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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 FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Hearing:	March 24, 2021
Time:	9:30 a.m.
Place:	Dept. 302 Hon. Ethan Schulman
Action Filed:	December 27, 2016
FAC Filed:	June 14, 2017
Trial Date:	April 26, 2021

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I. SUMMARY OF ARGUMENT

The federal government has "broad, undoubted power" over immigration and "the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). However, Defendant Vicki Hennessy, former Sheriff of San Francisco, believes she knows best when it comes to immigration policy. She believes certain aliens wanted for removal or subject to final orders of removal pursuant to federal immigration law should not be taken into custody by federal immigration officials or removed from the United States. To prevent that from occurring, Defendant has created a complex, multi-layered local immigration policy. The policy is so effective in regulating immigration and obstructing Congress' purposes under federal immigration law that, in over 2,401 known instances, it has never resulted in ICE taking into custody a single alien, not even aliens with significant criminal backgrounds wanted for removal. In fact, of the 6 aliens only who satisfied Defendant's unique, stringent tests, Defendant decided not to notify U.S. Immigration and Customs Enforcement ("ICE") of the alien's release date and time in 3 instances. The remaining 3 aliens were still before her only because their criminal cases had not been resolved in court. In the single case Defendant could recall, she decided not to notify ICE about the release of a 34-year old hardened criminal alien in her custody on a burglary charge because the alien had come to the United States as a teenager, had not been back to his or her home country, and was the breadwinner for his or her family. Defendant offers no reason why it is appropriate for her, as opposed to federal officials, to make the determination of whether an alien should be subject to removal or removed.

In addition to addressing the release of criminal aliens, Defendant's policy ("SFSD 02-39") also addresses information sharing regarding alien immigration status generally. Although Defendant denies that SFSD 02-39 restricts sharing such information with ICE, no such sharing has taken place under the policy.

Defendant's presumption against preemption argument is a red herring because authority to regulate immigration is vested in the federal government, not the States, and Defendant has not, and indeed cannot, point to any historic police power or express federal enactment that gives State or local officials authority to regulate immigration. Moreover, as the Ninth Circuit has observed, even state or

local enactments that regulate in areas of traditional state concern can still effect an impermissbile regulation of immigration. Defendant's Tenth Amendment argument is another red herring because the Constitution delegates immigration authority to the federal government, not the States. Defendant cites the Tenth Amendment, then ignores what it says. Neither of the two precedents on which Defendant chiefly relies arose in the context of immigration, and at least one court has rejected Defendant's Tenth Amendment argument. Besides, there is no Tenth Amendment violation because this case involves simply reporting the date and time when an alien is scheduled to be released. And even if Defendant is arguing that reporting release dates and times is a Tenth Amendment violation, that argument is of no avail because the Supreme Court has implied the existence of a Tenth Amendment exception for reporting requirements.

While Defendant asserts the Court should provide deference to her and SFSD 02-39 because Plaintiff brings a facial challenge, she doesn't even try to demonstrate that the traditional facial vs. as applied framework is appropriate in this case. It's not. SFSD 02-39 is invalid not because Defendant exercises discretion wisely or poorly over a particular alien, but because she supplants the policy choices of Congress and the implementation of the INA through federal immigration officials' authority with her own policy choices. This she may not do legally.

Plaintiff's first cause of action claims Defendant's policy is expressly preempted by two federal statutes, 8 U.S.C. §§ 1373 and 1644. Generally, both statutes prohibit states or local governments from prohibiting or otherwise restricting the sharing of information regarding "citizenship or immigration status" with federal immigration officials. While Plaintiff does not dispute that Defendant's seven-page, single spaced policy includes a token, half-sentence quotation from 8 U.S.C. § 1373, all other available evidence plainly demonstrates that Defendant restricts, if not prohibits, the sharing of immigration related information.

Plaintiff's second cause of action alleges that sections 1373 and 1644 expressly preempt restrictions on sharing all types of immigration-related information, including dates and times aliens are to be released from Defendant's custody. Defendant disputes that sections 1373 and 1644 can be read to include information other than citizenship or immigration status. Defendant's narrow interpretation of these federal statutes is inconsistent with the text, structure, and purpose of section 1373. Sections

1373(a) and (b) do not bar restrictions only on sharing an individual's "immigration status;" they bar restrictions on sharing "information regarding" immigration status, and Congress's inclusion of the term "regarding" indicates Congress intended there would be information sharing regarding the presence, whereabouts, and activities of illegal aliens, and the legislative history of section 1373 confirms this statutory interpretation. Defendant's argument varies little from the argument she made and the Court rejected in her demurrer. Defendant offers no reason why the Court should now revisit its prior ruling based on California case law.

Plaintiff's third cause of action alleges that Defendant's restrictions on sharing release information constitutes an unlawful local regulation of immigration and is an obstacle to Congress' clear purpose in enacting the INA. They are an unlawful local regulation of immigration because Congress and federal immigration officials, not states, counties, or local law enforcement officials, classify aliens for immigration purposes and determine the conditions on which aliens remain in the United States. SFSD 02-39 unlawfully regulates immigration by creating new categories of aliens, establishing local criteria for ICE to take an alien into custody for removal purposes, and granting protections to aliens in San Francisco that are not afforded to aliens in other cities, counties, or states nationwide.

Defendant's restrictions on sharing release information also are an obstacle to Congress' clear purpose in enacting the INA. Congress plainly wanted aliens subject to final orders of removal or certain criminal aliens in federal immigration custody and, for those subject to final orders of removal, removed within 90 days of their final order of removal or release from federal, state, or local criminal custody. Under Defendant's policy, aliens subject to final orders of removal are not being transferred to immigration officials' custody pending their removal, removal is unlikely to take place within 90 days, and aliens not removed within 90 days are unlikely to be held under immigration officials' supervision as required by law. Similarly, Defendant's policy also is an obstacle to Congress' clear mandate that certain criminal aliens, based on the offenses they have committed, be held in immigration officials' custody upon release from local jails. The Ninth Circuit ruling on which Defendant heavily relies, *United States v. California*, does not demand a different outcome. Given that, despite over 2,401 requests, Defendant has not once provided an individual's release information to federal officials, there can be no genuine claim here that the policy that produced this lopsided result is not an obstacle to

effectuating Congress' clear purpose of removing criminal aliens in a timely manner and keeping them off the streets.

II. FEDERAL LAW BACKGROUND

The federal government has "broad, undoubted power" over immigration and "the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). In *Arizona*, the Court found that, by enacting the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, and related statutes, Congress had created an "extensive and complex" framework governing immigration and alien status. *Id.* at 395; *Castro-O'Ryan v. U.S. Dept. of Immigration and Naturalization,* 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed "second only to the Internal Revenue Code in complexity."). Of particular relevance here, the Court declared, "Congress has specified which aliens may be removed from the United States and the procedures for doing so." *Id*. at 396.

Aliens can be removed for multiple reasons, including having committed one or more specified crimes. *See* 8 U.S.C. §§ 1182(a)(2), 1227(a)(2). Federal immigration officials, principally officials of the U.S. Immigration and Customs Enforcement ("ICE"), have broad discretion to decide whether to remove an alien. *Arizona*, 567 U.S. at 396. When federal officials decide to seek removal, they may issue a warrant authorizing that the alien "be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a); *see Arizona*, 567 U.S. at 407-408. An alien who has committed one or more subsets of crimes must be taken into federal immigration custody and detained pending removal proceedings "when the alien is released" from criminal custody, including from a state prison or jail. 8 U.S.C. § 1226(c); *see Nielsen v. Preap*, 139 S. Ct. 954, 963 (2019).

When an alien is ordered removed, federal officials must remove him within 90 days. 8 U.S.C. § 1231(a)(1)(A). During the removal period, federal officials "shall detain the alien," and "[u]nder no circumstances" may release an alien convicted of a specified crime. 8 U.S.C. § 1231(a)(2). Aliens not removed within the 90-day period "shall be subject to supervision" by federal officials. 8 U.S.C. § 1231(a)(3). When an alien who has been ordered removed is jailed or imprisoned on a federal, state, or local criminal charge or conviction, the removal period begins on the date he or she is released. 8

U.S.C. § 1231(a)(1)(B)(iii). Federal officials generally may not remove an alien who is sentenced to imprisonment until the alien is released. 8 U.S.C. § 1231(a)(4)(A).

As those provisions illustrate, "[c]onsultation between federal and state officials is an important feature of the immigration system." *Arizona*, 567 U.S. at 411. Because many aliens convicted of state crimes are subject to mandatory immigration detention upon release from state custody, see 8 U.S.C. §§ 1226(c), 1231(a)(2), Congress has directed certain forms of cooperation and information-sharing between federal and state officials. Federal officials must make investigative resources available to state and local authorities "to determine whether individuals arrested … for aggravated felonies are aliens." 8 U.S.C. § 1226(d)(1)(A). Federal officials must also designate and train officers and employees to serve as liaisons to state and local officials "with respect to the arrest, conviction, and release of any alien charged with an aggravated felony." 8 U.S.C. § 1226(d)(1)(B). In addition, federal officials are required to respond to state or local officials' inquiries "seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction" of those officials. 8 U.S.C. § 1373(c). By this same token, state and local officials "may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a); see also 8 U.S.C. § 1373(b), 1644 (similar provisions); *Arizona*, 567 U.S. at 412-413.

III. POLICY NO. SFSD 02-39

Defendant has created a complex, multi-layered regulatory-like process for deciding when ICE takes into custody aliens wanted for removal or subject to final orders of removal. It is a process so onerous and effective that, in over 2,401 instances, it has never resulted in ICE taking individuals into custody, not even aliens with significant criminal backgrounds wanted for removal. Plf's Sep. Stmt. of Mat'l Facts ISO Plf's Opp. to Def's MSJ/Adjud. ("Plf's SMF")59.

The process, set forth in Policy No. SFSD 02-39, has at least four "off ramps" by which Defendant enables aliens wanted by ICE to avoid transfer into ICE's custody. Typically, when ICE learns that an alien wanted for removal is presently in Defendant's custody, it sends a notice to Defendant requesting information about the date and time the alien will be released from her custody. Plf's SMF -27. The notice is accompanied by either an administrative arrest warrant asserting that

probable cause exists to believe the alien is removable from the United States or a warrant of removal demonstrating that the alien is already subject to a final order of removal. Plf's SMF -28. Under SFSD 02-39, Defendant's staff - first checks to determine whether the alien is in Defendant's custody on an open charge for a serious or violent felony other than one related to domestic violence. Plf's SMF37. If not, SFSD 02-39 directs SFSD to ignore the ICE request. Plf's SMF37. If so, SFSD checks to determine if the alien is "held to answer" on the felony charge, meaning that a magistrate has determined probable cause exists to believe the alien committed the offense. Plf's SMF38. If the alien is not held to answer, SFSD 02-39 requires SFSD release the alien without notifying ICE. Plf's SMF38.

If the alien is held to answer, then SFSD reviews the alien's criminal history. Plf's SMF39. Under SFSD 02-39, only aliens with particularly egregious criminal histories move on to the next level of review. Plf's SMF39. If the alien's criminal history does not meet SFSD's stringent test, he or she will be released without SFSD notifying ICE and ICE taking the alien into custody. Plf's SMF40. The criminal history step is determined initially by SFSD staff, then doublechecked by the lieutenant who oversees the SFSD's Central Records and Warrants unit. Plf's SMF41. It is then checked again by Defendant's legal counsel. Plf's SMF42. If an alien satisfies the criminal history test, the review process continues. Plf's SMF45. If not, he or she will be released without SFSD notifying ICE or ICE taking the alien into custody. Plf's SMF45. Only 6 of the 2,401 aliens wanted by ICE for removal or already subject to a final order of removal have satisfied the criminal history test. Plf's SMF52,56.

The next and final step of the review process is Defendant's review of the alien's background and personal situation to determine whether mitigating circumstances exist that warrant impeding ICE in taking the alien into custody for a determination on removability or, in the case of an alien subject to a final order of removal, to actually remove that alien. PLF'S SMF45. Defendant does not consult with ICE but may consult the alien's criminal defense attorney as part of her final review. Plf's SMF44,48. Of the 6 aliens who satisfied SFSD 02-39's stringent criminal history test, Defendant decided not to notify ICE in 3 instances. Plf's SMF57. The remaining 3 were still before her pending resolution of their court cases. Plf's SMF57. In the single case Defendant could recall, she decided not to notify ICE about the release of a 34-year old criminal alien in her custody on a burglary charge because the alien had come to the United States as a teenager, had not been back to his or her home country, and was the

breadwinner for his or her family. Plf's SMF58. She offered no reason why it was appropriate for her, as opposed to ICE, to make a determination on the alien's removal.

In addition to addressing the release of criminal aliens, SFSD 02-39 also addresses information sharing regarding alien immigration status generally. Although Defendant denies that SFSD 02-39 restricts sharing such information with ICE, no such sharing has taken place under the policy. Plf's SMF50,51.

Defendant produced voluminous records for aliens in the custody of the SFSD and subject to an ICE detainer, request for notification of release, and warrant of removal or arrest for possible removal while SFSD 02-39 was in effect. Plf's SMF 64-66. Records for 98 aliens were examined in relation to the policy by Jessica M. Vaughan, Director of Policy Studies for the Center For Immigration Studies, and a highly-qualified and widely-respected expert on immigration policy and operations, including immigration enforcement and state and local immigration policies. Decl. of Jessica M. Vaughan ISO Plf's Opp. to Def's MSJ/Adjud. ("Vaughan Decl."), ¶¶ 1-6; Plf's SMF 65-85. Ms. Vaughan's detailed findings of fact and conclusions concerning SFSD 02-39 as relates to this case are well set forth in her declaration, and, for brevity's sake, are not repeated here. Vaughan Decl., ¶¶ 7-25; Plf's SMF 65-91. Among many others, Ms. Vaughan finds that SFSD 02-39 deviates substantially from what is required by California law, and includes a number of "unusual and egregious prohibitions on information-sharing and cooperation with ICE," that such restrictions are unusual among sheriff's departments nationwide and in California and unusually restrictive even in comparison with other county sanctuary policies, and that even within California it is an outlier. Plf's SMF 67-72. She finds that routinely releasing aliens as a matter of policy deliberately frustrates and impedes federal immigration officials' activities. Plf's SMF 78. The restrictions even hinder SFSD officers from meeting their own mandate of establishing identity of all detainees. Plf's SMF 80. The evidence also shows "the Sheriff is essentially adjudicating whether or not these aliens will be subject to removal – and the adjudication always has been that they should not be, even in the cases of the most serious alien offenders." Plf's SMF 84. SFSD 02-39 "is not a scheme to allow the sheriff to adjudicate whether the aliens will be subject to enforcement, but a scheme to ensure that the alien offenders are not subject to removal or enforcement at all." Plf's SMF 84.

IV. ANALYSIS

A. The Presumption Against Preemption, The Tenth Amendment, and *Murphy*.

Defendant's presumption against preemption argument is a red herring. Authority to regulate immigration is vested in the federal government, not the States. *Arizona*, 567 U.S. at 394. Defendant identifies no "historic police power" that the States – or counties or county officials – possess over immigration. Defendant also identifies no federal enactment clearly and manifestly granting States, counties, or county officials the authority to enact the immigration regulations Plaintiff challenges here. *Arizona*, 567 U.S. at 394. Even so, a state or local enactment that "regulates an area of traditional state concern can still effect an impermissible regulation of immigration." *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957, 972 (9th Cir. 2017) (discussing five examples, including two U.S. Supreme Court cases).

Defendant's Tenth Amendment argument is another red herring. The amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X. Again, the Constitution delegates immigration authority to the federal government, not the States. *Arizona*, 567 U.S. at 395. Defendant fails to demonstrate that the concerns covered by the Tenth Amendment even apply. She cites the amendment, then ignores what it says.

Neither *Printz v. United States,* 521 U.S. 898 (1997) nor *New York v. United States,* 505 U.S. 144 (1992) – the two authorities on which Defendant chiefly relies – arose in the context of immigration, and at least one court has rejected Defendant's Tenth Amendment argument. *See City of New York v. United States,* 179 F.3d 29, 31-35 (2d Cir. 1999). Defendant also fails to demonstrate how a simple notification of the date and time of an inmate's release from her custody constitutes a Tenth Amendment violation. "Tuesday at 10:00" does not infringe States' rights, especially in the immigration context. In fact, the chief case on which Defendant relies held, "the Supreme Court has implied the existence of a Tenth Amendment exception for reporting requirements." *United States v. California*, 921 F.3d 865, 890 (9th Cir. 2019) (citing *Printz*, 521 U.S. at 917-18). Since reporting is at issue here, the Tenth Amendment does not bar finding the challenged policy illegal.

Finally, Defendant's Murphy argument that sections 1373 and 1644 are not valid preemption

provisions also is a red herring. There the Court reasoned that PAPSA compelled state legislation in violation of the Tenth Amendment by preventing state legislatures from rescinding existing gambling restrictions. *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018) ("The PAPSA provision at issue here . . . unequivocally dictates what a state legislature may and may not do."). The "basic principle" at play was "that Congress cannot issue direct orders to state legislatures[.]" *Id*. Not only was *Murphy* not an immigration case, but the PAPSA provisions there and sections 1373 and 1644 are nothing alike. And to the extent that *Murphy* held the anti-authorization provision in PAPSA was not a valid preemption provision, it was because "the Supremacy Clause . . . is not an independent grant of legislative power to Congress." *Id*. at 1479.

B. Facial vs. As Applied Challenges.

While she asserts the Court should provide deference to her and SFSD 02-39 because Plaintiff brings a facial challenge, Defendant fails to demonstrate that the traditional facial vs. as applied framework is appropriate in this case. It is not. As Justice Breyer explained when discussing the constitutionality of the public loitering ordinance in Chicago:

> The reason why the ordinance is invalid explains how that is so. As I have said, I believe the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances. And I see no way to distinguish in the ordinance's terms between one application of that discretion and another. The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications.

City of Chicago v. Morales, 527 U.S. 41, 71 (1991) (Breyer, J., concurring). The same is true here. SFSD 02-39 is invalid not because Defendant applies her discretion wisely or poorly towards a particular alien, but because she supplants the policy choices of Congress and the implementation of the INA through federal immigration officials' authority with her own. *Arizona*, 567 U.S. at 402, 410 (By "put[ting] in place a system" reflecting different judgments on those exclusively federal issues, Arizona impermissibly "create[d] an obstacle to the full purposes and objectives of Congress" even though the Arizona statute had "the same aim as federal law.").

C. Plaintiff's "Citizenship or Immigration Status" Claim.

Plaintiff's first cause of action concerns sharing information regarding "citizenship or immigration status." Plaintiff claims Defendant's policy is expressly preempted by two federal statutes,

8 U.S.C. §§ 1373 and 1644. Generally, both statutes prohibit states or local governments from restricting the sharing of information regarding "citizenship or immigration status (lawful or unlawful)" with federal immigration officials.

Before Defendant took office, her predecessor expressly prohibited SFSD from sharing citizenship or immigration status with ICE. Plf's SMF14. When Defendant took office, she rescinded her predecessor's directive and replaced it with her own. Plf's SMF16. Defendant's directive identified two categories of information: information staff were "Authorized" to provide to ICE upon request and information staff were "Not Authorized" to provide. Plf's SMF15. Whereas her predecessor's directive expressly prohibited sharing information about citizenship or immigration status, Defendant's directive does not expressly authorize such information; rather, it makes no mention of such information. Plf's SMF18. Neither citizenship nor immigration status was identified as "Authorized" or "Not Authorized." Plf's SMF18. At her deposition, Defendant admitted that her directive was "ambiguous." Plf's SMF19. But there is nothing ambiguous about the fact that on this record such information is not expressly authorized as Defendant suggests.

The evidence that such information is not authorized mounted when Defendant issued SFSD 02-39. Plf's SMF22. Specifically, Defendant's policy tells staff they "may not assist DHS/ICE in the enforcement of federal civil immigration laws, expect as noted in this policy." Plf's SMF23. The policy then sets forth the "Authorized" and "Not Authorized" categories of information from the earlier directive. Citizenship and immigration status are not expressly authorized; they do not appear in either category. Plf's SMF24.

While Plaintiff does not dispute that Defendant's seven-page, single spaced policy includes a half-sentence quotation from 8 U.S.C. § 1373, overwhelming evidenceshows this is a token with no real effect. Defendant testified she was unaware of SFSD ever providing ICE with information about an individual's citizenship or immigration status. Plf's SMF50. Lt. John Quanico testified similarly. Plf's SMF50. And significantly, the San Francisco Administrative Code requires Defendant to submit semi-annual reports to the Board of Supervisors and Mayor outlining any and all communications between SFSD and federal immigration officials. Plf's SMF51. None of the reports Defendant has produced in discovery identify any SFSD communications with federal officials about any individual's citizenship or

immigration status. Plf's SMF51. At a minimum, the absence of any reference to citizenship or immigration status in the category of information SFSD is authorized to share with ICE and the undisputed evidence that SFSD has not, and does not, share information with ICE about citizenship or immigration status creates a genuine issue for trial such that summary judgment and/or adjudication cannot be entered on Plaintiff's first cause of action.

D. Plaintiff's Release Information Claims.

Plaintiff's second and third causes of action concern release information. For her second cause of action, Plaintiff alleges that sections 1373 and 1644 expressly preempt restrictions on sharing all types of immigration-related information, including dates and times aliens are to be released from Defendant's custody. For her third cause of action, Plaintiff argues that Defendant's restrictions on sharing release information constitutes an unlawful local regulation of immigration and is an obstacle to Congress' clear purpose in enacting the INA.

1. Express Preemption.

Defendant disputes sections 1373 and 1644 can be read to include immigration-related information other than citizenship or immigration status. As all evidence presently available to Plaintiff shows that Defendant restricts the sharing of release information – SFSD 02-39 does so expressly – the sole question Defendant raises is largely one of statutory interpretation. As both statutes were enacted in 1996 and use nearly identical language, Plaintiff will focus her arguments on section 1373.

Section 1373(a) provides that a "[s]tate . . . 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, [federal immigration officials] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. 1373(a). Defendant's reading of the term "immigration status" is far too narrow, as are the readings of courts whose decisions Defendant cites. Decl. of Andrew R. Arthur ISO Plf's Opp. to Def's MSJ/Adjud. ("Arthur Decl."), at 7, ¶ 11 ("sections [1373(a) and 1644] prohibit bars on the sharing of a broader range of information than federal courts – particularly the Ninth Circuit – have recognized.").[1]

Defendant's reading is inconsistent with the text, structure, and purpose of section 1373. Section

[1] Notably, SFSD 02-39 does not define "citizenship" or "immigration status."

1373(a) does not bar restrictions only on sharing an individual's "citizenship or immigration status;" it bars restrictions on sharing "*information regarding* [an individual's] citizenship or immigration status." 8 U.S.C. § 1373(a) (emphasis added). Section 1373(b) does likewise with respect to exchanging "*information regarding* [an individual's] immigration status." 8 U.S.C. § 1373(b) (emphasis added). As the U.S. Supreme Court has explained, statutory terms like "regarding" or "related to" have "a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1759-1760 (2018) (citing authorities). Reading the term "regarding" to have such a "broadening effect" is especially appropriate in this statutory context, because section 1373(c) – unlike sections 1373(a) and 1373(b) – refers only to "the citizenship or immigration status of any individual." Congress's inclusion of "regarding" in sections 1373(a) and (b), juxtaposed with its omission of such a term in an otherwise-parallel provision of the same statute, indicates that "Congress intended a difference in meaning." *Loughrin* v. *United States*, 573 U.S. 351, 358 (2014); *see also* Arthur Declaration, at 13 ¶ 21; *id.* at 17 ("the most signficant error in the NinthCircuit's analysis under California is its recognition that the term 'regarding' in section 1373 'may generally have a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject, but then failing to explore what the limits of that 'broadening effect ' was.") (internal citations omitted).

The legislative history confirms this structural inference. Congress enacted Sections 1373(a) and (b) to ensure that state and local officials can "communicate with [federal immigration authorities] regarding *the presence, whereabouts, or activities of illegal aliens*," not merely whether they are lawfully or unlawfully present. H.R. Rep. No. 725, 104th Cong., 2d. Sess. 383 (1996) (emphasis added). Interpreting sections 1373(a) and 1373(b) to mean only "a person's legal classification" (Def's Mem. at 16), contradicts the statutory text, structure, and purpose and would effectively read "regarding" out of the statute.

Under a proper reading of sections 1373(a) and (b), SFSD 02-39's restriction on sharing information about when an alien wanted by ICE for removal will be released from Defendant's custody undoubtedly is a restriction on sharing "information regarding . . . immigration status." 8 U.S.C. §§ 1373(a) and (b). An individual's release date and time is immigration status related information. For

example, the INA provides that a convicted alien in state criminal custody who is subject to a final removal order may not be removed until he "is released from imprisonment," 8 U.S.C. § 1231(a)(4)(A), but then must be removed "within a period of 90 days," 8 U.S.C. § 1231(a)(1)(A). The release date thus dictates when such an alien must be detained and removed from the United States – a matter directly related to (and thus "regarding") "immigration status." 8 U.S.C. §§1373(a) and (b); *see Appling*, 138 S. Ct. at 1759-1760. The release date starts the clock for removal. If federal immigration officials do not know when the alien will be released, they do not know when the removal period commences and by when the alien must be removed. The release date is an integral part of an alien's "immigration status." Defendant's policy concedes this reading of the statutes because it directly restricts and prohibits sharing release dates for aliens wanted for removal.

Importantly, Defendant's argument varies little from the argument she made and the Court rejected in her demurrer. There the Court found, "California case law strongly indicates that the statutory language, especially when considered in light of Congressional objectives and legislative history, is not narrowly confined to whether a person is or is not a citizen or otherwise lawfully in this country, as the Sheriff urges." Order Overruling Demurrer to the Second and Third Causes of Action in the First Amended Complaint for Express or Implied Preemption (Nov. 21, 2017) at 3 (*citing Bologna v. City and County of San Francisco*, 192 Cal.App. 4th 429, 438-39 (2001) and *Sturgeon v. Bratton*, 174 Cal.App.4th 1407, 1423 (2009)). The Court continued, "Although neither *Bologna* nor *Sturgeon* explicitly holds that release information is covered by the INA, both come close to doing so and cannot fairly be read to exclude release information from the ambit of "information regarding the citizenship or immigration status." *Id.* "*Sturgeon* stated 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.*" *Id.* at 3-4. The Court also noted that this particular language "was quoted with approval in *Bologna*." *Id.* at 4. Defendant offers no reason why the Court should now revisit its prior ruling. And, obviously, this Court is obligated to follow California case law, not Ninth Circuit rulings or the rulings of any other federal court.

2. Regulation of Immigration/Implied Preemption.

Plaintiff's third cause of action includes two allegations. First, Plaintiff alleges that SFSD 02-39 is an impermissible local classification of aliens and/or regulation of immigration, an issue that is inherently intertwined with the Supremacy Clause and preemption. A regulation of immigration is, essentially, a determination of who should or should not be admitted into the country, and the conditions under which an alien may remain. *De Canas v. Bica*, 424 U.S. 351, 355 (1976). Because the regulation of immigration is an exclusive federal power, Defendant has no authority to regulate immigration herself. Second, and relatedly, Plaintiff alleges that SFSD 02-39 stands as an obstacle to a clear purpose and objective of Congress, specifically, Congress' mandate that certain criminal aliens be detained to determine their removability "when released" from criminal custody.

a. Regulation of Immigration.

"The States enjoy no power with respect to the classification of aliens." *Plyler v. Doe,* 457 U.S. 202, 225 (1982). The power to classify aliens for immigration purposes is "committed to the political branches of the Federal Government." *Id.* Congress exercised this power in enacting the INA, which creates numerous classifications of aliens and gives federal immigration officials the exclusive authority to determine whether an alien is removable. Congress and federal immigration officials, not states, counties, or local law enforcement officials, also determine the conditions on which aliens remain in the United States.

SFSD 02-39 regulates immigration in at least three distinct ways. First, SFSD 02-39 creates new categories of aliens. Second, Defendant establishes her own criteria for ICE to take an alien into custody and remove that alien. Third, the policy grants protections to aliens in San Francisco that are not afforded to aliens in other cities, counties, or states across the country.

i. Classifying Aliens.

Defendant is creating her own alien classifications by using criminal history requirements that differ from federal law. If an alien has the requisite criminal history under section 1226(c), Congress mandates he or she must be held in custody. Yet, the criminal history necessary for notification under SFSD 02-39 differs from the requisite criminal history under 1226(c).

In *Arizona Dream Act Coalition*, the U.S. Supreme Court held the INA occupied the field of

immigration classifications and impliedly preempted the State of Arizona's independent classification of who is authorized under federal law to be in the United States. *See Ariz. Dream Act Coalition,* 855 F.3d at 964, 975. At issue was an attempt by Arizona to deny drivers licenses to "Deferred Action for Childhood Arrival" ("DACA") recipients. Under the program, created by federal executive order, aliens brought to the United States as children are permitted to remain for a certain period of time as long as they meet certain conditions. *Id.* Arizona rejected DACA recipients' applications for drivers' licenses – an area of traditional state concern – concluding that they lack proof of authorized, lawful presence. *Id.* The court found Arizona had impermissibly created its own immigration classifications and was regulating immigration. *Id.* at 973. It held that the State's refusal to recognize DACA recipients' status "necessarily embodies the State's independent judgment that recipients of DACA are not authorized to be present in the United States." *Id.* (internal quotations and citations omitted). "[B]y arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design ... despite the fact that 'States enjoy no power with respect to the classification of aliens.'" *Id.* at 973-974 (*quoting Plyler,* 457 U.S. at 225).

Sheriff Hennessy has done the same thing here. She is classifying criminal aliens according to her own design, not the federal government's design. She has rejected the INA's classifications of deportable criminal aliens to be transferred to the custody of federal immigration officials under section 1226(c) and replaced the INA's classifications with her own. She also has rejected the classifications of potentially removable criminal aliens set forth in sections 1226(a), 1226(c), and 1227 and supplanted them with her own. And by refusing to provide release information based on her classifications, she is assisting criminal aliens in avoiding apprehension and detention by federal immigration officials, in effect setting her own priorities for which criminal aliens should be removed from the United States. Her classifications and refusal to provide release information about criminal aliens "necessarily embodies" the same type of impermissible, independent judgment on immigration the Court rejected in *Ariz. Dream Act Coalition.* In short, Sheriff Hennessy is encroaching on the exclusive federal authority to create immigration classifications and impermissibly regulating immigration just like Arizona did in the DACA case. *Ariz. Dream Act Coalition,* 855 F.3d at 971 (concluding that "Arizona's policy

encroaches on the exclusive federal authority to create immigration classifications and so is displaced by the INA.").

ii. Removal Criteria.

By considering "mitigating factors," Defendant is applying her own criteria for ICE to take custody of an alien and to remove that alien from the United States. Her criteria have no basis in federal law, nor does federal law grant her authority to create and apply such criteria. She is creating her own immigration policy.

Defendant does not dispute this. In fact, she testifies that her views toward immigration have changed. She now disagrees with federal law.

> [W[e have a system here of criminal justice that's supposed to be the same for everybody. And it should be the same, in my opinion, for people in jail that are there whether they're undocumented or not. And if they're here for a criminal act in the United States, then the criminal justice system in the United States should probably be taking care of that. And the fact that we have a large immigrant population in San Francisco and a concern for public safety in terms of them being able to come forward and report crimes [] and be witnesses in crimes without having to worry about being detained.

PLF'S SMF63. Congress however has legislated differently. As already demonstrated, section 1226(a) gives federal immigration authorities the sole discretion to arrest and detain aliens pending decisions on their removal, and section 1226(c) requires certain criminal aliens be detained by federal immigration officials upon their release from federal, state, or local criminal custody. 8 U.S.C. §§ 1226(a) and (c). Defendant cannot change federal immigration policy. Only Congress can do so.

iii. Additional Protections.

SFSD 02-39 grants protections to aliens in San Francisco that shield them from ICE removal. These protections are unique to San Francisco, specifically to aliens in Defendant's custody. They are not protections afforded to aliens in other counties or states. *See Arizona,* 567 U.S. at 395 (Having one, overarching immigration framework instead of a patchwork of policies is essential to allow foreign countries to communicate about the status, safety, and security of their nationals "with one national sovereign, not the 50 separate States."). SFSD 02-39 and the associated complex, multi-layered process for deciding when ICE takes into custody aliens wanted for removal or subject to final orders of removal is exclusive to San Francisco. The four "off ramps" by which Defendant enables aliens wanted by ICE to avoid transfer into ICE's custody do not exist in Santa Clara County or Tucson, Arizona. They also

do not exist in Chicago, Illinois, or Montgomery County, Maryland. If an alien is arrested by law enforcement in other California counties or other cities across the country, he or she is not guaranteed that an agency will not enable ICE to take custody of him or her. Aliens in SFSD custody therefore may remain in the country more easily than aliens detained by other state or local law enforcement agencies.

b. Obstacle Preemption.

Congress plainly does not want aliens subject to final orders of removal or certain criminal aliens out on the street. 8 U.S.C. §§ 1226(c), 1231(a)(1), and (a)(2). It wants them in federal immigration custody and, for those subject to final orders of removal, removed within 90 days from the date of the final order or from the day they are released from federal, state, or local criminal custody. *Id.* If not removed within 90 days, then Congress directs that such aliens be held under federal immigration officials' supervision. *Id.* at § 1231(a)(3). For certain criminal aliens released from criminal custody, Congress mandates that they be held in federal immigration custody pending a decision on their removability. 8 U.S.C. §§ 1226(c) and 1231(a)(2). Covered aliens include those who have committed, *inter alia,* an aggravated felony, a controlled substance offense, firearms offense, or two or more "crimes of moral turpitude." 8 U.S.C. § 1226(c)(1).

As Defendant unequivocally testified, she disagrees with Congress' mandates: "the federal government need[s] to step up and provide criminal warrants." PLF'S SMF 62. She therefore has taken it upon herself to enact a policy so restrictive that it makes her the ultimate arbiter of whether ICE takes custody of an alien based upon her view of whether "mitigating factors" are demonstrated. Federal law grants her no such authority.

Defendant's policy is an obvious obstacle to effectuating Congress' clear policy choices on removal. Aliens subject to final orders of removal – those with I-205s attached to their I-247As – are not being transferred to immigration officials' custody pending their removal, and removal is unlikely to take place within 90 days if ICE must re-locate them after they are released from Defendant's custody. Similarly, aliens not removed within 90 days are unlikely to be held under immigration officials' supervision.

Defendant's policy also is an obstacle to Congress' clear mandate that certain criminal aliens be held in immigration officials' custody upon release from criminal custody. Congress identified this

group of criminal aliens based on the offenses they have committed. 8 U.S.C. § 1226(c). Congress was so concerned about these particular criminal aliens being released into the general population that it required they be held without bond or conditional parole under all but a few, very limited circumstances as determined by the Attorney General. *See generally* 8 U.S.C. § 1226(c)(2); *see also Demore v.Kim,* 538 U.S. 510 (2003). It even precluded judicial review of covered aliens' non-constitutional challenges to their detention. 8 U.S.C. § 1226(e); *Demore,* 538 U.S. at 516-17. The U.S. Supreme Court upheld the constitutionality of section 1226(c) in *Demore.* The Court found Congress was "justifiably concerned with evidence that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore,* 538 U.S. at 513. According to the Court, "Congress adopted this provision against a backdrop of wholesale failure by federal immigration officials to deal with the increasing rates of criminal activity by aliens." *Demore,* 538 U.S. at 518. According to another court, "Section 1226(c) was intended to remedy this perceived problem by ensuring that aliens convicted of certain crimes would be present at their removal proceedings and not on the loose in their communities, where they might pose a danger." *Diop v. ICE/Homeland Security,* 656 F.3d 221, 231-32 (3rd Cir. 2011).

Finally, the Ninth Circuit ruling on which Defendant relies so heavily, *United States v. California*, does not demand a different outcome. The decision arose on a preliminary injunction, and, because the challenged statute had only recently been enacted, the Court lacked the benefit of any history of application or enforcement of the provision or an otherwise well-developed factual record. The limited record before the Ninth Circuit was nothing like the record in this case, in which it is undisputed that, despite over 2,401 requests, Defendant has not once provided information to ICE about the release of an alien in her custody. There can be no genuine claim that the policy that produced this lopsided result is not an obstacle to effectuating Congress' clear purpose of removing criminal aliens in a timely manner and keeping them off the streets or at least under supervision pending their removal. Defendant cites no facts and provides no evidence otherwise. She just rearticulates the same legal arguments she raised unsuccessfully in her demurrer. Neither the Ninth Circuit's ruling nor any argument Defendant raised warrants a contrary result on summary judgment. See Arthur Decl., at 6-25 (the operative provision in sections 1373 and 1644 is "broad and ambiguous" and the Ninth Circuit's

decision in *California* "created an absurd result contrary to law.").

V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment and/or Adjudication should be denied.

Dated: March 10, 2021

JUDICIAL WATCH, INC.

By: */s/ Robert Patrick Sticht.*
ROBERT PATRICK STICHT

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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 SEPARATE STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Hearing:	March 24, 2021
Time:	9:30 a.m.
Place:	Dept. 302 Hon. Ethan Schulman
Action Filed:	December 27, 2016
FAC Filed:	June 14, 2017
Trial Date:	April 26, 2021

Plaintiff Cynthia Cerletti, by counsel, and pursuant to Cal. Code Civ. P. § 437c and Cal. R. Ct., Rules 3.1350 – 3.1354, respectfully submits the following material facts, supporting evidence, and references to objections in opposition to Defendant's motion for summary judgment and/or adjudication.

Dated: March 10, 2021

JUDICIAL WATCH, INC.

By: */s/ Robert Patrick Sticht.*
ROBERT PATRICK STICHT

Attorneys for Plaintiffs,
Cynthia Cerletti

FIRST CAUSE OF ACTION
CITIZENSHIP AND IMMIGRATION STATUS – EXPRESS PREEMPTION

	MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND ALLEGED SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND EVIDENCE
1.	On December 7, 2017, defendant Hennessy, who was then Sheriff of the City and County of San Francisco, issued Policy No. SFSD 02-39, entitled "Immigration." Declaration of Sheriff Paul Miyamoto ("Miyamoto Decl."), ¶ 5; *id*., Ex. B.	Undisputed.
2.	Policy No. SFSD 02-39 expressly states on its first page that it "supersedes and replaces all previous SFSD policies and directives concerning immigration." Miyamoto Decl., ¶5; *id*., Ex. B at p. 1.	Undisputed.
3.	Policy No. SFSD 02-39 expressly states on its first page that "This policy does not prohibit or restrict employees 'from sending to, or receiving from, DHS / ICE information regarding the citizenship or immigration status, lawful or unlawful, of any individual.' (8 U.S.C. 1373.)" Miyamoto Decl., ¶ 7; *id*., Ex. B at p. 1.	Undisputed.
4.	Policy No. SFSD 02-39 remains in full effect today. Miyamoto Decl., ¶ 6	Undisputed.
5.	Policy No. SFSD 02-39 is the only SFSD policy and procedure now in effect concerning immigration, including concerning communications between SFSD staff and ICE with regard to immigration and SFSD jail inmates. Miyamoto Decl., ¶ 6.	Disputed.
6.	SFSD does not have any policy or procedure that prohibits or restricts SFSD employees from sending to or receiving from federal immigration authorities information regarding any individual's citizenship or immigration status, lawful or	Disputed.

	MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND ALLEGED SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND EVIDENCE
	unlawful. Miyamoto Decl., ¶ 8.	
7.	An SFSD Training Bulletin concerning Policy No. SFSD 02-39, dated December 8, 2017, states, *inter alia,* that Policy No. SFSD 02-39 "does not prohibit or restrict staff from 'from sending to, or receiving from, [DHS/ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.' (8 U.S.C. 1373)." Miyamoto Decl., ¶ 13; *id.*, Ex. D.	Undisputed.
8.	An explanatory memorandum from Sheriff Hennessy to all SFSD personnel, dated December 8, 2017, states, inter alia, that Policy No. SFSD 02-39 "consolidates and supersedes ALL prior memoranda issued regarding the Sheriff's Departments immigration policies." That explanatory memorandum also states, inter alia, that 8 U.S.C. § 1373 "prohibits restrictions on the exchange of information regarding citizenship and immigration status among Federal, State and Local government," and that Policy No. SFSD 02-39 "reaffirms our continuing compliance with this federal statute." Miyamoto Decl., ¶¶ 9, 10; *id*., Ex. C at p. 1.	Undisputed.
9.	A memorandum from San Francisco's Human Resources Director to all City employees, dated January 19, 2017, states, *inter alia*, that "federal law states that a '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 Services information regarding the citizenship or immigration status, lawful or unlawful, of any individual," citing 8 U.S.C. § 1373. Declaration of Carol Isen, ¶ 4; *id*., Ex. A, ¶ 2.	Undisputed. (*inter alia* is taken to mean there are "other types of restrictions" discussed in the same sentence as Section 1373)
10.	Defendant served a special interrogatory upon plaintiff that, for each SFSD policy that plaintiff claims substantially restricts or prohibits SFSD personnel from sharing information with federal	Disputed as to the phrase "but did not list any SFSD personnel." Otherwise undisputed.

	MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND ALLEGED SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND EVIDENCE
	immigration officials about the citizenship, immigration status, and time and date of release of criminal aliens in SFSD's custody, asks plaintiff to "list by name and rank each member of SFSD personnel who wishes to share information with federal immigration officials about any person's citizenship or immigration status, but has not do so because of" that policy. In response, plaintiff asserted various objections, but did not list any SFSD personnel. Declaration of Wayne Snodgrass ("Snodgrass Decl."), Ex. B, at Special Interrogatory No. 4; *id*., Ex. C, at Response to Special Interrogatory No. 4.	
11.	Defendant served a special interrogatory upon plaintiff that, for each SFSD policy that plaintiff claims substantially restricts or prohibits SFSD personnel from sharing information with federal immigration officials about the citizenship, immigration status, and time and date of release of criminal aliens in SFSD's custody, asks plaintiff to "list by name and rank each member of SFSD personnel who wishes to share information with federal immigration officials about the time and date of release of any person in SFSD's custody, but has not done so because of" that policy. In response, plaintiff asserted various objections, but did not list any SFSD personnel. Snodgrass Decl., Ex. B, at Special Interrogatory No. 6; *id*., Ex. C, at Response to Special Interrogatory No. 6.	Disputed as to the phrase "but did not list any SFSD personnel." Otherwise undisputed.

SECOND CAUSE OF ACTION
RELEASE INFORMATION – EXPRESS PREEMPTION

	MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND ALLEGED SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND EVIDENCE
12.	Policy No. SFSD 02-39 states, inter alia, that "San Francisco Administrative Code 12I.3(d) defines the circumstances under which the Sheriff may honor	Undisputed.

	MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND ALLEGED SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND EVIDENCE
	DHS/ICE notification requests. If those conditions are met, the Sheriff may exercise discretion to notify pursuant to that request." It also provides that staff may not respond "to I-247A or other DHS / ICE release notification requests unless expressly authorized by the Sheriff." Miyamoto Decl., Ex. B, pp. 4-5, 6.	

THIRD CAUSE OF ACTION
RELEASE INFORMATION – IMPLIED PREEMPTION

	MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND ALLEGED SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND EVIDENCE
13.	Policy No. SFSD 02-39 states, *inter alia*, that "San Francisco Administrative Code 12I.3(d) defines the circumstances under which the Sheriff may honor DHS/ICE notification requests. If those conditions are met, the Sheriff may exercise discretion to notify pursuant to that request." It also provides that staff may not respond "to I-247A or other DHS / ICE release notification requests unless expressly authorized by the Sheriff." Miyamoto Decl., Ex. B, pp. 4-5, 6.	Undisputed.

PLAINTIFF'S ADDITIONAL MATERIAL FACTS

14.	When Sheriff Hennessy took office in January 2016, her predecessor, Sheriff Ross Mirkarimi, had in place a directive, dated March 13, 2015, that expressly prohibited SFSD staff from providing ICE with information about an inmate's citizenship or immigration status or release dates or times, among other information. Hennessy Dep., 21:4 to 22:6 and 25:1 to 26:7 (Plf's Ex 1[1]); Quanico Dep., 38:11-22 (Plf's Ex 3); Quanico Dep Ex. 3 (Plf's Ex 4)	
15.	The March 13, 2015 directive sets forth two general categories of information: information SFSD staff were authorized to share with ICE upon	

[1] Exhibits to Robert Patrick Sticht's Declaration are referenced as "Plf's Ex" hereinafter.

	request and information SFSD staff were not authorized to share with ICE. Quanico Dep., 38:11-22 (Plf's Ex 3); Quanico Dep Ex. 3 (Plf's Ex 4)	
16.	On April 11, 2016, Sheriff Hennessy issued a directive expressly revoking Sheriff Mirkarimi's March 13, 2015 policy directive. Hennessy Dep., 21:19 to 22:6 and 25:1 to 26:7 (Plf's Ex 1); Quanico Dep., 35:23 to 36:21, 37:4-5, 50:11-15 (Plf's Ex 3); Quanico Dep Ex. 2 (Plf's Ex 4)	
17.	Like Sheriff Mirkarimi's March 13, 2015 directive, Sheriff Hennessy's April 11, 2016 directive sets forth two general categories of information: information SFSD staff were authorized to share with ICE upon request and information SFDS staff were not authorized to share with ICE. Quanico Dep., Exs. 2 and 3 (Plf's Ex 4)	
18.	Sheriff Hennessy's April 11, 2016 directive removed citizenship and immigration status from the category of information SFSD staff were not authorized to share with ICE but did not include citizenship or immigration status under the category of information SFSD staff were authorized to share. Quanico Dep., Exs 2 and 3 (Plf's Ex 4)	
19.	Sheriff Hennessy admitted that the April 11, 2016 directive is ambiguous about whether sharing information with ICE about an inmate's citizenship or immigration status is authorized. Hennessy Dep., 27:9 to 28:6 (Plf's Ex 1); Quanico Dep., Ex. 2. (Plf's Ex 4)	
20.	Also like Sheriff Mirkarimi's March 13, 2015 directive, Sheriff Hennessy's April 11, 2016 directive prohibited SFSD staff from sharing inmates' release information with ICE. The directive instructed SFSD staff to forward all ICE requests for release information to Sheriff Hennessy and her legal counsel "without action" so that they could undertake a case-by-case review of	

	such requests. Hennessy Dep., 43:15-23 and 130:14-15 (Plf's Ex 1); Quanico Dep., Exs. 2 and 3 (Plf's Ex 4)	
21.	At the time Sheriff Hennessy issued the April 11, 2016 directive, when ICE requested information about the release of an alien held in state or local custody, it did so by using U.S. Department of Homeland Security Forms I-247D or I-247N. ICE subsequently developed a new form for such requests, Form I-247A ("I-247A"). Hennessy Dep., 41:14 to 42:4 (Plf's Ex 1); Quanico Dep., 84:15-24 (Plf's Ex 3); Quanico Dep Ex. 2 (Plf's Ex 4); Hennessy Decl., Ex. B at p. 2; VH_000012-14 (Plf's Ex 7)	
22.	Sheriff Hennessy's April 11, 2016 directive was only an interim measure. On December 7, 2017, Sheriff Hennessy issued Policy No. SFSD 02-39, entitled "Immigration," which, among other things, created a more comprehensive review process for I-247As and complied with the TRUTH Act, which became law in 2017. Hennessy Dep., 19:9 to 20:4, 21:19 to 22:3, 37:7-14, 39:20-24, 43:6 to 44:16, and 130:10 to 131:4 (Plf's Ex 1); Quanico Dep., Exs. 2 and 4 (Plf's Ex 4)	
23.	Under SFSD 02-39, SFSD staff "may not assist DHS/ICE in the enforcement of federal civil immigration laws" except as set forth in the policy. Quanico Dep., Ex. 4, p. 2 (Plf's Ex 4)	
24.	Like Sheriff Hennessy's April 11, 2016 directive, SFSD 02-39 sets forth two general categories of information: information SFSD staff were authorized to share with ICE upon request and information SFDS staff were not authorized to share with ICE. Citizenship or immigration status is not included in either category. Quanico Dep., Ex. 4, pp. 5-6 (Plf's Ex 4)	
25.	Also like Sheriff Hennessy's April 11, 2016 directive, SFSD 02-39 prohibits SFSD staff from sharing inmates' release "dates and times" with	

	ICE. Instead, the policy creates a centralized process for evaluating such requests. Quanico Dep., Ex. 4., pp. 2 and 4-6 (Plf's Ex 4)	
26.	SFSD 02-39 does not define the terms "citizenship" or "immigration status." Quanico Dep., Ex. 4 (Plf's Ex 4)	
27.	When an individual is booked into an SFSD jail, the individual is finger-printed, and his or her fingerprints are shared electronically with the FBI, which in turn shares the fingerprints with ICE. ICE then uses the fingerprints to identify aliens who are either subject to orders of removal or for whom ICE has probable cause to believe are removable. Once such an alien is identified, ICE generates an I-247A for the alien. Hennessy Dep., 101:3-5 (Plf's Ex 1); Quanico Dep., 77:10-15, 99:8-14, 114:24 to 115:7, 134:8-13, and 135:10-16 (Plf's Ex 3); Hennessy Decl., Ex. B at pp 2-3; VH_000012-14 (Plf's Ex 7)	
28.	I-247As are typically accompanied by either a Form I-200 "Warrant for Arrest of Alien" or a Form I-205 "Warrant of Removal/Deportation" for the alien. Quanico Dep., 77:10-15 (Plf's Ex 3); Hennessy Decl., Ex. B at pp. 2-3; RPS Decl., VH_000015-17 (Plf's Ex 7)	
29.	Under SFSD 02-39, all I-247As are directed to the SFSD's Central Records Unit, now known as the Central Records and Warrants Unit ("CRW"), for evaluation. Quanico Dep., 118:6-18 and 121:11-15 (Plf's Ex 3)	
30.	ICE usually sends an I-247A to CRW, via email, within 24 hours of an alien's booking. Quanico Dep., 121:22 to 122:1-17, 134:1-13, 135:1-3 (Plf's Ex 3)	
31.	When CRW receives an I-247A, CRW staff create a file – referred to as "the packet" – that includes	

	the I-247A, the Form 200 or 205, and the SFSD booking card for the alien subject to the request. Quanico Dep., 122:8-19 (Plf's Ex 3)	
32.	The "packet" also includes SFSD Forms 17-01 and 17-02, which are forms created by the SFSD to aid in complying with the TRUTH Act's requirement that aliens subject to I-247A be given notice of the request. Quanico Dep., 123:21 to 124:1-22 (Plf's Ex 3); Hennessy Decl., ¶ 4 & Ex. B	
33.	The "packet" is then emailed to Lt. James Quanico, who is the head of CWR, and to all supervisors within CWR. Quanico Dep., 8:3-6 and 123:21 to 124:21 (Plf's Ex 3)	
34.	The "packet" also is emailed separately to SFSD's Prisoner Legal Services unit, which serves the alien subject to the I-247A with a copy of the request and the SFSD Forms 17-01 and 17-02. Quanico Dep., 124:14-25 (Plf's Ex 3)	
35.	In addition, CWR staff create an entry in an Excel spreadsheet to track the I-247A and review whether the request satisfies SFSD 20-39's criteria for providing release information to ICE. Quanico Dep., 126:9-15 (Plf's Ex 3)	
36.	CRW has used the same Excel spreadsheet to track and review I-247A since the inception of SFSD 20-39. It includes columns for the alien's last name and first name, a San Francisco identification number, ICE identification number, date of birth, underlying charges on which the alien was arrested, whether the I-247A was accompanied by a Form I-200 or Form I-205; next court date, whether the alien was held to answer and, if so, the charge(s) on which he or she was held to answer, whether the alien meets the criteria of San Francisco Admin. Code Sections 12H and I, the name of the CRW staff member who, if necessary, conducted a criminal history check, release date and time, and notes.	

	Quanico Dep., 126:8-15 and 127:15 to 128:25 (Plf's Ex 3)	
37.	Under SFSD 02-39, if an alien subject to an I-247A is not in SFSD custody on an open felony charge, CRW's review process ends, and ICE will not be notified of the alien's release date or time. Additionally, for CRW's review to continue, the open felony charge must be a "serious" or "violent" felony other than for domestic violence. Quanico Dep., 112:4 to 115:18, 129:8-10, 132:11-19, and 138:7-24 (Plf's Ex 3); Hennessy Dep., Ex. 11 (S.F. Cal. Admin. Code § 12I.3(d)(2)) (Plf's Ex 2); Hennessy Decl., Ex. B at pp. 4-5	
38.	In addition, under SFSD 02-39, if an alien subject to an I-247A is not held to answer on an open, "serious" or "violent" felony charge other than for domestic violence, meaning that a magistrate has determined there is probable cause to believe the alien is guilty of the charge, CRW's review process ends and ICE will not be notified of the alien's release date or time. Quanico Dep., 112:4 to 115:18, 129:8-10, 132:11-19, and 138:7-24 (Plf's Ex 3); Hennessy Dep., Ex. 11 (S.F. Cal. Admin. Code § 12I.3(d)(2)) (Plf's Ex 2); Hennessy Decl., Ex. B at pp. 4-5 and Ex. D	
39.	Under SFSD 02-39, it is only when an alien subject to an I-247A is held to answer on a "serious" or "violent" felony charge other than for domestic violence that CRW staff review the alien's criminal history to determine whether that criminal history satisfies the criteria of San Francisco Admin. Code Sections 12H and I for purposes of notifying ICE of the alien's release date and time. Quanico Dep., 129:8-10, 133:13-18, 137:2 to 139:20, and 144:1-9 (Plf's Ex 3); Hennessy Dep., Ex. 11 (S.F. Cal. Admin. Code § 12I.3(d)(2)) (Plf's Ex 2)	
40.	If, under SFSD 02-39, CRW staff determines that an alien subject to an I-247A is held to answer on an open, "serious" or "violent" felony charge other than for domestic violence but does not satisfy the criminal history criteria of San Francisco Admin. Code Sections 12H and I, a "DNQ" notation is made on the Excel spreadsheet. CRW's review	

	process ends, and ICE will not be notified of the alien's release date or time. Nor will Sheriff Hennessy even see the I-247A or the "packet" and other materials. Hennessy Dep., 131:15-17 (Plf's Ex 1) and Ex. 11 (SF. Cal. Admin. Code § 12I.3(d)(2)) (Plf's Ex 2); Quanico Dep. 151:2 to 152:22 (Plf's Ex 3)	
41.	If, under SFSD 02-39, CRW staff determines an alien subject to an I-247A is held to answer on an open, "serious" or "violent" felony charge other than for domestic violence and satisfies the criminal history criteria of San Francisco Admin. Code Sections 12H and I, a worksheet is used to document CRW's determination. The worksheet is then double-checked by Lt. Quanico. Quanico Dep., 144:1-20, 146:15 to 147:18, and 158:11-24 (Plf's Ex 3); Hennessy Dep., Ex. 11 (S.F. Cal. Admin. Code § 12I.3(d)(2)) (Plf's Ex 2)	
42.	After being double-checked by Lt. Quanico, the "packet," criminal history, and worksheet are sent to Sheriff Hennessy's legal counsel for further review. Quanico Dep., 144:1-20, 158:11-21, and 159:19 to 160:10 (Plf's Ex 3); VH_00005 (Plf's Ex 7); *see also* Quanico Dep., Ex. 5, p. 5 (Plf's Ex 4)	
43.	The Sheriff's legal counsel then conducts a further review of the materials provided by Lt. Quanico. Legal counsel also may ask Lt. Quanico for records of further developments in the alien's pending criminal case as well as information on "mitigating factors," which Lt. Quanico gathers and provides. Any such materials about developments in the pending criminal case and any information on "mitigating factors" become part of the record for further review. Hennessy Dep., 92:13-25 (Plf's Ex 1); Quanico Dep., 161:25 to 162:18 and 164:2 to 165:19 (Plf's Ex 3)	
44.	"Mitigating factors" information may include information provided by the alien's attorney or the community. In one case, an alien's attorney submitted a handwritten letter.	

	Hennessy Dep., 89:21 to 90:7 (Plf's Ex 1); Quanico Dep., 162:21 to 163:1 and 165:20 to 166:10 (Plf's Ex 3)	
45.	If, under SFSD 02-39, the Sheriff's legal counsel determines that an alien subject to an I-247A has been held to answer on an open, "serious" or "violent" felony charge other than for domestic violence but does not satisfy the criminal history criteria of San Francisco Admin. Code Sections 12H and 12I despite the conclusions of the two earlier reviews, ICE will not be notified of the alien's release date or time. If the alien satisfies the criminal history criteria, the case file will be sent to Sheriff Hennessy for review of the "mitigating factors." Hennessy Dep., 92:13-25 (Plf's Ex 1); Quanico Dep., 160:14 to 161:24 and 184:11 to 185:8 (Plf's Ex 3)	
46.	"Mitigating factors" Sheriff Hennessy considers as part of her review include the alien's background, family ties, and contribution to the community, whether the alien is the victim of a crime, the alien ties to his or her home country, and whether the alien has made an effort to better himself or herself by participating in educational or drug treatment programs while in custody. Hennessy Dep., 84:9-19, 89:21 to 90:4, and 97:20 to 98:2 (Plf's Ex 1); Quanico Dep., 184:23 to 185:8 (Plf's Ex 3)	
47.	Following her "mitigating factors" review, Sheriff Hennessy advised Lt. Quanico of her decision about whether release information will be provided. Quanico Dep., 184:11-22 (Plf's Ex 3)	
48.	Sheriff Hennessy does not interview ICE or seek or obtain information from ICE as part of her review process. Hennessy Dep., 87:12-21 and 97:7-12 (Plf's Ex 1)	
49.	San Francisco Admin. Code Section 12I.5 requires Sherriff Hennessy to submit a written report to the San Francisco Board of Supervisors and the	

	Mayor, by January 1st and July 1st of each year, describing all communications with "the Federal agency charged with enforcement of Federal Immigration law," meaning ICE. Hennessy Dep., Ex. 11 (S.F. Cal. Admin. Code § 12I.5 (Plf's Ex 2)	
50.	Both Sheriff Hennessy and Lt. Quanico are unaware of any instance in which SFSD staff has provided ICE with information about an individual's citizenship or immigration status. Hennessy Dep., 73:20 to 74:3 (Plf's Ex 1); Def's Responses to First Set of Interrogatories, Response to Interrogatory Nos. 6 and 8 (Plf's Ex 5); Def's Responses to Second Set of Interrogatories, Response to Interrogatory No. 29 (Plf's Ex 6); *see also* Quanico Dep., 73:13-16 (Plf's Ex 3) (Lt. Quanico unaware of any instance in which SFSD staff shared immigration status information with ICE)	
51.	None of the semi-annual reports Sheriff Hennessy has submitted to the Board of Supervisors and Mayor under San Francisco Admin. Code Section 12I.5 identify any communications with ICE about an individual's citizenship or immigration status. VH_000036-37, VH_000529-30, and VH_000644-45 (Plf's Ex 7)	
52.	Between April 11, 2016, when Sheriff Hennessy issued her ICE notification request directive and September 24, 2019, SFSD received 2,401 requests from ICE for release information. Def's Responses to Second Set of Interrogatories, Response to Interrogatory No. 31 (Plf's Ex 6)	
53.	In 2018, SFSD received 1,025 I-247As. Quanico Dep., 146:5-6 (Plf's Ex 3)	
54.	In 2019, SFSD received 820 I-247As as of October 23, 2019. It is expected that the number of I-247As SFSD will received by the end of 2019 will be similar to the number received in 2018.	

	Quanico Dep., 146:9-14 (Plf's Ex 3)	
55.	Between December 2017, when SFSD 02-39 took effect, and October 23, 2019, only seven I-247As were forwarded to Sheriff Hennessy's legal counsel for review. Hennessy Dep., 75:20 to 76:5 (Plf's Ex 1); Quanico Dep., 159:2-18 (Plf's Ex 3)	
56.	Of the seven I-247As forwarded to Sheriff Hennessy's legal counsel, one was determined by legal counsel not to satisfy the criminal history criteria of San Francisco Admin. Code Sections 12H and I, and a total of six were sent to Sheriff Hennessy for a final determination. Hennessy Dep., 75:20 to 76:5 (Plf's Ex 1); Quanico Dep., 160:14 to 161:24 (Plf's Ex 3)	
57.	Of the six sent to Sheriff Hennessy for a final determination, Sheriff Hennessy chose not to notify ICE of the alien's release date and time in three cases. The other three remain pending because the charges on which the aliens have been held to answer have not had final court determinations. Hennessy Dep., 76:6-20 (Plf's Ex 1)	
58.	Sheriff Hennessy could only remember a few details about one of the three cases in which she declined to notify ICE about the release of an alien in her custody to answer for an open, "serious" or "violent" felony charge other than for domestic violence and had a criminal history that satisfied the criteria of San Francisco Admin. Code Sections 12H and 12I. In that one case, Sheriff Hennessy recalled that the 34-year old alien had been in the United States since he or she was 12 or 13 years old, had not been back to his or her on country, was the breadwinner for his or her family, and was in custody on a burglary charge. Hennessy Dep., 97:18 to 98:4 (Plf's Ex 1)	
59.	In sum, out of the more than 2,400 requests from ICE for release information received by SFSD between April 11, 2016 and October 23, 2019, SFSD has yet to honor a single request.	

	Hennessy Dep., 75:20 to 76:20 (Plf's Ex 1); Def's Responses to Second Set of Interrogatories, Response to Interrogatory No. 31 (Plf's Ex 6)	
60.	It is presently unknown how many of the more than 2,400 ICE requests for release information received by SFSD since April 2016 were for aliens for which immigration officials have probable cause for removal (*i.e.*, the I-247A for the alien was accompanied by an I-200) and how many were for aliens already subject to final orders of removal (*i.e.*, the I-247A for the alien was accompanied by an I-205). Def's Responses to First Set of Interrogatories, Response to Interrogatory No. 24 (Plf's Ex 5) (refusing to provide requested information)	
61.	It also is presently unknown how many of the more than 2,400 ICE requests for release information received by SFSD since April 2016 were for aliens with at least one conviction for an aggravated felony (as defined in 8 U.S.C. §§ 1101(a)(43) and 1227(a)(2)(A)(iii)) and how many were for aliens with at least one conviction for controlled substances (as defined in 8 U.S.C. § 1227(a)(2)(B)). Def's Responses to Second Set of Interrogatories at Response Nos. 33 and 34 (Plf's Ex 6) (refusing to provide requested information)	
62.	Sheriff Hennessy believes "the federal government need[s] to step up and provide criminal warrants" when it seeks information about or transfers of aliens from state law enforcement agencies. Hennessy Dep., 31:8 to 31:14 (Plf's Ex 1)	
63.	Sheriff Hennessy also believes that the criminal justice system is "supposed to be the same for everybody. And it should be the same, in my opinion, for people in jail that are there whether they're undocumented or not. And if they're here for a criminal act in the United States, then the criminal justice system in the United States should probably be taking care of that. And the fact that we have a large immigrant population in San Francisco and a concern for public safety in terms of them being able to come forward and report crimes [] and be witnesses in crimes without having to worry about being detained."	

	Hennessy Dep., 32:2 to 32:16 (Plf's Ex 1)	
64.	On December 16, 2019, Defendant made an additional production of approximately 3,712 records responsive to Plaintiff's discovery requests in this matter. These records show that, between approximately January 1, 2018 and April 30, 2019, Defendant received 646 ICE Form I-205s for aliens in Defendant's custody who were subject to final orders of removal. As Plaintiff understands Defendant's processing of I-247As, these ICE Form I-205s were received as part of ICE requests for release information. Of these 646 ICE Form I-205s, 400 were based on final orders of removal issued by an immigration judge in an exclusion, deportation, or removal proceeding, 245 were based on final orders of removal issued by a designated immigration official, and 1 was based on a final order of removal issued by a U.S. District Court Judge or Magistrate Judge. Examples of the ICE Form I-205s produced by Defendant are found in Plaintiff's evidence as Exhibit 8. Decl. of Robert Patrick Sticht ISO Plf's Opp. to Def's MSJ/Adjud. ("Sticht Decl."), ¶ 2; Plf's Evid. ISO Plf's Opp. to Def's MSJ/Adjud. ("Plf's Evid."), Vol. I, Ex. 8.	
65.	In 2020, Defendant produced records of 98 aliens who were incarcerated in the San Francisco County Jail from the period October 2018 to November 2019 and subject to an ICE detainer, request for notification, and warrant. These records were selected by the plaintiff from a longer list of partial records of 1,157 inmates provided by SFSD. Decl. of Jessica M. Vaughan ISO Plf's Opp. to Def's MSJ/Adjud. ("Vaughan Decl."), ¶¶ 8, 11-13; Sticht Decl., ¶¶ 3, 4; Plf's Evid., Vol. II, Exhibit 9, Vol. III, Exhibit 10.	
66.	In 2020, Defendant produced 9 packets of documents and records related to aliens whom SFSD determined satisfied the criteria in the Sheriff's policy for potentially providing release date notification to ICE, which were compiled by SFSD officers to present to the Sheriff for review and determination whether to notify ICE or not.	

	Vaughan Decl., ¶ 8; Sticht Decl., ¶ 5; Plf's Evid., Vol. IV, Exhibits 11, 12.	
67.	The sheriff has created a system for responding to ICE requests for notifications and warrants of arrest and removal that deviates substantially from what is required in California law, San Francisco law, and federal law. Vaughan Decl., ¶ 8.	
68.	SFSD 02-39 includes a number of unusual and egregious prohibitions on information-sharing and cooperation with ICE that are routine for most other law enforcement agencies. These include: singling out ICE for non-cooperation on detainers and warrants of arrest and removal; prohibition on honoring routine ICE requests for notification of release dates; instructions to deny ICE officers access to the jail and to inmates; and a prohibition on disclosing to ICE inmate release dates, information from booking and arrest reports, or other information that would assist in apprehending the criminal alien sought by ICE. Vaughan Decl., ¶ 9.	
69.	The restrictions in SFSD 02-39 are unusual among county sheriff's departments nationwide and in California. The vast majority of local law enforcement agencies do not have sanctuary policies and cooperate fully with ICE, either by law, by policy, or as a routine practice. Only about 140 out of more than 3,000 U.S. counties that have adopted sanctuary policies. Vaughan Decl. ¶ 9.	
70.	The SFSD policy is unusually restrictive even in comparison with other county sanctuary policies. Of the 140 county-level sanctuary policies, many of them merely involve restrictions on honoring ICE detainers and do not prohibit jail officers from providing ICE with release dates or other inmate information, as the SFSD policy does. Most do not deny ICE officers access to the jail to interview inmates, as the SFSD policy does. Vaughan Decl., ¶ 9.	

71.	Even within California, the SFSD policy is an outlier. For example, the California TRUST Act (AB4), which went into effect on January 1, 2014, allows sheriff's departments to honor ICE detainers in certain cases, including aliens convicted of serious or violent felonies or certain recent misdemeanors. Importantly, state law does not bar sheriff's department personnel from sharing release dates or other information with ICE, as the SFSD policy does. Vaughan Decl., ¶ 9.	
72.	The San Francisco Administrative Code, which allegedly governs the SFSD policy, also allows SFSD personnel to provide ICE with notifications of release in certain cases, including in the case of recent serious or violent felony convictions. Vaughan Decl., ¶ 9.	
73.	Of the 98 alien records produced by Defendant: • All but one of the ICE detainers in the sample of 98 included a statement of probable cause that the alien was removable from the United States. • Just over one-half (55) of the detainers were issued regarding aliens who already were subject to a final order of removal. All of these were accompanied by a warrant of removal. Of these removal orders, 47 were issued by an immigration judge and eight were issued by a designated immigration official so authorized. These are aliens who already have been arrested in the past and who completed their immigration proceedings, were found to lack eligibility to remain in the United States, and accordingly were ordered removed. • All of the warrants of removal included a citation of the specific grounds of removal under U.S. immigration law. Seventeen of these citations indicated that the alien had been convicted of an aggravated felony, a controlled substance violation, or a crime involving moral turpitude (CIMT). Twenty-four of the removal warrants were reinstatements of final orders, meaning that the alien previously had been ordered removed from the country and is not able to obtain relief. All of these indicate that the	

	alien would be a priority for removal under U.S. immigration law. • Forty-three of the detainers were accompanied by a warrant of arrest. Six of the warrants of arrest indicated that the alien was already in removal proceedings, pending a decision by an immigration judge. • Seventy-nine of the 98 detainers included an indication by the issuing officer that the alien had been affirmatively identified by means of a biometric (fingerprint) match of records in DHS databases. • The warrants of arrest typically were signed by a supervisory officer, such as section chief or assistant field office director. The warrants of removal typically were signed by an assistant field office director or field office director. • The ICE arrest warrants include critical information for identifying the inmates, including name, date of birth, country of citizenship, and, in many cases, aliases the alien has used, which might not otherwise be known to the SFSD officers. Vaughan Decl. ¶ 14.	
74.	In addition to copies of ICE detainers and warrants for the 98 aliens, the SFSD provided counsel declarations containing an analysis of the prior criminal convictions of the aliens in relation to certain federal statutes, specifically regarding convictions for aggravated felonies and drug crimes. Under federal immigration law, aliens convicted of these crimes are deportable. 64 out of 99 alien inmates in the sample had been convicted of either an aggravated felony or a controlled substance crime or both. Of this group, 59 aliens had an aggravated felony conviction and 35 had a controlled substance conviction. A total of 30 inmates had convictions for both. Vaughan Decl., ¶ 15.	
75.	Contrary to what is claimed in the "Findings" section of the San Francisco administrative code, which provides the primary justification for the sanctuary policy, immigration detainers and requests for notification are not typically issued without evidentiary support, without a statement of	

	probable cause or without authority. The 98 alien records illustrate that ICE detainers are typically issued on the basis of a biometric identity match (fingerprints); include a warrant and statement of probable cause that the alien is removable, signed by a supervisory officer or senior official; and often are issued for aliens who have been ordered removed by an immigration judge. Vaughan Decl., ¶ 16(a).	
76.	A number of cases in the 98 alien records have convictions for offenses that fall within the state and city guidelines as serious enough potentially to allow for cooperation with ICE in the form of notification of the date and time of the alien's release from local custody. About two-thirds of the selected cases had convictions for aggravated felonies, controlled substance violations, or both. Vaughan Decl., ¶ 16(b).	
77.	According to the evidence, a significant number of individuals in the 98 alien cases almost certainly meet the federal definition of aliens who are mandatory for ICE to arrest, detain and/or remove. These include aliens convicted of serious crimes, such as CIMTs, aggravated felonies, drug crimes, firearms offenses, and other crimes spelled out in federal law. Vaughan Decl., ¶ 16(c).	
78.	Routinely releasing aliens – as a matter of policy -- that ICE is required by law to arrest and detain without notification is a serious complication for ICE and could fairly be described as deliberately frustrating and impeding immigration enforcement, especially when such cooperation is authorized under state and local law. Vaughan Decl., ¶ 16(c).	
79.	Based on the information on their convictions, many of the individuals in the sample would reasonably be considered to be a public safety threat and/or a flight risk. The long list of aliens released despite ICE detainers include aliens charged and convicted of murder, sexual assaults, assault with a deadly weapon, multiple felonies, and numerous other crimes of violence and destruction.	

	Vaughan Decl., ¶ 16(d).	
80.	According to the Sheriff's policy, establishing the identity of all detainees is a requirement for SFSD officers. Yet in order for SFSD officers to be able to do that in the case of many of the alien inmates, it would be necessary for them to communicate with ICE or allow ICE officers to enter the jail to interview inmates, both of which are prohibited by the very same policy. For example, a large share of the ICE arrest warrants included information on aliases associated with an alien inmate. Other inmates may be using aliases that are unknown to ICE and may have evaded encounters with ICE or other DHS personnel, and thus do not have fingerprints on file at DHS that could be matched to a local arrest record. The prohibition on communication with ICE thus hinders SFSD officers from meeting the mandate of establishing identity, and may hinder ICE from learning of alien inmates who are in SFSD custody. This discrepancy between the stated requirements for SFSD officers to establish identity and their practical ability to do so while prohibited from communicating and sharing information with ICE destroys the credibility of the policy, and the entire policy is in fact geared primarily toward restricting or regulating ICE's ability to arrest inmates rather than enhancing local policing and public safety. Vaughan Decl., ¶ 16(e).	
81.	In addition to the copies of detainers and warrants for the group of cases selected, the SFSD provided the plaintiffs with the so-called packets of documents prepared by SFSD officers on nine cases in which the alien inmates were potentially amenable to disclosure of their release date to ICE, based on their criminal histories. These packets were presented to the Sheriff for review and a final decision on whether to allow ICE to be notified on a release date, pursuant to her policy. Vaughan Decl., ¶ 17.	
82.	The documents in the packets relate to nine different cases: three citizens of Mexico, one citizen of Cuba, one citizen of Vietnam, one citizen of Ethiopia, one citizen of Honduras, one citizen of Ukraine, and one citizen of Cambodia. Six of the aliens were subject to ICE detainers and removal warrants and previously been issued final orders of	

	removal. Two of the aliens were subject to ICE detainers and arrest warrants, and one was the subject of an ICE request for notification (I-247N), which was a form used by ICE in 2016 and discontinued in 2017. Vaughan Decl., ¶ 18.	
83.	By definition, these aliens each had been convicted of multiple serious and violent crimes in the recent past, and were facing current charges serious enough to have been ordered to be kept in custody ("held to answer") by the local magistrate. The following is a summary of the charges for each alien: * The citizen of Cuba faced charges for burglary and a parole violation, with a prior burglary conviction. He had been ordered removed previously. The packet was sent to the Sheriff for review about six weeks after the detainer was received (which was at the time of arrest). The file included a brief statement from an expert regarding difficult conditions in Cuba and the possibility of persecution of dissidents. * The citizen of Vietnam faced charges for robbery, battery, and assault. He had been ordered removed previously. No information on mitigating circumstances was included in the packet. It was forwarded to the sheriff for review about two weeks after the detainer was received. * The citizen of Ethiopia was charged with assault with a deadly weapon, assault on a peace officer, receiving stolen property, a parole violation, and had prior convictions for stolen property crimes. This offender already was subject to a final order of removal. The packet was sent to the Sheriff for review approximately two months after the alien's arrest. * One citizen of Mexico had a long list of current and prior offenses, including convictions for assault with a deadly weapon, robbery, felony assault, false imprisonment, burglary, vehicle theft, and probation violations, including one revocation of probation. This individual appeared to have been arrested at least nine times between January, 2015 and March, 2020. SFSD personnel had determined on five separate occasions during that time that the alien was potentially amenable to notification to ICE of release dates, due to the seriousness, frequency, and recentness of the crimes. Most of the convictions occurred after guilty pleas. On at least	

	three of those occasions, the packets were forwarded to the Sheriff for review, but apparently remained in pending status. The alien was repeatedly released after serving time in jail or after receiving a sentence of probation. No information on mitigating circumstances was included in the packet. * The citizen of Honduras was facing instant charges of burglary. His criminal history included prior convictions on felonies such as burglary while in possession of a concealed, loaded firearm, giving false information to an officer, child endangerment, theft, domestic violence, robbery, assault, and violating a restraining order. The rap sheet was five pages long. The ICE detainer was accompanied by a warrant of arrest, indicating that the individual probably had not been removed or ordered removed before. The packet was forwarded to the Sheriff for review, but apparently remains pending. No information on mitigating circumstances was included in the packet. * Another citizen of Mexico was facing instant charges of robbery, domestic violence and assault and also was the subject of an ICE detainer and warrant of arrest after a biometric match with DHS records. The alien had three recent, separate, prior felony convictions: two for auto theft and one for burglary, which had occurred over a 15-month period ending two and one-half years prior to the instant offense. A packet was sent to the sheriff for review, but apparently the offender was released on an ankle bracelet before a decision was made on whether to notify ICE of his release. Information was included in the packet relating to a prior application for asylum based on his claimed fear of harassment or violence from authorities in Mexico, relating to witnessing a murder as a teenager back in Mexico, which was the motivation given for his illegal entry into the United States. These documents were apparently included as potentially mitigating circumstances, although no information was included on the outcome of his asylum case (dating back almost 10 years), and whether it was found to be credible. * The citizen of Ukraine was arrested and held to answer for a felony burglary charge, along with false imprisonment, receiving stolen property, threatening an officer, and a firearms charge. Two years prior, he was convicted on a robbery charge, among other offenses. The ICE request for notification was issued in April, 2016, and the packet was sent to the sheriff for review in January, 2018. The packet included information on	

	potentially mitigating circumstances to be considered by the sheriff. The offender was said to suffer from addiction to methamphetamine and cocaine, but "hadn't been in prison since 2003." Included in the packet was a copy of an email from SFSD Prisoner Legal Services staff member Nick Gregoratos, dated March, 2018, to Andrea Lindsay, the lawyer for the alien, soliciting information on potentially mitigating circumstances that could be considered by the sheriff: "If you can give me a call to discuss ASAP, it may be beneficial to your client." * Another citizen of Mexico was held to answer on felony burglary charges, false imprisonment, and adult kidnapping charges. The alien had prior burglary convictions, one occurring one year prior to the instant charge, and another occurring four years prior, for which he was sentenced to 364 days plus probation. The ICE detainer was accompanied by a warrant of removal, indicating that the alien previously had been ordered removed. The packet included information on his employment as a utility worker, presumably as potentially mitigating information. * The citizen of Cambodia was facing instant charges for assault with a deadly weapon, murder, and a loaded firearm violation. ICE had issued two detainers, and the alien was subject to a final order of removal. The Notice of Action Review worksheet was dated September 8, 2019 and sent to the sheriff for review on November 12, 2019. The packet included information on difficulties faced by Cambodian citizens who have lived much of their life in the United States as lawful permanent residents, but who are deported to Cambodia after committing serious crimes. Vaughan Decl., ¶ 19.	
84.	The evidence in the packets establishes: • The individual offenders whose files are submitted to the sheriff for review meet the definition of serious and violent criminals. In addition, because of their long criminal histories, they are a priority for removal for ICE. Most of the cases in this sample would be relatively simple, routine removal cases for ICE, because the aliens have already been put through due process and issued a final order of removal. In all likelihood, they would not qualify to stay in the United States. These are cases that would qualify as a priority for removal even under the Biden administration's new policies, which are the most lenient in recent	

	history. Yet the SFSD personnel and the sheriff are devoting significant time and resources to an intensive review of their circumstances, generating large files with dozens of pages of information documenting the crimes and cases. Further, SFSD personnel are not trained in immigration law, and are not qualified to speculate on whether an individual may or may not be removable from the United States, or whether a case should or should not be a priority for federal immigration authorities. • The SFSD review process takes a very long time. In a number of these cases, the review packet prepared for the sheriff took a month or more to compile, and the sheriff takes months or even years to issue a decision. In some cases, the review is pending for what seems to be an endless period of time, during which the alien is released after serving a sentence. This gives the impression that the lack of a formal decision is actually the de facto decision not to communicate a release date to ICE. • At least two of the criminal aliens whose cases were in the nine packets (the citizen of Cambodia and one of the citizens of Mexico) were released and committed additional crimes after the packets were submitted for review by the sheriff and even while her review remained pending. The case of a citizen of Mexico was reviewed at least five times when he was in SFSD custody for at least five different serious convictions within three years. • Remarkably, in at least one instance, the SFSD appeared to solicit information from an alien offender's lawyer to assist the sheriff in finding mitigating circumstances to justify not giving out the alien's release date to ICE. • Through this elaborate system of case review and adjudicating the question of whether to allow ICE to learn the release date of some of the most serious criminal offenders who are ever in the custody of the SFSD, the Sheriff is essentially adjudicating whether or not these aliens will be subject to removal – and the adjudication always has been that they should not be, even in the cases of the most serious alien offenders. Thus the evidence shows that this policy is not a scheme to allow the sheriff to adjudicate whether the aliens will be subject to enforcement, but a scheme to ensure that the alien offenders are not subject to removal or enforcement at all. Vaughan Decl., ¶ 20.	

85.	According to the San Francisco administrative code that is the basis for the SFSD policy, the purpose of the sanctuary policy is "to foster respect and trust between law enforcement and residents, to protect limited local resources, to encourage cooperation between residents and City officials, including especially law enforcement and public health officers and employees, and to ensure community security, and due process for all." There is no evidence that the SFSD policy fulfills any of these goals. Vaughan Decl., ¶ 21.	
86.	A sanctuary policy is not an appropriate or effective way to foster trust between law enforcement agencies and community residents or to increase reporting of crimes. The most authoritative research on immigrants and crime reporting indicates that immigrants are no less likely to report crimes than native born residents. Vaughan Decl., ¶ 21.	
87.	Defendant has produced no evidence that the SFSD policy protects the limited fiscal resources of San Francisco County. Rather, the elaborate process for reviewing cases upon receipt of an ICE detainer, which according to the evidence reviewed above involves SFSD staff members in numerous departments, including the central records office, prisoner legal services, and occasionally the sheriff, is time-consuming and therefore costly; this review process likely consumes far more resources than simply notifying ICE of the release dates for the criminal aliens who are subject to ICE detainers, by telephone or electronic communication. Certainly, the cost of repeated arrests, prosecution, detention, probation, and other functions of the local criminal justice system as a result of recidivism by criminal aliens is likely to be far greater than the cost of providing ICE with notifications of release dates so that criminal aliens can be removed from the community and returned to their home countries. Vaughan Decl., ¶ 22.	
88.	There is ample evidence that many criminal alien offenders will commit new crimes after release, just as native-born offenders do. Such recidivism has been documented in the two cases of the citizen	

	of Cambodia and one of the citizens of Mexico, who were released and apparently committed additional crimes *while their packets were pending determination by the sheriff to notify ICE* or not. This is consistent with the nationwide data in the case of releases due to sanctuary policies. Vaughan Decl., ¶ 23 (emphasis original).	
89.	It is remarkable and shocking that the top law enforcement officer of San Francisco has established this elaborate system that results in the retention in the community of criminal offenders who are present in violation of U.S. law, virtually guaranteeing that more victimization of residents will occur. Vaughan Decl., ¶ 23.	
90.	It is impossible to claim that the SFSD policy ensures community security. Vaughan Decl., ¶ 23.	
91.	As for "ensuring due process," another stated purpose of the policy, it is clear from the evidence that the aliens sought by ICE are receiving it. Due process in immigration proceedings is not determined by local or state officials; it has been established by Congress, with tweaking by the federal courts over time. It includes authorization for ICE officers to issue detainers and warrants of arrest and removal, and authorizes local law enforcement agencies to comply with them. As demonstrated in the numerous files of detainers, warrants and other records made available which show, for example, statements of probable cause for arrest and final orders of removal issued by immigration judges and designated ICE officers that cite the grounds for removal, all of the criminal aliens whose cases are at issue are receiving and have received ample due process to resolve their immigration charges. Vaughan Decl., ¶ 24.	

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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

DECLARATION OF JESSICA M. VAUGHAN IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Hearing:	March 24, 2021
Time:	9:30 a.m.
Place:	Dept. 302 Hon. Ethan Schulman
Action Filed:	December 27, 2016
FAC Filed:	June 14, 2017
Trial Date:	April 26, 2021

I, Jessica M. Vaughan, declare:

I am the Director of Policy Studies for the Center for Immigration Studies. I am making this declaration in support of Plaintiff's opposition to Defendant's motion for summary judgment and/or adjudication. I have personal knowledge of the facts contained in this declaration, and, if called as a witness could, and would, competently testify to those facts.

My Background, Experience, and Qualifications

1. I am the Director of Policy Studies for the Center for Immigration Studies (CIS), a Washington, D.C.-based research institute that examines the impact of immigration on American society and educates policymakers and opinion leaders on immigration issues. I have worked with CIS since 1992, and my area of expertise is immigration policy and operations, including immigration enforcement and state and local immigration policies. I have extensively studied and published reports on the topic of sanctuary policies, immigration enforcement in the interior, and crime and public safety aspects of illegal immigration and immigration enforcement.

2. I have spent nearly 30 years researching, analyzing, and monitoring the policies and actions of the government agencies in charge of implementing the nation's immigration laws, including the Department of Homeland Security and component agencies, including Immigration and Customs Enforcement (ICE). My responsibilities include examining and analyzing federal statues, government regulations and statistics, and academic data and reports on immigration enforcement.

3. I was the project director for a Department of Justice funded project on the use of immigration enforcement to combat transnational gangs. I have interviewed numerous federal, state and local officials, including ICE managers, special agents and deportation officers, sheriffs, police chiefs, and other law enforcement officers. The expertise I have developed has allowed me to understand and recognize the actual effects and significance of the discretionary policy actions taken and regulations promulgated by state and local governments.

4. I have testified before the U.S. Congress more than two dozen times, and am frequently consulted by federal and state government officials, other researchers, and news media seeking expertise on these matters. I have served as an expert witness in several federal and state court cases on immigration matters.

5. Besides working at the Center, I am an instructor at Northwestern University's Center for Public Safety, where I give a training course on immigration policy and public safety for command-level law enforcement officers from around the country. One part of the curriculum is dedicated to training local officers on ICE detainers and the intersection of federal law and local policies on this matter.

6. My work has been published in numerous international, national, and regional outlets, and can be found at www.cis.org. I have given presentations at many academic, government and law enforcement conferences and trainings as a subject matter expert on immigration. I earned a Master's degree in Government from Georgetown University and a Bachelor's degree in International Studies from Washington College in Maryland.

The policy SFSD 02-39, the evidence, and my findings and conclusions

7. My goal in this declaration is to present an opinion on the purpose, operation, and effects of Policy No. SFSD 02-39, hereafter "the policy" of the San Francisco Sheriff's Department (SFSD), based on evidence presented by the SFSD. My review of the evidence leads me to a number of conclusions on the effects of the policy on public safety and on the ability of federal immigration authorities to meet their obligation to enforce immigration laws.

8. The sheriff has created a system for responding to ICE requests for notifications and warrants of arrest and removal that deviates substantially from what is required in California law, San Francisco law, and federal law.

The evidence I have reviewed includes:

A - Selected information from records of 98 aliens who were incarcerated in the San Francisco County Jail from the period October 2018 to November 2019 and subject to an ICE detainer, request for notification, and warrant. Plf's Evid. ISO Plf's Opp. to Def's MSJ/Adjud. ("Plf's Evid."), Vol. II, Exhibit 9, Vol. III, Exhibit 10. These records were selected by the plaintiff from a longer list of partial records of 1,157 inmates provided by SFSD. [1] I participated in that selection process.

B – 9 packets of documents and records related to aliens whom SFSD determined satisfied the criteria in the policy for potentially providing release date notification to ICE, which were compiled by

[1] The parties agreed that SFSD would provide records of 100 alien inmates selected from a spreadsheet of records on 1,157 alien inmates in the prescribed time period. However, only 98 records were furnished to the plaintiffs.

SFSD officers to present to the Sheriff for review and determination whether to notify ICE or not. Plf's Evid., Vol. IV, Exhibits 11, 12.[2]

9. The stated purpose of the SFSD policy in question is to inform SFSD officers of how they should handle communication, information-sharing with ICE officers, and specifically, how to handle requests from ICE regarding release dates of inmates subject to ICE detainers and warrants of arrest and removal.

This policy includes a number of unusual and egregious prohibitions on information-sharing and cooperation with ICE that are routine for most other law enforcement agencies. These include: singling out ICE for non-cooperation on detainers and warrants of arrest and removal; prohibition on honoring routine ICE requests for notification of release dates; instructions to deny ICE officers access to the jail and to inmates; and a prohibition on disclosing to ICE inmate release dates, information from booking and arrest reports, or other information that would assist in apprehending the criminal alien sought by ICE.

These restrictions are unusual among county sheriff's departments nationwide and in California. According to my ongoing research and monitoring of sanctuary policies nationwide, the vast majority of local law enforcement agencies do not have sanctuary policies and cooperate fully with ICE, either by law, by policy, or as a routine practice.[3] I have identified only about 140 out of more than 3,000 U.S. counties that have adopted sanctuary policies.

The SFSD policy is unusually restrictive even in comparison with other county sanctuary policies. Of the 140 county-level sanctuary policies I have reviewed, many of them merely involve restrictions on honoring ICE detainers and do not prohibit jail officers from providing ICE with release dates or other inmate information, as the SFSD policy does. Most do not deny ICE officers access to the jail to interview inmates, as the SFSD policy does.

Even within California, the SFSD policy is an outlier. For example, the California TRUST Act

[2] Plaintiff was told that six packets were being provided representing all of the packets submitted to the Sheriff. Documents were later provided in two large pdf files without delimiters or other markers between cases, and with identifying information redacted, but to the best I can ascertain, it appeared that nine different packets were included in the files.

[3] Jessica M. Vaughan and Bryan Griffith, "Sanctuary Cities, Counties and States," Center for Immigration Studies, Map: Sanctuary Cities, Counties, and States (cis.org).

(AB4), which went into effect on January 1, 2014, allows sheriff's departments to honor ICE detainers in certain cases, including aliens convicted of serious or violent felonies or certain recent misdemeanors. Importantly, state law does not bar sheriff's department personnel from sharing release dates or other information with ICE, as the SFSD policy does.[4]

Further, the San Francisco Administrative Code, which allegedly governs the SFSD policy, also allows SFSD personnel to provide ICE with notifications of release in certain cases, including in the case of recent serious or violent felony convictions.[5]

Evidence A – Selected records provided in discovery

10. Evidence shows that the Sheriff has created her own scheme to determine when notifications may be provided to ICE and which detainers may be honored that deviates substantially and significantly from that provided for in federal law, California law, and San Francisco law.

11. The parties agreed that SFSD would provide additional information on 100 specific cases chosen by the plaintiff out of the 1,157 alien inmates sought by ICE over the period. I assisted in selecting these records.

12. The cases were selected to include a variety of types of cases, including:

- The most serious offenders, including those potentially categorized as aggravated felons and serious drug offenders;
- Aliens who were the subject of ICE arrest warrants (I-200) and warrants of removal (I-205), indicating both aliens who ICE had probable cause to believe were removable and aliens who had already been ordered removed from the United States;
- Different countries of citizenship;
- A variety of types of offenses, including violent crimes, drug crimes, property crimes, and others;
- Offenders who were held in custody to answer for their crimes, under local protocols.

13. The defendant provided copies of ICE Form I-247, the ICE Detainer and Notice of Action, commonly known as the ICE detainer/request for notification form for 98 of the 100 selected

[4] Bill Text - AB-4 State government: federal immigration policy enforcement. (ca.gov)

[5] Chapter 12 H of the San Francisco Administrative Code, CHAPTER 12H: IMMIGRATION STATUS (sfgov.org).

cases. This form is issued by an authorized ICE official, and is primarily used to notify a local law enforcement agency that ICE has determined that there is probable cause to arrest an alien in the custody of the local agency on the basis of immigration law violations. It is used primarily to request that the agency provide ICE with reasonable notification of the alien's release date and keep the alien in custody upon disposition of the case for a period not to exceed 48 hours to allow DHS to assume custody. According to ICE rules, it is accompanied by a warrant of arrest or removal. This form is issued frequently and routinely; in 2020, ICE issued 122,233 detainers.[6] I have examined all of these detainer records and warrants provided by the defendant.

14. These are my key findings:

- All but one of the ICE detainers I reviewed in the sample of 98 included a statement of probable cause that the alien was removable from the United States.
- Just over one-half (55) of the detainers were issued regarding aliens who already were subject to a final order of removal. All of these were accompanied by a warrant of removal. Of these removal orders, 47 were issued by an immigration judge and eight were issued by a designated immigration official so authorized. These are aliens who already have been arrested in the past and who completed their immigration proceedings, were found to lack eligibility to remain in the United States, and accordingly were ordered removed.
- All of the warrants of removal included a citation of the specific grounds of removal under U.S. immigration law. Seventeen of these citations indicated that the alien had been convicted of an aggravated felony, a controlled substance violation, or a crime involving moral turpitude (CIMT). Twenty-four of the removal warrants were reinstatements of final orders, meaning that the alien previously had been ordered removed from the country and is not able to obtain relief. All of these indicate that the alien would be a priority for removal under U.S. immigration law.
- Forty-three of the detainers were accompanied by a warrant of arrest. Six of the warrants of arrest indicated that the alien was already in removal proceedings, pending a decision by an immigration judge.

[6] ICE, "U.S. Immigration and Cstoms Enforcement Fiscal Year 2020 Enforcement and Removal Operation Report, U.S. Immigration and Customs Enforcement FY 2020 Enforcement and Removal Operations Report (ice.gov). An example of a detainer can be viewed here: I-274A (ice.gov).

- Seventy-nine of the 98 detainers included an indication by the issuing officer that the alien had been affirmatively identified by means of a biometric (fingerprint) match of records in DHS databases.
- The warrants of arrest typically were signed by a supervisory officer, such as section chief or assistant field office director. The warrants of removal typically were signed by an assistant field office director or field office director.
- The ICE arrest warrants include critical information for identifying the inmates, including name, date of birth, country of citizenship, and, in many cases, aliases the alien has used, which might not otherwise be known to the SFSD officers.

15. In addition to copies of ICE detainers and warrants, the SFSD provided the plaintiffs with declarations containing an analysis of the prior criminal convictions of the aliens in relation to certain federal statutes, specifically regarding convictions for aggravated felonies[7] and drug crimes[8] . According to federal immigration law, aliens convicted of these crimes are deportable.

According to the SFSD analysis of these same records provided to the plaintiff, 64 out of 99 alien inmates in the sample had been convicted of either an aggravated felony or a controlled substance crime or both. Of this group, 59 aliens had an aggravated felony conviction and 35 had a controlled substance conviction. A total of 30 inmates had convictions for both.

16. My examination and analysis of these records leads me to conclude:

a. Contrary to what is claimed in the "Findings" section of the San Francisco administrative code, which provides the primary justification for the sanctuary policy, immigration detainers and requests for notification are not typically issued without evidentiary support, without a statement of

[7] 8 USC 1227(a)(2)(A)(iii): "Any alien who is convicted of an aggravated felony at any time after admission is deportable." The federal definition of aggravated felony can be found here: Definition: aggravated felony from 8 USC § 1101(a)(43) | LII / Legal Information Institute (cornell.edu)

[8] 8 USC 1227(a)(2)(B): "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable," and "Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable."

probable cause or without authority.[9] This sample illustrates that ICE detainers are typically issued on the basis of a biometric identity match (fingerprints); include a warrant and statement of probable cause that the alien is removable, signed by a supervisory officer or senior official; and often are issued for aliens who have been ordered removed by an immigration judge.

b. A number of cases in the sample have convictions for offenses that fall within the state and city guidelines as serious enough potentially to allow for cooperation with ICE in the form of notification of the date and time of the alien's release from local custody. About two-thirds of the selected cases had convictions for aggravated felonies, controlled substance violations, or both.

c. According to the information in the SFSD analysis of convictions, the information on the ICE warrants of removal, and the information in the original spreadsheet of cases, a significant number of cases in the sample almost certainly meet the federal definition of aliens who are mandatory for ICE to arrest, detain and/or remove. These include aliens convicted of serious crimes, such as CIMTs, aggravated felonies, drug crimes, firearms offenses, and other crimes spelled out in federal law.[10] Routinely releasing aliens – as a matter of policy -- that ICE is required by law to arrest and detain without notification is a serious complication for ICE and could fairly be described as deliberately frustrating and impeding immigration enforcement, especially when such cooperation is authorized under state and local law.

d. Based on the information on their convictions, many of the aliens in the sample would reasonably be considered to be a public safety threat and/or a flight risk. The long list of aliens released despite ICE detainers include aliens charged and convicted of murder, sexual assaults, assault with a deadly weapon, multiple felonies, and numerous other crimes of violence and destruction.

e. According to the Sheriff's policy, establishing the identity of all detainees is a requirement for

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[9] The Findings section of the code claims: "Civil Immigration detainers may be issued without evidentiary support or probable cause by border patrol agents, aircraft pilots, special agents, deportation officers, immigration inspectors, and immigration adjudication officers….."

"Given that civil immigration detainers are issued by immigration officers without judicial oversight, and the regulation authorizing civil immigration detainers provides no minimum standard of proof for their issuance, there are serious questions as to their constitutionality."

[10] 8 U.S. Code § 1226 - Apprehension and detention of aliens | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu)

SFSD officers.[11] Yet in order for SFSD officers to be able to do that in the case of many of the alien inmates, it would be necessary for them to communicate with ICE or allow ICE officers to enter the jail to interview inmates, both of which are prohibited by the very same policy. For example, a large share of the ICE arrest warrants I reviewed included information on aliases associated with an alien inmate. Other inmates may be using aliases that are unknown to ICE and may have evaded encounters with ICE or other DHS personnel, and thus do not have fingerprints on file at DHS that could be matched to a local arrest record. The prohibition on communication with ICE thus hinders SFSD officers from meeting the mandate of establishing identity, and may hinder ICE from learning of alien inmates who are in SFSD custody. This discrepancy between the stated requirements for SFSD officers to establish identity and their practical ability to do so while prohibited from communicating and sharing information with ICE destroys the credibility of the policy, and the entire policy is in fact geared primarily toward restricting or regulating ICE's ability to arrest inmates rather than enhancing local policing and public safety.

Evidence B – Packets sent to the Sheriff

17. In addition to the copies of detainers and warrants for the group of cases selected, the SFSD provided the plaintiffs with the so-called packets of documents prepared by SFSD officers on nine cases in which the alien inmates were potentially amenable to disclosure of their release date to ICE, based on their criminal histories. These packets were presented to the Sheriff for review and a final decision on whether to allow ICE to be notified on a release date, pursuant to her policy.

18. Summary of information in the packets. The documents appeared to relate to nine different cases: three citizens of Mexico, one citizen of Cuba, one citizen of Vietnam, one citizen of Ethiopia, one citizen of Honduras, one citizen of Ukraine, and one citizen of Cambodia.[12]

Six of the aliens were subject to ICE detainers and removal warrants and previously been issued final orders of removal. Two of the aliens were subject to ICE detainers and arrest warrants, and one was the subject of an ICE request for notification (I-247N), which was a form used by ICE in 2016 and

[11] From SFSD 02-39: "Establishing Identity. 1. SFSD personnel shall attempt to identify any person they detain, arrest or who come into the custody of the SFSD. 2. Any person eligible for citation and release, who is unable to present satisfactory evidence of his or her identity, shall be detained for the purpose of establishing his or her identity."

[12] See note 2, *supra*.

discontinued in 2017.

19. By definition, these aliens each had been convicted of multiple serious and violent crimes in the recent past, and were facing current charges serious enough to have been ordered to be kept in custody ("held to answer") by the local magistrate. The following is a summary of the charges for each alien:

* The citizen of Cuba faced charges for burglary and a parole violation, with a prior burglary conviction. He had been ordered removed previously. The packet was sent to the Sheriff for review about six weeks after the detainer was received (which was at the time of arrest). The file included a brief statement from an expert regarding difficult conditions in Cuba and the possibility of persecution of dissidents.

* The citizen of Vietnam faced charges for robbery, battery, and assault. He had been ordered removed previously. No information on mitigating circumstances was included in the packet. It was forwarded to the sheriff for review about two weeks after the detainer was received.

* The citizen of Ethiopia was charged with assault with a deadly weapon, assault on a peace officer, receiving stolen property, a parole violation, and had prior convictions for stolen property crimes. This offender already was subject to a final order of removal. The packet was sent to the Sheriff for review approximately two months after the alien's arrest.

* One citizen of Mexico had a long list of current and prior offenses, including convictions for assault with a deadly weapon, robbery, felony assault, false imprisonment, burglary, vehicle theft, and probation violations, including one revocation of probation. This individual appeared to have been arrested at least nine times between January, 2015 and March, 2020. SFSD personnel had determined on five separate occasions during that time that the alien was potentially amenable to notification to ICE of release dates, due to the seriousness, frequency, and recentness of the crimes. Most of the convictions occurred after guilty pleas. On at least three of those occasions, the packets were forwarded to the Sheriff for review, but apparently remained in pending status. The alien was repeatedly released after serving time in jail or after receiving a sentence of probation. No information on mitigating circumstances was included in the packet.

* The citizen of Honduras was facing instant charges of burglary. His criminal history

included prior convictions on felonies such as burglary while in possession of a concealed, loaded firearm, giving false information to an officer, child endangerment, theft, domestic violence, robbery, assault, and violating a restraining order. The rap sheet was five pages long. The ICE detainer was accompanied by a warrant of arrest, indicating that the individual probably had not been removed or ordered removed before. The packet was forwarded to the Sheriff for review, but apparently remains pending. No information on mitigating circumstances was included in the packet.

* Another citizen of Mexico was facing instant charges of robbery, domestic violence and assault and also was the subject of an ICE detainer and warrant of arrest after a biometric match with DHS records. The alien had three recent, separate, prior felony convictions: two for auto theft and one for burglary, which had occurred over a 15-month period ending two and one-half years prior to the instant offense. A packet was sent to the sheriff for review, but apparently the offender was released on an ankle bracelet before a decision was made on whether to notify ICE of his release. Information was included in the packet relating to a prior application for asylum based on his claimed fear of harassment or violence from authorities in Mexico, relating to witnessing a murder as a teenager back in Mexico, which was the motivation given for his illegal entry into the United States. These documents were apparently included as potentially mitigating circumstances, although no information was included on the outcome of his asylum case (dating back almost 10 years), and whether it was found to be credible.

* The citizen of Ukraine was arrested and held to answer for a felony burglary charge, along with false imprisonment, receiving stolen property, threatening an officer, and a firearms charge. Two years prior, he was convicted on a robbery charge, among other offenses. The ICE request for notification was issued in April, 2016, and the packet was sent to the sheriff for review in January, 2018. The packet included information on potentially mitigating circumstances to be considered by the sheriff. The offender was said to suffer from addiction to methamphetamine and cocaine, but "hadn't been in prison since 2003." Included in the packet was a copy of an email from SFSD Prisoner Legal Services staff member Nick Gregoratos, dated March, 2018, to Andrea Lindsay, the lawyer for the alien, soliciting information on potentially mitigating circumstances that could be considered by the sheriff: "If you can give me a call to discuss ASAP, it may be beneficial to your client."

* Another citizen of Mexico was held to answer on felony burglary charges, false

imprisonment, and adult kidnapping charges. The alien had prior burglary convictions, one occurring one year prior to the instant charge, and another occurring four years prior, for which he was sentenced to 364 days plus probation. The ICE detainer was accompanied by a warrant of removal, indicating that the alien previously had been ordered removed. The packet included information on his employment as a utility worker, presumably as potentially mitigating information.

* The citizen of Cambodia was facing instant charges for assault with a deadly weapon, murder, and a loaded firearm violation. ICE had issued two detainers, and the alien was subject to a final order of removal. The Notice of Action Review worksheet was dated September 8, 2019 and sent to the sheriff for review on November 12, 2019. The packet included information on difficulties faced by Cambodian citizens who have lived much of their life in the United States as lawful permanent residents, but who are deported to Cambodia after committing serious crimes.

20. My findings related to the review packets are:

- The individual offenders whose files are submitted to the sheriff for review meet the definition of serious and violent criminals. In addition, because of their long criminal histories, they are a priority for removal for ICE. Most of the cases in this sample would be relatively simple, routine removal cases for ICE, because the aliens have already been put through due process and issued a final order of removal. In all likelihood, they would not qualify to stay in the United States. These are cases that would qualify as a priority for removal even under the Biden administration's new policies, which are the most lenient in recent history. Yet the SFSD personnel and the sheriff are devoting significant time and resources to an intensive review of their circumstances, generating large files with dozens of pages of information documenting the crimes and cases. Further, SFSD personnel are not trained in immigration law, and are not qualified to speculate on whether an individual may or may not be removable from the United States, or whether a case should or should not be a priority for federal immigration authorities.
- The SFSD review process takes a very long time. In a number of these cases, the review packet prepared for the sheriff took a month or more to compile, and the sheriff takes months or even years to issue a decision. In some cases, the review is pending for what seems to be an endless period of time, during which the alien is released after serving a sentence. This gives the

impression that the lack of a formal decision is actually the de facto decision not to communicate a release date to ICE.

- At least two of the criminal aliens whose cases were in the nine packets (the citizen of Cambodia and one of the citizens of Mexico) were released and committed additional crimes after the packets were submitted for review by the sheriff and even while her review remained pending. The case of a citizen of Mexico was reviewed at least five times when he was in SFSD custody for at least five different serious convictions within three years.
- Remarkably, in at least one instance, the SFSD appeared to solicit information from an alien offender's lawyer to assist the sheriff in finding mitigating circumstances to justify not giving out the alien's release date to ICE.
- Through this elaborate system of case review and adjudicating the question of whether to allow ICE to learn the release date of some of the most serious criminal offenders who are ever in the custody of the SFSD, the Sheriff is essentially adjudicating whether or not these aliens will be subject to removal – and the adjudication always has been that they should not be, even in the cases of the most serious alien offenders. Thus the evidence shows that this policy is not a scheme to allow the sheriff to adjudicate whether the aliens will be subject to enforcement, but a scheme to ensure that the alien offenders are not subject to removal or enforcement at all.

***Additional concluding findings*.**

21. According to the San Francisco administrative code that is the basis for the SFSD policy, the purpose of the sanctuary policy is "to foster respect and trust between law enforcement and residents, to protect limited local resources, to encourage cooperation between residents and City officials, including especially law enforcement and public health officers and employees, and to ensure community security, and due process for all."

Yet there is no evidence that the SFSD policy fulfills any of these goals. First, a sanctuary policy is not an appropriate or effective way to foster trust between law enforcement agencies and community residents or to increase reporting of crimes. The most authoritative research on immigrants and crime reporting indicates that immigrants are no less likely to report crimes than native born residents.

For example, the National Crime Victimization Study conducted by the Department of Justice,

numerous studies by local law enforcement agencies, and academic studies and surveys have shown that immigrants are actually more likely to report crimes than the native born, even without sanctuary policies.[13] This indicates that trust of authorities is not likely to be a significant problem requiring adoption of an extreme sanctuary policy.

Moreover, when criminal aliens are released back to the community instead of removed to their home country, they have the opportunity to continue committing crimes, and often the victims are other immigrants in the community.[14] Most law enforcement experts I have consulted agree that such releases tend to erode trust in law enforcement agencies, not enhance it.

22. There is no indication that the SFSD policy protects the limited fiscal resources of San Francisco County. Rather, it appears that the elaborate process for reviewing cases upon receipt of an ICE detainer, which according to the evidence reviewed above involves SFSD staff members in numerous departments, including the central records office, prisoner legal services, and occasionally the sheriff, is time-consuming and therefore costly; this review process likely consumes far more resources than simply notifying ICE of the release dates for the criminal aliens who are subject to ICE detainers, by telephone or electronic communication. Certainly, the cost of repeated arrests, prosecution, detention, probation, and other functions of the local criminal justice system as a result of recidivism by criminal aliens is likely to be far greater than the cost of providing ICE with notifications of release dates so that criminal aliens can be removed from the community and returned to their home countries.

23. Similarly, it is impossible to claim that the SFSD policy ensures community security. In fact, in my opinion it is remarkable and shocking that the top law enforcement officer of San Francisco has established this elaborate system that results in the retention in the community of criminal offenders who are present in violation of U.S. law, virtually guaranteeing that more victimization of residents will occur. There is ample evidence that many criminal alien offenders will commit new crimes after release, just as native-born offenders do. Such recidivism has been documented above in the two cases

[13] See Jessica M. Vaughan, "The Impact of Immigration Enforcement on California Children," testimony before the California Advisory Committee to the U.S. Commission on Civil Rights, October 16, 2019, Los Angeles, California: The Impact of Immigration Enforcement on California Children (cis.org)

[14] See testimony of Kenneth Blanco, U.S. Department of Justice, before the U.S. Senate Committee on the Judiciary, June, 2017, reported here: Top Justice Official Scoffs at Immigrant Crime Reporting "Chilling Effect" (cis.org).

of the citizen of Cambodia and one of the citizens of Mexico, who were released and apparently committed additional crimes *while their packets were pending determination by the sheriff to notify ICE* or not. This is consistent with the nationwide data in the case of releases due to sanctuary policies.

For example, in a 2015 study of criminal alien releases, ICE found that out of 8,145 individual aliens who were freed by local agencies due to sanctuary policies over an eight-month period in 2014, there were 1,867 (23 percent) who were subsequently arrested again within the period for another criminal offense.[15] They were arrested 4,298 additional times, and accumulated 7,491 new charges in total, after their release. The report describes several instances of very serious crimes committed by criminal alien felons who were sought by ICE with a detainer, but nevertheless released by a local law enforcement agency with sanctuary policies, including one case in San Francisco:

> ***"****On March 19, 2014, an illegal alien with two prior deportations was arrested for "felony second degree robbery, felony conspiracy to commit a crime, and felony possession of a narcotic controlled substance", After release, the alien was again arrested for "felony rape with force or fear", "felony sexual penetration with force", "felony false imprisonment", witness intimidation, and other charges.*

Recently, the California State Advisory Committee to the U.S. Commission on Civil Rights expressed concern about the public safety problems created by sanctuary policies like the one adopted by San Francisco. The committee's report, based on extensive testimony from academic and government experts, and published in January, 2021 stated:

> *"Many local law enforcement agencies allow limited access to ICE to undocumented persons in local custody. This limited access may reduce the ability for ICE to deport undocumented individuals who committed crimes and who may pose the highest risk to public safety. As a result, many undocumented individuals convicted of crimes are released into communities resulting in ICE agents seeking the arrest and deportation of these same individuals in communities rather than in a controlled custodial environment.*

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[15] Jessica M. Vaughan, "Rejecting Detainers, Endangering Communities: Sanctuaries release thousands of criminals," Center for Immigration Studies, July 13, 2015, Rejecting Detainers, Endangering Communities (cis.org).

The transfer of ICE enforcement activity from the local jails/prisons to the communities increases the risk to agents, the undocumented individuals being sought as well as to community members at large. The enforcement in communities also increases the negative perception of ICE in those communities and creates greater fear for undocumented individuals and their children living in those communities. Although the sanctuary laws were intended to protect undocumented immigrants, they may be doing more harm than good and primarily protecting undocumented immigrants who commit crimes."[16]

24. As for "ensuring due process," another stated purpose of the policy, it is clear from the evidence that the aliens sought by ICE are receiving it. Due process in immigration proceedings is not determined by local or state officials; it has been established by Congress, with tweaking by the federal courts over time. It includes authorization for ICE officers to issue detainers and warrants of arrest and removal, and authorizes local law enforcement agencies to comply with them. As demonstrated in the numerous files of detainers, warrants and other records made available which show, for example, statements of probable cause for arrest and final orders of removal issued by immigration judges and designated ICE officers that cite the grounds for removal, all of the criminal aliens whose cases are at issue are receiving and have received ample due process to resolve their immigration charges.

25. The aforementioned California civil rights committee report also noted that sanctuary policies that prohibit communication and cooperation with ICE have the effect of interfering with ICE's ability to carry out its mission, and increase the danger to ICE officers. The committee reported on testimony from David Marin, director of ICE's Los Angeles Field Office, stating that the number of arrests that ICE officers are making in the communities – rather than in custody of local law enforcement: hence with increased peril to all concerned -- is increasing due to restrictions on cooperation with federal authorities imposed upon local law enforcement agencies by state sanctuary laws.

The aforementioned 2015 ICE report on criminal alien releases and recidivism stated that

[16] Report of the California Advisory Committee to the U.S. Commission on Civil Rights, "Understanding the Impact of Immigration Enforcement on California Children in K-12 Schools," January, 2021, Native American Briefing Report (usccr.gov).

officers were able to apprehend only a fraction of the aliens released by sanctuary policies within the time period of the report. Specifically, of 1,867 released offenders who subsequently were arrested for another crime within that eight-month period, ICE was able to re-apprehend 751 of the recidivists, but 1,116 (60 percent) remained at large.[17]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed March 10, 2021, at *city* St. Helena Island and *state* SC.

Jessica M. Vaughan

JESSICA M. VAUGHAN

[17] ICE statistics cited in Vaughan, "Rejecting Detainers."

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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

DECLARATION OF ANDREW R. ARTHUR IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Hearing:	March 24, 2021
Time:	9:30 a.m.
Place:	Dept. 302 Hon. Ethan Schulman
Action Filed:	December 27, 2016
FAC Filed:	June 14, 2017
Trial Date:	April 26, 2021

I, Andrew R. Arthur, declare:

I am the Resident Fellow in Law and Policy at the Center for Immigration Studies in Washington, D.C. I am making this declaration in support of Plaintiff's opposition to Defendant's motion for summary judgment and/or adjudication. I have personal knowledge of the facts contained in this declaration, and, if called as a witness could, and would, competently testify to those facts.

My Background and Experience in Drafting, Applying, and Interpreting the Immigration Laws of the United States in the Context of State Criminal Laws

1. I was admitted to the bar of the Court of Appeals of the State of Maryland on December 15, 1992, and remain a member in good standing. I was also admitted to the bar of the U.S. Court of Federal Claims on January 6, 1994, and remain in good standing.

2. In 1992, I was selected through the Attorney General's Honors program to serve in the U.S. Department of Justice, Executive Office for Immigration Review (EOIR), Office of the Chief Administrative Hearing Officer (OCAHO) in Falls Church, Virginia. At OCAHO, I worked as a judicial law clerk to the late Hon. Joseph McGuire, an administrative law judge. I commenced my service with Judge McGuire in June 1992.

OCAHO has jurisdiction over cases arising under three provisions of the Immigration and Nationality Act (INA): (1) knowingly hiring, recruiting or referring for a fee unauthorized aliens, or the continued employment of unauthorized aliens, failure to comply with employment verification requirements, and requiring indemnity bonds from employees in violation of section 274A of the INA, 8 U.S.C. § 1324a; (2) immigration-related unfair employment practices in violation of section 274B of the INA, 8 U.S.C. § 1324b; and (3) immigration-related document fraud in violation of section 274C of the INA, 8 U.S.C. § 1324c.

As a judicial law clerk, I reviewed complaints filed by the Department of Justice's then-Immigration and Naturalization Service (INS) (duties now performed by U.S. Immigration and Customs Enforcement (ICE) within the Department of Homeland Security (DHS)), the department's then-Office of Special Counsel for Immigration Related Unfair Employment Practices (now the Civil Rights Division's Immigrant and Employee Rights section within the Department of Justice), and private plaintiffs, as well as responses filed by defendants in those matters and other briefs and pleadings. I also

briefed issues for Judge McGuire, and drafted proposed decisions.

3. In September 1994, I was again selected through the Attorney General's Honors Program as a trial attorney (later designated "Assistant District Counsel") in the INS District Counsel's Office in San Francisco, California, where I remained until February 1998. In February 1998, I transferred to the INS District Counsel's Office in Baltimore, Maryland.

In both the San Francisco and Baltimore District Counsel's Offices, I represented the government in exclusion, deportation, removal, and rescission cases before the respective immigration courts in EOIR. In those matters, I presented evidence showing that alien respondents were subject to exclusion, deportation, or removal from the United States, or should have their lawful permanent resident (LPR) status rescinded, in accordance with various grounds of inadmissibility, excludability, and deportability in the INA, or alternatively in accordance with the rescission statute.

In those matters, I also represented the government with respect to claims by alien respondents that they were eligible for relief or protection under various provisions of the INA. Of relevance to this case, I largely was assigned to represent the government in matters involving alien respondents who were detained (particularly in the San Francisco District Counsel's Office), usually because they had committed state or federal criminal offenses that rendered them amenable to exclusion, deportation, or removal from the United States.

In addition, I represented the INS in matters under sections 274A and 274C of the INA, and also provided legal advice to operational units within those respective INS offices as to the application of the INA, the U.S. Constitution, and various state and federal criminal laws.

4. In January 1999, I was promoted to the INS General Counsel's Office in Washington, D.C., where I served first as an Associate General Counsel, and then as an Assistant General Counsel. I began my service within the INS General Counsel's Office with the Enforcement Law Division, which had jurisdiction over aliens who were subject to exclusion, deportation, and removal under the INA.

When a separate National Security Law Division was established within the INS General Counsel's Office, I was transferred thereto. In the National Security Law Division, I supervised district- and regional-level immigration attorneys assigned to cases before the immigration courts involving aliens known or suspected of having engaged in terrorism, espionage, and persecution, as well as other

high-profile immigration-related cases.

In this capacity, I served as a personal advisor to then-Attorney General Janet Reno. In addition, I provided legal and operational advice on the application and interpretation of the INA and various state and federal criminal laws to operational units at INS headquarters, as well as to the commissioner of the INS, the Federal Bureau of Investigation (FBI), the Department of State, the Central Intelligence Agency, and the National Security Agency.

During the spring and into the summer of 2001, I served as the Acting Chief of the National Security Law Division at the INS General Counsel's Office.

5. In July 2001, I left the INS, and went to the Committee on the Judiciary at the U.S. House of Representatives, where I served as an oversight counsel to the full committee as well as a counsel to its Subcommittee on Immigration and Claims (later the Subcommittee on Immigration, Border Security and Claims, and now the Subcommittee on Immigration and Citizenship).

In this position, I advised the Judiciary Committee chairman, subcommittee chairmen, the Speaker of the House, House Majority Leader, House Majority Whip, other committee chairmen, and Members of the House and Senate from both parties on issues relating to the INA and its implementation, as well as on matters having to do with the national security of the United States.

As counsel, I was involved in the drafting of and negotiation on various bills that were enacted into law, including: the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001", Pub.L. 107-56, 115 Stat. 272 (2001); the "Homeland Security Act of 2002", Pub.L. No: 107-296, 116 Stat. 2135 (2002); the "North Korean Human Rights Act of 2004", Pub.L. 108-333, 118 Stat. 1287 (2004); the "Intelligence Reform and Terrorism Prevention Act of 2004", Pub.L.108-458, 118 Stat. 3638 (2004); the "REAL ID Act of 2005", Pub.L. 109–13, 119 Stat. 302 (2005); and the "Secure Fence Act of 2006", Pub.L. 109–367, 120 Stat. 2638 (2006).

I was the primary staff drafter of Title I of the REAL ID Act, as well as the primary staff drafter and negotiator of the Committee Report relating to that title.

6. On November 2, 2006, I was appointed by the Attorney General to serve as an immigration judge at the York Immigration Court in York, Pennsylvania. As an immigration judge, I

heard removal, exclusion, and deportation cases involving aliens charged with removability under the INA. In addition, I adjudicated bond requests by respondents in removal and deportation proceedings, and applications for relief and protection under various provisions of the INA.

The York Immigration Court has jurisdiction over cases of alien respondents in ICE detention facilities within the Commonwealth of Pennsylvania (including the York County Prison, where the court was co-located), as well as those incarcerated in the Pennsylvania state corrections system, Federal Correctional Institution (FCI) Allenwood, and FCI Moshannon. As a result, a large number of the alien respondents who appeared before me had federal or state criminal convictions.

7. In January 2015, I returned to the House of Representatives, serving as the staff director for the Subcommittee on National Security at the Committee on Oversight and Government Reform (now the Committee on Oversight and Reform). In this capacity, I had and exercised oversight of DHS (including ICE, CBP, and USCIS), the Department of Justice (including EOIR), the Department of Defense, and various intelligence agencies.

8. I retired from government service in September 2016. In my personal capacity, I testified before the House Committee on the Judiciary, Subcommittee on Immigration and Border Security on "Restoring Enforcement of our Nation's Immigration Laws," on March 28, 2017.

9. In April 2017, I was hired to be the Resident Fellow in Law and Policy at the Center for Immigration Studies (CIS). In this role, I analyze and interpret various provisions of the INA, as well as federal court decisions related to immigration, and assess the implications of immigration policies.

At CIS, I have testified before the U.S. Congress as a witness on a wide variety of immigration-related topics on seven different occasions: Before the House Committee on Natural Resources, Subcommittee on Oversight and Investigations on "The Costs of Denying Border Patrol Access: Our Environment and Security," on February 15, 2018; before the House Committee on Oversight and Government Reform, Subcommittee on National Security on "A Caravan of Illegal Immigrants: A Test of U.S. Borders," on April 12, 2018; before the Senate Committee on the Judiciary, Subcommittee on Border and Immigration on "Strengthening and Reforming America's Immigration Court System," on April 18, 2018; before the House Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies on "Reviewing the Administration's Unaccompanied

Children Program," on February 27, 2019; before the House Committee on the Judiciary, on "Protecting Dreamers and TPS Recipients," on March 6, 2019; before the House Committee on the Judiciary, Subcommittee on Immigration and Citizenship and the House Committee on Foreign Affairs, Subcommittee on Oversight and Investigations, on "Oversight of the Trump Administration's Travel Ban," on September 24, 2019; and before the House Committee on the Judiciary, Subcommittee on Immigration and Citizenship, on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts," on January 29, 2020.

10. In addition, I have appeared on PBS, Fox News, the Australian Broadcasting Corporation, NPR, the Voice of America, and the British Broadcasting Corporation—as well as various other international, national, and local news outlets -- to discuss various aspects of immigration law and policy. I have also been quoted in the Washington Post, Wall Street Journal, and numerous other newspapers and press outlets on these subjects.

I have also advised foreign parliamentarians on immigration issues--both in the United States and in their own countries-- at the behest of the United States Department of State.

Notwithstanding Contrary Ninth Circuit Precedent, the Operative Phrase in Sections 1373(a) and 1644 Most Relevant to this Case Is Broad and Ambiguous

11. There are two provisions in Title 8 of the U.S. Code that are pertinent to this matter. The first, 8 U.S.C. § 1373(a) ("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, the Immigration and Naturalization Service* ***information regarding the citizenship or immigration status, lawful or unlawful, of any individual****. (Emphasis added.)*

Similarly, 8 U.S.C. § 1644 ("section 1644") states:

> *Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service* ***information regarding the immigration status, lawful or unlawful, of an alien in the United States****. (Emphasis added.)*

I will refer to the language highlighted in the provisions above as "the operative phrase" in these sections of Title 8.

Congress has made clear in the two sections above that it wants to ensure that there is a free flow

of communication between federal immigration agencies and state and local officials with respect to the information described in that operative phrase, to the degree that state and local officials—as opposed to the agencies or entities for which they work—are willing to share that information.

That operative phrase has also been the subject of published Ninth Circuit decisions addressing these sections, and that phrase is, in my opinion, central to the issues in this suit. Having reviewed the legislative history and case law, I conclude that this phrase is ambiguous, and requires reference to that legislative history to define the parameters of the information included therein. I also conclude that those sections prohibit bars on the sharing of a broader range of information than federal courts—particularly the Ninth Circuit—have recognized.

I will explain the reasons for these conclusions, below.

References to the Immigration and Naturalization Service in sections 1373(a) and 1644 Now Refer, De Jure and De Facto, To ICE

12. As an aside, I note that since the passage of those sections of Title 8 in 1996, the INS was abolished in section 471(a) of the Homeland Security Act of 2002, effective March 1, 2003 (*see* 116 Stat. 2205). Its responsibilities for enforcement of the INA and other immigration laws in the interior of the United States has subsequently been assigned to ICE. Accordingly, reference in each section to the "Immigration and Naturalization Service" should now be primarily if not exclusively to "ICE".

The Legislative History of Sections 1373(a) and 1644

13. Individually and taken together, these two provisions bar states and localities from prohibiting or otherwise restricting state and local government entities or officials in sending to or receiving from ICE information regarding the immigration status (if any) of an individual.

Section 1644 was added to Title 8 of the U.S. Code by section 434 of the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996" (PRWORA), Pub.L. 104-193, 110 Stat. 2105, 2275 (1996).

Section 1373(a), on the other hand, was added by the "Illegal Immigration Reform and Immigrant Responsibility Act of 1995" (IIRIRA), Div. C of the "Omnibus Consolidated Appropriations Act, 1997", Pub.L. 104-208, 110 Stat. 3009-546 *et seq*. (1996), at title VI, subtitle D, section 642, 110 Stat. 3009-707.

The two provisions were enacted in a short period of time: PRWORA was signed on August 22, 1996, while IIRIRA was signed on September 30, 1996.

Ninth Circuit Case Law Interpreting Sections 1373(a) and 1644

14. In *Steinle v. City and Cty. of San Francisco*, 919 F.3d 1154 (9th Cir. 2019)—which involved an appeal from a district court dismissal of a general negligence claim-- the Ninth Circuit implied that the textual language of the operative phrase in the two provisions was "unambiguous", and therefore reference to the legislative history of those provisions and cross-reference to other provisions in Title 8 to interpret them was inappropriate. *Id*. at 1164.

I say "implied", because the circuit court's logic was largely conclusory, and respectfully not entirely clear. It held, however, that the statutory language in neither section 1373(a) nor section 1644 included the disclosure of release-date information by local law enforcement officials. *Id*. But, the Ninth Circuit did not further explain the parameters of the information that cannot be prohibited from disclosure under those provisions, as that case focused on such release-date information.

Rather, it concluded somewhat vaguely, that the statutory text in those provisions "includes only 'information regarding' 'immigration status.'" Again, that begs the question of exactly *what* that means, and therefore *what* disclosures cannot be barred under those provisions. By failing to address this issue, there is no way to assess the validity of the circuit court's ultimate conclusions. I will return to this below.

15. Thereafter, in *United States v. California*, 921 F.3d 865 (9th Cir. 2019), the Ninth Circuit held that "the phrase 'information regarding the citizenship or immigration status, lawful or unlawful, of any individual'" in section 1373(a) "is naturally understood as a reference to a person's legal classification under federal law". *Id* at 891.

California involved an appeal from a denial of a preliminary injunction sought by the federal government of, *inter alia*, California's Senate Bill 54 (SB 54), the "California Values Act", which limits assistance by state and local law enforcement agencies to federal immigration enforcement agencies (in most instances, ICE).

The circuit court found that the district court below "correctly concluded that 'Section 1373 and the information sharing provisions of SB 54 do not directly conflict.'" *Id*. at 893, quoting *United States*

v. California, 314 F.Supp.3d 1077, 1104 (E.D. Cal. 2018) (*California I*). Among the disclosures prohibited under SB 54 are release-date information for detainees and the home address of any person, as the circuit court noted. *California*, 921 F.3d at 876.

The circuit court's narrow interpretation of section 1373(a) in *California*, like that of the district court below, was in error as a matter of statutory interpretation.

Note that both courts took the 13 words in the operative phrase in section 1373(a) (again, "information regarding the citizenship or immigration status, lawful or unlawful, of any individual"), and eliminated all of them except the following six: "the . . . immigration status . . . of any individual", or in the circuit court's terms in *California* "a person's legal classification under federal law". *California*, 921 F.3d at 891 (citing *California I*, 314 F.Supp.3d at 1102).

Interestingly, the circuit court did admit that "[p]hrases like 'regarding' may generally have 'a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject". *California*, 921 F.3d at 891-92.

It ultimately ignored, however, the implications of its own assessments about that broadening language in section 1373(a), cursorily finding "if the term 'regarding' were 'taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere." *Id*.

Plainly, the operative phrase is and must be cabined, but again respectfully, the Ninth Circuit in *California* never even attempted to explain what information or how broad a range of information that section 1373(a) prohibits federal, state, and local governments from barring state and local entities and officials from disclosing.

Because of that, again, there is no way to accurately gauge whether the Ninth Circuit in *California* was ultimately correct in its conclusion that a state provision like SB 54 prohibiting state and local officials from disclosing, *inter alia*, release-date information does not violate section 1373(a).

And, I note that the United States there was not arguing for any such universal application of the sort that the Ninth Circuit envisioned—just for information relevant to an individual's citizenship or immigration status, lawful or unlawful, as section 1373(a) requires. Consequently, the Ninth Circuit gave the word "regarding"—and six other words in the relevant operative phrase in section 1373(a)—no

effect at all.

The Ninth Circuit's Decision in* California *Contravened Precedent in Failing to Give Operative Effect to Each of the Words in the Operative Phrase in Section 1373

16. That was the error, as reference to controlling precedent reveals.

Specifically, in *United States v. Nordic Village*, 503 U.S. 30, 36 (1992), the Supreme Court held that there is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." The rationale is simple, and one that I understand well as a former congressional staffer.

Simply put, Congress is expected to know how the laws are enforced when it drafts legislation, and means what it says. But, it cannot anticipate every exigency when it drafts legislation, and thus uses broadening language like the word "regarding" in the operative phrase in sections 1373(a) and 1644 to ensure that it does not inadvertently exclude some key act, fact, or procedure from the scope of that legislation.

As noted above, the circuit court in *California*, like the district court in *California I*, violated the "settled rule" described in *Nordic Village* by essentially striking seven words in the 13-word operative phrase in section 1373(a).

This error may have occurred because the litigation in *California* never advanced beyond the preliminary injunction stage, where a more complete analysis of the provision—including analysis informed by expert testimony—would have been possible. But, the reasoning in *Steinle* rests on no sounder basis, nor is the conclusion of the circuit court there any more persuasive.

17. The circuit court in *Steinle* quoted *In re HP InkJet Printer Litig.*, 716 F.3d 1173, 1180 (9th Cir. 2013), for the proposition that:

> *The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.*

Steinle, 919 F.3d 1164. Respectfully, the Ninth Circuit's reliance there on what is-- in my opinion-- inapplicable precedent (given the breadth of the language in the operative phrase, and the circuit's failure to give operative effect to that language) was in error.

Notably, however, the circuit court in *Steinle* never made clear what sections 1373(a) and 1644

do mean—it only stated what it concluded they don't. That fact itself indicates that the operative phrase is not as clear as that court's conclusory statements would suggest. Specifically, because the Ninth Circuit never fleshed out the full parameters and implications of those provisions, there is no way to assess whether its ultimate conclusion about release dates not being included in those provisions is correct, or not.

The Ninth Circuit Decision in* California *Created an Absurd Result Contrary to Law

18. It is axiomatic that courts "should attempt to effectuate the purpose of federal legislation and avoid interpretations which produce absurd or nugatory results." *Application of United States*, 563 F.2d 637, 642 (4th Cir. 1977); *cf. Nardone v. United States*, 308 U.S. 338, 341 (1939) ("A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose.").

As noted above, the Ninth Circuit in *California* found that the operative phrase in section 1373(a) "is naturally understood as a reference to a person's legal classification under federal law". *California*, 921 F.3d at 891. Again, with due respect, it is only "naturally" understood as a person's legal classification under federal law if one lacks an understanding of how the INA and in particular immigration enforcement works in practice, because in practice it creates an absurd result.

19. To understand how immigration enforcement works in practice in this context, this court need go no further than the defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment and/or Adjudication. It provides a fairly clear and accurate description of how ICE identifies potentially removable aliens in state and local criminal custody.

It explains:

> *[The San Francisco Sheriff's Department (SFSD)] scans arrestees' fingerprints during booking and sends those prints electronically to the California Department of Justice, which in turn sends them to the FBI, which defendant understands shares them with other federal agencies including the Department of Homeland Security – thus providing the basis for ICE to send detainer requests and/or notification requests to SFSD.*

Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment and/or Adjudication, at 11 n.5.

In other words, suspects are booked into state and local custody, and state and local law enforcement agents send those fingerprints up the line to the FBI. FBI sends them to other federal

agencies, including to the ICE Law Enforcement Support Center (LESC) in Williston, Vermont. *See Law Enforcement Support Center*, U.S. Immigration and Customs Enforcement (undated), available at: https://www.ice.gov/lesc (last accessed March 5, 2021).

LESC then performs records checks to assess whether the arrestee is an alien, and if so, whether the alien is removable from the United States. That gets sent back down the ICE line, resulting in the issuance of an I-247A ("Immigration Detainer—Notice of Action") to the state or local law-enforcement agency.

ICE has the expertise to determine "the citizenship or immigration status, lawful or unlawful" of an individual, but records checks often if not usually do not provide sufficient information to make that determination as a dispositive matter.

20. The absurdity in the Ninth Circuit's interpretation of section 1373(a) in *California* becomes clear when the first lines of the referenced footnote in the defendant's Memorandum of Points and Authorities is considered.

That footnote in the defendant's Memorandum begins:

> *As a practical matter, ICE is likely to know more about the citizenship and immigration status of inmates in SFSD's jails than SFSD does. SFSD itself does not investigate any person's immigration status, save when that status may be a material fact of an alleged criminal offense, such as trafficking, smuggling, or terrorism.*

Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment and/or Adjudication, at 11 n.5.

In the case of SFSD, the department likely does not know the citizenship and immigration status of its inmates because it deliberately bars its officers from asking about a suspect's immigration status (pursuant to its own and other local and state laws and policies), and because such status is not relevant to the enforcement of California's or San Francisco's laws. *See* SFSD 02-39, "Policy" ("A person's immigration status shall have no bearing on the manner in which employees execute their duties").

Even for local law enforcement agencies that do not have such restrictive policies, however, any assessment by officers in those agencies of an individual's alienage *vel non* will not actually answer the question of whether the individual is a citizen or alien, "lawful or unlawful". *See* 8 U.S.C. § 1373(a).

Absent training under section 287(g) of the INA, 8 U.S.C. § 1357(g), or unless those officers previously served in DHS, they likely would not be experts in the complexities of immigration law, nor

should they be expected to be—they are the experts in local law enforcement.

State and local officers would not even likely know the facts that they needed to elicit to make a determination of whether an individual is an alien, or if he or she is, whether that individual is here illegally. So, that local law enforcement agency could not actually tell ICE precisely what the "person's legal classification under federal law" is, even if they wanted to. *See California*, 921 F.3d at 891.

According to the Ninth Circuit in *California*, however, that is the *only information* that Congress in section 1373(a) prohibits states and localities from barring their entities and officials from sending to ICE. *See id*. That is the absurd result of the circuit court's interpretation there: The only information that local entities and officials must be allowed to share with ICE is information that those entities and officers have no expertise in collecting and assessing, and about which ICE usually already knows more than those entities and officers to begin with.

21. Comparing section 1373(a) to 8 U.S.C. § 1373(c) (section 1373(c)) further proves this point, and illustrates Congress's understanding of how the immigration laws are enforced and its intentions in drafting that provision.

Section 1373(c) states:

> *The Immigration and Naturalization Service [now ICE] shall respond to an 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****. (Emphasis added.)*

As the Supreme Court has held: "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983), *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (internal brackets omitted). That is certainly true in section 1373(c), where no broadening language having to do with "information regarding" the immigration status of any individual appears, as it does in section 1373(a).

Comparing the highlighted portion of the excerpt from 1373(c) to the operative phrase in 1373(a) demonstrates Congress's understanding of the different levels of expertise between ICE on the one hand and state and local law enforcement officials on the other when it comes to the ability of each to identify

an individual's "classification under federal [immigration] law".

Immigration law is complex (*see Castro-O'Ryan v. U.S. Dept. of Immigration and Naturalization,* 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed "second only to the Internal Revenue Code in complexity.") (citations omitted)), and there are many facts that state and local officials would not have at their disposal to make an assessment of a person's immigration classification under federal law, absent asking ICE.

Simply put, ICE can verify an individual's immigration status for a federal, state, or local government agency as Congress has directed it to do in section 1373(c). A state or local official cannot do the same for ICE, but allowing for the provision of such information is the only restriction on states and local governments that the Ninth Circuit in *California* reads into section 1373(a). *See California*, 921 F.3d at 891.

22. As an aside, I note that footnote 5 in the Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment and/or Adjudication all but admits as much. Congress plainly wanted information sharing between state and local entities and officers on the one hand and INS/ICE on the other, because it prevented prohibitions to such information sharing in two separate provisions (sections 1644 and 1373(a)) in two separate bills passed just weeks apart.

For that reason, the Ninth Circuit's limitation in *California* on the information that states and localities are prohibited under section 1373(a) from barring their officials from disclosing to ICE to a "person's classification under federal law" both improperly *de facto* negates section 1373(a) and leads to an absurd result. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217-18 (2002) ("It is. . . not our job to find reasons for what Congress has plainly done; and it is our job to avoid rendering what Congress has plainly done . . . devoid of reason and effect.").

23. That absurdity, however, may not be apparent in the abstract. For that reason, I will provide a concrete example.

Section 320 of the INA, 8 U.S.C. § 1431, governs the automatic acquisition of citizenship by children born outside of the United States who have been lawfully admitted for permanent residence.

Pursuant to subsection (a) in that provision, if an alien lawfully admitted for permanent residence

(that is, with a green card, *see* section 101(a)(20) of the INA, 8 U.S.C. § 1101(a)(20) (defining the term "lawfully admitted for permanent residence")) resides in the United States while under the age of 18 in the legal and physical custody of a parent who is a citizen of the United States by birth or naturalization, that erstwhile lawful permanent resident will automatically become a lawful U.S. citizen. *See* section 320(a) of the INA, 8 U.S.C. § 1431(a).

So, if a local law enforcement officer were to arrest an individual, and in the course of checking that individual's possessions finds a green card (for example), at best the officer would know that the individual had been a lawful permanent resident alien at one time.

The same would likely be true even if that officer asked the arrestee what his or her immigration status was, because many individuals who have automatically gained citizenship under section 320 of the INA are unaware of that fact.

Those facts (that an arrestee claims to be a lawful permanent resident and has a green card) would not alone be enough information for ICE to determine whether the arrestee was an alien amenable to deportation (*i.e.*, the individual's "immigration status, lawful or unlawful"), regardless of the individual's criminal history, because that individual may have become a U.S. citizen automatically under section 320 of the INA.

24. This is not a purely theoretical scenario. As an immigration judge, I heard many cases involving individuals convicted of criminal offenses designated as "aggravated felonies" under section 101(a)(43) of the INA, 8 U.S.C. § 1101(a)(43)—crimes that render even lawful permanent resident aliens removable and that bar any alien from almost all forms of relief and protection—who asserted as a defense to removal that they had become citizens automatically under section 320 of the INA, 8 U.S.C. § 1431(a).

The only way for ICE officers to make such a determination would be to actually interview the arrestee. The ways in which ICE officers would be able to interview the arrestee would be to talk to that arrestee in state or local criminal custody, or to be told by state or local officials that arrestee's release date or home or work address, so that those ICE officers could interview the arrestee outside of state or local custody.

ICE access to arrestees is barred, however, under SFSD 02-39, section 2 ("Procedures"),

subsection F ("Communications with LEA, Including Agencies Conducting Civil Immigration Enforcement"), paragraph 2, subparagraph (a). More pertinently, however, SFFD 02-39, section 2, subsection F, paragraph 2, subparagraphs (e) and (f) bar SFSD officers and employees from disclosing release dates and home and work contact information.

25. That said, however, the court does not need to solely consider the situation in which aliens may have attained citizenship automatically under section 320 of the INA. There are an unknown number of immigrants who enter the United States illegally and evade detection by U.S. Customs and Border Protection annually.

ICE would have no information about those individuals, but it would have probable cause to believe that they were aliens unlawfully present in the United States if there were no information indicating that they were born in the United States or had immigrated lawfully. Only by interviewing those individuals can ICE determine their status.

If those individuals are in state or local custody, in order for ICE to interview them, it would need to be granted access to them in custody, or to be told their release dates or home- or work-contact information. That would therefore be "information regarding" their "citizenship or immigration status, lawful or unlawful". *See* section 1373(a); section 1644.

Thus, release dates and home and work contact information are, contrary to the Ninth Circuit's decisions in *Steinle* and *California*, "information regarding the citizenship or immigration status, lawful or unlawful, of any individual", that states and localities are prohibited from barring their officers and employees from disclosing under sections 1373(a) and 1644. *Cf. Steinle*, 919 F.3d at 1164; *California*, 921 F.3d at 891.

The Ambiguity in Sections 1373(a) and 1644

26. All of this demonstrates that the Ninth Circuit's interpretation of section 1373(a) in *California* creates a result that at best negates that provision, and at worst renders it an absurdity. *Cf. id.* ("the phrase 'information regarding the citizenship or immigration status, lawful or unlawful, of any individual' is naturally understood as a reference to a person's legal classification under federal law"). As noted, the circuit court's formulation is thus contrary to precedent. *See Great-West Like & Annuity Ins. Co.*, 534 U.S. at 217-18; *see also Nardone*, 308 U.S. at 341*; Application of United States*, 563 F.2d

at 642.

The fact that the circuit court in *Steinle* implied that the operative phrase in sections 1373(a) and 1644 was "unambiguous" does not mean that its decision there does not suffer from similar infirmities. *See Steinle*, 919 F.3d at 1164.

The Supreme Court has held that judicial inquiry of an unambiguous statute "is complete except in rare and exceptional circumstances", but that one of those circumstances is "where the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters.'" *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991), *quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

As explained above, the interpretation of sections 1373(a) and 1644 in *Steinle* is at odds with the intentions of the drafters of IIRIRA and PRWORA, respectively, because that result is an absurd nullity.

The Ninth Circuit in *California* (in particular) failed to recognize the ambiguity in the operative phrase in section 1373(a), because, as noted, it improperly failed to give operative effect to seven of the 13 words in that phrase . *See Nordic Village*, 503 U.S. at 36; *cf. California*, 921 F.3d at 891 ("the phrase 'information regarding the citizenship or immigration status, lawful or unlawful, of any individual' is naturally understood as a reference to a person's legal classification under federal law").

To reiterate again, ICE does not need state and local officials to tell it "the legal classification under federal law" of a state or local inmate or detainee to do its job. *See id*. Instead, even under the most restrictive interpretation of the operative term, the agency either needs to have access to the inmate or detainee in state or local custody, to know the release date of that individual, or to have contact information for that individual, so that it can interview the individual to assess accurately what that individual's status is.

The most significant error in the Ninth Circuit's analysis under *California* is its recognition that the term "regarding" in section 1373 "may generally have 'a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject," (*id*. at 891-92, *quoting Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1759-60 (2018)), but then failing to explore what the limits of that "broadening effect" was. The word, however, is in the operative phrase in both sections 1373(a) and 1644, but the Ninth Circuit simply read it out, and thereby failed to recognize that

the phrase is ambiguous.

Given the Ambiguity in Sections 1373(a) and 1644, Reference to Legislative History Is Appropriate

27. The seven words that the circuit courts essentially struck in the operative phrase must mean something (and be given effect), as *Nordic Village* makes clear. *See Nordic Village*, 503 U.S. at 36. That ambiguity invites reference to the legislative history of each provision to determine what that something is.

In *Thornburg v. Gingles*, 478 U.S. 30, 44 n. 7 (1986), the Supreme Court held: "We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill."

The committee report on the precursor to section 1373(a) is enlightening in this regard, and helps to explain why the word "regarding" -- which the circuit court in *California* found generally has 'a broadening effect'"-- is in the operative phrase.

That provision began as a slightly differently worded section 833 of the Immigration in the National Interest Act of 1995, H.R. 2202 (104th Cong.).

At the time the Committee Report of the House Judiciary Committee on that bill, H.R. Rep. 104-469 Part 1, was ordered to be published on March 4, 1996, section 833 read:

> *Notwithstanding any other provision of Federal, State, or local law, no State or local government entity shall prohibit, or in any way restrict, any government entity or any official within its jurisdiction 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. Notwithstanding any other provision of Federal, State, or local law (and excepting the attorney-client privilege), no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.*

H.R. Rep. 104-469, at 104 (1996).

The House Judiciary Committee fleshed out its intentions for this provision in that report:

> *This section provides that notwithstanding any other provision of Federal, State, or local law, no State or local government entity shall prohibit or in any way restrict any government entity or official from sending to or receiving from the INS information regarding the immigration status of an alien in the United States.*
>
> *The Committee* ***intends to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, and activities of illegal aliens****. This section 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 Committee believes 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 U.S. undetected and unapprehended***. *(Emphasis added.)*

Id. at 277.

You can see the parameters of what would become section 1373(a) in the report summary for that section. And, the intention of the drafters was more than clear: It wanted INS to know where what it termed "illegal aliens" were, and that logically includes release dates for aliens detained in state and local facilities.

I have explained why that information is encompassed in the operative phrase above, in explaining why the Ninth Circuit's interpretations of the operative phrase in sections 1373(a) and 1644 is absurd, as a matter of law and fact.

By the time that H.R. 2202 (by then renamed "IIRIRA"), went to conference, the language had more or less been trimmed down to what appears in section 1373(a) today, and the conference report simply reiterated that language, in what was now section 642 of H.R. 2202. *See* H. Rept. 104-828, at 249 (1996).

28. Section 1644 appears in the Conference Report for PRWORA, in connection with Title IV, subtitle D of that bill, captioned "Eligibility for State and Local Public Benefits Programs". *See* H.R. Rep. 104-725, at 390-392 (1996).

The Conference Report explains the rationale for section 1644 (then section 434 of PRWORA):

> *The confidentiality provisions of various State statutes may prohibit disclosure of immigration status obtained under them. Some Federal laws, including the Family Education Rights and Protection Act, may deny funds to certain State and local agencies that disclose a protected individual's immigration status. Various localities have enacted laws preventing local officials from disclosing the immigration status of individuals to INS.*

H.R. Rep. 104-725, at 391 (1996). That more or less supports the Ninth Circuit's conclusions in *Steinle* and *California*, but it is not the end of the story, because the conferees had already expanded on what would become section 1644 earlier in the same title, in the preceding subtitle B, which creates at section 401 therein a comprehensive scheme for "aliens who are not qualified aliens or nonimmigrants ineligible for public benefits". *Id*. at 382-384.

That Conference Report references and further explains the language in section 434 (again, the

future section 1644), stating:

> *The conference agreement provides that no State or local government entity shall prohibit, or in any way restrict, any entity or official from sending to or receiving from the INS information regarding the immigration status of an alien* ***or the presence, whereabouts, or activities of illegal aliens. It does not require, in and of itself, any government agency or law enforcement official to communicate with the INS. 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****. (Emphasis added.)*

Id. at 383. Note that this provision places section 434 in the context of the comprehensive scheme in section 401 of PRWORA, in much the same way that the House Judiciary Committee Report for what would become section 1373(a) places that provision in the context of the general immigration enforcement scheme of the INA (which I explain further below).

At the same time, however, the PRWORA conferees also recognized the federalism and Tenth Amendment concerns that a broader application of what would become section 1644 would have created (*i.e.*, "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."). *See id*.

The Conference Report did not say that State and local officials *had* to communicate with INS—only that they had the authority to do so, and that this authority could not be restricted by state or local government entities, which is exactly what the SFSD is attempting to do in SFSD 02-39. *See id*; *see e.g.*, SFSD 02-39, section II ("Procedures"), subsection F ("Communications with LEA, Including Agencies Conducting Civil Immigration Enforcement"), paragraph 3 (SFSD employees are barred from providing "Responses to I-247A or other DHS / ICE release notification requests unless *expressly authorized by the Sheriff*.") (emphasis added).

29. The House Judiciary Report for H.R. 2202 and the Conference Report for PRWORA reflect the legislative intent for the operative phrase in both sections 1373(a) and 1644 at the time that those provisions were drafted and approved.

The PRWORA Conference Report is particularly significant. To understand why, it is important to recognize what a conference committee does, and what a committee report is.

As the Glossary for the U.S. Senate explains, a conference committee is:

> *A temporary, ad hoc panel composed of House and Senate conferees which is formed for the purpose of reconciling differences in legislation that has passed both chambers. Conference committees are usually convened to resolve bicameral differences on major and controversial legislation.*

Glossary Term, U.S. Senate (undated), available at: https://www.senate.gov/reference/glossary_term/conference_committee.htm (last accessed March 5, 2021).

To explain further, when one chamber of the U.S. Congress passes legislation, it then sends it to the other for consideration and amendment prior to passage therein. The resulting bill from that second chamber often differs from the one that was passed by the other chamber as a result of that process, and the conference committee is where the differences between the two bills are resolved, if possible.

The resulting conference report is: "The compromise product negotiated by the conference committee. The 'conference report,' which is printed and available to senators, is submitted to each chamber for its consideration, such as approval or disapproval." *Id*.

H.R. Rep. 104-725 was approved by the House of Representatives by a bipartisan vote of 328-101 on July 31, 1996. *Roll Call 383*, Clerk, U.S. House of Representatives (Jul. 31, 1996), available at: https://clerk.house.gov/Votes/1996383 (last access March 5, 2021). That conference report was approved by the Senate by a bipartisan vote of 78-21 on August 1, 1996. Roll Call Vote 104th Congress - 2nd Session, No. 262, U.S. Senate (Aug. 1, 1996), available at: https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00262 (last accessed Mar. 5, 2021).

Note that the votes on the Conference Report were the last votes that were taken by Congress on PRWORA before it was presented to President Bill Clinton for signature. The Conference Report was Congress's final word on that legislation.

It is apparent from those committee reports that Congress in IIRIRA and PRWORA respectively intended to prohibit state and local governments from barring their entities and officials from disclosing information related to the "presence, whereabouts, or activities of illegal aliens" in their possession. Again, Congress did not, and likely could not, force those state and local officials to provide that information to ICE. But, it prohibited states and local governments from barring the provision of that

information in the usual course of communications between law-enforcement officials.

The Role of Section 1373(a) in the Immigration Framework of IIRIRA

30. To understand why that information was so important to Congress, section 1373(a) must be placed into the context of the framework that Congress had created in IIRIRA to enforce the immigration laws of the United States.

Section 303 of IIRIRA added a new section 236 to the INA, now codified at 8 U.S.C. § 1226. IIRIRA, section 303(a), 110 Stat. 3009-585 to 587. New section 236(c) directs the Attorney General (now ICE) to take into custody aliens who are inadmissible or deportable on criminal grounds (including aliens who have been convicted of criminal offenses designated as "aggravated felonies" as defined in section 101(a)(43) of the INA, 8 U.S.C. § 1101(a)(43)).

That subsection directs ICE to take the aliens identified in that section into custody "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested again for the same offense."

Although there are federal criminal statutes in 18 U.S. Code, most aliens who are convicted of offenses identified in section 236(c) have been convicted under state law. Allowing ICE access to take those individuals into its custody "when the alien is released" by state and local officials is crucial to the requirement in that subsection. That means either taking those individuals directly from state or local custody, or being informed of their release dates so that ICE can take them immediately into custody upon release.

Similarly, in section 305 of IIRIRA, Congress created new rules for the detention, release, and removal of aliens who have been ordered removed in a revised section 241 of the INA. IIRIRA, section 305(a), 110 Stat. 3009-597 to 607. Under that revised section 241(a)(1) of the INA, absent a judicial stay of removal, ICE is directed to remove aliens who have been ordered removed within 90 days of the date that the removal order becomes final or the date that a detained or confined alien is released from detention or confinement.

A refusal by state or local governments to provide release dates to ICE would defeat that regime by allowing criminal aliens to evade removal, and thereby bypass the removal requirement that Congress established in section 241(a)(1) of the INA.

Each of these amendments to the INA in IIRIRA (section 1373(a), section 236(c) of the INA, section 241(a)(1) of the INA, and others) were intended to work together, to ensure that alien criminals were identified, provided due process through the immigration courts, and if ordered removed, removed in a timely manner.

The prohibitions on bars to information sharing in section 1373(a) were intended to ensure that state and local governments did not improperly create their own immigration policies. As the Supreme Court has held, the federal government has "broad, undoubted power over immigration and alien status", and that under the Supremacy Clause "Congress has the power to preempt state law". *Arizona v. United States*, 567 U.S. 387, 394, 399 (2012).

Even Under the Ninth Circuit's Limits on Section 1373(a) in* California, *SFSD 02-39 Facially Violates Section 1373(a)

31. All of that said, even limiting section 1373(a) to a simple prohibition on state and local governments from barring their entities and officials from providing information about "a person's legal classification under federal law" to ICE (as the Ninth Circuit did in *California*, 921 F.3d 891) SFSD 02-39 facially violates that section of Title 8.

Section II ("Procedures"), subsection F ("Communications with LEA, Including Agencies Conducting Civil Immigration Enforcement"), paragraph 4 of SFSD 02-39 states: "Employees shall refer all DHS / ICE requests for assistance with criminal investigations to the Central Records Unit. The Central Records Unit shall forward those requests to the Sheriff who shall direct any assistance, through the chain of command."

Although immigration is generally considered a civil matter, there are a number of criminal violations included in the INA.

Under section 276 of the INA, 8 U.S.C. § 1326, reentry after exclusion, deportation, or removal is a crime.

The penalty for such an offense ranges from two years' imprisonment and/or a fine under section 276(a)(2) of the INA, 8 U.S.C. § 1326(a)(2) (a "Class E felony" as defined in 18 U.S.C. § 3559(a)(5)) to 20 years' imprisonment and/or a fine (for reentry after removal subsequent to a conviction for an "aggravated felony" as defined in section 101(a)(43) of the INA, 8 U.S.C. § 1101(a)(43), a "Class C

felony" as defined in 18 U.S.C. § 3559(a)(3)).

Section 262(a) of the INA, 8 U.S.C. 1302(a), requires aliens 14 years of age or older who have not been registered under section 221(b) of the INA, 8 U.S.C. 1201, or sections 30 or 31 of the Alien Registration Act of 1940, Pub.L. 76-670, 56 Stat. 670 (1940), and who remain in the United States for 30 days or longer to apply for registration and be fingerprinted during that 30-day period.

A willful failure to register under this provision subjects the offender to imprisonment of not more than six months and/or a fine pursuant to section 266(a) of the INA, 8 U.S.C. § 1306(a), a "Class B misdemeanor" under 18 U.S.C. § 3559(a)(7).

Aliens who are required to be registered under the INA must notify DHS of any change of address within 10 days, under section 265(a) of the INA, 8 U.S.C. § 1305(a). A failure to notify DHS of a change of address within this period subjects the offender to a possible 30 days' imprisonment and/or a fine under section 266(b) of the INA, 8 U.S.C. § 1306(b) (a "Class B misdemeanor" under 18 U.S.C. § 3559(a)(8)).

An alien under a final order of removal who willfully fails to depart the United States within 90 days; willfully fails to make a timely application for a travel document in good faith; "connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure"; or willfully fails or refuses to appear for removal upon notice is subject to a fine and/or a sentence of four to 10 years (a "Class D felony" or a "Class C felony", respectively, pursuant to 18 U.S.C. § 3559(a)) under section 243(a)(1) of the INA, 8 U.S.C. § 243(a)(1).

Were ICE to request the immigration status of an individual that it was criminally investigating in connection with any of these offenses who was in the custody of the SFSD, under SFSD 02-39, § II, subsec. F, para. 4, an officer or employee would not be able to respond to that request, in violation of section 1373(a), as interpreted by the Ninth Circuit in *California*, 921 F.3d 891.

Instead, that officer or employee would have to send that request to the SFSD Central Records Unit, who would forward it to the Sheriff for response, if any. It should be noted that section 1373(a) does not distinguish between civil and criminal ICE investigations.

The "POLICY" provision in SFSD 02-39 states: "This policy does not prohibit or restrict employees 'from sending to, or receiving from, DHS / ICE information regarding the citizenship or

immigration status, lawful or unlawful, of any individual.'"

The Supreme Court has held: "It is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012), *quoting Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). There is no reason to believe that this common rule of statutory construction would not apply to the SFSD policy as well, and from its face, it does.

Therefore, despite the policy's statement to the contrary, with respect to ICE criminal investigations, SFSD 02-39, § II, subsec. F, para. 4 violates section 1373(a), even under the narrow interpretation of that rule in *California*, 921 F.3d 891.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed March 10, 2021, at *city* Woodstock and *state* Maryland

ANDREW R. ARTHUR