

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CHARLES FONSECA,

Plaintiff and Appellant,

v.

HEATHER J. FONG as Chief, etc., et al.,

Defendants and Respondents;

SAN FRANCISCO POLICE  
DEPARTMENT,

Real Party in Interest and  
Respondent.

A120206

(San Francisco County  
Super. Ct. No. CPF-07-507227)

**ORDER MODIFYING OPINION AND  
DENYING REHEARING  
[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the published opinion filed herein on October 22, 2008, be modified as follows:

1. In footnote 9, on page 9 of the opinion, the last full sentence and the citation following thereafter shall be deleted. The modified footnote shall otherwise remain unchanged, with the exception of the addition of “see Pen. Code, § 836” to the now final citation, and shall read as follows:

<sup>9</sup> Though Section 11369 does not mandate state or local enforcement of the *criminal* provisions of the INA, it deserves to be noted that preemption principles do not bar state and local law enforcement officers from enforcing those provisions. Unlike the civil provisions of the INA, which are so comprehensive that no opportunity for state activity remains, the criminal provisions of the INA (8 U.S.C. §§ 1323-1328) are few and simple and it is settled that the federal government has not occupied the field of criminal immigration enforcement. (*Gonzalez v. City of Peoria* (9th Cir. 1983) 722 F.2d 468, 475, overruled on other grounds by *Hodgers-*

*Durgin v. de la Vina* (9th Cir. 1999) 199 F.3d 1037, 1040, fn. 1; *People v. Barajas* (1978) 81 Cal.App.3d 999; Am. Jur.2d (2008) Aliens and Citizens, § 99; Cal.Jur. 3d (2008) Aliens Rights, § 16.) State and local law enforcement authorities may legally arrest a person for being in this country in violation of the criminal provisions of the INA (most commonly 8 U.S.C. §§ 1325 [improper entry by alien, a misdemeanor] and 1326 [improper reentry by removed alien, a felony]); provided only that such arrests are authorized by state law. (*Miller v. United States* (1958) 357 U.S. 301, 305; see Pen. Code, § 836.)

There is no change in the judgment.

Respondents' petition for rehearing is denied.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Kline, P.J.

Trial Court:

Superior Court of San Francisco

Trial Judge:

Hon. Peter J. Busch

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