bratton* (2009) 174 Cal. App. 4th 1407. It applied the same "facial versus as applied" standard to Plaintiff's Complaint that typically is reserved for challenges to the constitutionality of statutes and ordinances, and, like the

trial court, disregarded the substantial evidence Plaintiff had presented regarding the unwritten practices implementing the administrative policy:

> Instead, [Plaintiff] bases his argument on the premise that statute and ordinances are accorded a presumption of validity which does not apply to mere policies or practices, and he notes the existence of several cases in which policies or practices were challenged without the court determining whether the challenge was facial or as-applied. (E.g., *White v. Davis (1975) 13 Cal. 3d 77 [120 Cal. Rptr. 94, 533 P.2d 222]*.) We are not persuaded. When a duly authorized policy is challenged as unconstitutional, recent authority has, in fact, considered whether the challenge is facial, and has accorded the policy the same deference accorded to a facially challenged statute or regulation. (*American Civil Rights Foundation v. Berkeley Unified School Dist., supra, 172 Cal. App. 4th at p. 216* [under a facial challenge to a school board's student assignment policy, the challenger must establish that no set of circumstances exist under which the policy would be valid]).
>
> We therefore consider whether Sturgeon's challenge to Special Order 40 is facial or as-applied. Indisputably, it is facial only. An as-applied challenge depends on the existence of previous, or current instances of unconstitutional applications. Sturgeon relies on no applications of [Special Order 40] . . . In the absence of any specific applications of the policy, Sturgeon's challenge is necessarily facial only.

Sturgeon, 174 Cal. App. 4th at 1419-20.

The Court of Appeal also rejected Plaintiff's argument that Special Order 40 violates Penal Code § 834b, citing *LULAC I* for the proposition that the statute was preempted by federal law despite the subsequent enactment of 8 U.S.C. §§ 1373 and 1644, which are completely consistent

with, not contrary to, this California statute. *Sturgeon*, 174 Cal. App. 4th at 1424-25. No petition for rehearing was filed.

ARGUMENT

A. THIS COURT SHOULD GRANT REVIEW TO SETTLE THE IMPORTANT QUESTION OF WHETHER A TAXPAYER CHALLENGING THE LEGALITY OF A LOCAL ADMINISTRATIVE POLICY MUST SATISFY THE SAME, HEAVY BURDEN THAT A PERSON BRINGING A "FACIAL" CHALLENGE TO THE CONSTITUTIONALITY OF A STATUTE OR ORDINANCE MUST SATISFY.

It is well-established that 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).

It is equally well-established that another way to challenge the constitutionality of a statute or ordinance is to bring an "as applied" challenge. Such challenges require 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.* It "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, ordinances, or other similar legislative enactments by elected bodies that enjoy plenary authority. No such statute, ordinance, or other legislative enactment 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, ordinances, or legislative enactments. By definition, a "facial vs. as applied" analysis cannot be applied to a legal challenge to a practice because, by definition, a practice does not have a "face." This is especially the case in legal challenges to *unwritten* practices such as Plaintiff has asserted here. There simply is no text to be analyzed.

The single case cited by the Court of Appeal in support of its decision to apply a "facial" analysis to Plaintiff's legal challenge to Special Order 40, *American Civil Rights Found.* (2009) 172 Cal. App. 4th 207, did not decide the issue of what standard should be applied to administrative policies, much less to unwritten practices.[2] It does not appear that the issue was even raised. Rather, the Court of Appeal in *American Civil Rights Foundation* simply applied a facial analysis to the school board policy at issue in that case. Moreover, it did so after noting that school boards in California have "wide authority to set policies for the communities they serve" and "pervasive control over and continuing responsibility" for both daily decisions and long range plans, including "plenary authority to determine school assignment policies." *American Civil Rights Found.*, 172

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[2] Again, like the trial court, the Court of Appeal simply disregarded Plaintiff's challenge to the LAPD's even more restrictive practices implementing Special Order and the substantial, compelling evidence of these practices Plaintiff presented. *See, e.g., Sturgeon*, 174 Cal.App. 4th at 1420.

Cal. App. 4th at 216 (*quoting Crawford v. Bd. of Educ.* (1976) 17 Cal.3d 280, 294). Thus, the elected school board in *American Civil Rights Foundation* was acting as a plenary, legislative body, not as an executive branch or administrative entity. This Court should grant review to decide the important issue of what standard should be applied to legal challenges to administrative policies such as Plaintiff brings here.

There are many compelling reasons why courts give greater deference to statutes, ordinances, and other enactments of elected bodies with plenary authority over a given subject matter than to administrative policies. Not the least of these is that statutes, ordinances, and other similar enactments 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 the constitutionality of any duly enacted *law*, but instead challenges an administrative *policy* and the unwritten *practices* implementing that policy. Neither this Court nor the Court of Appeal has adjudicated whether the same deference afforded to statutes, ordinances, and other legislative enactments also should be afforded to local administrative policies.[3]

This Court has noted the difference between challenges to legislative enactments and challenges to mere policies, however. In *Arcadia Unified School Dist. v. State Dep't of Educ.* (1992) 2 Cal.4th 251, this Court expressly distinguished a challenge to the constitutionality of a section of

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[3] In reaching its erroneous conclusion that Plaintiff had to demonstrate there was no set of circumstances under which the text of Special Order 40 could ever be lawful, both the trial court and the Court of Appeal relied heavily 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. Clearly, there was no question about applying a "facial versus as applied" standard in that case.

the Education Code from a challenge to the constitutionality of a mere 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." In *Hartzwell*, the plaintiffs challenged a school district's decision to charge fees to students wishing to participate in extracurricular activities. Without ever undertaking a "facial" or "as applied" analysis, this Court found that the fee policy violated the "free school" guarantee of the California Constitution and a provision in the California Administrative Code. *Hartzwell*, 35 Cal.3d at 917. By contrast, in *Arcadia Unified School District*, this Court analyzed the plaintiff's challenge to the constitutionality of Ed. Code § 39807.5 as a "facial" challenge, repeatedly emphasizing that the provision at issue was a legislative enactment and noting that "it is our duty to uphold it unless its constitutionality is clear and unquestionable." *Id.* at 260 & n.7, 265. Simply put, challenges to the legality of administrative policies are, in the words of this Court, "fundamentally different" from challenges to the constitutionality of legislative enactments. *Id.* at 260.

While this Court does not appear to have ever decided the precise question of what burden should be placed on a party challenging the legality of an administrative policy, as opposed to a party challenging the

constitutionality of a duly enacted statute or ordinance, numerous cases have been decided, including other cases challenging police policies and practices, in which no "facial versus as applied" analysis was undertaken. 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, this 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. This 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.

In *Sundance v. Municipal Court* (1986) 42 Cal.3d 1011, this Court considered several constitutional challenges to Penal Code § 647(f), which governs public intoxication, as well as challenges to various practices and procedures of the LAPD, the Los Angeles County Sheriff's Department, and the local court regarding the arrest and detention of public inebriates. It also considered a challenge to a special order of the LAPD concerning Section 647(f) arrestees. This Court reviewed the plaintiffs' challenge to the statute using a "facial versus as applied" analysis, but did not employ this same analysis when reviewing the local court and police practices and procedures or the special order.

Most recently, in *Fonseca v. Fong* (2008) 167 Cal.App.4th 922, 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. Again, no "facial vs. as applied" analysis was undertaken in considering the plaintiff's legal challenge to the police department's policies, practices, and procedures. Nor was the plaintiff required to satisfy the requirements of either a "facial" or an "as applied" challenge.

Like the plaintiffs in *White*, *Wirin v. Parker*, *Wirin v. Horrall*, *Sundance*, and *Fonseca*, Plaintiff challenges the legality of a police policy and unwritten practices implementing that policy, not the constitutionality of a legislative enactment. Like the plaintiffs in *White*, *Wirin v. Parker*, *Wirin v. Horrall*, *Sundance*, and *Fonseca*, Plaintiff should not have been required to satisfy the requirements of either a "facial" or an "as applied" challenge. Indeed, imposing this additional, substantial burden on a plaintiff challenging any kind of local administrative policy will make it more difficult for future plaintiffs to try to challenge such policies. It also frustrates the remedial purpose of section 526a and is contrary to the liberal interpretation customarily given to the taxpayer standing statute. *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-68. The Court thus should grant review in order to settle this important question of law.

B. THIS COURT SHOULD GRANT REVIEW TO SETTLE THE IMPORTANT QUESTION OF WHETHER PENAL CODE § 834b IS PREEMPTED BY FEDERAL LAW.

This Court also should grant review to settle the important question of whether Penal Code § 834b is preempted by federal law. Early this year, this Court found that a California statute allowing juveniles to be declared wards of the court based on violations of federal immigration laws was not preempted by the Supremacy Clause or any other federal law. *In re Jose C*

(2009) 45 Cal.4th 534. In so ruling, this Court recognized that federal law establishes "a regime of cooperative federalism, in which local, state, and federal governments may work together to ensure the achievement of federal criminal immigration policy." *Id.* at 553.

Despite this Court's ruling in *In re Jose C*, the Court of Appeal declined to apply Penal Code § 834b to Plaintiff's claims, finding that the provision enacted by California voters in 1994 as part of Proposition 187 was preempted by federal law. The statute 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). The statute also requires 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. Penal Code § 834b(b)(1).

In finding that the statute was preempted by federal law, the Court of Appeal cited *LULAC I*, in which a federal court enjoined enforcement of various provisions of Proposition 187, including Penal Code § 834b. *Sturgeon*, 714 Cal. App. 4th at 1424-25. In a mere two paragraphs, the federal court in *LULAC I* concluded that Penal Code § 834b was preempted in its entirety as an "impermissible regulation of immigration."[4] *LULAC I*, 908 F. Supp. at 771. It completely and utterly failed to explain how a law requiring state and local law enforcement officials to cooperate with federal immigration authorities and notify them of the arrest of an illegal alien constitutes an "impermissible regulation of immigration." *Id.* Importantly, not only was *LULAC I* never reviewed by a higher court, but it was decided prior to the enactment of both 8 U.S.C. §§ 1373 and 1644.

These two federal statutes were enacted separately in August and September 1996, almost a year after *LULAC I* was decided. In August of 1996, the U.S. Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996). One month later, in September of 1996, the U.S. Congress enacted the Illegal Immigration Reform and Immigrant

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

Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996). Section 434 of the PRA, 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.

Both provisions reflect a clear congressional intent to promote the free flow of information between state and local governments and officials and federal immigration authorities regarding a person's immigration status. The House Conference Report accompanying Section 434 of PRA 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:

> [p]rohibits 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). Both reports 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 local, state, and federal authorities.

In 1997, the federal court that decided *LULAC I* revisited its ruling in *League of United Latin Am. Citizens v. Wilson* (1997 C.D. Cal.) 997 F. Supp. 1244 ("*LULAC II*"). While the federal court declined to modify its injunction, it nonetheless stated:

> **The Court agrees that some cooperation is permitted and even required by the PRA.** However, the cooperation and reporting detailed in Sections 4(a), 4(b)(3), 4(c), 5(c)(3), 6(c)(3), 8(c) (first sentence only) and 9 of Proposition 187 are part of a regulatory scheme preempted by federal law, as explained in the Court's November 20, 1995 Opinion. These sections of Proposition 187 require state officials, teachers, health care providers and other unknown individuals to report to the I.N.S. information about alien status that such individuals are not permitted to determine. **Nothing in this**

Court's decision should be interpreted to prohibit cooperation between state officials and the I.N.S. pursuant to the PRA.

LULAC II, 997 F. Supp. at 1252 n.9 (emphasis added). The federal court that decided both *LULAC I* and *LULAC II* apparently never considered the impact of the passage of the IIRIRA, which includes 8 U.S.C. § 1373, on its ruling.

The Court of Appeal's answer to the subsequent enactments of 8 U.S.C. §§ 1373 and 1644 was the backhanded assertion that, because Penal Code § 834b "was preempted as an impermissible regulation of immigration," "an intervening congressional enactment cannot save it." *Sturgeon*, 174 Cal. App. 4th at 1424-25. It is ironic, to say the least, that a statute enacted by California voters to promote cooperation and information sharing between state, local, and federal law officials on immigration matters would be dismissed so easily as an impermissible regulation of immigration when federal law so obviously seeks to promote these very same goals. At a minimum, the conclusion that Penal Code § 834b constitutes an "impermissible regulation of immigration" should have been reconsidered in light of Congress's clear intent to promote cooperation and information sharing among federal, state, and local officials in immigration enforcement. This is doubly the case given that this Court recently

recognized that federal law establishes "a regime of cooperative federalism, in which local, state, and federal governments may work together to ensure the achievement of federal criminal immigration policy." *In re Jose C*, 45 Cal.4th at 553.

Moreover, Penal Code § 834b was enacted through a voter initiative -- not as a mere administrative policy or an unwritten practice -- and it is well established that "all presumptions favor the validity of the measure and mere doubts as to validity are insufficient." *Legislature v. Eu* (1991) 54 Cal.3d 492, 501. Initiatives "must be upheld unless their unconstitutionality clearly, positively, and unmistakeably appears." *Id.* A finding that any portion of an initiative is preempted also requires a court to determine whether the preempted provision is severable from the balance of the initiative so that the remainder may take effect. *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821. The Court of Appeal completely failed to undertake any severability analysis in finding Penal Code § 834b preempted in its entirety. Instead, after placing too heavy a burden on Plaintiff by treating his claims under 8 U.S.C. §§ 1373 and 1644 as "facial" challenges to a local administrative police policy, the Court of Appeal failed to give due deference to a statute enacted by California voters when it considered Plaintiff's claim under Penal Code § 834b. The Court of Appeal

got it exactly wrong. It should have given greater deference to the state statute and less deference to the local administrative police policy. This Court should take this opportunity to decide this additional, important question of preemption.

CONCLUSION

For the compelling reasons set forth above, Plaintiff respectfully requests that this Court grant review of the Court of Appeal's June 17, 2009 ruling.

Dated: July 27, 2009

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CERTIFICATION OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this brief, including footnotes, is proportionally spaced, has a typeface of 13 points or more, and contains 7,529 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare the brief.

Dated: July 27, 2009

Sterling E. Norris (PJD)
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Attorneys for Plaintiff-Appellant

Filed 6/17/09

CERTIFIED FOR PUBLICATION

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; BREAK THE CYCLE et al., Interveners and Respondents.	B209913 (Los Angeles County Super. Ct. No. BC351646)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Judicial Watch, Inc. and Sterling E. Norris for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney and Paul L. Winnemore, Deputy City Attorney for Defendants and Respondents.

ACLU Foundation of Southern California, Hector O. Villagra, Belinda Escobosa Helzer, Mark Rosenbaum and Ahilan Arulanantham for Interveners and Respondents.

Special Order 40 (SO40) is the policy of the Los Angeles Police Department (LAPD) governing interactions with illegal immigrants. It prohibits LAPD officers from initiating police action with the *sole* objective of discovering the immigration status of an individual, and arresting individuals for illegal entry into the United States. In 1987, this court upheld SO40 against a challenge that the mere questioning of a criminal arrestee about his immigration status, and passing that information on to federal immigration officials, acts permitted by SO40, constituted unconstitutional state enforcement of federal civil immigration law. (*Gates v. Superior Court* (1987) 193 Cal.App.3d 205, 219.) We concluded that the LAPD could *voluntarily transfer legitimately obtained arrest information* to federal authorities without running afoul of the U.S. Constitution. (*Ibid.*)

Subsequently, Congress enacted a statute invalidating state and local restrictions on the voluntary exchange of immigration information with federal immigration authorities. (8 U.S.C. § 1373 (section 1373).) Plaintiff Harold P. Sturgeon brought a taxpayer action to enjoin defendants, LAPD Chief William Bratton and other officials,[1] from enforcing SO40, as a local restriction invalidated by section 1373. The trial court permitted intervention, in support of defendants, by several organizations supporting immigrants' rights.[2] Interveners and defendants moved for summary

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[1] The other defendants are President of the Board of Police Commissioners John Mack, and members of the Board of Police Commissioners Shelley Freeman, Alan J. Skobin, Andrea Ordin and Anthony Pacheco.

[2] Intervenors are Break the Cycle, Los Jornaleros, El Monite de Jornaleros and Instituto de Educacion Popular del Sur de California.

judgment on the basis that SO40 was not invalid. Sturgeon took the position that SO40 violated the supremacy clause (U.S. Const., art. VI, cl. 2) because it conflicted with section 1373. Alternatively, Sturgeon argued that SO40 was preempted by federal immigration law. Finally, Sturgeon argued that SO40 violated Penal Code section 834b, a California statute requiring local law enforcement agencies to cooperate with federal immigration authorities, and specifying certain immigration enforcement tasks which must be taken with respect to every arrestee suspected of being present in the United States illegally.

The trial court granted summary judgment, upholding the validity of SO40. As to Sturgeon's contention that SO40 violated the supremacy clause, the trial court concluded that Sturgeon's challenge was solely a facial challenge, not an as-applied challenge, and that Sturgeon had failed to establish that SO40 was facially invalid under all circumstances. As to Sturgeon's preemption argument, the trial court concluded SO40 is not preempted by federal immigration authority. Finally, as to Sturgeon's argument that SO40 violated Penal Code section 834b, the trial court concluded that Penal Code section 834b was itself preempted by federal law. The trial court therefore granted summary judgment in favor of defendants and interveners. Sturgeon appeals. We agree with the trial court's analysis in all respects, and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A brief review of the relationship between federal and local authorities with respect to the enforcement of immigration law is helpful to place into context the adoption of SO40. While improper entry into the United States is a misdemeanor

(8 U.S.C. § 1325(a)), an alien illegally in the country may also be subjected to removal proceedings before an immigration judge (8 U.S.C. § 1229a). Only the former constitutes a criminal proceeding.

The federal government has the exclusive authority to enforce the civil provisions of federal immigration law relating to issues such as admission, exclusion and deportation of aliens. (*Gates v. Superior Court, supra,* 193 Cal.App.3d at pp. 214-215.) As such, Congress is prohibited by the Tenth Amendment from passing laws requiring states to administer civil immigration law. (*City of New York v. United States* (2d Cir. 1999) 179 F.3d 29, 33-35.)

Under federal law, matters of immigration are handled by the Office of Immigration and Customs Enforcement (ICE), a branch of the Department of Homeland Security.[3] (*Fonseca v. Fong* (2008) 167 Cal.App.4th 922, 927.) Authorized ICE officers have powers to enforce federal immigration laws which exceed the powers of state law enforcement officers.[4] Under 8 U.S.C. § 1357(g), the Attorney General of the United States may enter into a written agreement with a State or political subdivision pursuant to which State or local officers may carry out the function of immigration officers, but this requires a voluntary agreement, and the local officer would be subject

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[3] Previously, these matters were handled by the Immigration and Naturalization Service (INS) and there is no dispute that statutory or case law references to the INS are to be read to refer to the ICE.

[4] For example, ICE officers may, without warrant: interrogate any alien or person believed to be an alien as to his right to be in the United States (8 U.S.C. § 1357(a)(1)); arrest any alien believed to be in the United States illegally and likely to escape before a warrant can be obtained (8 U.S.C. § 1357(a)(2)); and board and search vessels within a reasonable distance of the border to search for aliens (8 U.S.C. § 1357(a)(3)).

to the supervision of the Attorney General when performing the functions of an ICE officer. (8 U.S.C. § 1357(g)(3).) Similarly, the Attorney General may authorize local law enforcement officers to perform as ICE officers when a mass influx of aliens requires an immediate response; even then, the Attorney General must act "with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving." (8 U.S.C. § 1103, subd. (a)(10).)

While the Tenth Amendment shields state and local governments from the federal government requiring them to administer federal civil immigration law, local police are not precluded from enforcing federal criminal statutes. (*Gates v. Superior Court, supra,* 193 Cal.App.3d at p. 215.) Thus, in theory, local police could arrest for misdemeanor improper entry into the United States. However, in California, a police officer may arrest for a misdemeanor only when that offense is committed in the officer's presence. (Pen. Code, § 836, subd. (a).) As the misdemeanor offense of improper entry into the United States is complete upon the improper entry itself, no California police officer can arrest for misdemeanor illegal entry once the alien has reached a place of repose. (*Gates v. Superior Court, supra,* 193 Cal.App.3d at pp. 215-216.) As it is extremely unlikely that an LAPD officer would make contact with an illegal alien during the course of that individual's illegal entry into the United States, LAPD officers generally cannot arrest aliens for illegal entry into the United States.

As LAPD officers can neither commence deportation proceedings nor arrest aliens for improper entry, they are powerless to take direct action against an individual

they believe to be in this country illegally. However, LAPD officers may, " 'as a matter of comity and good citizenship,' " *voluntarily* report such individuals to ICE, and it does not constitute improper local enforcement of civil immigration law for them to do so. (*Gates v. Superior Court, supra,* 193 Cal.App.3d at p. 219.) Many local police agencies, including the LAPD, believe that local law enforcement can best achieve its goal of crime prevention by making it known to the community that local law enforcement officers are unconcerned with immigration violations – thereby encouraging illegal immigrants to come forward with relevant information about crimes without fear of deportation. Thus, while local police officers are permitted under federal law to voluntarily report suspected illegal aliens to ICE, some local entities have chosen to restrict such reporting. (See *City of New York v. United States, supra,* 179 F.3d at p. 31-32 [considering a Mayor's Executive Order prohibiting city officers from transmitting information regarding immigration status to federal authorities except under specified circumstances].) The LAPD did not do so. Instead, it chose to impose limits on its officers' ability to investigate the immigration status of aliens with whom they come into contact.

SO40 was promulgated by then-Chief of Police Daryl Gates on November 27, 1979. Special Orders are directives issued by the Chief of Police which amend the LAPD Manual. Although the parties, and, apparently, members of the community, continue to refer to the LAPD's policy regarding illegal immigrants as "SO40," the relevant provision is in the LAPD Manual with a different section number. Volume IV, Section 264.50 of the LAPD Manual provides, "ENFORCEMENT OF UNITED

STATES IMMIGRATION LAWS. 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)."[5] Stated broadly, SO40 prevents LAPD officers from commencing investigations directed solely toward uncovering violations of civil immigration laws, and arresting for an immigration misdemeanor which is not committed within their presence.

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[5] Volume IV of the LAPD Manual sets forth "Line Procedures," which are "detailed rules and procedures to aid Department employees in the execution of line duties performed in the direct furtherance of police objectives." (LAPD Manual, Vol. 0, Section 010.) Volume I of the LAPD Manual sets forth "Policy," which is "not a statement of what must be done in a particular situation; rather, it is a statement of guiding principles which should be followed in activities which are directed toward the attainment of Department objectives." (LAPD Manual, Vol. I, Section 010.) The LAPD's "Policy" regarding undocumented aliens is set forth at Volume I, section 390. It provides, "Undocumented alien status in itself is not a matter for police action. It is, therefore, incumbent upon all employees of this Department to make a personal commitment to equal enforcement of the law and service to the public regardless of alien status. In addition, the Department will provide special assistance to persons, groups, communities and businesses who, by the nature of the crimes being committed upon them, require individualized services. Since undocumented aliens, because of their status, are often more vulnerable to victimization, crime prevention assistance will be offered to assist them in safeguarding their property and to lessen their potential to be crime victims. [¶] Police service will be readily available to all persons, including the undocumented alien, to ensure a safe and tranquil environment. Participation and involvement of the undocumented alien community in police activities will increase the Department's ability to protect and to serve the entire community." Sturgeon brings no challenge to this "Policy." Additionally, there are sections of the LAPD Manual providing that, when an arrestee is booked, the arrestee's birthplace must be noted, with a particular notation made if the arrestee is foreign-born (LAPD Manual, Vol. IV, Section 604.41) and the placement and disposition of ICE holds (LAPD Manual, Vol. IV, Section 675.35). There is no argument that these practices are in any way inadequate under the law.

Sturgeon's challenge to SO40 is based entirely on a federal statute enacted some 17 years after SO40. In 1996, Congress enacted a statute to protect the voluntary exchange of information with ICE. Section 1373 provides, "Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[6] (Section 1373(a)). The statute also provides that no person or agency may prohibit or restrict a local entity from: (1) sending such information to, or requesting and receiving such information from, ICE; (2) maintaining such information; or (3) exchanging such information with any other government entity. (Section 1373(b).) Finally, the statute requires ICE to respond to any inquiry by a federal, state, or local government agency "seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."[7] (Section 1373(c).)

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6 Sturgeon also relies on Title 8 United States Code section 1644, which prevents prohibitions or restrictions on the communication between any "State or local government *entity*" and ICE (emphasis added). As we are here concerned with the communication between police *officers* and ICE, it is clear that section 1373, not section 1644, is the relevant statute.

7 We note that Congress is currently considering a comprehensive reform to the immigration law, which would include a repeal of section 1373, under the heading, "Preventing Inappropriate State and Local Government Involvement in the Enforcement of Civil Immigration Provisions under the Immigration and Nationality Act." (H.R. No. 264, 111th Cong., 1st Sess., § 1402 (2009).)

On May 1, 2006, Sturgeon brought this action against defendants. Sturgeon had not been personally impacted by the application of SO40; instead, he brought a so-called "taxpayer" action to enjoin the enforcement of SO40 as an illegal expenditure of public funds. (Code Civ. Proc., § 526a.) Defendants' demurrer was overruled, and the interveners were permitted to join the action on behalf of defendants.

Substantial discovery was conducted. The majority of Sturgeon's discovery consisted of depositions of current and past high-ranking LAPD officers, in order to obtain their opinions on the scope of SO40 and the particular police conduct it prohibits and permits. Sturgeon did not obtain any information regarding any specific instance of the application of SO40. When asked, by special interrogatory, to identify all individuals "who have been prohibited by [SO40] from sending to immigration officials information regarding the immigration status of an individual," Sturgeon objected to the request as "inappropriate to the type of lawsuit brought by Plaintiff, which is a legal challenge to a longstanding policy of the [LAPD], and not reasonably calculated to lead to the discovery of admissible evidence." The same response was given to interrogatories asking for the identity of individuals prohibited by SO40 from receiving information from immigration officials, maintaining immigration information, and exchanging immigration information with any law enforcement agency. Indeed, Sturgeon gave the same response to an interrogatory seeking the identity of law enforcement officers who have complained about the prohibitions or restrictions of SO40.

Thereafter, both defendants and interveners moved for summary judgment. They argued that: (1) Sturgeon brought only a facial challenge to SO40, not an as-applied challenge; (2) SO40 was not facially invalid as it did not violate section 1373 in all circumstances; (3) SO40 was similarly not preempted by federal law; and (4) there can be no conflict with Penal Code section 834b, as that statute had been determined to be preempted by federal immigration law. With respect to the purported conflict with section 1373, defendants and interveners took the position that SO40, on its face, says nothing regarding prohibiting communication with ICE, but only prohibits officers from initiating police action regarding immigration status. In contrast, defendants and interveners argued, section 1373, on its face, says nothing regarding local policies prohibiting the initiation of police action into immigration status, but only invalidates local policies prohibiting contact with ICE.

Sturgeon opposed summary judgment with deposition excerpts, reports,[8] and other evidence regarding the scope of SO40. Sturgeon argued that he was challenging not merely the language of SO40, but the broader way in which in which it had been applied. However, none of Sturgeon's evidence dealt with a particular application of

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[8] Sturgeon relies heavily on a February 2001 Report of the Rampart Independent Review Panel regarding SO40. Defendants had relied on this report in support of their demurrer, but when Sturgeon sought judicial notice of the report in opposition to the motion for summary judgment, the interveners (who had not been in the case at the time of the defendants' demurrer) opposed the request. The trial court denied the request for judicial notice. Sturgeon does not contest this ruling in his opening brief, and simply relies on the Rampart report without mention of the trial court's ruling. While he argues, in his reply brief, that the Rampart report is relevant and admissible, we do not consider the argument due to his failure to raise it in his opening brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

SO40; instead, Sturgeon focused on the opinions of highly-ranked LAPD officers regarding the meaning of SO40. While we do not disagree with Sturgeon that the proffered interpretations of SO40 were somewhat inconsistent, all of the LAPD witnesses agreed that SO40 prohibits arresting someone for misdemeanor illegal entry, and prohibits *initiating an investigation into an individual solely to determine that person's immigration status*. There was some disagreement among the LAPD witnesses regarding whether SO40 also prohibits investigating the immigration of status of an individual already under investigation for something *unrelated* to immigration status.[9] Moreover, there was some disagreement regarding whether an LAPD officer who happened to discover information indicating that an individual not otherwise under arrest was present in the country illegally could contact ICE.[10] In response to a special interrogatory asking the circumstances under which SO40 prohibits asking ICE regarding a person's immigration status, defendants responded "[SO40] prohibits LAPD

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[9] Commander Sergio Diaz, Chief Gary Brennan, Assistant Chief Earl Paysinger, Captain Mark Olvera and former Assistant Chief George Gascon all testified that SO40 is essentially a prohibition against initiating enforcement actions aimed at determining the alien status of a person, and does not prohibit inquiring regarding the alien status of someone otherwise under investigation. Only Deputy Chief Mark Perez stated that LAPD officers are prohibited from questioning *anyone* regarding their immigration status.

[10] Commander Diaz testified that SO40 does not prohibit any contact between the LAPD and ICE. Chief Brennan stated that it is inconsistent with department policy to contact ICE if unrelated to a criminal investigation. He noted that inquiring of ICE with respect to someone who is not otherwise under investigation is generally not done and would be a very rare occurrence. Former Assistant Chief Gascon had a similar interpretation, but noted that he did not believe the LAPD interpreted SO40 to be in violation of section 1373.

from initiating police action with the objective of discovering the alien status of a person. If an individual were to contact [ICE] for that explicit purpose and for no other, they would be violating [SO40]."

The disagreements among the witnesses as to the scope of SO40 are irrelevant, as Sturgeon argued that SO40's undisputed prohibition on initiating investigations for the sole purpose of determining immigration status was itself a violation of section 1373. Sturgeon argued that preventing officers from *obtaining information* regarding an individual's immigration status is a restriction on voluntarily reporting such information to ICE, because a restriction on *obtaining* information reduces the amount of information which can then be reported.[11] Additionally, Sturgeon argued that a triable issue of fact exists as to whether, in practice, SO40 is interpreted to prevent, at least in some cases, otherwise-permissible voluntary contact with ICE, in violation of section 1373.

The trial court concluded that, as Sturgeon relied on no actual instances of the application of SO40, Sturgeon's challenge to SO40 was strictly facial. As such, the court denied all requests for judicial notice (and declined to rule on all evidentiary objections) as only the language of SO40 was relevant. Concluding that there was no total and fatal conflict with section 1373, the trial court held that SO40 survived Sturgeon's facial challenge. The court also concluded that SO40 is not otherwise preempted by federal law, and that since Penal Code section 834b is preempted, SO40's

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[11] Sturgeon similarly argued that a restriction on arresting for misdemeanor illegal entry prevents the transmission of information regarding the arrest to ICE.

conflict with that statute is irrelevant. Summary judgment was granted. Judgment was entered in favor of defendants and interveners. Sturgeon filed a timely notice of appeal.

ISSUES ON APPEAL

We first consider whether the trial court erred in determining that Sturgeon brought only a facial, not an as-applied, challenge to SO40; we conclude the trial court did not err. We next conclude that Sturgeon's facial challenge is insufficient to enjoin the enforcement of SO40 and SO40 is not otherwise preempted by federal immigration law. Finally, we agree that Penal Code section 834b is preempted, and thus cannot pose a challenge to the enforcement of SO40. We therefore will affirm the judgment.

DISCUSSION

1. *Standard of Review*

" 'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.' (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) The pleadings define the issues to be considered on a motion for summary judgment. (*Sadlier v. Superior Court* (1986) 184 Cal.App.3d 1050, 1055.) As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065.)" (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the

party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.) We exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

2. *Facial and As-Applied Challenges*

Sturgeon contends SO40 violates the supremacy clause because it is impermissible under section 1373. A constitutional challenge to a statute, ordinance or policy may be facial or as-applied. "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. [Citation.] ' "To support a determination of facial unconstitutionality, voiding the statute as a whole, [those challenging the statute or ordinance] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute . . . . Rather, [the challengers] must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." ' " (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084; *American Civil Rights Foundation v. Berkeley Unified School Dist.* (2009) 172 Cal.App.4th 207,

216.) Under a facial challenge, the fact that the statute " 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . .' " (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679.)

"An as applied challenge may seek (1) relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or (2) an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past. It 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." (*Tobe v. City of Santa Ana, supra,* 9 Cal.4th at p. 1084) "If a plaintiff seeks to enjoin future, allegedly impermissible, types of applications of a facially valid statute or ordinance, the plaintiff must demonstrate that such application is occurring or has occurred in the past." (*Ibid.*)

On appeal, Sturgeon argues that the facial/as-applied distinction applies only to challenges to statutes and ordinances, not policies or practices. Sturgeon fails to cite any authority which has held that this distinction does not apply to policies or

practices.[12] Instead, he bases his argument on the premise that statutes and ordinances are accorded a presumption of validity which does not apply to mere policies or practices, and he notes the existence of several cases in which policies or practices were challenged without the court determining whether the challenge was facial or as-applied. (E.g., *White v. Davis* (1975) 13 Cal.3d 757.) We are not persuaded. When a duly authorized policy is challenged as unconstitutional, recent authority has, in fact, considered whether the challenge is facial, and has accorded the policy the same deference accorded a facially-challenged statute or regulation. (*American Civil Rights Foundation v. Berkeley Unified School Dist.* (2009) 172 Cal.App.4th 207, 216 [under a facial challenge to a school board's student assignment policy, the challenger must establish that no set of circumstances exists under which the policy would be valid].)

We therefore consider whether Sturgeon's challenge to SO40 is facial or as-applied. Indisputably, it is facial only. An as-applied challenge depends on the existence of previous, or current, instances of unconstitutional applications. Sturgeon

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[12] Sturgeon relies on *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 260, which was considering the constitutionality of a statute and presumed the validity of the statute and resolved all doubts in its favor. The Supreme Court distinguished *Hartzell v. Connell* (1984) 35 Cal.3d 899, a case which had considered the propriety of "fees that were imposed by a school district, *which the district had not been authorized by law to impose.*" (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th at p. 260, fn. 7.) This was clearly not a statement that policies are not entitled to the same deference as that granted to statutes, but only a statement that policies enacted *in violation of regulations* are not entitled to such deference. Here, Sturgeon does not dispute that the Board of Police Commissioners is authorized by the City Charter to set policy for the LAPD and that SO40 was properly adopted by the Commissioners and incorporated into the LAPD Manual. There is no suggestion that SO40 violates any applicable regulation or state statute, outside of Penal Code section 834b (discussed below).

relies on *no* applications of SO40. He cites to no instances in which an officer was disciplined for violating SO40, and even asserted that the discovery of such instances would be "inappropriate to the type of lawsuit" he brought. Nor can Sturgeon identify an instance in which an officer wanted to contact ICE or question an individual regarding immigration but failed to do so because of a belief that such contact or inquiry would be barred by SO40. In the absence of any specific applications of the policy, Sturgeon's challenge is necessarily facial only.

Sturgeon suggests that he has presented evidence of the way SO40 is applied by means of the deposition testimony of high-ranking LAPD officers as to their opinion of the meaning of SO40. We disagree. There is no evidence that the deposition testimony of these officers was anything more than their opinion of how SO40 might be applied in hypothetical situations. There was no evidence that these officers ever: (1) actually applied SO40 in the manner in which they testified; (2) disciplined a subordinate for violating their interpretation of SO40; or even (3) directed subordinates to act in accordance with their interpretation of SO40.

The most persuasive evidence Sturgeon has of the way in which SO40 is applied is defendants' interrogatory answer that "[SO40] prohibits LAPD from initiating police action with the objective of discovering the alien status of a person. If an individual were to contact [ICE] for that explicit purpose and for no other, they would be violating [SO40]." Yet this language, too, is couched in hypothetical language beginning, "If an individual were to contact [ICE] . . . ." There is no evidence that an LAPD officer ever *wanted* to voluntary contact ICE for these purposes, but was deterred from doing so by

SO40. With no evidence that officers actually *were* prohibited from voluntarily contacting ICE for the sole purpose of discovering immigration status, Sturgeon's challenge to SO40's constitutionality cannot be characterized as an as-applied challenge.

3. *SO40 Survives a Facial Challenge*

To succeed at his facial challenge, Sturgeon must establish that SO40's provisions *inevitably* pose a present total and fatal conflict with section 1373; a mere hypothetical conflict is insufficient.

"In interpreting a statute, we apply the usual rules of statutory construction. 'We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. [Citation.] . . . To determine intent, " 'The court turns first to the words themselves for the answer.' " [Citations.] "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) . . . ." ' [Citation.] We give the language of the statute its 'usual, ordinary import and accord significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided.' " (*Kane v. Hurley* (1994) 30 Cal.App.4th 859, 862.)

The text of SO40 provides: "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)." The text of section 1373(a) states: "Notwithstanding any other

provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." Consideration of both of these provisions demonstrates that there is no total and fatal conflict.[13]

SO40 does not address communication with ICE; it addresses only the initiation of police action and arrests for illegal entry. Section 1373(a) does not address the initiation of police action or arrests for illegal entry; it addresses only communications with ICE. Sturgeon argues a total and fatal conflict exists, because the language of section 1373(a) which prohibits local entities from "restrict[ing] in any way" the *sending* of information to ICE should be read to strike down local prohibitions on *obtaining information* that might later be sent to ICE. We disagree. Section 1373(b) prohibits local entities from restricting government entities from *maintaining* immigration information and *exchanging* such information with any other entity. Clearly, if Congress had wanted to prohibit restrictions on local entities *obtaining* such information, it could have expressly so legislated. Moreover, if "restrict[ing] in any way" communications with ICE is read to include *obtaining information* to give ICE, there would be no need for section 1373(b) to specifically permit local entities to maintain immigration information and exchange it with other governmental entities as,

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[13] Our function as a court is not to conceive of every possible scenario in which the enforcement of SO40 may occur and determine whether, and under what circumstances, such enforcement would conflict with section 1373. In the absence of any evidence regarding situations in which SO40 *has been applied*, Sturgeon's challenge is defeated by the determination that SO40 can, in fact, be applied in a constitutional manner.

clearly, maintaining such information and obtaining it from other governmental entities makes the information available to be transmitted to ICE. In short, Sturgeon's strained interpretation of section 1373 finds no support in the language of the statute, and, in fact, would render provisions of the statute nugatory. We therefore reject it.

4. *SO40 Is Not Preempted*

Sturgeon next argues that even if SO40 is not unconstitutionally invalid because of a conflict with section 1373, SO40 is preempted by section 1373. Sturgeon does not argue that SO40 is preempted by any other federal law or federal immigration legislation generally. He simply argues that the perceived overlap between SO40 and section 1373 results in the latter preempting the former. Recharacterizing his argument as sounding in preemption is of little advantage to Sturgeon, for the result is the same. We will not strike down SO40 as preempted when there exists only the hypothetical possibility that it may be applied contrary to the terms of section 1373.

"There is ordinarily a 'strong presumption' against preemption. [Citations.] 'Consideration of issues arising under the [s]upremacy [c]lause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." [Citation.] Accordingly, " '[t]he purpose of Congress is the ultimate touchstone' " of pre-emption analysis. [Citation.]' [Citation.] However, when the state regulates in an area where there has been a history of significant federal presence the ' "assumption" of nonpre-emption is not triggered . . . . ' [Citation.]" (*Fonseca v. Fong, supra,* 167 Cal.App.4th at p. 930.)

The power to regulate immigration is unquestionably exclusively a federal power. (*Ibid.*) However, it does not follow that all state regulations touching on aliens are preempted. "Only if the state statute is in fact a 'regulation of immigration,' i.e., 'a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain' [citation], is preemption structural and automatic. Otherwise, the usual rules of statutory preemption analysis apply; state law will be displaced only when affirmative congressional action compels the conclusion it must be." (*In re Jose C.* (2009) 45 Cal.4th 534, 550.) As SO40 is a regulation of police conduct and not a regulation of immigration, there is no structural preemption and the assumption of non-preemption applies.

Sturgeon contends SO40 is preempted by federal law, as it conflicts with the intent of Congress in enacting section 1373 and stands as an obstacle to the accomplishment of that intention.[14] Obstacle preemption arises when a state statute or

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[14] The California Supreme Court has recognized four types of preemption: express, conflict, obstacle, and field. (*In re Jose C., supra,* 45 Cal.4th at p. 550.) Other courts have distilled only three types of preemption (express, field, and obstacle) from the U.S. Supreme Court's opinion in *DeCanas v. Bica* (1976) 424 U.S. 351. (E.g., *Fonseca v. Fong, supra,* 167 Cal.App.4th at p. 931.) Sturgeon states that he is relying on the second two types of *DeCanas* preemption, which would be field and obstacle preemption. However, his analysis of the second *DeCanas* type of preemption does not discuss "field" preemption, which is " ' "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." ' " (*In re Jose C., supra,* 45 Cal.4th at p. 551.) Instead, he argues that the second *DeCanas* test is violated by SO40 because 1373 "constitute[s an] unmistakable federal mandate[] requiring the free flow of information regarding persons' immigration status." This appears to be a misunderstanding of field preemption. While field preemption can occur if Congress has unmistakably ordained that state regulation in the field cannot coexist with federal regulation (*Fonseca v. Fong, supra,* 167 Cal.App.4th at p. 931), this requirement

regulation " ' "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' " (*In re Jose C., supra,* 45 Cal.4th at p. 551.) It cannot seriously be disputed that Congress's objective in enacting section 1373 was to eliminate any restrictions on the voluntary flow of immigration information between state and local officials and ICE; indeed, the express language of section 1373 does just that. Nonetheless, we do not conclude SO40 is preempted for the same reason we did not conclude that it was unconstitutional: as a general rule, enforcement of SO40 *has no effect* on the voluntary flow of immigration information between LAPD officers and ICE. SO40 addresses only the initiation of investigations (and a prohibition on misdemeanor arrests); it does not, by its terms, restrict LAPD officers from voluntarily contacting ICE. Without any indication that SO40 is actually interpreted to conflict with section 1373, we will not find preemption based only on a hypothetical situation. (*Solorzano v. Superior Court* (1992) 10 Cal.App.4th 1135, 1148 [stating "mere speculation about a hypothetical conflict is not the stuff of which preemption is made"].)

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focuses on Congress's intent *to exclusively occupy the field*. Sturgeon quotes out of context language regarding Congressional intent and uses it to argue that a state regulation is preempted if it conflicts with Congress's intent *in enacting a particular federal statute*, even if it does not conflict with the statute itself. This is not the test for field preemption and, if anything, is a restatement of Sturgeon's obstacle preemption argument. While Sturgeon claims to be making two preemption arguments, he is really making one: SO40 is preempted by the express language of section 1373, and compliance with SO40 therefore creates an obstacle to compliance with section 1373.

5. *Penal Code 834b Creates No Bar to SO40, as it is Preempted*

Sturgeon's final argument is that SO40 violates Penal Code section 834b. That Penal Code section was enacted by Proposition 187, and governs law enforcement cooperation with ICE. It provides that every law enforcement agency in California "shall fully cooperate" with ICE "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." (Pen. Code, § 834b, subd. (a).) With respect to any such person, the statute requires that law enforcement "attempt to verify the legal status of such person" as a citizen, lawful permanent resident, lawful temporary resident, or alien present in violation of immigration laws. (Pen. Code, § 834b, subd. (b)(1).) If it appears that the person falls into the latter category, law enforcement is required to notify the person of his or her apparent illegal status "and inform him or her that, apart from any criminal justice proceedings, he or she must either obtain legal status or leave the United States." (Pen. Code, § 834b, subd. (b)(2).) Law enforcement is also required to notify the California Attorney General and ICE of the apparent illegal status of the arrestee. (Pen. Code, § 834b, subd. (b)(3).) Penal Code section 834b, subdivision (c) expressly provides: "Any legislative, administrative, or other action by a city, county, or other legally authorized local governmental entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited."

In 1995, shortly after the voters adopted Proposition 187, the United States District Court for the Central District of California concluded that Penal Code

section 834b, in its entirety, was preempted as an impermissible regulation of immigration.[15] (*League of United Latin American Citizens v. Wilson, supra,* 908 F.Supp. at p. 771.) This conclusion has been acknowledged in California courts. (*Fonseca v. Fong, supra,* 167 Cal.App.4th 922, 933-935.)

The district court's opinion that Penal Code section 834b was preempted predated Congress's 1996 enactment of section 1373. Sturgeon argues that section 1373 undermines the district court's finding of preemption, because section 1373 encourages cooperation between local police and ICE.[16] We disagree. "[A] state law invading an area reserved exclusively to the federal government under the Constitution cannot be saved by a congressional enactment." (*Fonseca v. Fong, supra,* 167 Cal.App.4th at p. 928, fn. 7.) Penal Code section 834b was preempted as an impermissible regulation of immigration; an intervening congressional enactment cannot save it. As Penal Code section 834b is preempted by federal law, any perceived conflict with SO40 is irrelevant.

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[15] The district court found it to be preempted under field and obstacle preemption as well. (*League of United Latin American Citizens v. Wilson* (C.D.Cal. 1995) 908 F.Supp. 755, 777.)

[16] Shortly after the enactment of 8 U.S.C. § 1644, which provides that no state or local *entity* may be prohibited or restricted from exchanging information with ICE, the defendants in *League of United Latin American Citizens v. Wilson* returned to district court, seeking reconsideration of the preemption ruling in light of 8 U.S.C. § 1644. In an unpublished opinion, the court denied reconsideration. (*League of United Latin American Citizens v. Wilson* (C.D.Cal. 1997) 997 F.Supp. 1244, 1252.)

DISPOSITION

The judgment is affirmed. Defendants and interveners shall recover their costs on appeal.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.

PROOF OF SERVICE

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

On July 27, 2009, I served a copy of the within document described as: **PETITION FOR REVIEW**

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Washington, D.C. addressed as set forth below.

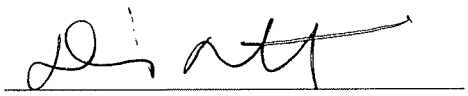
☒ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the addresses(es) set forth below.

***See* ATTACHED SERVICE LIST**

I am readily familiar with the firm's practice of collection 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 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 in affidavit.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on July 27, 2009 at Washington, D.C.



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