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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

CYNTHIA CERLETTI,

Plaintiff,

v.

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

Defendant.

Case No.: CGC-16-556164

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE

Reservation No.: 02160410-16

Hearing Date: May 15, 2017
Judge: Hon. Harold A. Kahn
Time: 9:30 a.m.
Place: Dept. 302

Complaint Filed: December 27, 2016
Trial Date: None Set

INTRODUCTION

Defendant Sheriff Hennessy has simultaneously filed, in the alternative, a demurrer to the complaint and a separate motion to strike certain allegations in the complaint. These challenges are limited in scope to allegations concerning ICE notification requests for information about inmate release dates and times. The memoranda of points and authorities in support of the demurrer and motion to strike are essentially identical, except for one argument that appears only in the memorandum for the demurrer. In that argument, Sheriff Hennessy contends that, under California's primary rights theory, Plaintiff Cynthia Cerletti's allegations about Sheriff Hennessy's policies regarding ICE notification requests are a distinct cause of action with respect to which the Sheriff may demur. According to Sheriff Hennessy, if such allegations "affect[] less than an entire cause of action," she may still challenge that portion of the cause of action as legally invalid and, for that reason, Sheriff Hennessy has also filed a motion to strike those allegations. In this opposition brief, Cerletti will demonstrate that Sheriff Hennessy's reliance on the primary rights theory is misplaced and lacks merit, and therefore the demurrer should be overruled. Cerletti will further establish that Sheriff Hennessy misapprehends Cerletti's preemption claims, that such claims are legally valid and based on substantial facts necessary to constitute a cause of action, and therefore the demurrer should be overruled and the motion to strike should be denied. This brief is organized under the same headings used in Sheriff Hennessy's memoranda in support of her demurrer / motion to strike.

BACKGROUND

I. UNDERLYING CONSTITUTIONAL PRINCIPLES

Sheriff Hennessy believes "[t]his taxpayer suit concerns the degree to which Congress has required – and, under the federal Constitution, can require – state or local governments to make their own taxpayer-funded employees and resources available to assist the federal government in enforcing federal immigration law." Def's. Dem. MPA at 2:6-8. No, it is not. This lawsuit is about preemption. As the Sheriff admits, "this Court need not address [any Tenth Amendment] issue for puposes [sic] of defendant's demurrer and accompanying motion to strike . . . ." *Id.* at 1.

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II. 2015: SHERIFF MIRKARIMI'S DIRECTIVE AND THE *CERLITTI I* SUIT

Sheriff Hennessy contends that *Cerletti I* "did not challenge the 2015 Directive's prohibition against providing ICE with jail inmates' 'release dates or times.'" *Id.* at 3:13. Yes, it did. But it doesn't matter. Cerletti is not required to have challenged the 2015 Directive's prohibition on sharing release information in a prior lawsuit in order to bring this lawsuit.

III. 2016: DEFENDANT REVOKES THE 2015 DIRECTIVE

The *Cerletti I* lawsuit was filed on December 4, 2015 in response to the 2015 Directive. *See* Def's Req. for Judicial Notice, Ex. B. Sheriff Hennessy correctly states that, four months after the *Cerletti I* lawsuit was filed, she revoked the 2015 Directive and replaced it with the 2016 Directive. *Id.* at 3. Sheriff Hennessy attempts to distinguish her 2016 Directive from its illegal 2015 predecessor on the grounds that it does not express a policy of having only "limited contact and communication with ICE;" that citizenship or immigration status is no longer on the list of information that may not be shared with ICE; that "it does not contain any restriction on communicating with ICE about inmates' citizenship or immigration status;" and that it contains a savings clause, whereby it "'does not limit staff from providing information required or authorized by state law . . . and federal law.'" *See* Def's Dem. MPA at 4. These purported differences do not make the 2016 Directive lawful. They make it worse, as Cerletti alleges in her complaint. *See e.g.,* Compl. ¶¶ 9, 29, 39; *id.* ¶¶ 33, 34;[1] *id.* ¶¶ 36-37. But such differences don't matter either for present purposes because Sheriff Hennessy does not rely on them in any substantive way in either her demurrer or motion to strike.

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[1] Regarding the savings clause, the complaint alleges on information and belief that the reference therein to "federal law" does not refer to Sections 1373 and 1644. *Id.* ¶ 34. Also, that "[n]either statute requires or authorizes any information, including citizenship or immigration status, be provided to ICE; they only prohibit obstacles to sharing such information." *Id.*; *see also Opinion*, 75 Ops. Cal. Att'y Gen. 270 (1992), 1992 Cal. AG LEXIS 43 [14], n.9 (holding that despite the fact that an ordinance allows cooperation with INS agents if such assistance is required by federal or state statute, "[i]t is the ordinance's creation of an 'obstacle' to the objectives of Congress that is impermissible . . . A direct conflict with a federal or state statute or regulation presents a separate and distinct basis for the preemption of a local ordinance.).

IV. PLAINTIFF FILES THIS ACTION

A. Plaintiff's Allegations Concerning Notification Requests.

The complaint alleges that "[t]he free exchange of immigration-related information by state and local agencies remains a federal priority, as confirmed by the current program and policies of the federal agencies responsible for immigration law enforcement . . . ." Compl. ¶ 17. The complaint then alleges that, "[i]n 2014, DHS changed its immigration enforcement program and policies to promote cooperation and information sharing by state and local law enforcement officials particularly regarding criminal aliens in their custody." *Id.* ¶ 18. The complaint goes on to allege that "[t]he change was prompted by a number of enforcement obstacles including state and local law enforcement officials refusing to cooperate and communicate with ICE and issuing policies or signing laws prohibiting such cooperation." *Id.* In her discussion concerning ICE notification requests for release information, the Sheriff ignores these allegations and recites only a few of the particular subsequent allegations in the complaint concerning the DHS's Priority Enforcement Program ("PEP"). Def's Dem. MPA at 4-5. However, such allegations cannot properly be ignored when discussing Cerletti's preemption claims because, as explained later, those claims are based in part on Congress' overall purpose and objective of promoting information sharing and consultation and the fact that such information sharing and consultation remain a federal priority.

The Sheriff then construes Cerletti's complaint as follows: "Cerletti also alleges that San Francisco laws, or Sheriff Hennessy's policies, restrict local officials from complying with such ICE notification requests." *Id.* at 5. Next, the Sheriff selectively quotes from a few allegations in the complaint that describe and quote San Francisco Administrative Code Sections 12H.2, 12I.2, and 12I.3. In so doing, the Sheriff totally ignores the allegations in the complaint that "[t]he City and County of San Francisco has declared it is a City and County of Refuge," that, as such, "the CCSF has enacted a number of laws that serve as barriers or obstacles to federal civil immigration enforcement," and that "[i]ndeed, the CCSF imposes substantial restrictions on sharing information with, and providing assistance to, federal immigration law enforcement officials."

Compl. ¶ 21. Here, again, such allegations cannot properly be ignored when discussing Cerletti's claim based on obstacle preemption.

B. Plaintiff's Allegations About Citizenship or Immigration Status Information.

Sheriff Hennessy also ignores these allegations in her discussion of Cerletti's allegations concerning citizenship or immigration status information. In addition, the Sheriff construes Cerletti's complaint as follows: "'On information and belief,' for example, she claims that SFAC Section 12I bars the use of City funds or resources to 'disseminat[e] information,' in an employee's official capacity, about any person's 'citizenship and immigration status.'" Def's Dem. MPA at 6 (citing Compl. ¶¶ 22, 23). Actually, the complaint alleges that Section 12H.2 – which is entitled "Immigration Status" – prohibits the use of City funds or resources to gather or disseminate information regarding the release status of any individual "or any other such personal information" as defined in Section 12I (Compl. ¶ 21); that this prohibition expressly includes requesting or disseminating such information, in one's official capacity (*Id.* ¶ 22); that "personal information" is defined in Section 12I to include not only an individual's release status but also any confidential "identifying information about an individual" (*Id.* ¶ 23); and that, "[o]n information and belief, citizenship and immigration status constitutes 'identifying information about an individual.'" *Id.* Thus, Cerletti alleges that, together, Sections 12H.2 and 12I.2 prohibit the use of City funds or resources, in any capacity, to gather or disseminate any confidential "identifying information about an individual," including, on information and belief, citizenship and immigration status, and immigration status in particular.

C. Plaintiff Alleges That SFSD's "Policies and Practices" Are Preempted.

Sheriff Hennessy construes Cerletti's complaint to allege that her "(1) policies or practices addressing ICE notification requests, and (2) policies or practices addressing the sharing of citizenship/immigration status information with ICE – conflict with Sections 1373 and 1644." Def's Dem. MPA at 6. This statement is confusing and demonstrates that the Sheriff misapprehends, or is deliberately distorting, Cerletti's claims. As stated above, Cerletti's first claim is that all of the Sheriff's "policies and practices substantially restricting, if not prohibiting, SFSD personnel from sharing information with federal immigration law enforcement officials are

expressly preempted by 8 U.S.C. §§ 1373 and/or 1644 and, as a result, are illegal." Compl. ¶ 43 (First Cause of Action); *id.* ¶ 1. This claim raises the issue of whether the Sheriff's policies or practices in any way restrict, if not prohibit, SFSD personnel from sharing information with federal immigration authorities. The resolution of this issue does not depend on ICE notification requests, or even release dates and times, solely or even primarily.

It helps to think about Cerletti's claims in terms of a single policy or practice. An earlier policy issued by Sheriff Mirkarimi in 2015 expressly prohibited SFSD personnel from sharing information about inmates' citizenship or immigration status with ICE. *Id.* ¶ 29. A written directive issued by Sheriff Hennessy in January 2016 purportedly revoked Sheriff Mirkirimi's policy and now differentiates between two categories of information – information SFSD personnel are authorized to share with ICE and information SFSD personnel are not authorized to share with ICE. *Id.* ¶ 33. Citizenship or immigration status information is not listed under either category. *Id.* Cerletti's complaint alleges that the Sheriff's policy or practice is broader than her 2016 written directive and restricts, if not prohibits, sharing information about inmates' citizenship or immigration status. *Id.* ¶¶ 29, 39 and 43; *see also id.* ¶¶ 21-26 (alleging local laws which govern the Sheriff's policy or practice, including S.F. Admin. Code ch. 12H.2, 12I.2, and 12I.3). This claim is largely a question of fact, and discovery will be essential. If, as a factual matter, discovery shows that the Sheriff's policy or practice in any way restricts SFSD personnel from sharing such information with ICE, then the policy is expressly preempted by Sections 1373 and 1644, and is therefore illegal. If discovery does not support this claim, it will fail.

Next, the Sheriff acknowledges Cerletti's allegation that Sections 1373 and 1644, and other statutes, including Sections 1357(g)(10) and 1357(d), evidence Congress' longstanding goal "to encourage full and open communication between local agencies and federal immigration officials and to remove obstacles to such communication to aid in the enforcement of federal immigration law." Def's Dem. MPA at 6 (citing Compl. ¶¶ 10, 14 and 15); *see also* Compl. ¶ 16. However, in a footnote, the Sheriff states, "[s]ignificantly, however, plaintiff does not allege that any of Sheriff Hennessy's 'policies and/or practices' violate, or are preempted by, 8 U.S.C. §§ 1357(d) or 1357(g)(10)." Def's Dem. MPA at n.2. The significance, if any, of this statement is

not explained. The statement further demonstrates, however, that the Sheriff misapprehends Cerletti's second claim.

Specifically, in Count Two of her complaint, Cerletti contends that the Sheriff's "policies and practices substantially restricting, if not prohibiting, SFSD personnel from sharing information with federal immigration law enforcement officials are impliedly preempted because they stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress and, as a result, are illegal." Compl. ¶ 48. This claim, once again, raises the issue of whether the Sheriff's policies or practices in any way restrict, if not prohibit, SFSD personnel from sharing information with federal immigration authorities. The resolution of this issue does not depend on Sections 1373 and 1644 exclusively or even primarily, or for that matter 1357(g)(10) and 1357(d).

Plaintiff's second preemption claim invoked "obstacle" preemption. *Id.* A state or local law or policy is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (*quoting Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Congress demonstrated a clear intent to promote information sharing between state and local law enforcement agencies and federal immigration officials, including ICE, by enacting multiple statutes, including Sections 1373, 1644, 1357(d) and 1357(g)(10). Compl. at ¶¶ 7-9 and 14-15. The legislative history of these provisions and subsequent case law confirm this clear congressional purpose and objective. *Id.* at ¶¶ 10-13 and 16; *see also Arizona*, 567 U.S. at 411 ("Consultation between federal and state officials is an important feature of the immigration system.").

Cerletti's implied preemption claim is broader legally than her express preemption claim. It is also broader factually. For example, Sheriff Hennessy's 2016 written directive expressly prohibits SFSD personnel from providing various types of information to ICE, including, for example, release dates and times. Compl. ¶ 33. The directive states that the department is developing a "case by case" policy for providing release information to ICE. *Id.* 35. This policy considers the criminal history of the alien in custody and any mitigating circumstances in

determining whether to provide release information to ICE. *Id.* ¶¶ 37-38. Under the policy, the SFSD will only provide release information if an alien wanted by ICE for possible removal has a criminal history that exceeds a certain threshold and mitigating circumstances are either absent or insufficient. *Id.* A review conducted by Sheriff Hennessy during her first three months in office of approximately 50 requests for release information found no cases where consideration of criminal history triggered consideration of mitigation circumstances. *Id.* ¶ 38; Pltf. Req. for Judicial Notice, Ex. BB. Cerletti alleges that this policy is an obstacle to Congress' demonstrated purpose and objective of promoting information sharing and consultation, and therefore is preempted.

Plaintiff's preemption claim also is based on an additional, separate preemption theory that does not depend on Sections 1373 and 1644, or 1357(g)(10) and 1357(d). "The States enjoy no power with respect to the classification of aliens." *Ariz. Dream Act Coalition v. Brewer*, 2017 U.S. LEXIS App. 1919, *27 (9th Cir. Feb. 15, 2017) (*quoting Plyler v. Doe*, 457 U.S. 202, 225 (1982)). "[T]he power to classify aliens for immigration purposes is 'committed to the political branches of the Federal Government.'" *Id.* at *28 (*quoting Plyler*, 457 U.S. at 225). Sherriff Hennessy's policy classifies aliens in her custody based upon their criminal history and any mitigating circumstances. The agencies charged with enforcement of the immigration laws – the Department of Homeland Security ("DHS") and its immigration components, ICE, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services – have their own priorities for enforcing the nation's immigration laws. Compl. ¶¶ 17-20. Cerletti outlined these priorities – part of DHS's "Priority Enforcement Program" – in the complaint. *Id.* ¶ 19. By creating her own classifications of aliens to determine whether to share release information with ICE, Sheriff Hennessy has "encroach[ed] on the exclusive federal authority to create immigration classifications." *Ariz. Dream Act Coalition*, 2017 U.S. LEXIS App. 1919 at *26.

DHS Form I-247N (Request for Voluntary Notification of Release of Suspected Priority Alien) illustrates the problem. Pltf. Req. for Judicial Notice, Ex. AA. It expressly states that "DHS suspects that the subject is a removable alien," and that the alien is an "immigration enforcement priority" for at least one of six reasons. *Id.* With the sole exception of the first one –

terrorism, espionage, and national security danger – all are based on criminal history. But Sheriff Hennessy has her own criminal history test for sharing release information, on top of which she can also apply unidentified "mitigating circumstances." The Sheriff is not using DHS's priorities. In fact, she's acting contrary to DHS's priorities. Specifically, Sheriff Hennessy is usurping DHS's authority to prioritize removable aliens and replacing it with her own, creating her own classification system, and sheltering aliens she doesn't believe should be subject to removal. It only makes matters worse that the Sheriff is denying federal requests for release information after ICE has identified an alien as a "suspected priority alien" and an "immigration enforcement priority."

Regarding Cerletti's implied preemption claim, Sheriff Hennessy notes that it "does not itself identify any specific congressional enactments that allegedly give rise to implied preemption. Instead, it incorporates by reference the complaint's earlier allegations concerning 8 U.S.C. §§ 1373 and 1644." Def's Dem. MPA at 7:9-11. Actually, Cerletti incorporates by reference all earlier allegations, not just those concerning Sections 1373 and 1644, Compl. ¶ 47, to support her claim that Sheriff Hennessy's policies and practices are impliedly preempted "because they stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress . . . ." Id. ¶ 48. At least five separate such allegations describe Congress' enactments and objectives. *Id.* ¶ 10 (Sections 1373 and 1644 "demonstrate that *Congress* has long sought to encourage full and open communication between state and local agencies and federal immigration law enforcement officials and to remove *obstacles* to such communication to aid in the enforcement of federal immigration laws.") (emphasis added); *Id.* ¶12 ("The Senate Report accompanying Section 1373 also confirms this clear congressional objective:"); *Id.* ¶ 14 ("Other statutes reflect this same congressional objective.") (*citing* 8 U.S.C. § 1357(g)(10)); *Id.* ¶ 15 ("Another provision in this same statute demonstrates Congress' particular interest in promoting information sharing between state and local law enforcement agencies and federal immigration law enforcement officials . . . .") (citing 8 U.S.C. § 1357(d)); *Id.* ¶ 16 ("The Court also noted that Congress 'has encouraged the sharing of information about possible immigration violations.'") (*citing Arizona*,132 S. Ct. at 2508).

ARGUMENT

II.

A. The Plain Language of 1373

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

Nevertheless, Sheriff Hennessy gleans from the text of these two statutes that "Congress sought to prevent local restrictions on local officials' communications with ICE, but *only* insofar as those communications concerned an individual's citizenship or immigration status." Def's Dem. MPA at 10:17-19 (emphasis original). She then assigns to these terms the following

meaning: "Information about an individual's citizenship or immigration status means just that: information about the country or countries of which that individual is a citizen (including whether that individual is a citizen of the United States), and about whether, and how, that individual is lawfully present within the United States." *Id.* at 10: 22-25. From there, Sheriff Hennessy concludes that "a communication about the date and time at which a specified individual is expected to be released from custody – addresses a subject on which Sections 1373 and 1644 are silent," and thus is not preempted. *Id.* at 11:9-14. Sheriff Hennessy's formulation does not withstand scrutiny.

Some preliminary observations merit attention. First, Sheriff Hennessy's formulation of the term "immigration status" relies on presence in the United States. How is ICE to determine the presence of those who are not lawfully residing in this country if she sets them free without first giving notice of their release to ICE? They could be anywhere! Second, the fact that Sheriff Hennessy assigns a restrictive meaning to the broad term "immigration status" only serves to highlight an ambiguity in the text itself. Third, it does not aid the inquiry to suggest that Congress could have added release dates and times to the text. Congress also could have used the language suggested by Sheriff Hennessy to limit the types of information it intended to regulate. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("That the statute could have expressly included the phrase 'former employees' does not aid our inquiry. Congress also could have used the phrase 'current employees.'").

Sheriff Hennessy's formulation also does not survive scrutiny in the larger context of Sections 1373 and 1644. "[W]e do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' *People v. Pieters*, 52 Cal. 3d 894, 899 (1991) *citing Clean Air Constituency v. State Air Resources Bd.*, 11 Cal. 3d 801, 814 (1974). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341; *see also Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In

determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.")

The object and policy of Sections 1373 and 1644 are clear. "The two statutes individually and collectively demonstrate that Congress has long sought to encourage full and open communication between state and local agencies and federal immigration law enforcement officials and to remove obstacles to such communication to aid in the enforcement of federal immigration laws." Compl. ¶ 10. The legislative history of these provisions and subsequent case law confirm this clear congressional purpose and objective. *Id.* ¶¶ 10-13, 16; *see Arizona*, 567 U.S. at 411 ("Consultation between federal and state officials is an important feature of the immigration system."). Indeed, the entire scheme of the INA of which these statutes are a part demonstrates a clear intent to promote information sharing and consultation between state and local law enforcement agencies and federal immigration officials, including ICE. Compl. ¶¶ 14-15 (quoting Sections 1357(d) and 1357(g)(10)).

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

B. Steinle Decision

Sheriff Hennessy relies on *Steinle v. City and County of San Francisco*, 2017 U.S. Dist. LEXIS 2380 (N.D. CA 2017), a federal district court order on the City's motion to dismiss the

Kate Steinle family's wrongful death lawsuit, for the proposition that Sections 1373 and 1644 do not apply to ICE notification requests for release information. Def's Dem. MPA at 11-13. This court is not bound by the *Steinle* court's interpretation of Section 1373 in that context, and the Steinle case is distinguishable factually and legally in any event. For example, the plaintiffs in that case did not argue that the term "immigration status" includes release date and time information. Sheriff Hennessy also fails to apprise this Court of footnote 6 of the Steinle court's order: "Although Plaintiffs note the California Attorney General's position in passing, neither the complaint nor their opposition brief argues that the March 13 [Mirkarimi] memorandum or any portion of Chapter 12H violates the Supremacy Clause of the United States Constitution." *Steinle*, 2017 LEXIS 2380 [88], n.6.[2] Thus, the Steinle court was not presented with a preemption claim.

The *Steinle* court also deviated from sound principles of statutory construction discussed above to avoid having to consider Section 1373's legislative history, which does not support the court's position, and, as a result, it viewed the provision in total isolation and did not consider the broader context of either the statute as a whole or the entire scheme of law of which it is a part. Finally, as noted above, the First Appellate District has examined Section 1373 and, unlike the *Steinle* court, it held that "section 1373(a) invalidates all restrictions on the voluntary exchange of immigration information . . . ." *See Bologna v. City and County of San Francisco*, 192 Cal. App. 4th 429, 438 (Cal. Ct. App. 2011); *see also Hispanic Interest Coalition v. Governor of Ala.*, 691 F.3d 1236, 1248 (11th Cir. 2012) ("Sections 1373 and 1644 . . . require Alabama to provide immigration-related information to the federal government . . . and prohibit Alabama from restricting this transfer of information.").[3]

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[2] The California Attorney General issued an opinion in 1992 holding that, under the Supremacy Clause of the United States Constitution, a city may not prohibit its officers and employees from cooperating with federal immigration investigations or gathering or disseminating information regarding immigration status. *See Opinion*, 75 Ops. Cal. Att'y Gen. 270 (1992), 1992 Cal. AG LEXIS 43 [13].

[3] Sheriff Hennessy also relies on *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407 (Cal. Ct. App. 2009) for the proposition that "in examining whether a local law enforcement agency's directive violates Section 1373 and/or 1644, those statutes are applied according to their plain language." Def's Dem. at 12:19-21. However, as Sheriff Hennessy admits, unlike her policy, *Sturgeon* involved the Los Angeles Police Department's Special Order 40, which only prohibits LAPD officers from initiating police action with the sole objective of making arrests for illegal entry, says nothing about communication with ICE, and therefore does not implicate Section 1373. *Id.* at 12-13.

C. Voluntary Nature of ICE Notifications

Sheriff Hennessy expresses the view that ICE notification requests (Form I-247N) are "voluntary," and that means "optional," so they escape scrutiny under Section 1373. Def's Dem. MPA at 14:7. She cites no authority for this view, which also doesn't make any sense.

D. Avoid Substantial Constitutional Problems

Finally, Sheriff Hennessy relies on the doctrine of constitutional avoidance: "To avoid the significant Tenth Amendment issues presented by Cerletti's notification request claims, this Court should not extend the preemptive effect of Sections 1373 and 1644 beyond those statutes' plain text." Def's Dem. MPA at 15. The Court need not be concerned with the rule of constitutional avoidance because Cerletti's claims do not present any Tenth Amendment issues and, as Sheriff Hennessy admits, she does not challenge the constitutionality of Section 1373 or Section 1644 on Tenth Amendment grounds or otherwise. *Id.* at 1:20-28. Also, "[w]hile preemption derives its force from the Supremacy Clause of the Constitution, 'it is treated as "statutory" for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications.'" *Ariz. Dream Act Coalition v. Brewer*, 2017 U.S. LEXIS App. 1919, *25 (9th Cir. Feb. 15, 2017), *citing Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 271-72 (1977). The cases cited by Sheriff Hennessy, *People v. Harrison*, 57 Cal. 4th 1211 (2013) and *People v. Engram*, 50 Cal. 4th 1131 (2010), are not preemption cases, and therefore do not apply.

CONCLUSION

For all of the foregoing reasons, Sheriff Hennessy's demurrer should be overruled and her motion to strike should be denied.

Dated: May 2, 2017

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