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 OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Counsel hereby discloses pursuant to Cal. Rule of Court 8.208 that the following entities or persons may have an interest in this case:

Petitioner-Appellant Charles Fonseca

Respondent Heather J. Fong (in her capacity as Chief of Police for the San Francisco Police Department)

Respondent Louise Renne (in her official capacity as a Member of the Police Commission)

Respondent David Campos (in his official capacity as a Member of the Police Commission)

Respondent Joe Alioto Veronese (in his official capacity as a Member of the Police Commission)

Respondent Petra Dejesus (in her official capacity as a Member of the Police Commission)

Respondent Yvonne Lee (in her official capacity as a Member of the Police Commission)

Respondent Dr. Joe Marshall (in his official capacity as a Member of the Police Commission)

Respondents Does 1 to 100

Real Party in Interest San Francisco Police Department

Attorneys for Petitioner-Appellant

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INTRODUCTION AND STATEMENT OF THE CASE

This case arises from a failure of San Francisco Police Department to obey California law. California Health & Safety Code § 11369 ("§ 11369") requires that persons arrested for certain drug-related offenses to be reported to federal immigration authorities when there is reason to believe that the arrestees are not U.S. citizens. Petitioner-Appellant ("Petitioner"), a resident and taxpayer of San Francisco, brought this petition for writ of mandamus to compel Respondents-Appellees (collectively the "SFPD") to comply with § 11369 or desist from creating an atmosphere of non-cooperation with federal immigration authorities that deters compliance with § 11369. In response, the SFPD demurred, asserting that § 11369 is "unenforceable" because it is preempted by federal law. The trial court sustained the demurrer and dismissed the Petition, concluding that § 11369 is "federally preempted and is an impermissible state regulation on immigration." Clerk's Transcript ("CT") at 127. For the reasons set forth herein, the trial court's ruling should be reversed.

FACTUAL BACKGROUND

Section 11369 requires that federal immigration authorities be notified upon the arrest for various narcotics offenses of any person they have reason to believe may not be a U.S. citizen. The statute states as follows:

> When there is reason to believe that any person arrested for a violation of Section 11350, 11351, 11351.5, 11352, 11353, 11355, 11357, 11359, 11360, 11361, 11363, 11366, 11368 or 11550, may not be a citizen of the United States, the arresting agency shall notify the appropriate agency of the United States having charge of deportation matters.

Section 11369 (adopted in 1991; derived from former Health & Safety Code § 11715.5 (1939)).

The Petition alleges a variety of facts demonstrating the SFPD's failure to comply with § 11369. The Petition further alleges that this failure also is in violation of federal law, including 8 U.S.C. § 1373, which prohibits local police departments from restricting in any way a police officer's ability to provide information to federal immigration officials about a person's immigration status, and the Supremacy Clause of the United States Constitution.

ARGUMENT

I. The Trial Court Erred in Finding that § 11369 Is Federally Preempted.

Section 11369 is not preempted, as the statute does not directly regulate immigration. In fact, the statute is entirely in accord with federal law that specifically contemplates and endorses free and open communication between state/local officials and federal immigration authorities. As such, § 11369 is in

harmony with federal law and facilitates, rather than conflicts with, the accomplishment of congressional purposes.

A. Standard of Review

The standard of review for an appeal from a dismissal following a general demurrer sustained is well established. *Batt v. City and County of San Francisco* (2007) 155 Cal. App. 4th 65, 71. The Court accepts as true facts alleged in the complaint and exercises its "independent judgment about whether the complaint states a cause of action as a matter of law." *Id.* (citing *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal. App. 4th 1129, 1134-35.

B. There Is a Strong Presumption Against Preemption By Federal Law.

Under Article VI, Clause 2 of the U.S. Constitution, state law is preempted by federal law only if Congress so intends. Any preemption analysis must begin "with the assumption that the historic police powers of the State [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 (quoting *Rice v. Sante Fe Elevator Corp.* (1947) 331 U.S. 218, 230). "The purpose of Congress is the ultimate touchstone of pre-emption analysis." *Id.* (quoting *Malone v. White Motor Corp.* (1978) 435 U.S. 497, 504); *Olszewski v. Scripps Health*

(2003) 30 Cal. 4th 798, 816, 135 Cal. Rptr. 2d 1, 16. Importantly, there is a "strong presumption" against preemption.[1] *Cipollone*, 505 U.S. at 523; *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal. App. 4th 635, 666-67 & 674, 11 Cal. Rptr. 3d 807, 832, 839 (citing *Cipollone*, 505 U.S. at 523). In *De Canas v. Bica* (1976) 424 U.S. 351, the Supreme Court reiterated this high standard:

> [F]ederal regulation . . . should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.

Id. at 356 (quoting *Florida Lime & Avocado Growers v. Paul* (1963) 373 U.S. 132, 142 (emphasis added).

Preemption in the immigration context is governed by the controlling Supreme Court precedent of *De Canas*. In that case, the Court set out a three-part test for determining whether a state regulation "touching" upon aliens is displaced through implied preemption. A state regulation is preempted only (1) if it falls into the narrow category of a "regulation of immigration," *id.* at 355, (2) if Congress expressed "the clear and manifest purpose" of completely occupying the field and displacing all state activity, *id.* at 357, or (3) if the state regulation

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[1] Under California law, "there is a general presumption against federal preemption." *Arnold v. Dow Chemical Co.* (2001) 91 Cal. App. 4th 698, 709, 110 Cal. Rptr. 2d 722, 731 (emphasis added).

conflicts with federal laws, such that it "stands as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress." *Id.* at 363.

C. Section 11369 Is Not a Regulation of Immigration.

The trial court erred by concluding that § 11369 constitutes a regulation of immigration. CT at 128. The court viewed § 11369 as requiring an arresting officer to "act as an investigative arm of federal deportation authorities,""make an independent determination as to the arrestee's nationality," and otherwise "cooperate with the INS, solely for the purpose of ensuring that such persons leave the country." *Id.* (relying solely on *League of United Latin American Citizens v. Wilson* (C.D. Cal. 1995) 908 F. Supp. 755 ("*LULAC* "). This was simply a misapplication of law.

In assessing federal preemption, *De Canas* instructs that a court must first determine whether a legislative enactment "regulates immigration." *De Canas*, 424 U.S. at 355. While the "[p]ower to regulate immigration is exclusively a federal power," not every state enactment "which in any way deals with aliens is a regulation of immigration" and thus constitutionally preempted. *Id.* at 354. Moreover, a statute is not preempted merely because "aliens are the subject of a state statute . . . ." *Id.* at 355. A state statute is a regulation of immigration only if it makes "a determination of who should or should not be admitted into the

country, and the conditions under which a legal entrant may remain." *Id.* at 355. As explained by one court:

> 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.'

Equal Access Educ. v. Merten (E.D. Va. 2004) 305 F. Supp. 2d 585, 602-03 (quoting *De Canas*, 424 U.S. at 355).

On its face, § 11369 does not in any way empower or require a police department to "determine" an arrestee's nationality or if such person is lawfully present in the United States. *De Canas*, 424 U.S. at 355-56. Moreover, it does not enable a police department to set the standards by which such a person may remain in the country, nor determine whether any specific person may remain. On the contrary, any such standards are set by – and applied by – the proper federal authorities.

At most, § 11369 requires a sharing of information with federal authorities, the kind of cooperation expressly allowed under *De Canas*. Following any such sharing of information, the role of the state agency in any "immigration" matter ceases. The fact that the information may, or may not, have an "indirect impact

on immigration" is of no consequence. *Id. at* 355-56. Under *De Canas*, it is clear that a statute is not transformed into a regulation of immigration simply because aliens are the subject matter.

By comparison, the California statute upheld in *De Canas* prohibited employers from knowingly employing aliens who are "not entitled to lawful residence in the United States." *De Canas*, 424 U.S. at 352 n.1. The Supreme Court found that the statute did not regulate immigration because it had adopted federal immigration standards regarding who was "entitled to lawful residence in the United States," and, thus, did not make "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355-56. In fact, as Justice Rehnquist would later write with regard to *De Canas*: "The statute in *De Canas* discriminated against aliens, yet the Court found no strong evidence that Congress intended to preempt it." *Toll v. Moreno* (1982) 458 U.S. 1 (Rehnquist, J., concurring). *See also Merten*, 305 F. Supp. 2d at 603 (school policies that deny admission to illegal aliens based on federal immigration standards do not regulate immigration.).

As applied here, § 11369 similarly involves no "determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas*, 424 U.S. at 355-56. Instead, it merely

requires arresting officers who have reason to believe an arrestee "may not be a citizen of the United States" to notify federal officials of the arrest. What federal officials do with that information is entirely up to them.

This very limited role of the arresting officer demonstrates that § 11369 does not involve any "determination" of immigration status. For example, an officer may have "reason to believe" a person is not a U.S. citizen simply if an arrestee voluntarily discloses he is a foreign national. An officer might have "reason to believe" a tourist detained for a drug offense is not a citizen if he produces an Australian passport. Or an officer would have "reason to believe" a person carrying a green card is not a citizen, as all permanent resident aliens are required by law to carry such cards. 8 U.S.C. § 1304(e). In each of these situations, an officer would have sufficient "reason to believe" the person is not a U.S. citizen and be required under § 11369 to forward this information to federal authorities. Any subsequent "determination" of immigration status is done by federal officials and is not a part of, or relevant to, § 11369.

D. *LULAC* Is Not Binding or Persuasive Precedent.

The trial court's decision relies almost entirely on the federal district court decision in *LULAC*. Not only is *LULAC*, of course, not controlling in this case, but it is also not persuasive precedent for the following reasons.

First, at issue in *LULAC* was Proposition 187, described by the court as a "comprehensive scheme to detect and report the presence and effect the removal" of illegal aliens. *LULAC* at 769. The court in *LULAC* recognized that the "verification, notification and cooperation/reporting requirements" contained with the ten sections of Proposition 187's eight pages of statutory text "directly regulated immigration" by "creating a comprehensive scheme to detect and report the presence and effect the removal" of illegal aliens. *Id.* In striking contrast, § 11369 involves no such comprehensive scheme, nor does it provide for a "determination" by the police department of the deportability of an alien, legal or illegal. *LULAC* at 777. Nor does the statute provide a means to "effect" the deportation of an alien. Hence, *LULAC* does not support a finding of preemption in regard to § 11369.

Second, unlike Proposition 187, which focused on illegal aliens, § 11369 concerns persons who may not be citizens of the United States. This is significant because the two groups are far from identical. For example, non-citizens include foreign nationals lawfully present in the United States, such as a foreign tourist, a student studying on a student visa, or a permanent resident alien carrying a green card. This is very different from the focus on illegal aliens in *LULAC*, and demonstrates how far afield § 11369 is from the situation in *LULAC*.

Finally, and perhaps most significantly, the viability of *LULAC* as a meaningful authority is in doubt. Following the enactment of certain federal legislation in 1996, the same federal court revisited its ruling in 1997. *See League of United Latin Am. Citizens v. Wilson* (C.D. Cal. 1997) 997 F. Supp. 1244 (*LULAC II*) (noting the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Immigration Reform Act"), Pub L. No. 104-208, 110 Stat. 3009 (1996)). Both of these statutes, discussed *infra*, specifically contemplate the free flow of information from state/local agencies to federal immigration authorities. *See, e.g.*, 8 U.S.C. § 1373. Thus, In *LULAC II*, the court revised its previous ruling in light of the PRA. While the court declined to modify its injunction, finding that the various provisions of Proposition 187 were part of a single state regulatory scheme, it declared: "The Court agrees that some cooperation is permitted and even required by the PRA . . . Nothing in this Court's decision should be interpreted to prohibit cooperation between state officials and the I.N.S. pursuant to the PRA." *LULAC II*, 997 F. Supp. at 1252 n. 9. Hence, even the *LULAC* court subsequently recognized that communication between state/local agencies and

federal authorities is not preempted, but, rather, is specifically contemplated under current federal law.

E. Section 11369 Is Not Preempted, as Congress Has Not Expressed a "Clear and Manifest Purpose" to Effect a "Complete Ouster of State Power, but in Fact Facilitates the Accomplishment of Congressional Purposes.

Under *De Canas,* a court must also determine whether it is the "clear and manifest purpose of Congress" to effect a "complete ouster of state power – including state power to promulgate laws not in conflict with federal laws" with respect to the subject matter the legislative enactment attempts to regulate. *De Canas*, 424 U.S. at 357. A court then evaluates whether the legislative enactment burdens or conflicts with federal law. *Id.* at 358 n.5, 363. A conflict exists "when it is impossible to comply with both state and federal law, or if the state law is an obstacle to the accomplishment of the full purposes and objectives of Congress in enacting the federal legislation." *Schneidewind v. ANR Pipeline Co.* (1988) 485 U.S. 293, 300 (internal quotation marks and citations omitted).

Section 11369 plainly is not an obstacle to purposes and objectives of Congress, nor has Congress displaced all state activity in regard to communication between state officials and federal immigration authorities. On the contrary, Congress has made clear its intent to promote the free flow of information between

state/local government agencies and federal immigration authorities regarding immigration. For example, Section 642 of the Immigration Reform Act, *supra*, entitled "Communication between Government Agencies and the Immigration and Naturalization Service," has been codified at 8 U.S.C. § 1373.[2] Section 1373(a) provides:

> Notwithstanding any other provision of Federal, State or local law, a Federal, State, or local government entity or official may not *prohibit, or in any way restrict,* any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the *citizenship or immigration status, lawful or unlawful,* of any individual.

See 8 U.S.C. § 1373(a) (emphasis added). *See also* § 1373(b) and (c). Similarly, the Senate Report accompanying the bill that became the Immigration Reform Act states:

> Sec. 177 – Communication between Federal, State, and local government agencies, and the Immigration and Naturalization Service
>
> Prohibits any restriction on the exchange of information between the Immigration and Naturalization Service and any Federal, State, or local agency regarding a person's immigration status. Effective immigration enforcement requires a cooperative effort between all levels of government. The *acquisition, maintenance, and exchange* of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the

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[2] One Court has found that Section 642 of the Immigration Reform Act "expands" Section 434 of the PRA. *City of New York v. Reno* (2d Cir. 1999) 179 F.3d 29, 33 (rejecting 10th Amendment challenge to both statutes).

> Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 104-249 (1996) at 19-20 (emphasis added). *See also* 8 U.S.C. § 1644 (codifying section 434 of the PRA, *supra*, providing that "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.").

It is difficult to conceive how Congress might have expressed its intent any clearer when it enacted these statutes. Congress has unmistakably ordained that state and local governments should communicate with federal immigration officials. Hence, rather than being preempted, § 11369 acts as the natural complement to federal law, mandating the free flow information about a person's citizenship or immigration status, and furthering congressional purposes.

In yet another example, Congress further demonstrated its desire for communication between state and federal law enforcement officials, by establishing the "287(g) program" in 1996. This program specifically endorses cooperation between state/local officials under written agreement between state/local officials and federal immigration authorities. The statute, however, specifically affirms that no such agreement is necessary for any state official "to

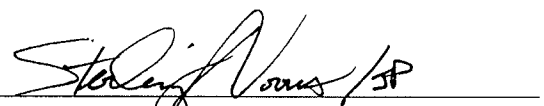
communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States" or "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(9)-(10). *See also* 67 Ops. Cal. Atty. Gen. 331 (1984) (federal law contemplates that local police may report illegal aliens arrested for drug offenses to federal authorities).

CONCLUSION

For the reasons set forth above, § 11369 is not preempted under federal law. Accordingly, the trial court's ruling should be reversed.

Dated: February 22, 2008

Respectfully submitted,



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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 3022 words.

Dated: February 22, 2008

Sterling E. Norris, Esq.

PROOF 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.

On February 22, 2008, I served the foregoing document described as:

APPELLANT'S OPENING BRIEF

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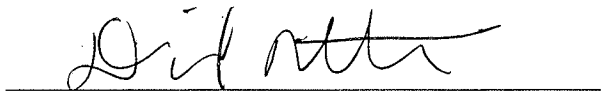

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