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UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA

Friendly House, et al.,) CV 04-649 TUC DCB
Plaintiffs, v.) ODDED
Janet Napolitano, et al.,	ORDER
Defendants.))

Pending before this Court is Plaintiffs' Application for Preliminary Injunction whereby they seek to enjoin the application and enforcement of Section 6 of Proposition 200. For the reasons set forth below, Plaintiffs' Application is denied and this Court's earlier Temporary Restraining Order is lifted.

LEGAL STANDARDS

I. Jurisdictional Statement

It is the duty and obligation of this Court, pursuant to Article III of the Constitution, "to adjudicate controversies involving alleged denials of constitutional rights." *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 136 (1964). An individual's constitutionally protected rights "cannot be denied even by a vote of a majority of a State's electorate," if the "scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause." *Id.* Indeed, the fact that a particular proposition "is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act." *Id.* Thus, "[o]ne's right to life, liberty, and property ... and other

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fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* (citation and internal quotation marks omitted). Put differently, "[n]o plebiscite can legalize an unjust discrimination." *Id.* at 736 n.29 (citation and internal quotation marks omitted). The fact that a challenged piece of legislation "was approved by the electorate is without federal constitutional significance," if the legislation fails to satisfy the requirements of the Constitution. *Id.* at 737.

Under Supreme Court precedent, "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). Nonetheless, this rule of law "does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship." *Mathews v. Diaz*, 426 U.S. 67, 78 (1976). Thus, "[t]he fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.' " *Id.* at 80. However, "[i]nsofar as *state* welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned." *Id.* at 85 (emphasis added).

This does not mean that a State may not ever, under any circumstances, deny public benefits to illegal aliens. To the contrary, so long as a State's law regarding benefits to illegal aliens corresponds to an identifiable congressional policy and in fact operates harmoniously with the overall federal approach to immigration, the law will likely pass constitutional muster. *See, Sudomir v. McMahon*, 767 F.2d 1456, 1466 (9th Cir. 1985) (*citing Plyler*, 457 U.S. at 225-26).

II. Standard for Granting Preliminary Injunctions

To obtain a preliminary injunction in the Ninth Circuit, the moving party is required to show: (1) a probability of success on the merits combined with a possibility of irreparable harm if the relief is denied; or (2) serious questions are raised and the balance of hardships

tips sharply in favor of the moving party. *Tillamook County v. U.S. Army Corps of Engineers*, 288 F.3d 1140, 1143 (9th Cir. 2002). Rather than being alternatives or separate tests, the aforementioned tests are "extremes of a single continuum." *Id.* Hence, "the greater the relative hardship to the moving party, the less probability of success must be shown." *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999) (citations omitted.)

As is more fully explained below, this Court does not find it probable that Plaintiffs will succeed on the merits. Furthermore, while this Court initially found "serious questions" regarding Proposition 200 sufficient to warrant a Temporary Restraining Order, having had the opportunity to analyze the issues, this Court believes any such questions are resolved in favor of Defendants. This Court finds that there is little possibility of irreparable harm if injunctive relief is denied because before the passage of Proposition 200, under both Federal and State law, undocumented aliens were not eligible to receive public benefits, with certain enumerated exceptions.

DISCUSSION

I. FEDERAL LAW

On August 22, 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA"), Pub. L. No. 104-193, 110 Stat. 2105. The PRA completely overhauled the federal welfare system and was intended to change the system by "enact[ing] new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(a)(5).

A. Eligibility for Federal Public Benefits

As of January 1, 1997, an alien who is not a "qualified alien," with certain enumerated exceptions, is not eligible for any federal, state or local public benefit. A "federal public benefit" is defined as, in relevant part,

any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other

similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

8 U.S.C. § 1611(c)(1)(B).

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A "qualified alien" is defined as an alien lawfully admitted as a permanent resident under the Immigration and Nationality Act ("INA"); an alien granted asylum under 8 U.S.C. § 1158; an alien admitted as a refugee under 8 U.S.C. § 1157; an alien paroled in the United States under 8 U.S.C. § 1182(d)(5), for a minimum of one year; an alien whose deportation is being withheld under 8 U.S.C. § 1253(h); an alien granted conditional entry pursuant to former 8 U.S.C. § 1153(a)(7), prior to April 1, 1980; or an alien who is a Cuban or Haitian entrant as defined in section 501(e) of the Refugee Education Assistance Act of 1980. 8 U.S.C. § 1641(b). A "qualified alien" also includes certain battered spouses and children. 8 U.S.C. § 1641(c).

Aliens who are not "qualified aliens" are still entitled to receive the following federal public benefits:

medical assistance under title XIX of the Social Security Act (42 (1) U.S.C. § 1396 et seq.) for care and services that are necessary for the treatment of an emergency medical condition;

short-term, non-cash, in-kind emergency disaster relief;

- (2) (3) public health assistance for immunizations for immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease;
- programs, services, or assistance specified by the Attorney General (4) which deliver in-kind services at the community level, do not condition the provision of assistance or the amount or cost of that assistance on the recipient's resources or income, and are necessary for the protection of life or safety; and
- programs for housing or community development assistance or (5) financial assistance, to the extent the alien received such a benefit on the date the PRA was enacted (i.e., August 22, 1996).

8 U.S.C. § 1611(b)(1)(A) - (E).

On January 16, 2001, the Justice Department published the "programs, services, or assistance ... specified by the Attorney General ... necessary for the protection of life and safety." 8 U.S.C. § 1611(b)(1)(D). Accordingly, the following community programs,

services, or assistance are specified by the Attorney General as necessary for the protection of life and safety and remain available to aliens who are not "qualified":

- (1) crisis counseling and intervention programs, child protection, adult protective services, violence and abuse prevention, services for victims of domestic violence or other criminal activity, and treatment of mental illness or substance abuse;
- short-term shelter or housing assistance for homeless persons, victims of domestic violence, or runaway, abused, or abandoned children;
- assistance for individuals during periods of adverse weather conditions, including periods of heat or cold;
- soup kitchens, community food banks, senior nutrition programs such as Meals on Wheels, and other nutritional services for persons requiring special assistance;
- (5) medical and public health services, including treatment and prevention of diseases and injuries, and mental health, disability, or substance abuse assistance necessary to protect life or safety;
- (6) activities designed to protect the life and safety of workers, children and youth, or community residents; and
- (7) any other programs, services, or assistance necessary for the protection of life or safety.

Attorney General Order No. 2553-2001 (Aug. 16, 2001), as published in 66 Fed. Reg. 3613-16.

These are the types of federal benefit programs that remain available to aliens who are not "qualified."

B. Eligibility for State and Local Benefits

In general, an alien who is not a "qualified alien" under 8 U.S.C. § 1641(b), who is a "nonimmigrant" under the INA¹, or who is an alien who is not paroled into the United States for at least one year, is not eligible for any state or local public benefit. 8 U.S.C. § 1621(a).

This exclusion does not apply to the following state or local public benefits:

- (1) emergency medical assistance;
- short-term, non-cash, in-kind emergency disaster relief; public health assistance for immunizations with respect to
- public health assistance for immunizations with respect to immunizable diseases and for the testing and treatment of communicable diseases;

The term "nonimmigrant" includes no fewer than nineteen (19) subclasses. *See*, 8 U.S.C. §§ 1101(15)(A) - (S). All nonimmigrant aliens, by definition, are legally present in the United States. *Id*.

(4) programs, services, or assistance specified by the Attorney General which deliver in-kind services at the community level, including through public or private nonprofit agencies; do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and are necessary for the protection of life or safety.

8 U.S.C. § 1621(b).

With respect to the final category of public benefits excepted from exclusion under the PRA, the community programs, services, or assistance specified by the Attorney General as necessary for the protection of life and safety, are those specified by the Attorney General pursuant to 8 U.S.C. § 1611(b)(1)(D). *See* Attorney General Order No. 2553-2001 (Aug. 16, 2001), *as published in* 66 Fed. Reg. 3613-16.

"State or local public benefit" is defined, inter alia, as

any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

8 U.S.C. § 1621(c)(1)(B).

"State or local public benefit" does not include any federal public benefit included under section 1611(c) of the PRA. 8 U.S.C. § 1621(c)(3).

II. ARIZONA LAW

On November 2, 2004, a majority of voters of the State of Arizona approved Proposition 200, a ballot initiative intended to require employees of the state or local governments to (1) verify the immigration status of applicants for state and local public benefits, and (2) report to federal immigration authorities any applicant for benefits who is in violation of federal immigration law. Specifically, Section 6 of Proposition 200 amended Title 46 of the Arizona Revised Statutes ("Welfare") to add a new section, A.R.S. § 46-140.01, which provides in part:

An agency of this state and all of its political subdivisions, including local governments, that are responsible for the administration of state and local public benefits that *are not federally mandated* shall do all of the following:

1. Verify the identity of each applicant for those benefits and verify that the applicant is eligible for benefits as prescribed by this section.

2. Provide any other employee of this state or any of its political subdivisions with information to verify the immigration status of any applicant for those benefits and assist the employee in obtaining that information from federal immigration officials.

3. Refuse to accept any identification card issued by the state or any political subdivision of this state, including a driver license, to establish identity or determine eligibility for those benefits unless the issuing authority has verified the immigration status of the applicant.

4. Require all employees of the state and its political subdivisions to make a written report to federal immigration authorities for any violation of federal immigration law by any applicant for benefits and that is discovered by the employee.

A.R.S. § 46-140.01(A) (emphasis added).

Section 6 of Proposition 200 further provides that any "[f]ailure to report discovered violations of federal immigration law by an employee is a Class 2 misdemeanor." A.R.S. § 46-140.01(B). Finally, Section 6 of Proposition 200 includes a citizen-suit provision which allows Arizona residents to bring a civil action against any agency or political subdivision for violations of the statute's provisions. A.R.S. § 46-140.01(C).

On November 12, 2004, the Arizona Attorney General issued his opinion clarifying which programs and services constitute "state and local benefits" for the purposes of Section 6 of Proposition 200. 104 Op. Ariz. Att'y Gen. 010 (2004).² In his opinion, the Arizona Attorney General concluded that "state and local benefits" under Proposition 200 are limited to those programs within Title 46 that meet the requirements of 8 U.S.C. § 1621. *Id*.³

The Attorney General's opinion, while entitled to respect, is advisory only and non-binding. *Logan v. Forever Living Products International, Inc.*, 203 Ariz. 191, 194 n.4, 52 P.3d 760, 763 n.4 (2002); *see also Price v. Akaka*, 3 F.3d 1220, 1225 (9th Cir. 1993). Nonetheless, this Court accepts the reasoned opinion of the Arizona Attorney General as it comports with the plain wording and stated intent of Proposition 200. *Ruiz v. Hull*, 191 Ariz. 441, 449, 957 P.2d 984, 992 (Ariz. 1998). In other words, the clear terms of Proposition 200 are "readily susceptible" to the constraints placed on them by the Attorney General. *Id.* (*citing Yniguez v. Arizonans for Official English*, 69 F.3d 920, 929 (9th Cir. 1995) (en banc)).

There is a suit pending in Maricopa County Superior Court challenging Attorney General Goddard's interpretation of Proposition 200 as too narrow. *Yes On Proposition 200 v.*

231 - 238; short-term crisis assistance, A.R.S. §§ 46-241 - 241.05; domestic violence victim assistance, A.R.S. § 46-244; temporary assistance for needy families, A.R.S. §§ 46-292 - 300.06; child care food program assistance, A.R.S. § 46-321; and the Arizona works program, A.R.S. §§ 46-340 - 355. Additionally, Title 46 governs child support obligations, A.R.S. §§ 46-401 - 444; adult protective services, A.R.S. §§ 46-451 - 457; utility assistance, A.R.S. §§ 46-701 - 741; and child care services, A.R.S. §§ 46-801 - 810. As is more fully explained below, eligibility for many of these public benefits was already conditioned upon an applicant's residency and/or immigration status prior to the approval of Proposition 200.

Title 46 includes the following "welfare" programs: general assistance, A.R.S. §§ 46-

III. PREEMPTION DOCTRINE

The Supremacy Clause provides that the Constitution, and laws and treaties enacted pursuant to it, are the supreme law of the land. U.S. Const., art. VI, cl. 2. Under the Supremacy Clause, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to a federal law, must yield." *Gade v. National Solid Wastes Management Assoc.*, 505 U.S. 88, 108 (1992) (internal quotation marks omitted).

Federal authority to regulate immigration "derives from various sources, including the federal government's power '[t]o establish [a] uniform Rule of Naturalization,' U.S. Const., art. I, § 8, cl. 4, its power '[t]o regulate commerce with foreign Nations,' *id.*, cl. 3, and its broad authority over foreign affairs." *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

In *DeCanas v. Bica*, 424 U.S. 351 (1976), the Supreme Court articulated three (3) tests for determining whether a state statute related to immigration is preempted. *Id.* at 354-63. Under the first test for preemption, the court must determine whether a state statute is, in fact, "a regulation of immigration." As noted by the Supreme Court, "[p]ower to regulate immigration is unquestionably exclusively a federal power." *Id.* at 355. However, not every state statute which deals with aliens in any way is a regulation of immigration and thus per

Napolitano, CV2004-092999.

se preempted by this federal power. *Id.* In other words, "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* Thus, a state statute impermissibly regulates immigration if it purports to determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.*

Under the second test, even if the state statute is not an impermissible regulation of immigration, it may still be preempted upon "demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was the clear and manifest purpose of Congress." *Id.* at 357 (citations and internal quotation marks omitted). Thus, a state statute may be preempted if "Congress intended to preclude even harmonious state regulation touching on aliens." *Id.* at 358. In other words, the question is whether Congress intended to "occupy the field." *Id.* at 357 n.5.

Under the third test articulated in *DeCanas*, a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 363 (citation and internal quotation marks omitted). Put differently, a state law is preempted if it conflicts with federal law, making it impossible to comply with both state and federal law. *LULAC v. Wilson ("LULAC II")*, 997 F.Supp. 1244, 1253 (C.D. Cal. 1997) (citations omitted).

A. Proposition 200 Is Not A "Regulation of Immigration"

In *DeCanas*, the Supreme Court held that a California statute which prohibited employers from knowingly employing aliens not entitled to legal residence in the United States if such employment would have an adverse effect on lawful resident workers was not preempted by federal law. *DeCanas*, 424 U.S. at 353. "Essential to the *DeCanas* decision is the fact that the California statute adopted *federal standards*, thus saving it from becoming 'a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.' " *Equal Access to Education v. Merten ("Merten I")*, 305

F.Supp.2d 585, 602 (E.D. Va. 2004) (*quoting DeCanas*, 424 U.S. at 356) (emphasis original). Accordingly,

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." *DeCanas*, 424 U.S. at 355.

Id. at 602-03.

Therefore, under the first *DeCanas* test, there is no preemption under the Supremacy Clause of Proposition 200's denial of public benefits to ineligible aliens, provided that in doing so, the agencies implementing the law adopt federal immigration standards. *See, id.* at 603. This case turns, therefore, on whether the standards for eligibility verification contained in Proposition 200 merely adopt federal standards, or instead create standards different from or in excess of federal standards. If the latter is true, Proposition 200 may be preempted under the Supremacy Clause.

Under the PRA, a State or political subdivision of a State is not required to adopt any particular eligibility criteria for state-funded programs. 8 U.S.C. § 1622(a). If a State chooses to follow the Federal classification in determining the eligibility of qualified aliens for public benefits, that State "shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(7). However, regardless of the eligibility criteria adopted by a State or political subdivision, qualified aliens "shall be eligible for any State public benefits." 8 U.S.C. § 1622(b) (emphasis added).

Furthermore, under the PRA, "a State or political subdivision of a State is authorized to prohibit or otherwise restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of the State or a political subdivision of a State." 8 U.S.C. § 1624(a). This authority, however, is limited and "may be exercised only to the extent that any prohibitions, limitations, or restrictions imposed by a State or

political subdivision of a State are not more restrictive than the prohibitions, limitations, or restrictions imposed under comparable Federal programs." 8 U.S.C. § 1624(b). In other words, under the PRA, a State is authorized to impose limitations on the eligibility of qualified aliens for State-funded welfare benefits, so long as such limitations are not more restrictive than comparable Federal limitations. *See Doe v. Commissioner of Transitional Assistance*, 773 N.E.2d 404, 406 n.3 (Mass. 2002).

With regard to state and local public benefits, Proposition 200 does not establish any eligibility criteria. A.R.S. 46-140.01(A). Rather, Proposition 200 merely requires that state and local government employees "verify the identity of each applicant for those benefits and verify that the applicant is eligible for benefits as prescribed by this section." A.R.S. § 46-140.01(A)(1). Furthermore, Proposition 200 requires government employees "verify the immigration status of any applicant for those benefits." A.R.S. § 46-140.01(A)(2). Finally, Proposition 200 requires all employees "make a written report to federal immigration authorities for *any* violation of federal immigration law by any applicant for benefits." A.R.S. § 46-140.01(A)(4) (emphasis added).⁴

If this Court were to follow the decision in *LULAC v. Wilson ("LULAC I)*, 908 F.Supp. 755 (C.D. Cal. 1995), which found several provisions of California's Proposition 187 to be preempted by federal immigration law, Proposition 200's verification and reporting provisions would "directly regulate immigration by creating a comprehensive scheme to detect and report the presence and effect the removal of illegal aliens." *Id.* at 769. For example, as in *LULAC I*, Proposition 200 requires state and local agents to question all

[&]quot;Any" violation of federal immigration law applies to violations well outside the scope of violations related to applying for public benefits. This would include, for example, possession of or traffic in narcotic drugs, 8 U.S.C. § 1182(a)(23); violation of a domestic violence protective order, 8 U.S.C. § 1227(a)(2)(E)(ii); or, commission of any other criminal activity which endangers public safety or national security, 8 U.S.C. § 1227(a)(4)(A)(ii). However, it is difficult to envision a set of circumstances under which such violations would be discovered through the normal application process for public benefits. Regardless, the above immigration violations would also violate Arizona law, which State and local officials would be authorized to report. *See*, A.R.S. §§ 13-3408 (narcotics), 13-3602 (domestic violence), 13-2308.01 (terrorism);

applicants for public benefits regarding their immigration status; to obtain and examine documents regarding the immigration status of such applicants; and to report to federal immigration authorities *any* violation of federal immigrant law by any such applicant.

LULAC I, however, was decided before the enactment of the PRA, thereby distinguishing it from the present case. For instance, under the PRA, "[a] State or political subdivision of a State is authorized to require an applicant ... to provide proof of eligibility." 8 U.S.C. § 1625. No such express authorization existed in LULAC I. Furthermore, under the PRA, a State is not required to follow the federal classification criteria in determining the eligibility of qualified aliens for public benefits. 8 U.S.C. § 1601(7). Rather, if it does follow federal criteria, a State is only presumed to have chosen the least restrictive means available for determining eligibility. *Id.* Again, in LULAC I, there was no federal statute giving the States such discretion.

Moreover, Congress clearly intended that State and local governments would ensure that illegal aliens not receive public benefits.

No current State law, State constitutional provision, State executive order or decision of any State or Federal court shall provide a sufficient basis for a State to be relieved of *the requirement to deny benefits to illegal aliens*. Laws, ordinances, or executive orders passed by county, city or other local officials will not allow those entities to provide benefits to illegal aliens. Only the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, that references this provision, will meet the requirements of this section.

H.R. Conf. Rep. No. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2771 (emphasis added). Manifestly, *LULACI* is distinguishable from and inapplicable to this case.

Plaintiffs further argue that Proposition 200's reporting requirements remain problematic as there is no express provision in the PRA that requires State or local agents to notify federal immigration authorities of alleged violations of federal immigration law. Thus, Plaintiffs argue, Proposition 200's reporting provision conflicts with federal law and establishes a standard by which State and local officials determine who is and who is not lawfully in this country, thereby amounting to a regulation of immigration.

However, the PRA does expressly remove any prohibitions and restrictions against any State or local government entity "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." 8 U.S.C. § 1644. By removing all such prohibitions and restrictions, Congress fully intended that State and local governments should communicate with federal authorities regarding an alien's immigration status. Indeed, by removing all such restrictions, Congress *encourages* such communication. As explained in the Conference Report accompanying the PRA:

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.

H.R. Conf. Rep. No. 104-725, at 383 (1996), reprinted in 1996 U.S.C.C.A.N. 2771.

Not only are State and local governments authorized and encouraged to communicate with federal authorities regarding an alien's immigration status, any law or regulation which would in any way restrict or limit such communications would be directly contrary to federal law. *See, City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999) (invalidating city executive order prohibiting city officials from voluntarily providing federal authorities with information regarding aliens' immigration status, except under certain circumstances, as preempted by 8 U.S.C. § 1644). Moreover, Congress may not directly compel states or localities to enact or administer federal programs or policies. *New York v. United States*, 505 U.S. 144, 166 (1992) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts"). Thus, Plaintiffs' argument that Proposition 200 cannot

require reporting when federal law only authorizes such reporting is simply unavailing and contrary to established notions of federalism.⁵

An additional potential problem presented by Proposition 200's reporting requirements is that State or local officials "cannot assume that an alien who admits he lacks proper documentation has violated" federal immigration law. *Gonzalez*, 722 F.2d at 476. A lack of documentation or other admission of illegal presence is merely "*some* indication of illegal entry." *Id.* at 477 (emphasis added). Significantly, however, the court in *Gonzalez* was concerned only with what would provide an *arresting* officer with "probable cause of the criminal violation of illegal entry." *Id.* Under Proposition 200, State and local officials are neither required nor authorized to arrest or detain applicants believed to be in violation of federal immigration law. Rather, such officials are only required to *inform* federal immigration authorities of immigration violations, something they are expressly authorized to do under 8 U.S.C. § 1357(g)(10).

This potential problem with Proposition 200 is further remedied by 8 U.S.C. § 1357(g)(10), which states:

Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State –

⁽A) 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

⁽B) 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)(10) (emphasis added).

Based upon Section 1357(g)(10), State and local officials are expressly authorized by Congress to report to federal authorities knowledge that an applicant for public benefits is not lawfully present in the United States. Indeed, as the Tenth Circuit recently explained:

This collection of statutory provisions [including 8 U.S.C. § 1357(g)(10)] evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws.

United States v. Vasquez-Alvarez, 176 F.3d 1294, 1300 (10th Cir. 1999).

In sum, under the first *DeCanas* test for preemption, Section 6 of Proposition 200, A.R.S. § 46-140.01, does not regulate immigration and is not preempted by federal law.⁶

B. Congress Does Not Occupy the Field Proposition 200 Purports to Regulate

Under the second *DeCanas* test, even if a state statute does not regulate immigration, it may still be preempted if Congress intended to "occupy the field" which the challenged state statute attempts to regulate. *DeCanas*, 424 U.S. at 357. The "ultimate touchstone" of any preemption analysis is the purpose of Congress. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citation and internal quotation marks omitted). Congress' intent may either be explicitly stated in the statute itself or it may be implied in the statute's structure and purpose. *Id.* (citation and internal quotation marks omitted). A state law is preempted "if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* (citations and internal quotation marks omitted). Field preemption, however, need not be total. The federal government may occupy the entire field of a particular area of regulation, but still expressly cede limited powers to the states. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 212 (1983).

As mentioned previously, the Constitution commits the power to regulate immigration exclusively to the federal government. *Decanas*, 424 U.S. at 354. Nonetheless, there is no "specific indication either in the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general." *DeCanas*, 424 U.S. at 358. However, the federal government, through the INA, "has certainly occupied the field of formulating the governing definitions and standards for determining a

If this Court were to determine that Section 6 of Proposition 200 does impermissibly regulate immigration, there are several other Arizona statutes which must also be preempted. For instance, an individual is ineligible for general assistance if he is not "a citizen of the United States by birth or naturalization, or if an alien, has [not] be legally admitted for permanent residence." A.R.S. § 46-233(A)(6). If Proposition 200 impermissibly regulated immigration, then by logical extension, so would Section 46-233(A)(6), and several other similar Arizona statutes.

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person's immigration status." *Merten I*, 605 F.Supp.2d at 605 n.20. Therefore, under the Supremacy Clause, it would be impermissible for state or local officials to classify aliens as "undocumented" or "illegal" in a manner different from the federal government. *Id*.

According to the court in LULAC II, by enacting the PRA, while there is no explicit declaration in the statute itself. Congress nevertheless manifested its clear intent to occupy the field of regulation of government benefits to aliens. LULAC II, 997 F. Supp. at 1253; see also Merten I, 305 F.Supp.2d at 605 ("As a result, it does appear that Congress has preempted the field of determining alien eligibility for certain public benefits, including even state benefits"). As the court explained in LULAC II, "[w]hatever the level of government extending the benefits and whatever the source of the funding for the benefits – federal, state or local – they are all included within the expansive reach of the PRA." *Id.* The PRA includes: statements of national policy regarding the denial of public benefits to illegal aliens (8 U.S.C. § 1601); rules regarding eligibility of immigrants for federal, state, and local benefits, including definitions of the benefits covered (8 U.S.C. §§ 1611, 1621); a description of a state's legislative options regarding immigrant eligibility for state or local benefits (8 U.S.C. § 1621(d)); and criteria to verify immigration eligibility for benefits (8 U.S.C. § 1642). Id. According to the court, "[t]ogether, these provisions both demarcate a field of comprehensive federal regulation within which states may not legislate, and define federal objectives with which states may not interfere." *Id.* at 1253-54.

In enacting the PRA, Congress explicitly declared that the national immigration policy of the United States is to deny public benefits to all but a narrowly defined class of immigrants, with illegal immigrants excluded. *See id.* at 1254; *see also* 8 U.S.C. § 1601. The court in *LULAC II* declared that "[t]his policy statement concerning the relationship between welfare and immigration leaves no doubt that the federal government has taken full control of the field of regulation of public benefits to aliens." *Id*.

A careful reading of both the language and legislative history of the PRA, however, leads this Court to a different conclusion. First, with certain exceptions, the PRA authorizes

States "to determine the eligibility for any State public benefits of an alien who is a qualified alien ..., a nonimmigrant ... or an alien who is paroled into the United States ... for less than one year." U.S.C. § 1622(a). In making such determinations, a State is not required to follow Federal standards, but, if it does so, is entitled to a presumption of having chosen "the least restrictive means" if it does so. 8 U.S.C. § 1601(7). Congress would not have vested State and local governments with such discretion had it intended to occupy the field.

Second, a State is permitted to "provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible ... through enactment of a State law ... which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d). In other words, through affirmative legislation, a State may exceed the PRA and provide state or local public benefits even to illegal aliens. The fact that Congress so empowered States further belies the argument that Congress intended to occupy the field.

Third, a State "is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes or aliens" for State or local programs of general cash public assistance. 8 U.S.C. § 1624(a). This authority is only limited to the extent that any prohibitions, limitations, or restrictions are not more restrictive than those imposed under comparable Federal programs. 8 U.S.C. § 1624(b). Therefore, so long as any such restrictions or limitations comply with similar Federal standards, a State is free to set its own standards regarding the eligibility of aliens for general cash public assistance.

Fourth, with certain enumerated exceptions, "in determining the eligibility and the amount of benefits of an alien for any State public benefits," State and local governments may, at their option, provide that the income and resources of the alien be deemed to include the income and resources of the alien's sponsor or spouse. 8 U.S.C. § 1632(a) ("Optional application to State programs"). By granting State and local governments the choice to attribute a sponsor's income and resources to an alien applying for State public benefits, Congress further demonstrated its intent *not* to occupy the field.

Finally, the legislative history of the PRA provides further evidence that Congress did not intend to completely occupy the field. For instance, in the legislative report regarding the PRA, Congress explicitly determined that "[i]t grants maximum State flexibility to show true compassion by helping those in need achieve the freedom of self-reliance." H.R. No. 104-651, at 3, *reprinted in* 1996 U.S.C.C.A.N. 2184. As mentioned previously, forcing aliens to be self-reliant is the declared national policy regarding welfare and immigration. 8 U.S.C. § 1601. Had Congress intended to completely occupy the field with respect to this national policy, it would not have granted States maximum flexibility in furthering that policy.

Based upon the above examples, it seems clear that Congress intended to stop short of occupying the field regarding the distribution of public benefits to aliens, at least with respect to State or local benefits not mandated under Federal law. Clearly, any state statute which purported to regulate State or local benefits mandated under Federal law would be preempted. However, by its express terms, Proposition 200 does not apply to State or local benefits that are federally mandated. Regarding State or local benefits that are not federally mandated, the PRA vests States with considerable discretion in determining who is eligible for such benefits and may even extend such benefits to illegal aliens who would not otherwise be eligible. Thus, it would *not* appear that the PRA occupies the field that Proposition 200 seeks to regulate. As was the case in *DeCanas*, there is "affirmative evidence ... that Congress sanctioned the concurrent state legislation on the subject covered by the challenged state law." *DeCanas*, 424 U.S. at 363.

C. Proposition 200 Does Not Interfere with Federal Law

Under the third *DeCanas* preemption test, a state statute is preempted if it "stands as an obstacle to the accomplishment and execution of the full purpose of Congress." *DeCanas*, 424 U.S. at 363. Put another way, Proposition 200 will be preempted if "compliance with

Notably, the court in LULACII did not address any of these examples from the PRA of Congress' intent not to occupy the field.

both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

In the present case, it is not physically impossible to comply with Proposition 200 and the PRA. In fact, the two laws are harmonious. Proposition 200 deals only with those State and local public benefits that "are not federally mandated." Thus, Proposition 200 does not touch upon such "federally mandated" public benefits as, *inter alia*, public elementary education (*Plyler v. Doe*, 457 U.S. 202 (1982); 8 U.S.C. § 1643(a)(2)); services and assistance related to child protection, adult protective services, violence and abuse prevention, and treatment of mental illness or substance abuse (66 Fed. Reg. 3613, 3616); and assistance for emergency medical treatment, short-term, non-cash, in-kind emergency disaster relief, and public health assistance for immunizations (8 U.S.C. § 1621(b)).

In implementing Proposition 200, State and local employees will need to distinguish between federally mandated public benefits and those which are authorized under Arizona law but *not* federally mandated.⁸ While this may require education of State and local officials, it does not render it physically impossible to comply with both Proposition 200 and the PRA. The task of complying with both laws is made less onerous by the fact that Proposition 200, as interpreted by the Arizona Attorney General, applies only to benefits provided under Title 46 of the Arizona Revised Statutes.

Based upon the foregoing, Proposition 200 is not preempted as it is not "physically impossible" to comply with it and the PRA.

IV. CONSTITUTIONALITY

A. Facial Challenge by "Applicant" Plaintiffs

Plaintiffs charge that Proposition 200, as it is drafted and before it has been implemented, is unconstitutionally vague and amounts to a violation of the due process rights of Plaintiffs who are or may be applicants for State and local public benefits. "To bring a

⁸ Clearly, under the PRA, this is something State and local officials are already required to do. *See, e.g.,* 8 U.S.C. §§ 1621, 1642.

successful facial challenge outside the context of the First Amendment, 'the challenger must establish that no set of circumstances exists under which the [statute] would be valid.' "Hotel & Motel Association of Oakland v. City of Oakland, 344 F.3d 959, 971 (9th Cir. 2003) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). "To pass constitutional muster against a vagueness attack, a statute must give a person of ordinary intelligence adequate notice of the conduct it proscribes." Craft v. National Park Service, 34 F.3d 918, 921 (9th Cir. 1994) (citation and internal quotation marks omitted). "Thus, a statute's application might violate the constitutional mandate against vagueness if its terms are not sufficiently clear." Id at 922. "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." Id. (citations and internal quotation marks omitted). If the exercise of constitutionally protected rights is inhibited, a more stringent vagueness test applies. Id.

As explained by the Supreme Court:

In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982) (footnotes omitted).

Proposition 200 is not impermissibly vague. First, Proposition 200 does not infringe upon any *substantive* constitutional rights. While an individual's interest in welfare benefits may entitle that individual to procedural due process, there is no substantive constitutional right to such benefits. *Richardson v. Belcher*, 404 U.S. 78, 81 (1971); *see also, Atkins v. Parker*, 472 U.S. 115, 128-29 (1985). As such, there is no "constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Id.* Rather, as explained in *Atkins*, welfare benefits "are a matter of statutory entitlement for

persons *qualified* to receive them." *Atkins*, 472 U.S. at 128 (*quoting Goldberg v. Kelly*, 397 U.S. 254, 262 (1970)) (emphasis added). Welfare benefits, therefore, are appropriately treated as a form of property, for those qualified to receive them, and are protected by the Due Process Clause. *Id.* Thus, "the procedures that are employed in determining whether an individual may *continue* to participate in the statutory program must comply with the commands of the Constitution." *Id.* (emphasis added).

Plaintiffs argue that Proposition 200 violates due process by denying benefits without a hearing. Under *Atkins*, however, only those individuals who are *qualified* to receive welfare benefits are entitled to the protections of the Due Process Clause, and only when officials must determine whether such individuals may *continue* to receive such benefits. It is worth noting that even before Proposition 200, Arizona conditioned eligibility for numerous public benefits on United States citizenship or legal immigration status. *See* A.R.S. § 46-233(A)(6), (C); A.R.S. § 46-292(A); A.R.S. § 46-346(A); Ariz. Admin. Code § R6-12-305(A); Ariz. Admin. Code § R6-13-306; Ariz. Admin. Code § R6-14-208(A); Ariz. Admin. Code § R6-17-403; and Ariz. Admin. Code § R6-5-4911(E).9

In the present case, therefore, Proposition 200 does not deny any Plaintiff due process inasmuch as all Plaintiffs who would allegedly apply for public benefits are all undocumented aliens and are neither qualified nor eligible to receive such benefits in the first place. Not being qualified to receive such benefits, there would be no determination as to

Arizona's conditioning eligibility for public benefits on immigration status extends to public benefits other than those contained in Title 46 of the Arizona Revised Statutes. For instance, the eligibility requirements for benefits under the Arizona Health Care Cost Containment System ("AHCCCS") incorporate the standards set forth in the PRA. A.R.S. § 36-2903.03; *see also* Ariz. Admin. Code §§ R9-22-1410, R9-28-404, and R9-29-210.

This Court does not address Plaintiffs' concerns regarding elementary education, emergency medical treatment, or any other federally mandated public benefits. Under the interpretation by the Arizona Attorney General, Proposition 200 does not apply to any benefits other than those set forth in Title 46 of the Arizona Revised Statutes. Also, according to the plain language of Proposition 200, its provisions do not apply to any "federally mandated" benefit. Finally, regardless of Proposition 200, under the PRA and other federal law, Arizona may not deny any

whether any of the Plaintiffs could *continue* to receive such benefits, entitling them to due process. In sum, as undocumented aliens illegally present in the United States, Plaintiffs do not have a property interest in any welfare benefits "that are not federally mandated," and are not entitled to due process protections regarding any such non-federally-mandated benefits. Indeed, the Supreme Court has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment." *Lyng v. Payne*, 476 U.S. 926, 942 (1986).

Assuming *arguendo* that Plaintiffs currently receive state or local public benefits, as in *Atkins*, "[t]his case ... does not concern the procedural fairness of individual eligibility determinations. Rather, it involves a legislatively mandated substantive change in the scope of the entire program." *Atkins*, 472 U.S. at 129. As a general rule, "a welfare recipient is not deprived of due process when the legislature adjusts benefit levels [T]he legislative determination provides all the process that is due." *Id.* at 129-30 (*quoting Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982)). Put differently, "[p]roperty rights to public benefits are defined by the statutes or customs that create the benefits. When, as here, the statute authorizing the benefits is amended or repealed, the property right disappears." *Austin v. City of Bisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988). As such, the procedural component of the Due Process Clause does not impose a constitutional limitation on the

illegal alien such benefits as emergency medical treatment (8 U.S.C. § 1621(b)(1)(A)), programs and services necessary for the protection of life and safety (8 U.S.C. § 1621(b)(1)(D)), free school breakfasts and lunches (8 U.S.C. § 1615), and public elementary education (*Plyler v. Doe*, 457 U.S. 202 (1982); 8 U.S.C. § 1643(b)). Therefore, Plaintiffs' concerns regarding such benefits are unfounded.

Of course, in this case, the statutes authorizing benefits are neither amended nor repealed by Proposition 200. There is nothing within Proposition 200 itself which conditions public benefits upon immigration status, or any other basis. Rather, Proposition 200 merely emphasizes and enforces the existing Arizona statutes that do condition eligibility for public benefits on many factors, including immigration status. As such, Proposition 200 in no way violates an individual's due process rights regarding public benefits as it in no way alters or impinges upon an individual's eligibility for or entitlement to such benefits.

power of the legislature to make substantive changes in the law of entitlement to public benefits. *Atkins*, 472 U.S. at 129.

In this case, Plaintiffs had no greater right to advance notice of alleged change to the citizenship requirement for state and local public benefits than did any other Arizona voters. *See, id.* at 130.¹² (Indeed, as illegal aliens with no right to vote, they had *less* right to advance notice than Arizona voters, lawfully present in the United States.) Plaintiffs make no claim that there was any defect in the ballot-initiative process. *See, id.* "Because the substantive reduction [(or even elimination)] in the level of [Plaintiffs'] benefits was the direct result of the statutory amendment, they have no basis for challenging the procedure that caused them to receive a different, less valuable property interest after the amendment became effective." *Id.*

B. Facial Challenge by "State and Local Officials" Plaintiffs

With respect to State and local officials, Plaintiffs claim that Proposition 200 is impermissibly vague in that it fails to set forth a culpable mental state for failure to report discovered violations of federal immigration law. Under Arizona law, a statute's failure to prescribe a culpable mental state is not fatal.

If a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for the commission of the offense, no culpable mental state is required for the commission of such offense, and the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state.

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Atkins, 472 U.S. at 130 n.33 (quoting Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915)).

A.R.S. 13-202(B).

Nonetheless, Plaintiffs argue that Proposition 200 fails to provide State and local officials with adequate notice of what would constitute criminal conduct.

Under the due process clause of the Fourteenth Amendment, individuals are guaranteed the right to fair notice of whether their conduct is prohibited by law. *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000) (*citing Colautti v. Franklin*, 439 U.S. 379-390-91 (1979)). While only constructive notice, as opposed to actual notice, is required, "individuals must be given a reasonable opportunity to discern whether their conduct is proscribed so they can choose whether or not to comply with the law." *Id.* Although statutes "need not be written with 'mathematical' precision," *id.* (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)), "they must be intelligible, defining a 'core' of proscribed conduct that allows people to understand whether their actions will result in adverse consequences." *Id.*

When, as here, "a statute subjects transgressors to criminal penalties ... vagueness review is even more exacting." *Id.* As well as defining "a core of proscribed behavior to give people constructive notice of the law, a criminal statute must provide standards to prevent arbitrary enforcement." *Id.* Thus, while "a challenged statute enjoys a presumption of constitutionality ..., where a statute criminalizes conduct, the law may not be impermissibly vague in any of its applications." *Id.* at 1012.

In the present case, Proposition 200 criminalizes any "failure to report discovered violations of federal immigration law by an employee," making such a failure a Class 2 misdemeanor. A.R.S. 46-140.01(B). Additionally, a supervisor commits a Class 2 misdemeanor "[i]f that employee's supervisor knew of the failure to report and failed to direct the employee to make the report." *Id.* Verification of an applicant's immigration status is nothing new to State and local officials. For example, pursuant to Section R6-13-306 of the Arizona Administrative Code, State and local officials are provided with methods of determining an applicant's eligibility, particularly on the basis of citizenship.

1 2 a recipient of assistance payments must be a citizen of the United States, an alien admitted 3 to the United States for permanent residence, or permanently residing in the United States under color of law." Ariz. Admin. Code § R6-13-306. Accordingly, "[a] person who was not 4 5 born in the United States must provide documentation." Ariz. Admin. Code § R6-13-306(1).

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Such documentation must be in one of the following forms:

Certificate of Citizenship; a. b.

Valid United States Passport; Consular Report of Birth or "Certificate of Birth"; Proof of marriage to a U.S. Citizen prior to September 22, 1922, provided other evidence establishes that the person was a U.S. citizen d. by birth or was naturalized before September 22, 1922;

Section R6-13-306 requires that "[e]xcept for the TC (Tuberculosis Control) Program,

An Identification Card issued from a Foreign Service Post;

e. f. Alien Registration Cards;

Citizen's Identification Card

Ariz. Admin. Code § R6-13-306(2).

Clearly, State and local officials do or should already know how to verify an applicant's immigration status. Thus, State and local officials do or should already have the bases upon which to reasonably determine that an applicant may be present in the United States in violation of federal immigration law. This is sufficient notice to pass constitutional muster.

As for Plaintiffs' claim that Proposition 200 is impermissibly vague by failing to specifically designate the benefits to which it applies, the claim is unavailing. As discussed previously, this Court agrees with and is persuaded by the reasoned opinion of the Arizona Attorney General limiting Proposition 200's application to Title 46 of the Arizona Revised Statutes. Furthermore, by its express terms, Proposition 200 applies only to "state and local benefits that are not federally mandated."¹³ A.R.S. § 46-140.01(A). Thus, even if this Court

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Such federally mandated benefits include: medical assistance under Title XIX of the Social Security Act (42 U.S.C. § 1396, et seq.); emergency disaster relief; immunizations; basic public education; crisis counseling and intervention programs; adult protective services; violence and abuse protection; services for victims of domestic violence; treatment of mental illness or substance abuse; short-term shelter or housing for the homeless, victims of domestic violence, and

were to reject the opinion of the Attorney General, Proposition 200 is self-limiting in its reach. In short, this Court is not persuaded that Proposition 200 fails to give State and local officials adequate notice of proscribed conduct.

Plaintiffs' position in this regard is further undermined by A.R.S. § 46-140, which was enacted in 1939 and last amended in 1976. Section 46-140 requires:

When a person employed under this title [Title 46] interviews or consults an applicant for or recipient of assistance or services authorized by this title [Title 46], and is informed that the applicant or recipient has by mistake, by withholding facts, or in any other manner, violated or attempted to violate, knowingly or unknowingly, any provision of this title [Title 46] which resulted in, or if undiscovered would have resulted in the applicant or recipient receiving assistance or services or in receiving more assistance or services that the applicant or recipient would have otherwise been entitled to receive, the employee interviewing or consulting with such applicant or recipient shall promptly make a complete written report of the information to the state department.

A.R.S. § 46-140(A).

Put more succinctly, if a State or local official discovers that an applicant for or recipient of public benefits under Title 46 is ineligible to receive such benefits, the State or local official is required to report that discovery. An applicant for or recipient of such benefits could be ineligible on the basis of, *inter alia*, residency, income, disability, citizenship or immigration status. *See, e.g.,* A.R.S. § 46-292(A).

Section 46-140 also provides that *any* failure, regardless of intent, by a State or local official to make the required written report "constitutes cause for immediate dismissal ... or prosecution." A.R.S. § 46-140(B). Failure to make the required written report constitutes a misdemeanor. A.R.S. § 46-140(C).

runaway, abused, or abandoned children; assistance during adverse weather conditions, including periods of heat or cold; soup kitchens, community food banks, and other nutritional services for persons requiring special assistance; medical and public health services necessary to protect life or

safety; and activities to protect the life and safety of workers, children, or community residents. *See*, 8 U.S.C. § 1611(b)(1)(A) - (E), § 1643(a)(2); 66 Fed. Reg. 3613-16. These services must be provided to everyone, including aliens who are not "qualified."

Based upon the long-standing provisions of A.R.S. 46-140, if a State or local official discovers that an applicant for or recipient of public benefits is not entitled to those benefits on the basis of citizenship or immigration status, that State or local official is already required, under pain of criminal prosecution, to report that discovery, albeit to state rather than federal officials. In light of this decades-old statute, this Court is hard-pressed to imagine how similar, if not substantially identical, provisions in Section 6 of Proposition 200 could be deemed unconstitutionally vague. Whether or not this prior statute has been enforced, State and local officials have long had notice of the proscribed conduct emphasized by Section 6 of Proposition 200.

CONCLUSION

As the above analysis demonstrates, Plaintiffs fail to satisfy the requirements for the issuance of a preliminary injunction under Rule 65, Fed.R.Civ.P.

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Accordingly, IT IS ORDERED that Plaintiffs' Application for Preliminary Injunction (document 5) is **DENIED.** IT IS FURTHER ORDERED that this Court's Temporary Restraining Order (document 10) is LIFTED. IT IS FURTHER ORDERED that since an interlocutory appeal of this Order will not "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), this Court **SHALL NOT** grant any application for appeal. **DATED** this <u>22nd</u> day of December, 2004. /s/ David C. Bury David C. Bury United States District Judge