IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSLYN M. JOHNSON	§	
	§	
v.	§	**CIVIL ACTION NO. H-10-366**
	§	**(Jury Demanded)**
HAROLD HURTT, in his Official Capacity as Chief of Police of the Houston Police Department, The CITY OF HOUSTON, and The HOUSTON POLICE DEPARTMENT	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS CITY OF HOUSTON AND HOUSTON POLICE DEPARTMENT'S RULE 12(b)(6) MOTION TO DISMISS

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Plaintiff Joslyn M. Johnson, by counsel, respectfully submits this Response in Opposition to Defendants City of Houston and Houston Police Department's Rule 12(b)(6) Motion to Dismiss.

I. Nature and Stage of Proceedings.

Plaintiff, a Sergeant in the Houston Police Department ("HPD"), brings this action for mandamus, declaratory, and injunctive relief against the City of Houston, the HPD, and the Chief of Police. Plaintiff's lawsuit challenges certain policies, practices, and procedures of the HPD that substantially restrict, if not prohibit, Plaintiff from communicating with U.S. Immigration and Customs Enforcement about illegal aliens who are criminally present in the United States. *See* Plaintiff's Original Petition With Request for Disclosure ("Plf's Petition") at ¶ 1. Plaintiff alleges that the HPD's policies, practices, and procedures violate her rights under the U.S. and Texas constitutions and federal law.

Plaintiff's lawsuit originally was filed in the District Court of Harris County, Texas, 151st Judicial District, but, in February 2010, the City of Houston removed the lawsuit to this Court. The City of Houston and the HPD have filed an answer to Plaintiff's original petition in addition to moving to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Harold Hurtt, who was named as a defendant in his official capacity as Chief of Police, resigned his office after Plaintiff filed suit but before service of process had been effected on him. A permanent replacement for Chief Hurtt has not yet been named. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Chief Hurtt's successor is automatically substituted as a party.

In many regards, the City of Houston and the HPD's motion to dismiss seeks to relitigate a claim for monetary damages Plaintiff brought against the City of Houston in her capacity as the

Executrix of the estate of her deceased husband, an HPD patrol officer killed in the line of duty, rather than the mandamus, declaratory, and injunctive relief claims she now brings in her own capacity in this lawsuit. When Plaintiff's claims are considered as she actually brought them rather than in the erroneous way the City of Houston and the HPD try to portray them, there is no doubt that Plaintiff's original petition states claims upon which relief may be granted.

II. Statement of Issues.

The City of Houston and the HPD's motion to dismiss requires the Court to rule on the following issues: (1) whether Plaintiff can sue the HPD as a separate entity; (2) whether Plaintiff's claims against the Chief of Police are redundant of Plaintiff's claims against the City of Houston and the HPD; (3) whether Plaintiff's claims are barred by the doctrine of claim preclusion; (4) whether Plaintiff has asserted a viable cause of action under 42 U.S.C. § 1983 for violation of her rights under the First Amendment to the U.S. Constitution; (5) whether Plaintiff has asserted a viable cause of action under 42 U.S.C. § 1983 for violation of her right as a U.S. citizen to report possible violations of federal law to federal authorities; (6) whether Plaintiff has asserted a viable cause of action under 42 U.S.C. § 1983 for violation of her rights under 8 U.S.C. §§ 1373 and 1644; (7) whether Plaintiff can seek declaratory and injunctive relief for violation of her right to freedom of expression under the Texas Constitution; (8) whether Plaintiff exercised due diligence in serving the City of Houston; and (9) whether Plaintiff's petition pleads facts supporting her prayer for declaratory and injunctive relief. Because the City of Houston and the HPD have moved to dismiss for failure to state a claim upon which relief can be granted, the standard of review is that of Rule 12(b)(6) of the Federal Rules of Civil Procedure. This standard is set forth in detail in Section IV(A), below.

III. Summary of the Argument.

Plaintiff's lawsuit plainly asserts claims on which relief can be granted. The City of Houston and the HPD's argument that the HPD cannot be sued as a separate entity is without merit. The HPD clearly has litigated cases in the past, and there is no reason for a different result here. In addition, Plaintiff's claims against the Chief of Police are not redundant of Plaintiff's claims against the City of Houston and the HPD, as the mandamus relief Plaintiff seeks against the Chief of Police is typically directed at public officials, and the Chief of Police is charged by law with responsibility for promulgating the policies, practices, and procedures Plaintiff challenges. Even if Plaintiff's claims against the Chief of Police were redundant, redundancy does not constitute grounds for dismissal.

Neither are any of Plaintiff's claims barred by the doctrine of claim preclusion, as there is no identity of parties between the present lawsuit by Plaintiff and the prior lawsuit brought by the estate of Plaintiff's deceased husband. In addition, there has been no final judgment on the merits of the estate's lawsuit, and there is no identity of causes of action between Plaintiff's lawsuit for mandamus, declaratory, and injunctive relief regarding the challenged policies, practices, and procedures, and the estate's lawsuit for monetary damages arising under a Fourteenth Amendment, "state-created danger" theory.

Plaintiff has asserted a viable cause of action under 42 U.S.C. § 1983 for violation of her rights under the First Amendment to the U.S. Constitution. While Plaintiff's claims for declaratory and injunctive relief are related to her employment, she enjoys a First Amendment right to share information with federal immigration officials about possible violations of federal law because she seeks to do so as a citizen, not as an employee, and the enforcement of federal

law obviously is a matter of public concern. Plaintiff also has asserted a viable cause of action under 42 U.S.C. § 1983 for violation of her right as a U.S. citizen to report possible violations of federal law to federal authorities, as this long-established right has been recognized by the U.S. Court of Appeal for the Fifth Circuit as giving rise to a cause of action under section 1983. Finally, Plaintiff also has asserted a viable cause of action under 42 U.S.C. § 1983 for violation of her rights under 8 U.S.C. § 1373 and its companion statute, 8 U.S.C. § 1644, as § 1373(a) in particular clearly benefits Plaintiff, is neither vague nor ambiguous, and imposes a direct and binding obligation on state and local governments. Because 42 U.S.C. § 1983 provides a remedy for violation of federal rights, there is no reason for the Court to separately consider whether an implied "private right of action" exists under 8 U.S.C. §§ 1373 and 1644.

Plaintiff's petition properly seeks declaratory and injunctive relief for violation of her right to freedom of expression under the Texas Constitution. Because Plaintiff does not seek monetary damages, the City of Houston and the HPD's argument that monetary relief is not available for claims arising under the Texas Constitution is without merit.

The City of Houston and the HPD's "due diligence" argument is without merit because it is based on a false assumption about the running of an unidentified statute of limitations. Plaintiff's lawsuit challenges policies, practices, and procedures that post-date the death of her husband, Officer Rodney Johnson, and these same policies, practice, and procedures continue in effect to date. Consequently, the statute of limitations has not run on Plaintiff's claims.

Finally, the City of Houston and the HPD's argument with respect to Plaintiff's prayer for relief is too vague, conclusory, and generalized to allow Plaintiff to formulate a response.

Plaintiff's lawsuit amply pleads facts demonstrating her entitlement to mandamus, declaratory, and injunctive relief. The argument has no merit.

IV. Argument.

A. Standard of Review.

The standard of review for a motion to dismiss for failure to state a claim upon which relief can be granted is well settled. The motion must be decided solely based on the allegations in the plaintiff's complaint. *See* Fed.R.Civ.P. 12(d). The court does not decide disputed issues of fact; instead, it must assume that all material facts in the plaintiff's complaint are true. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). Not only must the court accept the plaintiff's allegations as true, but it also must view them in the light most favorable to the plaintiff and draw all references in favor of the plaintiff. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000); *Capital Parks, Inc. v. Southeastern Advertising & Sales Sys., Inc.*, 30 F.3d 627, 629 (5th Cir. 1994). A motion to dismiss tests only the sufficiency of the plaintiff's formal statement of claim for relief. *Doe v. Hillsboro ISD*, 81 F.3d 1395, 1401 (5th Cir. 1996).

B. Plaintiff's Claims Against the Houston Police Department.

Although the City of Houston and the HPD claim that the HPD lacks legal existence and the capacity to be sued, the HPD has actively litigated numerous lawsuits in the past, sometimes even as an appellant. *Houston Police Department v. Berkowitz*, 95 S.W.3d 457 (Tex. App. -- Houston [1st Dist.] 2002) (appeal filed by HPD); *City of Houston v. Lazell-Mosier*, 5 S.W.3d 887 (Tex. App. -- Houston [1st Dist.] 1999) (appeal filed by HPD); *see also Rushing v. Houston Police Department*, 2007 U.S. Dist. LEXIS 15665 (S.D. Tex. March 6, 2007) (Hoyt, J.); *Houston*

Police Officers' Union v. City of Houston Police Department, 2001 U.S. Dist. LEXIS 26260 (S.D. Tex. Sept. 26, 2001); *Metzger v. Houston Police Department*, 846 S.W.2d. 383 (Tex. App. -- Houston [14th Dist.] 1992). Even in this lawsuit, the HPD filed an answer. *See* Docket Entry No. 4, filed February 16, 2010. In its answer, the HPD did not assert that it lacks a legal existence and is incapable of being sued. *Id.* Rather, it asserted multiple affirmative defenses and admitted, denied, or otherwise responded to the allegations in Plaintiff's Original Petition. *Id.* Such actions are clearly inconsistent with the claim that an entity has no legal presence and is not capable of suit. The argument has no merit.

C. Plaintiff's Claims Against the Chief of Police.

Plaintiff's claims against "retired Chief of Police Harold Hurtt" are not redundant even though Plaintiff also seeks relief against the City of Houston and the HPD. The arguments of the City of Houston and the HPD in this regard ignore two crucial points. First, Plaintiff's original petition seeks mandamus relief. Mandamus relief is, quintessentially, relief against a public official. "A writ of mandamus will issue to compel a public official to perform a ministerial act." *Anderson v. City of Seven Points*, 806 S.W.2d. 791, 793 (Tex. 1991). "An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion." *Id.* Plaintiff alleges that the federal statutes at issue, and 8 U.S.C. § 1373(a) in particular, left the Chief of Police no room to exercise any discretion; he may not limit or restrict in any way Plaintiff's ability to send information to, or receive information from, federal immigration officials about a person's citizenship or immigration status. Because mandamus is directed specifically at public officials and 8 U.S.C. §

1373(a) is directed expressly at local officials, it cannot be said that Plaintiff's claims against the Chief of Police are redundant.

Second, under the City of Houston's Code of Ordinances, the Chief of Police is charged with the duty of promulgating rules and regulations for the HPD. Code of Ordinances, City of Houston, Texas, § 34-23 ("The chief of police shall promulgate administrative rules and regulations of the police department . . . "). It is these same rules and regulations promulgated by the Chief of Police that Plaintiff challenges in this lawsuit. It is not redundant to seek relief against the Chief of Police, the City of Houston, and the HPD when the Chief of Police is expressly charged by law with promulgating the rules and regulations for the HPD that Plaintiff challenges. Regardless, there certainly is no prohibition on naming as defendants both a government official, in his or her official capacity, and the governmental entity for which he or she works. *See Nueces County v. Ferguson*, 97 S.W.3d 205, 213-16 (Tex. App. -- Corpus Christi [13th Dist.] 2002). In fact, one of the authorities on which the City of Houston and the HPD rely, *Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007), was a lawsuit brought against both the City of Houston and then-Chief Hurtt. Any alleged "redundancy" is not grounds for dismissal. *Id.*

D. Plaintiff's Claims Are Not Barred by Claim Preclusion.

The City of Houston and the HPD argue that Plaintiff's mandamus, declaratory, and injunctive relief claims in this lawsuit are somehow precluded by another lawsuit she brought in her capacity as the Executrix of the estate of her deceased husband, *Johnson v. City of Houston*, Civil Action No. H-08-03770 (S.D. Tex.) ("H-08-3770"). The City of Houston and the HPD properly assert that "four elements must be met for a claim to be barred by *res judicata*: (1) the

parties in both the prior suit and current suit must be identical; (2) a court of competent jurisdiction must have rendered the prior judgment; (3) the prior judgment must have been final and on the merits; and (4) the plaintiff must raise the same cause of action in both suits. Defendants City of Houston and Houston Police Department's 12(b)(6) Motion to Dismiss Plaintiff's Original Petition ("Defs' Mot.") at ¶ 19 (*citing Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 313 (5th Cir. 2004)). However, the City of Houston and the HPD fail to address each element of their *res judicata* defense, much less demonstrate that *res judicata* applies in this instance. It does not.

1. <u>There is no identity of parties</u>.

First and foremost there is no identity of parties. The sole defendant in H-08-3770 was the City of Houston. Neither Chief Hurtt, the office of the Chief of Police, or the HPD were named as defendants in that action.

More significantly, there is no identity of plaintiffs. The case before the Court is brought by Plaintiff in her personal capacity. Plf's Petition at ¶ 8. By contrast, H-08-3770 was brought by Plaintiff in her capacity as the Executrix of the estate of her deceased husband. Indeed, in ruling on the City of Houston's motion to dismiss in H-08-3770, the Court ruled:

> Plaintiff, in her response states that she brings this Section 1983 action neither on her own behalf nor on behalf of all Houston police officers. … Defendant's motion to dismiss Plaintiff's Section 1983 claims in her individual capacity or on behalf of all Houston Police Officers should be DENIED AS MOOT as Plaintiff makes no such claims.

Memorandum and Recommendation in H-08-3770, entered on September 8, 2009 (Docket Entry No. 23) and attached hereto as Exhibit 1, at 6.[1] Stated another way, the present lawsuit is "Joslyn

[1] The Memorandum and Recommendation was subsequently adopted by the Court. *See* Order Adopting Magistrate Judge's Memorandum and Recommendation in H-08-3770, entered on September 30, 2009 (Docket Entry No. 24) and attached hereto as Exhibit 2.

M. Johnson versus the Chief of Police," whereas H-08-3770 is "the Estate of Rodney Johnson versus the City of Houston." Because there is no identity of parties, *res judicata* does not apply.

2. There is no final judgment on the merits.

Nor has there been a final judgment on the merits. While the Court dismissed the federal law claims in "the Estate of Rodney Johnson versus the City of Houston," it remanded the state law claims to the 125th District Court of Harris County, Texas. Order of Remand in H-08-3770, entered on September 30, 2009 (Docket Entry No. 25) and attached hereto as Exhibit 3. The matter remains pending before the state court.

3. There is no identity of causes of action.

Nor is there any identity of claims. To determine whether two lawsuits involve the same cause of action, courts apply a "transactional" test. *Davis*, 383 F.3d at 313. Whether a grouping of facts constitutes a "transaction" or a "series of transactions" must "be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* (*quoting Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 395-69 (5th Cir. 2004)). The critical issue under the transactional test is whether the two actions are based on the "same nucleus of operative facts." *Id.*

The "nucleus of operative facts" of the causes of action in H-08-3770 was the September 21, 2006 shooting death of Plaintiff's husband during an otherwise routine traffic stop by Juan Leonardo Quintero-Perez, a previously deported illegal alien who had reentered the United States illegally and was never reported to federal immigration officials despite multiple

interactions with the HPD following his illegal reentry. In H-08-3770, Plaintiff's husband's estate alleged that the HPD's policies in effect at the time prevented HPD officers from reporting Quintero-Perez's criminal presence in the United States to federal immigration officials and therefore deprived Officer Rodney Johnson of his "life and liberty guaranteed by the Fourteenth Amendment to the U.S. Constitution." Exhibit 1 at 7. More specifically, Officer Rodney Johnson's estate "alleged an unsafe workplace environment theory cloaked as a state-created danger claim." *Id.* at 13. The Court found:

> Here . . . the [City of Houston's Sanctuary] policy did not arm Quintero, require him to conceal firearms on his person or incite him to shoot Johnson . . . Officer Johnson was employed in an inherently dangerous job and Defendant had no constitutional responsibility to protect him from those dangers. And, even if the Sanctuary Policy made Johnson's workplace marginally unsafe by not permitting its police officers to run a warrant check on all persons who had some contact with a police officer, such exposure to increased risk is not a violation of substantive due process . . . The court finds that Plaintiff has not alleged a substantive due process/state-created danger claim.

Id. at 14-15.

In contrast to the "substantive due process/state-created danger claim" for monetary damages asserted by Officer Rodney Johnson's estate in H-08-3770, which concerned a very complicated chain of events, complex issues of causation, the inherent dangers of being a police officer, and the City of Houston's duty to protect police officers, among other unique factual and legal issues, the present action presents a straightforward legal challenge to HPD policies, practices, and procedures. The only core, relevant facts are the policies, practices, and procedures themselves, not Officer Rodney Johnson's senseless murder. The references in the Petition to Plaintiff's husband's death were included solely to "illustrate[] the tragic effects that can result from Houston Police Department's policies, practices, and procedures." Plf's Petition

at ¶ 17. The City of Houston and the HPD even admit that "Plaintiff's constitutional complaints regarding the prohibition of her contacting ICE ***had nothing to do*** with the prior stopping of Officer Johnson's killer, Quintero-Perez, by the [HPD]." Defs. Mot. at ¶ 25 (emphasis added). The present action could have been brought by any HPD officer regardless of whether he or she – or his or her spouse – was injured or killed in the line of duty.

Moreover, Plaintiff alleges that, after Officer Rodney Johnson's death, the HPD revised its policies, practices, and procedures. Plf's Petition at ¶ 25. Plaintiff also alleged facts identifying why these revisions still fail to satisfy the requirements of federal law. *Id.* at ¶¶ 25-31. Because the HPD's policies, practices, and procedures in effect at the time of Officer Rodney Johnson's death differ from the HPD's current policies, practices, and procedures, it cannot even be said that the two cases share a single set of policies, practices, and procedures as a "common nucleus of operative facts."

Nor can the City of Houston and the HPD maintain that Plaintiff could have advanced the claims she brings in this action in H-08-3770. Again, the HPD's policies, practices, and procedures have changed since Officer Rodney Johnson's shooting (*id.* at ¶ 25), and Plaintiff was not a party to H-08-3770 in her personal capacity. Consequently, she could not have asserted the present set of claims. And clearly, Officer Rodney Johnson's estate could not bring a lawsuit seeking to enable Officer Rodney Johnson to exercise his discretion about whether and when to communicate with federal immigration officials. Not only is there no identity of parties, no final judgment, and no identity of claims, but the claims Plaintiff asserts in the present suit could not have been brought by Rodney Johnson's estate in the prior suit.

E. Plaintiff Has Asserted Viable Causes of Action for Violation of Her Federal Rights.

In addition to her mandamus claim, Plaintiff also asserts a claim under 42 U.S.C. § 1983 for deprivation of her "rights, privileges, and immunities secured by the Constitution and laws of the United States." Plf's Petition at ¶ 43.

It is irrefutable that "section 1983 imposes liability on anyone who, under color of state law, deprives a person 'of any rights, privileges, or immunities secured by the Constitution and laws.'" *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (*quoting Maine v. Thiboutot*, 448 U.S. 1 (1980)). In order to seek redress under section 1983, a plaintiff must assert not merely the violation of a federal law, but the violation of a federal right. *Id.* (*citing Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989)). Plaintiff has asserted violations of several federal rights in bringing her section 1983 claim.

1. The First Amendment.

First, Plaintiff alleges that the City of Houston and the HPD's policies, practices, and procedures violate her rights under the First Amendment. The U.S. Supreme Court has "made clear that public employees do not surrender all of their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id.* A public employee's speech is protected by the First Amendment when the interest of the employee as a citizen addressing matters of public concern outweighs the interests of the government employer in promoting the efficiency of the services it performs through its employees. *Charles v. Grief*, 522 F.3d 508, 512 (5th Cir. 2008). This

analysis sometimes is referred to as a "*Pickering* balancing test." *Id.* at 515 (*citing Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)).

The City of Houston and the HPD do not argue that the speech at issue – the sharing of information with federal immigration officials about possible violations of federal law – is not speech about a matter of public concern. Defs' Mot. at ¶¶ 23-25. It is. Nor do the City of Houston and the HPD argue that the results of a *Pickering* balancing test would weigh so clearly in their favor that Plaintiff cannot state a claim for relief as a matter of law. *Id.* It does not. Rather, their sole argument is that the speech at issue is not protected because it is part of Plaintiff's official duties and responsibilities. *Id.* at ¶ 25. It is ironic that the City of Houston and the HPD would claim that the speech at issue is unprotected because it is part of Plaintiff's job when, at the same time, they prohibit her from engaging in this same speech. If the speech at issue was part of Plaintiff's job, then the City of Houston and the HPD would not be prohibiting her from speaking.

In *Garcetti*, the U.S. Supreme Court's most recent case on the speech rights of public employees, the Court emphasized the distinction between a speaker acting in his or her role as a "citizen" and a speaker acting in his or her role as an "employee." *Charles*, 522 F.3d at 512. In *Garcetti*, a deputy district attorney reported to his supervisor that there were inaccuracies in an affidavit supporting a search warrant and recommended that the office refrain from prosecuting a related criminal case. The deputy alleged that he was subjected to a series of retaliatory actions in response to this intra-office speech. The Supreme Court concluded that the deputy's speech was not entitled to First Amendment protection because it was made pursuant to his official duties, specifically, the fulfillment of his responsibility to advise his supervisor about how best to

proceed with a pending case. *Id.* at 513. *Garcetti*, however, "did not explicate what it means to speak pursuant to one's official duties." *Williams v. Dallas Independent School District*, 480 F.3d 689, 692 (5th Cir. 2007) ("*Williams v. DISD*").

In *Williams v. DISD*, the U.S. Court of Appeals for the Fifth Circuit attempted to define when an employee is speaking pursuant to his "official duties." *Id.* at 693-94. It made clear that "a formal job description is not dispositive, nor is speaking on the subject matter of one's employment." *Id.* at 692 (*quoting Garcetti*, 547 U.S. at 421, 424-25). The Court went on to hold that "[job]-required speech is not protected." *Id.* at 693. Because the speech at issue in *Williams v. DISD* was not required by the job responsibilities of the plaintiff, the Court was required to determine the extent to which, under *Garcetti*, a public employee is protected by the First Amendment "if his speech is not necessarily required by his job duties, but nevertheless is related to those duties." *Id.* In *Williams v. DISD*, a high school athletic director was removed from his position after he wrote memoranda to high-ranking school officials, including the principal, calling into question the school's handling of its athletic fund. The Court concluded that the athletic director's speech concerned the fulfillment of his daily operations, namely budgeting for various athletic department expenses, and therefore was not protected.[2] *Id.*

The speech as issue here clearly is not "required" of Plaintiff by the City of Houston or the HPD as part of Plaintiff's job. Again, the City of Houston and the HPD seek to prevent the type of speech – voluntary information sharing and reporting – in which Plaintiff seeks to

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[2] Even seemingly directly-related speech may still be protected under the First Amendment post-*Garcetti* and post *Williams v. DISD*. In *Williams v. Riley*, 275 Fed. Appx. 385 (5th Cir. 2008), two county jailers sued their employer for violation of their First Amendment rights when they were fired for reporting prisoner abuse to their supervisors. The Court reversed a decision granting summary judgment against the jailers, holding that "[a]lthough it may be presumed that an employee's official job duties would include reporting crimes perpetrated at work by department members, it is not clearly so here." *Williams v. Riley*, 275 Fed. Appx. at 389.

engage. At the same time, Plaintiff does not dispute that the speech at issue is not unrelated to her job.

At least three factors are important in this regard. First, the City of Houston and the HPD cannot argue that Plaintiff's speech is not protected because it might arise from special knowledge she obtains through her employment. The Court in *Charles* squarely rejected this argument: "To hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights." *Charles*, 522 F.3d at 513.

Second, unlike in *Garcetti* and *Williams v. DISD*, the prohibited speech in which Plaintiff seeks to engage is not intra-office speech. It is not made to Plaintiff's supervisor or persons higher up in Plaintiff's chain of command. It is not even made within the HPD or the City of Houston. It is speech to federal officials. In this regard, the prohibited speech is analogous to the speech at issue in *Charles*, *supra*, which the Court found to be protected. In *Charles*, a employee of the Texas Lottery Commission provided information about racial discrimination and retaliation, misuse of funds, and other alleged misconduct by the Commission management to members of the Texas Legislature with oversight authority over the Commission. *Charles*, 522 F.2d at 510, 514. It also is analogous to the speech at issue in *Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008), in which a University of Texas computer systems administrator reported possible criminal behavior and racial discrimination, discovered during the course of carrying out her duties and responsibilities, to the Federal Bureau of Investigation and U.S. Equal Employment Opportunity Commission.[3] The Court in *Davis* found that these communications,

[3] The plaintiff in *Davis* alleged that she had made a variety of communications to different persons and/or entities. At least some of the persons to whom the plaintiff made disclosures

although related to the plaintiff's employment, were not unprotected, noting that a public employee's "external communications are ordinarily not made as an employee, but as a citizen." *Davis*, 518 F.3d at 313-314, 316.

Third, it is well established that citizens have the right to inform federal officials of possible violations of federal law. *See, e.g., In re Qualres*, 158 U.S. 532, 535-36 (1895); *United States v. Guest*, 383 U.S. 745, 775, 779 (1966) (Harlan, J., concurring in part and dissenting in part) (Brennan, J., concurring in part and dissenting in part); *Edwards v. Habib*, 366 F.2d 628, 629 (D.C. Cir. 1965) ("It is not seriously questioned that every citizen has the right, if not the duty, of informing his government of a violation of the law, and . . . a court of equity, on a proper showing, may enjoin any interference with that right"); *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 529-30 (Tex. App. -- Dallas [5th Dist.] 1978). Along with the right to petition Congress and vote in federal elections, it is among the set of rights and privileges enjoyed by citizens of the United States, as distinguished from those enjoyed by citizen of any particular state. *Twining v. New Jersey*, 211 U.S. 78, 97 (1908). Because the speech in which Plaintiff seeks to engage is an independent, well-established right of citizens, it would be anomalous to find, for purposes of a First Amendment analysis, that Plaintiff's exercise of this independent right would be undertaken in her role as an employee, not as a citizen.

The City of Houston and the HPD cite *Nixon v. City of Houston*, *supra*, for the proposition that the speech in which Plaintiff seeks to engage is not protected by the First Amendment. *Nixon* is inapposite; it essentially is an insubordination case, not a free speech case. In *Nixon*, an on-duty, uniformed HPD patrol officer who had a history of making unauthorized

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were in the plaintiff's chain of command. The Court described such cases as "mixed" speech cases and analyzed each communication separately. *Davis*, 518 F.3d at 314-16.

statements in the media was fired after going to the scene of an accident following a high speed police chase and making unauthorized statements to the media:

> Nixon posed as an official HPD spokesperson at the scene of an accident and criticized HPD's handling of the high-speed pursuit issue. Furthermore, in [follow-up media appearances] Nixon stated that he knowingly disobeyed HPD pursuit policy on a prior occasion and felt comfortable violating other direct orders because he has "civil service protection." Such statements and conduct ***smack of insubordination***, and it is entirely reasonable for the HPD to predict that such ***insubordination*** and likely acts of ***future insubordination*** would harm HPD's ability to maintain discipline and order in the department . . . Furthermore HPD could reasonably predict that an officer criticizing HPD policy while masking as an official spokesperson at the scene of an accident and discussing his past violations of HPD policy and future willingness to violate such policies would bring the mission of HPD and the professionalism of its officers into disrepute.

Nixon, 511 F.3d at 499. The Court found the officer's speech was not "protected citizen speech," declaring "[q]uite simply, there is 'no relevant analogue to speech by citizens.'" *Id.* (*citing Garcetti*, 547 U.S. at 424). Unlike in *Nixon*, this case obviously is not an insubordination case. Moreover, the officer in *Nixon* was not sharing information about possible violation of federal law with federal authorities. Sharing information about possible violations of federal law with federal authorities clearly is a "relevant analogue to speech by citizens."

In short, this case is not *Garcetti*, *Williams v. DISD*, or *Nixon.* The prohibited speech in which Plaintiff seeks to engage is more similar to the protected speech at issue in *Charles* and *Davis* than the unprotected speech at issue in *Garcetti*, *Williams v. DISD*, or *Nixon.* Because Plaintiff's speech is protected speech, Plaintiff has stated a claim for violation of her First Amendment rights.

2. The right to inform federal officials of possible violations of federal law.

Second, and related to, but independent of the First Amendment right to freedom of expression, is the already-noted, long-established right of U.S. citizens to inform federal officials of possible violations of federal law. *See, e.g., In re Qualres*, 158 U.S. at 535-36. Section 1983 has been used in other cases to remedy a violation of this longstanding right. In *Williams v. Allen*, 439 F.2d. 1398 (5th Cir. 1971), the Court found that a police officer could bring an action under section 1983 to remedy an alleged violation of his right to inform federal authorities of a possible violation of federal law after he was allegedly terminated in retaliation for having reported acceptance of lottery payoffs by police officers to the IRS. Clearly, Plaintiff's original petition states a claim under section 1983 for this reason as well.[4]

3. 8 U.S.C. §§ 1373 and 1644.

Third, Plaintiff also has stated a claim under section 1983 for violation of her rights under 8 U.S.C. § 1373 and its companion statute, 8 U.S.C. § 1644. The U.S. Supreme Court "has traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right." *Blessing*, 520 U.S. at 340. "First, Congress must have intended that the provision in question benefit the plaintiff." *Id.* (*citing Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 430 (1987)). "Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement

[4] Plaintiff's original petition did not expressly reference the right of citizens to provide information about possible violations of federal law to federal officials, but nonetheless clearly referenced the deprivation of her "rights and privileges and immunities secured by the Constitution and the laws of the United States, including but not limited to, the right to freedom of expression as guaranteed by the First Amendment and the right to contact ICE . . . as set forth in 8 U.S.C. §§ 1373 and 1644." Plf's Petition at ¶ 43. Plaintiff clearly could amend her pleading to expressly reference this right of national citizenship, should the Court find it not already included in her original petition.

would strain judicial competence." *Id.* at 340-41 (*quoting Wright*, 479 U.S. at 431-32). "Third, the statute must unambiguously impose a binding obligation on the States." *Id.* "In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms." *Id.*

It appears to be a question of first impression whether the federal statutes at issue give rise to a federal right. A reasonable examination of the statutes, especially section 1373(a), demonstrates that they confirm, if not create, a federal right on the part of local government officials such as Plaintiff to share information with federal immigration officials without interference from their employers. The most obvious example is section 1373(a), which expressly states that local government entities "may not prohibit or in any way restrict" a government 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). The language of both statutes is directed squarely at government officials' ability to share information. These provisions -- enacted by Congress in response to policies like the HPD's policy that were proliferating across the country -- benefit local government officials because they reinforce and amplify their constitutional rights to freedom of expression and to inform federal officials of possible violations of federal law. They are particularly beneficial to local law enforcement officials, such as Plaintiff, who have sworn an oath to preserve, protect, and defend the Constitution and laws of the United States and are charged by law with detecting and preventing crimes and arresting violators of the law. *See, e.g.*, Plf's Petition at ¶¶ 14 and 15.

Second, there is nothing vague or amorphous about the statutes or the right they create. It cannot be said that their enforcement would "strain judicial competence." Courts clearly are competent to determine whether prohibitions or restrictions are being placed on state or local government officials' communications with federal immigration officials and to declare any such prohibitions or restrictions unlawful.

Third, the statutes clearly impose a direct and binding obligation on state and local governments. Their language could not be clearer. No restrictions or prohibitions on the sharing of information are permitted. There is nothing precatory about them. It is difficult to conceive of how Congress could have expressed itself any clearer when it used the words "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." 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.

Whether characterized as a violation of her right to freedom of expression under the First Amendment to the U.S. Constitution, her right as a citizen of the United States to inform federal officials of possible violations of federal law, or her rights under 8 U.S.C. §§ 1373 and 1644 -- all of which are mutually reinforcing in this instance -- Plaintiff has clearly stated a claim under 42 U.S.C. § 1983.

F. The City of Houston and the HPD's "Private Right of Action" Arguments Have No Merit.

1. 8 U.S.C. §§ 1373 and 1644.

The City of Houston and the HPD argue that there is no private cause of action under 8 U.S.C. §§ 1373 and 1644. Defs' Mot. at ¶¶ 22-31. Plaintiff never claimed a private cause of action exists under these statutes. Rather, as Plaintiff has demonstrated, Plaintiff's original petition invokes the cause of action set forth in 42 U.S.C. § 1983, which provides a statutory remedy for violations of certain rights secured by federal law. The City of Houston and the HPD simply misread Plaintiff's original petition in this regard, and there is no reason to even consider whether there is some implied "private right of action" under 8 U.S.C. §§ 1373 or 1644.[5]

2. Texas Constitution.

The City of Houston and the HPD do not claim that Plaintiff has not properly asserted a claim for violation of her right to freedom of expression under the Texas Constitution. Rather, they claim that there is "no right of action for ***damages*** arising under the free-speech provision of the Texas Constitution." Defs' Mot. at ¶ 32 (emphasis added). They are correct. Nonetheless, the problem with the City of Houston and the HPD's argument is that Plaintiff does not seek monetary damages. She seeks mandamus, declaratory and injunctive relief. It is well

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[5] The one case cited by the City of Houston and the HPD in support of their argument, *Doe v. City of New York*, 19 Misc.3d 936, 860 N.Y.S.2d 841, 844 (N.Y. Sup. March 20, 2008), is inapposite. In *Doe*, the plaintiff brought suit against the City of New York and other public entities after she was attacked and robbed by several persons, including four illegal aliens, living in an encampment on the defendants' property. In addition to asserting a negligence claim, the plaintiff claimed that the defendants were liable to her for "failing to report the presence of illegal aliens to the federal authorities" in violation of 8 U.S.C. § 1373. *Doe*, 19 Misc.3d at 940, 860 N.Y.S.2d at 844. The court rejected the plaintiff's claim on multiple grounds, including finding that there was no private cause of action under 8 U.S.C. § 1373. *Id.* Not only did the court in *Doe* not consider whether the statute gives rise to a federal right enforceable through an action under 42 U.S.C. § 1983, but the plaintiff was not even arguably protected by section 1373 because she was a private citizen, not a public official or public employee like Plaintiff.

established that the Texas Constitution provides for equitable relief for violations of its provisions. *Olibas v. Gomez*, 481 F. Supp.2d 721, 726 (W.D. Tex. 2006); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995); *Nueces County*, 97 S.W.3d at 218; *City of Elsa v. M.A.L.*, 192 S.W.3d 678 (Tex. App. -- Corpus Christi [13th Dist.] 2006). Again, when Plaintiff's claims are analyzed based on how she pled them rather than as the City of Houston and the HPD miscontrue them, there is no doubt that Plaintiff has stated a claim upon which relief can be granted.

G. The City of Houston and the HPD's "Due Diligence" Argument Has No Merit.

The City of Houston and the HPD's "due diligence" argument essentially is a statute of limitations defense. They argue that "[b]ecause the City was served with citation on January 15, 2010, almost four months after the statute had run, Plaintiff failed to use due diligence in serving the City and Plaintiff's lawsuit should be dismissed." Defs' Motion at ¶ 36. While the City of Houston and the HPD appear to assume that the relevant statute of limitations began to run on the day of Officer Rodney Johnson's death, they never argue why this should be the case or identify what statute of limitations should apply. The authorities cited by the City of Houston and the HPD appear to stand for the proposition that a personal injury lawsuit must not only be filed within the statute of limitations period, but the plaintiff also must demonstrate due diligence in serving the defendants with process if service is not effected during the limitations period. *See, e.g., Proux v. Wells*, 235 S.W.3d 213, 216 (Tex. 2007). The *Proux* line of cases is simply irrelevant to this case.

Not only do the City of Houston and the HPD fail to identify any particular statute of limitations that allegedly applies to Plaintiff's claims for mandamus, declaratory, and injunctive

relief, but they also completely ignore the fact that the policies, practices, and procedures challenged by Plaintiff in this action were revised after Officer Rodney Johnson's death and that the revised policies, practices, and procedure remain in effect to date. Indeed, the City of Houston and the HPD do not claim otherwise. Because there is no statute of limitation defense to be asserted in this case, the City of Houston and the HPD's argument that Plaintiff failed to use "due diligence" to effect service of process has no merit.

H. Plaintiff's Petition Pleads Ample Facts Supporting Her Prayer for Declaratory and Injunctive Relief.

Plaintiff's Petition pleads ample facts supporting her claim for declaratory and injunctive relief, which she seeks under 42 U.S.C. § 1983. *See, e.g.*, Plf's Petition at ¶¶ 1-2, 13-15, 24-36, and 42-45. The City of Houston and the HPD's argument to the contrary is too vague, conclusory, and generalized to even permit Plaintiff to respond in a meaningful manner. It has no merit.

V. Conclusion.

For the foregoing reasons, Plaintiff prays that the City of Houston's motion to dismiss be denied in its entirety.

Dated: March 31, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been served on counsel identified below pursuant to the Federal Rules of Civil Procedure, on the 31st day of March, 2010

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