CASE NO. A120206

COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

CHARLES FONSECA,
Petitioner and Appellant,

v.

HEATHER J. FONG, *et al.*,
Respondents and Appellees.

ON APPEAL FROM THE FINAL JUDGMENT OF
CALIFORNIA SUPERIOR COURT, COUNTY OF SAN FRANCISCO
CASE NO. 507-227
THE HONORABLE PETER J. BUSCH

APPELLANT'S REPLY BRIEF

Sterling E. Norris (SBN 040993)
JUDICIAL WATCH, INC.
2540 Huntington Drive, Suite 201
San Marino, CA 91108-2601
(626) 287-4540

David Klehm (SBN 165302)
LAW OFFICES OF DAVID KLEHM
1851 East First Street, Suite 900
Santa Ana, CA 92705
(714) 619-9303

Counsel for Petitioner and Appellant Charles Fonseca

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INTRODUCTION

At issue in this case is the narrow question of whether California Health & Safety Code § 11369 (§ 11369) constitutes a "regulation of immigration." Respondents have staked their case on the sole ground that § 11369 fails the first test under *De Canas v. Bica* (1976) 42 U.S. 351, that a statute is *per se* preempted under the Constitution if it is a "regulation of immigration." Despite Respondents' repeated attempts to mischaracterize it, § 11369 plainly is not a "regulation of immigration," as it does not set any standard or require any assessment of immigration status. On the contrary, § 11369 provides merely for the sharing of information between government entities. Therefore, it is not preempted by the Constitution.

ARGUMENT

I. Section 11369 Is Not A "Regulation Of Immigration" As Defined Under *De Canas*.

As set forth in Appellant's Opening Brief ("AOB"), the U.S. Supreme Court long ago established a three-part test to determine if a state legislative enactment "touching" upon aliens is constitutionally preempted under the Supremacy Clause. (AOB at 4-5.) In order for such a statute to be preempted, it must fail at least one of the three prongs of the *De Canas* test. Respondents' sole argument is that

§ 11369 fails the first prong under *De Canas* – whether the statute is a "regulation of immigration." Respondents describe this test as "constitutional preemption."[1]

The Supreme Court in *De Canas* defined a regulation of immigration as "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." 424 U.S. at 355. While ignored by Respondent, one federal district has explained clearly how to interpret this definition:

> In other words, it is the creation of standards for determining who is and is not in this country legally that constitutes a regulation of immigration in these circumstances, not whether a state's determination in this regard results in the actual removal or inadmissibility of any particular alien, for the standards themselves are 'a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.'

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[1] As an initial matter Respondents are incorrect in asserting that the well-established presumption against preemption does not apply. (Respondents' Brief ("RB") at 10-11.) "In *all* preemption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 (citing *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 (emphasis added). *See also Cippolone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516; *New York Tel. Co. v. New York State Dep't of Labor* (1979) 440 U.S. 519, 540. As recently explained by a federal court that upheld a statute against a similar preemption challenge, the presumption should only be set aside if state enactments actually attempt to regulate "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Gray v. City of Valley Park* (E.D. Mo. Jan. 31, 2008) No. 4:07CV00881, 2008 U.S. Dist. LEXIS 7238 (quoting *De Canas*, 424 U.S. at 355).

Equal Access Educ. v. Merten (E.D. Va. 2004) 305 F. Supp. 2d 585, 602-03 (quoting *De Canas*, 424 U.S. at 355). Hence, the key inquiry is whether a state statute creates standards for determining who is or is not in the country illegally.

In this case, § 11369 plainly sets no "standards" for determination of who is or is not in the country illegally. Police officers do not apply any standards to "determine" the legality of an individual's immigration status. Nor do police departments set the "conditions" under which a particular person may remain in the country. Any "standards" are established by and applied by federal authorities. The statute merely requires that officers who have reason to believe an arrestee is not a U.S. citizen inform federal authorities of the arrest, regardless of the legality of their presence in the United States.

Nevertheless, Respondents repeatedly attempt to transform § 11369 into something that it is not. Respondents claim that the statute requires police officers to "assess" immigration status. (RB at 11.) No such requirement is in the statute. Respondents assert that the statute requires officials to make "independent determinations of immigration status." (RB at 14.) Section 11369 contains no requirement that officers make determinations of any kind regarding status, legally or illegally. And Respondents claim that the statute designates "local personnel to help enforce the immigration laws." (RB at 18.) Enforcement of immigration

laws is nowhere to be found in § 11369. Simply put, the statute sets no standards nor requires any assessment or determination of immigration status.

In reality, § 11369 provides for nothing more remarkable than the sharing of information between law enforcement authorities. This type of information sharing is expressly allowed under *De Canas*.[2] Section 11369 merely requires that an arresting officer who has reason to believe an arrestee "may not be a citizen of the United States" notify federal authorities of the arrest. Federal authorities, not a police officer, then apply federal standards and make any determinations regarding immigration status.

Respondents overlook the very limited role of the arresting officer under § 11369. In his opening brief, Appellant offered several examples of how an officer may receive information constituting a "reason to believe" that a person is not a U.S. citizen. (AOB at 8.) An officer may have "reason to believe" a person is not a citizen if, when arrested, he produces a green card, a foreign passport, or simply volunteers that he is not a citizen. A "reason to believe" is far afield from an "assessment of immigration status,"and § 11369 does not require further

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[2] It also cannot be prohibited by a state or local government. *See* 8 U.S.C. §§ 1373 and 1644.

investigation by the officer. The statute only requires that the information be forwarded to the proper *federal* authorities.[3]

While Respondents repeatedly, and mistakenly, suggest that police officers will be making determinations of immigration status, in one instance Respondents describe the roles of local and federal officials more accurately. According to Respondents, after information is transferred from local officials, the "federal agency will review those arrestees' immigration status, and in some cases, will deport them." (RB at 18 n.6.) Critically, as Respondents concede, it is the federal agency making any "determination" using federal standards and the federal agency that will take any consequential action.

II. Respondents' Reliance On *LULAC I* Is Unavailing.

Like the trial court, Respondents rely on *LULAC* to support their view of what constitutes a "regulation of immigration." (RB at 14-16 (citing *League of United Latin American Citizens v. Wilson* (C.D. Cal. 1995) 908 F. Supp. 755 ("*LULAC I*")). A fair reading of *LULAC I*, and the citations in Respondents' own

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[3] Respondents betray the weakness of their argument by misquoting § 11369 in order to exaggerate the role of the police officer under the statute. Section 11369 does not require police officers to "assess whether they 'reason[ably] . . . believe' that a drug arrestee is or is not 'a citizen of the United State,'. . . ." (RB at 14 (emphasis added).) The statute contains a lesser requirement that an officer report an arrest only when he has "reason to believe" that an arrestee is not a U.S. citizen.

brief, demonstrate that the statutory scheme preempted in *LULAC I* is markedly different than § 11369. Respondents' reliance on it as persuasive authority is misplaced.

According to Respondents' own description, the laws at issue in *LULAC* required state/local officials to "classify" members of the public, either as 'citizens' or as lawful permanent or temporary residents, but did 'not in any way tie[] [those classifications] to federal standards." (RB at 12 (citing *LULAC I*).) As Respondents note, the court determined that Proposition 187 had a "'direct,' rather than a 'purely speculative and indirect," impact on immigration. (RB at 13.) It was also important to the *LULAC I* court that Proposition 187 was a "comprehensive scheme to detect and report the presence and effect the removal" of illegal aliens. *LULAC I* at 769.

As explained in Appellant's Opening Brief, § 11369 is distinctly different from Proposition 187. First, § 11369 does not require local officials to "classify" persons by their immigration status or in any way "determine" whether they may remain in the United States. At most, § 11369 would have a "purely speculative and indirect impact" as a result of information forwarded to federal officials. Unlike in *LULAC I*, § 11369 leaves it entirely to federal officials to decide what use, if any, to make of information provided by local officials.

Proposition 187, by contrast, had a far more "direct" impact on immigration than does § 11369. This is important because the information sharing requirement in § 11369 also applies to persons in this country *legally*, such as foreign tourists or students studying on a visa. Section 11369 does nothing more than require that a police officer report the arrest of these persons to federal authorities. This is a far cry from the preempted scheme to "detect and remove" illegal aliens at issue in *LULAC I.*

Finally, and most significantly, Respondents make only a passing attempt to explain how *LULAC* is helpful to their argument when the same court, in a subsequent opinion, specifically endorsed the type of information sharing requirement contained in § 11369. (RB at 20-21 (*League of United Latin Am. Citizens v. Wilson* (C.D. Cal. 1997) 997 F. Supp. 1244 (*LULAC II*).) In *LULAC II*, the court reversed its conclusion regarding preemption of information sharing between state/local and federal authorities. (*See* AOB at 10.) Respondents cannot have it both ways, relying on court's ruling in *LULAC* in the first instance, but then ignoring the same court's ruling on the specific matter at issue here in *LULAC II.* In any event, LULAC does not support Respondents' argument that § 11369 should be preempted as a "regulation on immigration."

III. The Court Should Decline To Address The Factual Issues Raised Regarding DGO 5.15.

Finally, the Court should decline Respondents' invitation to consider a factual issue regarding alleged "Department General Order 5.15." (RB at 3, 26.) The trial court properly did not address Respondents' argument that, despite their belief that § 11369 is void as a matter of law, the San Francisco Police Department ("SFPD") complies with § 11369 as a matter of policy. This argument, however contradictory it may be, nevertheless raises factual issues concerning what exactly is the City's policy and the extent that the City abides by its own policy. Because the trial court did not reach this issue in ruling on Respondents' demurrer, this Court should not consider it now. (*See* AOB at 2 (noting that the Petition alleges a variety of facts demonstrating the SFPD's failure to comply with § 11369).)

CONCLUSION

For the reasons set forth above and in Appellant's Opening Brief, § 11369 is not preempted under the Constitution or federal law. Accordingly, the trial court's ruling should be reversed.

Dated: May 1, 2008

Respectfully submitted,

Sterling Norris /DR

Sterling E. Norris (SBN 040993)
JUDICIAL WATCH, INC.
2540 Huntington Drive, Suite 201
San Marino, CA 91108-2601
(626) 287-4540

David Klehm (SBN 165302)
LAW OFFICES OF DAVID KLEHM
1851 East First Street, Suite 900
Santa Ana, CA 92705
(714) 619-9303

Counsel for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 8.520(c)

I certify that pursuant to Rule 8.520(c), the attached brief is proportionally spaced, has a typeface of 14 points or more and contains 1,823 words.

Dated: May 1, 2008

Sterling Norris/OR
Sterling E. Norris, Esq.

CERTIFICATE OF SERVICE

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

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APPELLANT'S REPLY BRIEF

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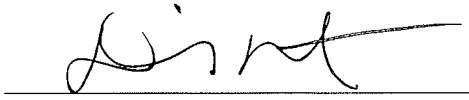

David F. Rothstein

SERVICE LIST

Dennis J. Herrera (1 copy)
Wayne K. Snodgrass
#1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 92102-4682
Tel: (415) 554-4675
Fax: (415) 554-4699

Clerk of California Supreme Court (4 copies)
350 McAllister Street
San Francisco, CA 94102-4797

The Hon. Peter J. Busch (1 copy)
c/o Clerk of the Court
Superior Court of California, County of San Francisco
400 McAllister Street
San Francisco, CA 94102