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APPENDIX A

APPENDIX B

BROKEN BORDERS: DECANAS V. BICA, AND THE STANDARDS THAT GOVERN THE VALIDITY OF STATE MEASURES DESIGNED TO DETER UNDOCUMENTED IMMIGRATION

I. INTRODUCTION

BusinessWeek recently featured a Hispanic family named Inez and Antonio Valenzuela (not their real name) in a cover story on illegal immigration. The author (the “Author”) explained that five years ago, the Valenzuelas crossed the Mexican border into California with little money, no jobs, and lacking basic documents such as Social Security numbers. However, friends and family guided the Valenzuelas to the local Mexican consulate, where they each signed up for an identification card known as a *matricula consular*. Next, the Valenzuelas applied to the Internal Revenue Service for individual tax identification numbers (ITINs), which allow them to pay taxes like any other U.S. citizen.

The Valenzuelas routinely work from four p.m. to two a.m. six days a week at their bustling street side taco trailer. In fact, the Valenzuelas’ enterprise is so successful that they bring in revenue well above the U.S. household average of \$43,000, making them a solidly middle-class family.

*Based only on Antonio’s *matricula* and his Mexican driver’s license, a local car dealer gave the Valenzuelas a loan for an \$11,000 Ford Motor Co. van. Moreover, Verizon Communications Inc. accepted Antonio’s *matricula* when he signed up for cell phone service. Furthermore, the Wells Fargo & Co. branch in the predominantly Hispanic neighborhood where the Valenzuelas live in northeast Los Angeles also accepted Antonio’s *matricula*. In fact, fully 80% of accounts opened at the Valenzuelas’ Wells Fargo branch are opened by *matricula* holders. Wells Fargo branch manager Steven Contreras explained that *matricula* holders like the Valenzuelas are “bringing us all the money that has been under the mattress.”*

The Valenzuelas’ Wells Fargo account allows them to pay bills by check and build up their savings. The Valenzuelas’ goal is to trade up from a one-bedroom rental to their own home, and to eventually expand their business by buying several more trailers. In fact, the Valenzuelas (ages 30 and 29), with their two young children (ages 8 and 2 months) in many ways reflect the values and ambitions of the 42 million Hispanics in the United States.¹

A. THE VALENZUELAS: BOON FOR BIG BUSINESS

The Author, however, also emphasized that the Valenzuelas are not typical American consumers - specifically, the Valenzuelas have lived and worked in the United States illegally since they entered the country five years ago.² And the Valenzuelas are not alone. “While most analysts peg the number of illegal immigrants [in the

¹ Brian Grow, *Embracing Illegals*, BUSINESSWEEK, July 18, 2005, at 56 (all italicized information in the first four paragraphs is from the BusinessWeek cover story).

² *Id.* at 58; The various sources that I cited for this article appeared to use terms such as “illegal(s)”, “illegal immigrant”, “illegal alien”, “undocumented alien”, and “undocumented immigrant” interchangeably. However, no individual source offered a precise definition for their use of any such term. Where I have included a direct quote from a source referencing terms including but not limited to as “illegal(s)”, “illegal immigrant”, “illegal alien”, “undocumented alien”, or “undocumented immigrant”, I have left the term used by the source in place. I believe that I risk taking one or more of my sources out of context by trying to apply a more precise definition to terms including but not limited to as “illegal(s)”, “illegal immigrant”, “illegal alien”, “undocumented alien”, or “undocumented immigrant”. Therefore, the use of terms including but not limited to as “illegal(s)”, “illegal immigrant”, “illegal alien”, “undocumented alien”, or “undocumented immigrant” shall refer to an individual who is in the United States in violation of at least one federal immigration statute.

United States] at [ten to eleven] million, [the actual number of undocumented immigrants like the Valenzuelas in the United States] could be as many as [twenty] million.”³ In fact, “[s]ince 2000, 1.4 million Mexicans have come to the [United States], and fully 85% of them have entered illegally.”⁴ Moreover, the 700,000 new undocumented immigrants that enter the United States every year is so significant that they represent “one of the nation’s largest sources of population growth.”⁵

Consequently, the Valenzuelas and other undocumented immigrants also represent a large number of potential customers that large consumer companies such as banks, insurers, mortgage lenders, credit card outfits, and phone carriers feel that they cannot ignore.⁶ In fact, the Author remarked that “[i]t may be against the law for the Valenzuelas to be in the [United States] or for an employer to hire them, but there’s nothing illegal about selling to them.”⁷

Furthermore, the approximately 700,000 new undocumented immigrants that enter the United States every year represent a larger source of new consumers for large consumer companies than the approximately 600,000 or so legal immigrants that enter the United States every year.⁸ Additionally, 84% of undocumented immigrants are “18-44 year olds, [and] in their prime spending years, vs. 60% of legal residents.”⁹ The number of undocumented immigrants entering the United States on an ongoing basis, and the age of the undocumented immigrants relative to their buying power underscores why large consumer companies are coming to covet undocumented immigrants.¹⁰

B. THE VALENZUELAS: MINUTEMAN BORDER ENFORCEMENT COMES TO SAN DIEGO

Jim Chase, 58, of Oceanside, California is not as likely as large consumer companies to welcome the Valenzuelas with open arms. Chase is a retired postal worker “who participated in the Minuteman Project in Arizona in April [2005] but cut ties with its leadership afterward due to personal disagreements”¹¹ Chase’s group, referred to as the “United States Border Patrol Auxiliary, Border Watch, and California Minutemen,” began patrolling the border with Mexico in the border community of Campo, outside of San Diego on Saturday July 16, 2005, bringing volunteers as far as 1,000 miles away from Colorado.¹² Chase explained that “I am not trying to look for trouble, I am just trying to get the border secured.”¹³ In fact, Chase commented further that “[i]t’s not about immigrants. It’s about illegal trespassing into the United States. It’s about [A] Qaeda. It’s about drugs.”¹⁴

However, Chase’s group “raised concerns from the U.S. Border Patrol [prior to the patrols] when it urged volunteers to bring baseball bats, Mace, pepper spray, and machetes to patrol the border.”¹⁵ Chase “toned down his Web site, removing items such as machetes and baseball bats from a things-to-bring list, although there [were] still instructions listed [prior to the beginning of the Campo patrols] for those who bring firearms.”¹⁶ In fact, Chase’s comments on the group’s web site emphasized that “I do request . . . anyone with a concealed permit do bring

³ *Id.* at 58, citing a recent study by Bear Stearns Asset Management (i.e. Robert Justich and Betty Ng, CFA, *The Underground Labor Force is Rising to the Surface*, Jan. 3, 2005, which claimed not only that the U.S. Census does not capture the total number of “illegal immigrants”, but that the U.S. Census may be capturing as little as half of the “total undocumented population”. The authors asserted that “[t]here are many ancillary sources of data that provide evidence that the rate of growth in the immigrant population is much greater than the Census Bureau statistics.” Such “ancillary sources include but are not limited to school enrollment, foreign remittances, border crossings, and housing permits), available at <http://www.bearstearns.com/bscportal/pdfs/underground.pdf>.

⁴ Paul Magnusson & Ben Elgin, *Go Back Where You Came From*, BUSINESSWEEK, July 4, 2005, at 87.

⁵ *Supra* note 1, at 58, citing *Unauthorized Migrants: Numbers and Characteristics*, a recent study by the Pew Hispanic center, a Washington think tank, authored by Jeffrey S. Passel, June 14, 2005.

⁶ *Id.* at 58.

⁷ *Id.* at 58.

⁸ *Id.* at 58, citing *supra* note 5.

⁹ *Id.* at 58, citing *id.*

¹⁰ See also, e.g., *id.* at 56-64.

¹¹ Leslie Berestein, *Border Watch and Protest Peaceful*, SAN DIEGO UNION TRIB., July 17, 2005, at B1, B7 (the article described the events of the very first day that Mr. Chase’s group began patrolling the California-Mexico border in an objective manner. The article’s author quoted some of the participants directly, and it is possible that the newspaper in question could have a bias in favor of or against Mr. Chase’s group. This source may also be inaccurate because they may have portrayed the events that occurred in a manner that emphasized certain events while excluding others, which could have served to promote or injure the interests of Mr. Chase’s group).

¹² *Id.* at B7.

¹³ *Id.* at B7.

¹⁴ Leslie Berestein, *Latino Groups Denounce Campo Patrol: Border Watchers to Gather Tomorrow*, SAN DIEGO UNION TRIB., at <http://www.signonsandiego.com/news/mexico/tijuana/20050715-9999-7m15border.html> (July 15, 2005).

¹⁵ Duncan Mansfield (Associated Press), *Fight Against Illegal Workers Spreads in U.S.: ‘Minutemen’ Try to Expose Employers in Southeast*, MYRTLE BEACH SUN NEWS, July 18, 2005, at A1.

¹⁶ *Supra* note 14.

weapons. Many and [a]ll legal weapons to protect the group. That is your first duty on Minuteman events, to protect our people against the monster, should they appear.”¹⁷

Chase’s group of approximately two dozen volunteers was outnumbered by protesters, “some of them from as far away as Los Angeles.”¹⁸ Standing among the protesters, and holding a sign that read “Nobody is illegal”, were cousins Rene Lopez and Matias Rico, both 55 and from Chula Vista, California.¹⁹ “We think these Minutemen are bullies,” said Lopez, an aerospace engineer. “The government should patrol the border, not vigilantes.”²⁰ The language used by both Mr. Chase and his organization, as well as by persons opposed to Mr. Chase’s group and others with the same views illustrates the passion and emotion that has fueled the past and present state efforts to deter undocumented immigration that I shall refer to in this article.

C. STATE MEASURES DESIGNED TO DETER UNDOCUMENTED IMMIGRATION, AND THE DECANAS TESTS: THE STATES’ RESPONSE TO THE PROBLEM, AND THE STANDARD AGAINST WHICH THEY WILL BE MEASURED

It is ironic that Minuteman-related citizen patrols of the border have arrived in California. Ironic because California voters enacted the “Save Our State” initiative, otherwise known as Proposition 187, back in 1994.²¹ Proposition 187 was an attempt by the state of California to deter undocumented immigration. However, much of Proposition 187 never went into effect because it was invalidated in the federal courts in the years following its passage, which I shall also discuss in greater detail in Part III of my article.

More recently, Arizona voters enacted Proposition 200 in November 2004.²² By passing Proposition 200, and as with Proposition 187, Arizona voters enacted a measure designed to deter undocumented immigration. I shall explain Proposition 200 in greater detail in Parts II and III of this article.

Although Proposition 187 and 200 were passed ten years apart, and although the measures were passed in separate states, each of the measures were attacked at least in part in the same manner. Specifically, opponents of the measures argued that each was invalid at least in part because federal law preempted them. Opponents asserted that each of the measures failed to satisfy at least one of the prongs of a three prong test that was set out by the United States Supreme Court in *DeCanas v. Bica*, 424 U.S. 351 (1976).²³

D. WHY MUST WE DISCUSS STATE EFFORTS TO DETER UNDOCUMENTED IMMIGRATION?

The Valenzuelas and undocumented immigrants like them, and their positive and negative treatment by different groups in the United States, illustrate the complexity of undocumented immigration in the United States. On the one hand undocumented immigrants, as a fast growing segment of the American population, are being eagerly courted by groups such as large consumer companies that are seeking their patronage. However, undocumented immigration is being opposed just as emphatically by other groups, particularly by state and local governments, whose resources are being taxed more and more by ever increasing numbers of undocumented immigrants. Furthermore, and as I will examine in more detail in Part II of this Article, undocumented immigration is such a complex and divisive issue that even the Republican and Democratic parties are conflicted within their own ranks about how to properly address it.

Consequently, state governments, believing that the federal government is not doing enough to deter undocumented immigration, are more eager to act to deter undocumented immigration. Proposition 187 represented the first notable attempt by a state to deter undocumented immigration,²⁴ and both the movement that produced Proposition 187, and the measure itself illustrate that states have attempted to deter undocumented immigration for some time.

Moreover, undocumented immigration is spreading beyond states that border Mexico, and the spread of undocumented immigration has spawned additional state efforts to deter it.²⁵ Proposition 200 represents, just as

¹⁷ *Id.*

¹⁸ *Supra* note 11.

¹⁹ *Id.* at B7.

²⁰ *Id.* at B7.

²¹ See generally the text of Proposition 187 in Appendix A.

²² See generally the text of Proposition 200 in Appendix B.

²³ Hereinafter *DeCanas* test(s).

²⁴ Karen E. Rosenblum, *Rights at Risk: California’s Proposition 187* [hereinafter Rosenblum], reprinted in *ILLEGAL IMMIGRATION IN AMERICA* 367 (David W. Haines & Karen E. Rosenblum eds., 1999) (asserting that Proposition 187, although much of it was invalidated by the courts in the five years that followed its passage, “is nevertheless widely regarded as a watershed in the national consideration of immigration.”)

²⁵ I shall discuss various measures that state and local governments have taken to address undocumented immigration in Part II of this article.

Proposition 187 did, an attempt to change state law through a popular initiative to deter illegal immigration. Still, as I will discuss in more detail later in my article, changing state law through popular initiative is not the only way that states can, and nor is it the only way that states are attempting to deter undocumented immigration.²⁶ However, analyzing Propositions 187 and 200 serves the useful purpose of illustrating how the *DeCanas* tests have, and can continue to be utilized by opponents of state measures designed to deter undocumented immigration to defeat such measures.

By examining the application of the *DeCanas* tests with respect to the *DeCanas v. Bica* case itself, and the court cases in which the *DeCanas* tests were applied to Proposition 187²⁷ and Proposition 200,²⁸ I conclude that California's ACA 6 represents an example of a state measure designed to deter undocumented immigration likely to withstand constitutional scrutiny under the *DeCanas* tests.

In Part II of this article, I shall first examine how California has been effected by undocumented immigration in recent decades, by both state and federal government actions, to illustrate how the movement that spawned Proposition 187 arose, and how Proposition 187 came to pass. I will then further examine how undocumented immigration has effected states beyond California since Proposition 187 was passed, and briefly analyze efforts in other states since Proposition 187 was enacted in 1994 that have aimed to deter undocumented immigration. Finally, I will paint a picture of the current state of affairs with respect to undocumented immigration in the United States to underscore the seriousness of the issue today.

In Part III, I will examine the facts of and the United States Supreme Court's holding in *DeCanas v. Bica*, and analyze the reasoning behind the *DeCanas* tests. I will then examine the passage of, and the provisions of Proposition 187, and further analyze how the United States District Court in California's Central District administered the *DeCanas* tests in such a manner that significant portions of Proposition 187 were preempted.²⁹ From there, I shall examine the passage of Proposition 200 in Arizona in November 2004, and explain how the United States District Court in the District of Arizona applied the *DeCanas* tests in denying Proposition 200's opponents' request for a preliminary injunction.

In Part IV, I will contemplate how Proposition 200 may withstand scrutiny under the *DeCanas* tests, or how part, or even all of the measure may be preempted by one or more of the tests. However, I will utilize those scenarios, along with my analysis throughout Part III to describe why California's ACA 6 will withstand scrutiny under the *DeCanas* tests.

II.

UNDOCUMENTED IMMIGRATION: FROM CALIFORNIA TO A NATIONWIDE ISSUE

Given California's proximity to the Mexican border, one can understand why California has experienced undocumented immigration. However, undocumented immigration has continued to spread to states throughout the United States, including states that do not line the border with Mexico.³⁰ Therefore, I shall examine how the effects of undocumented immigration are being felt by not only states that border Mexico, but states from coast to coast.

A. THE OPENING ACT: CALIFORNIA

I shall utilize Proposition 187 as my first example illustrating application of the *DeCanas* tests to a state measure designed to deter undocumented immigration. Therefore, I shall begin by analysis by examining the events and circumstances that propelled the movement to place Proposition 187 on the ballot, as well as support for and opposition to the measure.

²⁶ Specifically, Assembly Constitutional Amendment 6 (hereinafter ACA 6) was an attempt to deter undocumented immigration by amending Article XX of the California State Constitution. However, the measure did not get out of committee, although it may be presented to California voters as an initiative in the 2006 elections.

²⁷ The *DeCanas* tests were applied to Proposition 187 in two separate court cases: (1) *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (1995) (hereinafter LULAC I); and (2) *League of United Latin American Citizens v. Wilson*, 997 F.Supp. 1244 (1997) (hereinafter LULAC II). In fact, the same United States District Court tried both cases.

²⁸ *Friendly House v. Napolitano*, CV 04-649 (Ariz. D. 2004), *appeal docketed*, No. 05-1505 (9th Cir. Dec. 29, 2004) (hereinafter *Friendly House*).

²⁹ *Supra* note 27, referring to LULAC I and LULAC II.

³⁰ See generally David Kelly, *Illegal Immigration Fears Have Spread*, L.A. TIMES, Apr 25, 2005, at A1 (asserting that "Department of Homeland Security figures show that from 1990 to 2000, the illegal immigrant population in Alabama grew from 5,000 to 24,000; in Nebraska the number grew from 6,000 to 24,000, and in Arkansas from 5,000 to 27,000." However, Mr. Kelly did not identify the source of, or which specific Department of Homeland Security figures he was referring to).

1. PROPOSITION 13: CAUSES AND EFFECTS

Significant demographic shifts that occurred during the 1970s created early rumblings of what resulted with Proposition 187 in 1994. For example, “[b]etween 1900 and 1970 California’s white population dropped from 90 percent to 78 percent of the total.³¹ But by 1980 the percentage of whites dropped as much as it had in the century’s first seven decades.”³² Therefore, [b]y 1978 [the year in which Proposition 13 was passed,] more than one in three of [California’s] residents was non-white.”³³

Moreover, “Proposition 187 may have been an unanticipated consequence of Proposition 13 . . . [b]ecause state taxes and resources were reduced, [which made] redistributive expenditures such as education . . . more difficult to fund. As a result, immigrants were blamed for the economic downturn in California.”³⁴ Moreover, many persons on the front lines of government and state services now view the passage of Proposition 13 in 1978 as a turning point in the disassociation of white society from the growing number of non-whites among them.³⁵

2. THE 1980’S: FEDERAL GOVERNMENT ACTIONS, THE CALIFORNIA ECONOMY, AND THEIR ROLES IN PASSING PROPOSITION 187

Actions taken by the federal government were an additional catalyst for Proposition 187. For instance:

In the early 1980s many social programs, such as job training; energy and housing assistance; and legal services, that had been funded by the federal government were either cut or reassigned to the states. In the 1990s the impact of these cuts was devastating on poorer communities in states [such as California] with large immigrant populations. Funding for some of these programs would now have to come out of the pockets of state residents. In short, the impact of 1980s federalism was taking its toll, further exacerbating relations between residents and immigrants.³⁶

It is also necessary to understand the conditions in California in the years that preceded Proposition 187 to appreciate why the measure came into being, particularly with respect to an economic downturn. Specifically:

In the 1980s [California] had experienced steady growth, with the addition of 2.6 million jobs and an 18 percent increase in real terms of average income per capita. But that had ended abruptly in the recession of the early 1990s. Between 1990 and 1992, 1.5 million jobs were lost [in California]; between 1990 and 1993 the official poverty rate [in California] grew from 12.5 percent to 18.2 percent; by 1993 unemployment was over 9 percent. By 1993, California was, according to some criteria, among the nation’s ten poorest states.³⁷

Consequently, factors “including an ailing California economy and an unprecedented budget crunch extending over a number of years, an incumbent governor searching for an issue on which to base his re-election campaign, and the growing pains of a changing multi-cultural society” all contributed to the introduction of Proposition 187.³⁸ Therefore, such factors “helped focus popular concern on undocumented migration from Mexico.”³⁹

3. STIRRING UP A HORNETS NEST: PROPOSITION 187

Despite the existence the economic slowdown cited in the previous section, “[o]pponents [of Proposition 187], particularly ethnic activist and immigrant rights groups, countered that the initiative was nativist, racist, and

³¹ DALE MAHARIDGE, *THE COMING WHITE MINORITY* 4 (Time Books 1996).

³² *Id.* at 4.

³³ *Id.* at 4.

³⁴ LISA MAGANA, *STRADDLING THE BORDER: IMMIGRATION POLICY AND THE INS* 53 (University of Texas Press 2003).

³⁵ *Supra* note 31, at 4 (contemplating that “[b]y 1978 . . . [w]hites felt an undelying antipathy to what they viewed as a third-world society in their midst. They simply did not want to pay taxes for services that would benefit people different from them”).

³⁶ *Supra* note 34, at 53.

³⁷ Rosenblum, *in supra* note 24, at 374.

³⁸ *E.g.*, Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 633 (1995).

³⁹ *Id.* at 633.

motivated by antipathy toward undocumented Mexicans and, more generally, Mexican-Americans.⁴⁰ Specifically, “[t]he nativist theme – antagonism to internal minorities on the basis of their ‘foreignness’ and threat to the American way of life – was clearly framed in the public statements of proposition drafters.”⁴¹ For instance, the then media director for Proposition 187 in Southern California expressed:

Proposition 187 is . . . a logical step toward saving California from economic ruin. . . . By flooding the state with 2 million illegal aliens to date, and increasing that figure each of the following 10 years, Mexicans in California would number 15 to 20 million by 2004. During those 10 years about 5 to 8 million Californians would have emigrated to other states. *If these trends continued, a Mexico-controlled California could vote to establish Spanish as the sole language of California, 10 million more English-speaking Californians could flee, and there could be a statewide vote to leave the Union and annex California to Mexico.*⁴²

However, “Proposition 187 was also supported by [persons] who believed that [the measure] was race-neutral.”⁴³ For example, Jesse Laguna, a member of the Save Our State Committee, asserted that Proposition 187 had nothing to do with race:

If Latinos are caught more often, it is because they illegally cross the border more often. Most of the Angelos I work with on . . . the “Save Our State” Committee would feel exactly the same way if the border invaders were Canadians setting up camp in Montana and hollering for freebies.⁴⁴

However, even Republican political figures became concerned about Proposition 187’s possible adverse effects. In late 1994, former Republican cabinet members Jack Kemp and William Bennett voiced their opposition to Proposition 187 for fear that it would chase Latinos away from the Republican Party.⁴⁵ Specifically, a “joint Kemp-Bennett statement [warned] that Republicans had grown ‘pessimistic, angry, and opposed. . . . The anti-immigration boomerang, if it is unleashed, will come back to hurt the GOP.’”⁴⁶

⁴⁰ *E.g. id.* at 633 (citing Daniel M. Weintraub, *Crime, Immigration Issues Helped Wilson, Poll Finds*, L.A. TIMES, Nov. 9, 1994, at A1 (reporting results of exit polls showing that 78% of those voting for Proposition 187 believed that it “sends a message that needs to be sent” and 51% of that group agreed that measure “will force the federal government to face the issue”. Also reporting that exit poll showed that 39% of persons voting against Proposition 187, and 18% of the total voters, characterized the measure as “racist/anti-Latino”); Mr. Johnson also suggested *see also* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 179 (1984) (analyzing how voters in deciding on initiative focus on generalized ideology as opposed to details of measure); Mr. Johnson further suggested *see also* Fingerhut, Powers, Smith & Associates, *National Survey of the Attitudes of Hispanic Voters* 37-38 (1994) (survey on file with the Washington Law Review) (showing that 39% of Latinos surveyed agreed that politicians attacking “illegal immigrants” are “really attacking people of different cultures and languages, like people of Hispanic background,” that 73% were at least “a little angry” when undocumented workers were attacked for taking jobs or causing crime, and that 53% were at least “somewhat sympathetic” toward “illegal immigrants”). Claims of racism were not made exclusively by minorities. For example, the President of the American Bar Association stated that California voters endorsed Proposition 187 “[b]ased on unfounded economic arguments, ugly stereotypes and racial prejudice.” Statement by ABA President George E. Bushnell, Jr. on the Passage of California Proposition 187, PR NEWSWIRE, Nov. 9, 1994; additionally, Mr. Johnson also suggested *see also* Ronald Brownstein & Patrick J. McDonnell, *Kemp, Bennett and INS Chief Decry Prop. 187*, L.A. TIMES, Oct. 19, 1994, at A1 (reporting that Bill Bennett and Jack Kemp registered opposition to Proposition 187); Ron K. Unz, *Experience Reveals No Need for S.O.S.*, SACRAMENTO BEE, Oct. 23, 1994, at F3 (stating opinion of conservative challenger to California Governor Pete Wilson in Republican Party primary that Proposition 187 was unnecessary); William J. Bennett, *Immigration: Making Americans*, WASH. POST, Dec. 4, 1994, at C7 (arguing against Proposition 187 and related immigration measures); Dick Kirschten, *Second Thoughts*, NAT’L J., Jan. 21, 1995, at 150 (noting concern of business with Proposition 187). Mr. Johnson also identified concerns with the political repercussions of being labeled anti-immigrant and anti-minority may prevent a Republican-led Congress from proceeding with far-reaching immigration reforms. Mr. Johnson stated *see* Marc Sandalow, *After Much Ado on Immigration, GOP Backs Off*, S.F. CHRON., Mar. 13, 1995, at A3.

⁴¹ Rosenblum, in *supra* note 24, at 371 (quoting such a statement as stating that “[i]llegal aliens are killing us in California. . . . Those who support illegal immigration are, in effect, anti-American. [I]llegal aliens should be caught, skinned, and fried [because] the people are tired of watching their state run wild and become a third world country. . . . The militant arm of the pro-illegal activists [has] vowed to take over first California, then the Western States and then the rest of the nation. . . . You get illegal alien children, Third World children, out of schools and you will reduce the violence. . . . You’re dealing with Third World cultures who come in, they shoot, they beat, they stab and they spread their drugs around in our school system.”)

⁴² Kevin R. Johnson, *Citizens as “Foreigners”*, in THE LATINO/A CONDITION 199 (Richard Delgado & Jean Stefanic eds., New York University Press 1998) (quoting *Letter to Editor by Linda B. Hayes*, N.Y. TIMES, Oct. 15, 1994, at sec. 1, p. 18) (emphasis added).

⁴³ *Contra* Ruben J. Garcia, *The Racial Politics of Proposition 187*, in *id.* at 120.

⁴⁴ *Contra id.* at 120 (citing Jesse Laguna, *Latinos Want a Tighter Border Too*, L.A. TIMES, Sept. 23, 1994, at B7).

⁴⁵ *Supra* note 31, at 172 (explaining that Republicans in the east grew worried about driving Latinos away from the Republican Party, as when the party attacked immigrants, pushing several generations of Irish and Italians to the Democratic Party).

⁴⁶ *Id.* at 172, citing Pamela Burdman and Edward Epstein, “Wilson Goes After Kemp and Bennett: Governor Responds to Prop. 187 Attack,” SAN FRANCISCO CHRON., Oct. 20, 1994.

Proposition 187 started with strong support in the opinion polls, and the measure enjoyed a thirty-seven point lead among likely voters four months prior to the November 1994 election.⁴⁷ Ultimately, Proposition 187 passed with 59 percent of all votes cast. However, “[e]ven though Latinos were just between 8 to 10 percent of the turnout on election day, among all of the four major ethnicities, they were the strongest in opposition. Exit polls showed that Latinos were against the measure by a five to one margin.”⁴⁸

B. POST-PROPOSITION 187 EFFORTS TO DETER UNDOCUMENTED IMMIGRATION

Understanding Proposition 187’s effect requires more than an examination of the conditions that led to its passage, and the impact of the measure itself. Therefore, I shall briefly discuss measures passed by other states that were similar to Proposition 187, and examine additional actions that California took in response to undocumented immigration following Proposition 187. Furthermore, I shall also discuss federal legislation that was passed after Proposition 187 was approved.

1. STATE MEASURES TO DETER UNDOCUMENTED IMMIGRATION FOLLOWING PROPOSITION 187

Other states sought to pass measures similar to California’s Proposition 187 in their own states, including Florida and Arizona.⁴⁹ However, California’s attempts to address undocumented immigration did not end following passage of Proposition 187. After the measure was passed in 1994, “California . . . requested aid from the government to offset the expenses of supporting illegal immigration, and they sued the federal government for funding.”⁵⁰ Furthermore, California did begin receiving some help from the federal government following Proposition 187’s passage.⁵¹

2. PASSAGE OF FEDERAL LEGISLATION TO DETER UNDOCUMENTED IMMIGRATION FOLLOWING PROPOSITION 187

Proposition 187 also spurred additional action at the federal level. For instance:

Proposition 187 was the catalyst for the 1996 welfare reform act [The Personal Responsibility and Work Opportunity Reconciliation Act, or the PRA]. Ironically, the 1996 welfare reform, which

⁴⁷ Rosenblum, in *supra* note 24, at 373 (explaining that voters appeared to be evenly split on the measure by November. Still, the measure was supported by a majority of the whites, Asian Americans, and African Americans who voted. In fact, Only eight counties in all of California, all of which were in the San Francisco Bay Area, failed to support the measure. Moreover, white voters were disproportionately represented at the polls, evidenced by the fact that although 57 percent of California’s population was white, 75-80 percent of the voters were).

⁴⁸ *Supra* note 31, at 262.

⁴⁹ See generally DAVID M. REIMERS, UNWELCOME STRANGERS: AMERICAN IDENTITY AND THE TURN AGAINST IMMIGRATION 100 (Columbia University Press 1998) (explaining that for example, two separate groups sought to pass measures in Florida analogous to California Proposition 187. One measure, promoted by a group called Save Our State (based in Orlando and different from the California group of the same name) promoted a constitutional amendment to deny schooling and other social services (except medical care) to illegal aliens. However, fearful that the section denying illegal children an education might be unconstitutional, backers scaled back that section, but included other provisions requiring state agencies to report suspected illegal immigrants to the federal government. A second group called themselves Florida 187, and the groups was backed by The Federation for American Immigration Reform (FAIR). Florida 187 went even further than Save Our State, because the group advocated requiring that governmental services be provided only in English, and mandating that public servants pass an English proficiency exam. However, the two groups failed to cooperate with one another, or to gather the necessary number of signatures to qualify for the ballot in Florida in 1996. In addition, Arizona proponents of California’s Proposition 187 were unsuccessful in placing a less stringent version on the ballot for their 1996 election).

⁵⁰ See generally *id.* at 101 (explaining, however, that the suit was thrown out after Federal judges ruled that the federal government was not obligated to reimburse states for such expenses. Undeterred, California went to court again in 1996, claiming that the federal government had allowed an “invasion” of illegal aliens, and should reimburse California for their expenses, although the suit fared no better than the one that preceded it).

⁵¹ See generally *id.* at 101 (describing that for example in 1995, Congress began to vote funds to help states pay for the expenses of jailing criminal immigrants, and California received \$270 million of the amount allocated the next year. The amount was four times the amount voted by Congress the previous year, and Congress allowed some of the funds to be allocated to counties for the first time. Then-Justice Department Official Chris Rizzuto commented that “[w]e understand that the states, particularly the big states, have a problem and to the degree that the federal government can help . . . this is something that can be done.”).

was affected by both the [PRA] itself, and the Illegal Alien Reform and Immigrant Responsibility Act, was even more broadly cast than Proposition 187.⁵²

However, “the welfare reform package did not bar undocumented immigrants from public primary and secondary education, nor did it require that officials be informed of suspected undocumented immigrants.”⁵³ I shall discuss how passage of the PRA impacted Proposition 187’s constitutionality in Part III of this article.

C. THE CURRENT STATE OF UNDOCUMENTED IMMIGRATION IN THE UNITED STATES: REASONS FOR, AND CURRENT STATE EFFORTS TO DETER THE TREND

1. UNDOCUMENTED IMMIGRATION SPREADS BEYOND THE BORDER STATES

As I stated in my introduction, more and more states beyond those that border Mexico are feeling the effects of larger numbers of undocumented immigrants. Consequently, the increasing numbers of undocumented immigrants are having an effect on the economies in those states. For instance, James Burke, a retired ironworker in Cullman, Alabama complained that “the influx of undocumented immigrants working in chicken processing plants and construction has led to a rise in crime, decline in neighborhoods, and depressed wages.”⁵⁴ Mr. Burke further stressed that “[o]ur goal is to stop illegal immigration and get rid of the illegal immigrants who are here. What I saw happen in California over 30 years is happening here in just a few years.”⁵⁵ Mr. Burke added that “[i]f I were to break into your house, use all of your stuff, watch your big-screen television, and eat your food, would you say “That man is a criminal” or “He just wants to have a better life?”⁵⁶

2. HOLES IN THE DIKE: THE FEDERAL GOVERNMENT’S FAILURE TO ENFORCE EXISTING FEDERAL IMMIGRATION LAW

The number of undocumented immigrants has increased despite existing federal laws designed to prevent that from occurring. In 1986, The Immigration Reform and Control Act (IRCA) was passed, part of which “created sanctions prohibiting employers from knowingly hiring, recruiting, or referring for a fee aliens not authorized to work in the United States; and increased enforcement at U.S. borders.”⁵⁷ However, the Author asserted that “[t]he [IRCA] may still be on the books, but the feds have almost completely given up on enforcing it.”⁵⁸ For instance, “[l]ast year, the U.S. Immigration & Customs Enforcement Agency brought just three actions against companies for employing illegal immigrants, down from 417 actions as recently as 1999.”⁵⁹

The effect of such lax enforcement is apparent when one considers how dependent some employers are on undocumented immigrants. For example, “[i]llegal immigrants now comprise fully half of all farm laborers [nationally], up from 12% in 1990.”⁶⁰ In addition, “[illegal immigrants are] a quarter of workers in the meat and poultry industry 24% of dishwashers, and 27% of drywall and ceiling tile installers [nationally]”⁶¹

⁵² Rosenblum, in *supra* note 24, at 370 (explaining that “[m]ost significantly, [the 1996 welfare reform] denied nonemergency health care and public benefits (such as disability benefits and food stamps) to many categories of those *legally* admitted to the country, not just to illegal immigrants.”)

⁵³ *Id.* at 370.

⁵⁴ *Supra* note 30, at A1.

⁵⁵ *Id.* at A1.

⁵⁶ *Id.* at A1.

⁵⁷ *Supra* note 34, at 104 (summarizing some of the sanctions created by, and actions taken by the IRCA).

⁵⁸ *Supra* note 1, at 62.

⁵⁹ *Id.* at 62; according to the GAO; compare with George J. Borjas, HEAVEN’S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 204 (Princeton University Press 1999) (explaining that “it is no secret that many American employers benefit greatly from the entry of illegal aliens. This vast pool of workers lowers wages and increases profits in the affected industries. Even though it is illegal for employers to “knowingly hire” illegal aliens, the chances of getting caught are negligible, and the penalties are trivial.” The author further explained that “it was not illegal for firms to hire illegal aliens until 1988. Even though it was illegal for those persons to be in the United States, and it was illegal for those persons to work, firms were free to fire the illegal aliens. Since 1988, first-time offenders have been liable for fines ranging from \$250 to \$2,000 per illegal alien hired. Criminal penalties can be imposed on repeated violators when there is a “pattern and practice” of hiring illegal aliens, including a fine of \$3,000 per illegal alien and up to six months in prison.”)

⁶⁰ *Id.* at 62 (citing a recent Labor Dept. survey, the specifics of which were not provided by the author of the article).

⁶¹ *Id.* at 62 (citing Jeffrey S. Passel, a Pew senior research associate).

3. PERCEPTIONS OF THE AMERICAN PUBLIC

Recent public opinion surveys indicate that many Americans not only oppose undocumented immigration, but support how to and how not to address the issue. Specifically, “[i]n a June 2[, 2005] . . . poll of 900 registered voters, fully 79% said they favored stationing the military at the [United States-Mexico] border to stop illegals.”⁶² Alternatively, “a mid-May . . . poll of 1,005 adults found 58% disapproving of President Bush’s proposed amnesty proposal while just 38% approved.”⁶³

4. BLACK, WHITE, AND SHADES OF GRAY: DEMOCRATS AND REPUBLICANS DEBATE UNDOCUMENTED IMMIGRATION – WITHIN THEIR OWN PARTIES

Despite the public opposition to undocumented immigration, and even public support for stationing the military along the United States-Mexico border to stop it, both Republicans and Democrats are conflicted over how to best address undocumented immigration.

a. A GRAND OLD PROBLEM: REPUBLICANS ARE CONFLICTED OVER THE ISSUE OF UNDOCUMENTED IMMIGRATION

Different groups within the GOP, each with different interests, constituencies and agendas, favor different approaches to addressing undocumented immigration. For instance, “[b]usiness-friendly Republicans want to satisfy employers’ appetite for low wage labor by passing the [Bush] Administration’s guest worker program.”⁶⁴ However, the Republicans’ dilemma is that they “also want to score points for securing the borders against terrorists and criminals.”⁶⁵ Consequently, the Bush White House, while aiming to satisfy Latinos and businesses, is also attempting to “mollify a vocal block of cultural conservatives in the GOP . . . who argue that undocumented workers present a security threat and take some jobs that could be filled by Americans” by promoting tougher border security enforcement.⁶⁶ However, Wayne Cornelius, director of the Center for Comparative Studies at the University of California, San Diego, stated that “[y]ou have the cultural conservatives versus the libertarian, pro-business wing of the party. The cultural conservatives will not let this issue go away. They will keep holding the president’s feet to the fire.”⁶⁷

b. WHO DO YOU LOVE? DEMOCRATS’ INDECISION OVER UNDOCUMENTED IMMIGRANT WORKERS VS. AMERICAN WORKERS

Democrats are also divided when it comes to addressing illegal immigration. Michele L. Waslin, director of immigration studies at the National Council of La Raza, which favors the Secure America and Orderly Immigration Act⁶⁸, explained that “[t]hese immigrants come to the U.S. to live the American dream, but they’re often exploited.”⁶⁹ Consequently, “[Democrats] are sympathetic to the struggles of immigrants, legal and illegal alike, and also wish to retain their edge among Hispanic voters by appearing more welcoming to both groups.”⁷⁰

⁶² *Supra* note 4, at 87 (citing a Fox News poll conducted June 2, 2005).

⁶³ *Id.* at 87 (citing a NBC/Wall Street Journal poll conducted June 2, 2005).

⁶⁴ *Compare id.* at 87, and Peter Wallsten & Nicole Gaouette, *Immigration Rising on Bush’s To-Do List*, L.A. TIMES (July 24, 2005) at A1, A29 (hereinafter *Immigration Rising*) (explaining that [a] guest worker program is favored by many Latinos and by businesses, many of them GOP donors that depend on a steady flow of workers from Mexico and other countries” and that “the White House is working with political strategists to create a broad coalition of business groups and immigration advocates to back a plan that President Bush could promote in Congress and to minority voters in the 2006.” The coalition is tentatively titled the “Americans for Border and Economic Security”).

⁶⁵ *Supra* note 4, at 87.

⁶⁶ *Supra* *Immigration Rising*, at A29 (explaining, however, that “[s]ome Republican strategists worry that the more extreme voices among [cultural conservatives in the GOP] are alienating Latino voters with anti-immigration language.”)

⁶⁷ *Supra* note 30, at A1.

⁶⁸ S. 1033, 109th Cong. (2005) (the bill was introduced on may 12, 2005, and states in subsection (a) of Section 111 (“National Strategy for Border Security”) “that “in conjunction with strategic homeland security planning efforts, the Secretary shall develop, implement, and update, as needed, a National Strategy for Border Security that includes a security plan for the Border Patrol and the field offices of the Bureau of Customs and Border Protection of the Department of Homeland Security that has responsibility for the security of any portion of the international border of the United States.”)

⁶⁹ *Supra* note 4, at 87.

⁷⁰ *Id.* at 87 (explaining, however, that “Democrats are also mindful that the undocumented compete with legal immigrants for the lowest-skilled jobs, often holding down pay.”)

D. THE RESPONSE: CONTEMPORARY LOCAL AND STATE EFFORTS TO DETER UNDOCUMENTED IMMIGRATION

1. LOCAL GOVERNMENTS

In addition to state governments, local governments from coast to coast have also acted to deter undocumented immigration. For instance, Hudson, New Hampshire Police Chief Richard E. Gendron emphasized that “if you want to come to this country, come in the front door.”⁷¹ Otherwise, Gendron warned that undocumented immigrants caught in his town will be charged with criminal trespass.⁷²

Furthermore, Robert Vasquez, the Canyon County Commissioner in Idaho, “has sent Mexico an invoice for \$2 million to cover the cost of caring for illegal immigrants.”⁷³ More recently and significantly, Mr. Vasquez and Canyon County have considered attempting to recoup its expenses by “filing a racketeering lawsuit against the businesses that hire these workers.”⁷⁴ The “county’s attempt to recoup its expenses would be filed under the federal Racketeering Influenced and Corrupt Organizations Act, commonly called the RICO Act, which has been used against targets ranging from organized crime to Internet spammers.”⁷⁵ The legal theory may include showing “a pattern of immigration violations by employers is costing Canyon County millions of dollars in law enforcement, education, and social services.”⁷⁶

Gendron’s and Vasquez’s actions have been described as representing a “fastspreading grassroots backlash whose message to Washington is simple: Seal the borders from illegal immigration, or we’ll take matters into our own hands.”⁷⁷

2. STATE GOVERNMENTS

On November 2, 2004, voters in Arizona passed Proposition 200 (i.e. the Arizona Taxpayer and Citizen Protection Act). Consequently, a new section was added to Title 46 of the Arizona Revised Statutes.⁷⁸ I shall explain Proposition 200 in considerable detail in Parts III and IV of this article.

I shall utilize Proposition 200 primarily as an example of a modern day state effort designed to deter undocumented immigration. However, passage of Proposition 200 did not end state efforts to deter undocumented immigration. For example, Mark Wyland, a Republican member of the California Assembly from Del Mar, attempted to amend the California State Constitution to “prevent illegal immigrants from receiving any health care or social services not required by federal law.”⁷⁹ I shall discuss ACA 6 more extensively in Part IV of my article.

It is necessary to understand and appreciate the passion and emotion, along with the circumstances that have spawned both support for and opposition to state measures designed to deter undocumented immigration. Such state measures are attempts by states to address real and tangible problems that they have experienced, and that have resulted from undocumented immigration. However, it is equally important to understand the *DeCanas* tests because states do not have boundless authority to implement any measure(s) that they believe are necessary to address their problems. Moreover, it is also necessary to examine how the legal standard has been applied to state measures designed to deter undocumented immigration in the past so that states that are presently contemplating similar state measures, or who may do so in the future can anticipate what may be preempted by federal law, and what may not be.

⁷¹ *Id.* at 86.

⁷² *See generally id.* at 86 (explaining that Gendron’s officers have already intercepted three Mexicans and four Brazilians during traffic stops who were on their way to restaurant and landscaping jobs, and who admitted to being in the United States illegally).

⁷³ *Id.* at 87.

⁷⁴ Rebecca Boone (Associated Press), *Employers of Illegals Could Face RICO Suit*, SAN DIEGO UNION TRIB., July 17, 2005, at A13.

⁷⁵ *Id.* at A13.

⁷⁶ *See generally id.* at A13 (Such a lawsuit would be the first time that a government has sued a business under RICO, which was enacted in 1970. In addition, Chicago attorney Howard Foster, a RICO specialist that Canyon County signed a contract with in early July 2005, further emphasized that “[t]here is no such lawsuit in American history.” However, employers have indicated that the lawsuit could spell the end of many labor-intensive businesses that rely on immigrant labor, or at least drive up the cost, according to Ann Bates, the executive director of the Idaho Nursery and Landscape Association. “We do our best to be sure that they are legal, but the laws restrict you as to what you can ask,” Bates said. “We hope that someday somebody really understands that if we lose our labor force, they lose.”)

⁷⁷ *Supra* note 4, at 86.

⁷⁸ ARIZ. REV. STAT. § 46-140.01 was added to Article 3 (State Department of Public Welfare) of Chapter 1 (Administrative Agencies and Officers) in Title 46 of the Arizona Revised Statutes.

⁷⁹ Steve Lawrence, *Two Immigration Measures Halted*, SAN DIEGO UNION TRIB., July 6, 2005, at A4, referring to ACA 6.

III.

DECANAS V. BICA: THE BASIS OF THE DECANAS TESTS, AND THEIR APPLICATION IN LULAC I, LULAC II, AND FRIENDLY HOUSE

Analyzing how Proposition 187 was addressed by the United States District Court in California's Central District, and how Proposition 200 has thus far been addressed by the United States District Court in the District of Arizona illustrates how subsequent state statutes and other state measures seeking to deter illegal immigration might also be affected by the *DeCanas* tests. Therefore, one must appreciate and understand the facts and issues in *DeCanas v. Bica* in order to understand how its tests are to be administered.

A. *DECANAS V. BICA: THE FACTS OF THE CASE, AND THE ENSUING TESTS*

1. *THE FACTS*

The United States Supreme Court considered a California statute that prohibited employers from knowingly employing aliens who were not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.⁸⁰ Justice William J. Brennan delivered the majority opinion of the Court, and explained that “[p]etitioners, who are migrant farmworkers [“Plaintiffs”] brought their action pursuant to Section 2805(c) against farm labor contractors [“Defendants”] in California Superior Court.”⁸¹ In their action, the Plaintiffs alleged “that [the Defendants] had refused [the Plaintiffs] continued employment because of a surplus of labor resulting from [the Defendants’] knowing employment, in violation of Section 2805(a), of aliens not lawfully admitted to residence in the United States.”⁸² Consequently, the “[Plaintiffs] sought reinstatement and a permanent injunction against [the Defendants’] willful employment of illegal aliens.”⁸³

However, Justice Brennan explained that “[t]he Superior Court dismissed the [Plaintiffs’] complaint, holding that Section 2805 was unconstitutional . . . (because) (i)t encroaches upon, and interferes with, a comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration”⁸⁴ The opinion was affirmed by the California Court of Appeal, Second Appellate District, and the Supreme Court of California denied review.⁸⁵

2. *THE MECHANICS OF THE DECANAS TESTS*

a. *DECANAS TEST #1: REGULATION OF IMMIGRATION*

Justice Brennan emphasized that “[p]ower to regulate immigration is unquestionably exclusively a federal power.”⁸⁶ The federal government’s exclusive power to regulate immigration is derived from two portions of the United States Constitution. First, the Constitution grants to the Congress the power “[t]o establish a uniform Rule of Naturalization.”⁸⁷ Moreover, the Constitution grants Congress the power “[t]o regulate Commerce with foreign nations.”⁸⁸ In addition, “the United States Supreme Court has held that the federal government’s power to control immigration is inherent in the nation’s sovereignty.”⁸⁹

However, Justice Brennan cautioned that “the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power,

⁸⁰ *DeCanas*, 424 U.S. at 352-53, citing CAL. LAB. CODE § 2805(a) (“[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.”)

⁸¹ *Id.* at 353.

⁸² *Id.* at 353.

⁸³ *Id.* at 353.

⁸⁴ *Id.* at 353.

⁸⁵ *Id.* at 353-54.

⁸⁶ *Id.* at 354 (citing *Passenger Cases*, 7 How. 283, 12 L.Ed. 702 (1849); *Henderson v. Mayor of New York*, 92 U.S. 259, 23 L.Ed. 543 (1876); *Chy Lung v. Freeman*, 92 U.S. 275, 23 L.Ed. 550 (1876); *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905 (1893)).

⁸⁷ U.S. CONST. art. I, § 8, cl. 4 (cited in *LULAC I*, 908 F.Supp. at 768).

⁸⁸ U.S. CONST. art. I, § 8, cl. 3 (cited in *id.* at 768).

⁸⁹ *LULAC I*, 908 F.Supp. at 768 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (recognizing inherent power of sovereign nation to control its borders); *Plyer v. Doe*, 457 U.S. 202, 225 (1982) (“Drawing upon [its Article 1, section 8] power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments”))

whether latent or exercised.”⁹⁰ Moreover, Justice Brennan further reasoned that “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.”⁹¹ Justice Brennan further noted that:

In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.⁹²

Consequently, the *DeCanas v. Bica* majority held that “absent congressional action, Section 2805 would not be an invalid state incursion on federal power.”⁹³

b. DECANAS TEST #2: CLEAR AND MANIFEST PURPOSE OF CONGRESS TO EFFECT A COMPLETE OUSTER OF POWER

Justice Brennan further explained that “[e]ven when the Constitution does not itself commit exclusive power to regulate a particular field to the Federal Government, there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause.”⁹⁴ In fact, Justice Brennan added “even state regulation designed to protect vital state interests must give way to paramount federal legislation.”⁹⁵ The U.S. Supreme Court considered these matters carefully when they analyzed whether Congress, by enacting the Immigration and Nationality Act (INA), intended to oust state authority to regulate the employment relationship covered by Section 2805(a). However, the *DeCanas v. Bica* Court did not presume “that Congress, in enacting the INA, intended to oust state authority to regulate the employee relationship covered by Section 2805(a) in a manner consistent with pertinent federal laws.”⁹⁶ Justice Brennan emphasized that “[o]nly a 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’ would justify that conclusion.”⁹⁷ Therefore, the effect of the *DeCanas v. Bica* Court’s holding is that Congress ousts a state’s authority to enact a regulation which is harmonious with the federal standard only where there is a showing that it was Congress’ “clear and manifest purpose” to do so.

Justice Brennan further clarified that “[o]f course, even absent such a manifestation of the congressional intent to ‘occupy the field’, the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties.”⁹⁸ However, Justice Brennan added that:

“[C]onflicting law absent repealing or exclusivity provisions, should be preempted . . . ‘only to the extent necessary to protect the achievement of the aims of’ “the federal law, since “the proper approach is to reconcile ‘the operation of both statutory schemes with one another rather than holding (the state scheme) completely ousted.”⁹⁹

⁹⁰ *DeCanas*, 424 U.S. at 355 (explaining that for example, *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 415-422 (1948), and *Graham v. Richardson*, 403 U.S. 365, 372-373 (1971) cited a line of cases that upheld certain discriminatory state treatment of aliens lawfully within the United States).

⁹¹ *Id.* at 355 (explaining that the “doctrinal foundations” of the cases cited by *Takahashi*, 334 U.S. at 415-422 and *Graham*, 403 U.S. at 372-373, generally arose under the Equal Protection Clause e.g. *Clarke v. Deckebach*, 274 U.S. 392 (1927), and that the cases remain authority despite the fact that they “were undermined in *Takahashi*,” see *In re Griffiths*, 413 U.S. 717, 718-722 (1973); *Graham*, 403 U.S. at 372-375).

⁹² *Id.* at 355-56.

⁹³ *Id.* at 356.

⁹⁴ *Id.* at 356.

⁹⁵ *Id.* at 357.

⁹⁶ *Id.* at 357.

⁹⁷ *Id.* at 357 (citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁹⁸ *Id.* at 357 n.5.

⁹⁹ *Id.* at 357 n.5 (citing *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 361, 357 (1963)).

c. *DECANAS TEST #3: OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF THE FULL PURPOSES OF CONGRESS*

The *DeCanas v. Bica* Court explained that “although the INA contemplates some room for state legislation, Section 2805(a) is nevertheless unconstitutional [if it] ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ in enacting the INA.”¹⁰⁰ Or, “stated differently, a state law is preempted under the third test if it conflicts with federal law, making compliance with both state and federal law impossible.”¹⁰¹

d. *SUMMARY OF THE DECANAS TESTS*

The *DeCanas v. Bica* holding requires that all portions of a state statute seeking to deter illegal immigration must satisfy all three of the *DeCanas* tests in order for the entire statute to avoid being preempted by federal law. If all parts of a state statute satisfy the first *DeCanas* test, the entire state statute must then satisfy the second *DeCanas* test, and then the third *DeCanas* test to avoid having any portion of the statute preempted. Part of, and even an entire state statute seeking to deter illegal immigration is preempted at the point in which such a portion fails to satisfy any one of the *DeCanas* tests (i.e. part or all of a state statute that is not preempted by the first or second *DeCanas* tests may nevertheless be preempted by failing to satisfy the third *DeCanas* test). Therefore, state statutes seeking to deter illegal immigration must not fail any of the three *DeCanas* tests or else federal law shall preempt part of, or even all of the measure.

B. *PASSAGE OF PROPOSITION 187, AND APPLICATION OF THE DECANAS TESTS TO PROPOSITION 187 IN LULAC I*

District Judge Marianna Pfaelzer, delivering the majority opinion, explained that On November 8, 1994, Proposition 187 was passed “by [California voters by a majority] of 59% to 41% and [the measure] became effective the following day.”¹⁰² However, “[a]fter [Proposition 187] was passed, several actions challenging the constitutionality of Proposition 187 were commenced in state and federal courts in California.”¹⁰³ Judge Pfaelzer noted that “[u]ltimately, five actions filed in the United States District Court were consolidated in [the United States District Court in California’s Central District] for purposes of motions, hearings, petitions and trial.”¹⁰⁴ Judge Pfaelzer explained that “[t]he [LULAC I Plaintiffs] have brought suit for declaratory and injunctive relief seeking to bar California Governor Pete Wilson, Attorney General Dan Lundgren, and other state actors from enforcing the provisions of Proposition 187.”¹⁰⁵

Consequently, the LULAC I Court entered a temporary restraining order on November 16, 1994 (the “Order”).¹⁰⁶ The Order enjoined the implementation of Proposition 187’s Sections 4, 5, 6, 7 and 9 of (which I shall explain in more detail later in Part III).¹⁰⁷ The LULAC I Court also granted the Plaintiffs’ motions for a preliminary injunction (the “Injunction”) on December 14, 1994.¹⁰⁸ As a result, the Injunction enjoined the implementation and enforcement of Sections 4, 5, 6, 7 and 9 of Proposition 187.¹⁰⁹

¹⁰⁰ *Id.* at 363 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), *Florida Lime & Avacado Growers*, 373 U.S. at 141).

¹⁰¹ *LULAC I*, 908 F.Supp. at 768 (citing *Michigan Canners & Freezers v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 (1984); *Florida Lime & Avacado Growers*, 373 U.S. at 142-43 (1963)).

¹⁰² *Id.* at 763.

¹⁰³ *Id.* at 763.

¹⁰⁴ The five cases referred to as “LULAC I” are as follows: (1) *League of United Latin American Citizens v. Wilson*, Case No. CV 94-7569 MRP (those who brought this action shall be referred to as the “LULAC Plaintiffs”); (2) *Children Who Want an Education v. Wilson*, Case No. CV 94-7570 MRP; (3) *Ayala v. Pete B. Wilson*, Case No. CV 94-7571 MRP; (4) *Gregorio T. v. Wilson*, Case No. CV 94-7652 MRP (those who brought this action shall be referred to as the “Gregorio T. Plaintiffs”); (5) *Carlos P. v. Wilson*, Case No. CV 95-0187 MRP. In addition, the City of Los Angeles, the California Association of Catholic Hospitals and the Catholic Church of the United States, the California Teachers Association, the California Faculty Association, the American Federation of State, County and Municipal Employees AFL-CIO, the Service Employees International Union AFL-CIO, the Islamic Center of Southern California, the Muslim Public Affairs Council, and California Council of Churches were permitted to intervene as plaintiffs. I shall refer to those who brought the actions as the “Plaintiffs”, and those whom were the subject of the Plaintiffs’ actions as the “Defendants”.

¹⁰⁵ *Id.* at 763-4.

¹⁰⁶ *Id.* at 764.

¹⁰⁷ *Id.* at 764; *see generally* the specific Proposition 187 provisions referred to in Appendix A.

¹⁰⁸ *Id.* at 764.

¹⁰⁹ *Id.* at 764.

In addition, “[o]n May 1, 1995 the [LULAC Plaintiffs] and Gregorio T. [Plaintiffs] brought motions for summary judgement.”¹¹⁰ The Plaintiffs asserted “that Proposition 187 [was] unconstitutional on the sole ground that the initiative [was] preempted by the federal government’s exclusive constitutional authority over the regulation of immigration.”¹¹¹ The “Defendants oppose[d] the LULAC and Gregorio T [Plaintiffs]’ motions on the grounds that Proposition 187 [was] not preempted [by federal law] and, alternatively, that if any portion of [Proposition 187 was] preempted, the remaining portions [would be valid] and must be upheld.”¹¹²

1. CLASSIFICATION OF PROPOSITION 187’S PROVISIONS FOR APPLICATION OF THE DECANAS TESTS

Proposition 187 consisted of ten separate provisions when it passed on November 8, 1994. Among the provisions were a preamble (Section 1) and a clause that allowed for proposition 187 to be severed and amended (Section 10). However, Proposition 187 also changed eight different sections of the California Code which were disbursed among the Penal Code, Welfare and Institution Code, Health and Safety Code, Education Code, and Government Code.¹¹³ Therefore, the LULAC I Court divided Sections 2 through 9 of Proposition 187 into the following five different classification schemes based on the provisions’ functions, which I shall utilize throughout my article:

a. CLASSIFICATION AND VERIFICATION PROVISIONS

The LULAC I Court identified Proposition 187 “provisions that require[d] [California S]tate officials to verify or determine the immigration status of arrestees; applicants for social services and health care; and public school students and their parents.”¹¹⁴ Such provisions were further categorized and placed one of the following two categories:¹¹⁵

- 1. CLASSIFICATION:** Such provisions “require[d] [California S]tate agents to classify persons based on three state-created categories of “legal status” without any reference to federal immigration laws.”¹¹⁶ Moreover, “[S]tate agents [were required to] determine who [was] a ‘citizen’, and who [was] ‘lawfully admitted’ as a permanent resident or for a temporary period of time.”¹¹⁷ Therefore, the classification provisions required State agents to make determinations as to one’s “legal status” without reference to federal immigration laws.
- 2. REMAINING VERIFICATION:** Such provisions “contain[ed] a ‘catch all’ category [which] exempt[ed] from Proposition 187’s [benefit denial], notification, and reporting provisions persons who are otherwise lawfully present in the United States under federal law.”¹¹⁸ Therefore, the remaining verification provisions represent an effort by Proposition 187’s drafters, by exempting persons otherwise lawfully present in the United States under federal law from Proposition 187’s provisions, to avoid conflict with federal law under certain circumstances.

¹¹⁰ *Id.* at 764.

¹¹¹ *Id.* at 764.

¹¹² *Id.* at 764.

¹¹³ *See generally* the specific Proposition 187 provisions referred to in Appendix A (specifically, Proposition 187 Section 2 added Section 113 to the California Penal Code; Section 3 added Section 114 to the California Penal Code; Section 4 would have added Section 834(b) to the California Penal Code; Section 5 would have added Section 10001.5 to the California Welfare and Institutions Code; Section 6 would have added Section 130 to Part 1 of Division 1 of the Health and Safety Code; to the California Penal Code; Section 7 would have added Section 48215 to the California Education Code; Section 8 would have added Section 66010.8 to the California Education Code; and Section 9 would have added Section 53069.65 to the California Government Code).

¹¹⁴ *Id.* at 764.

¹¹⁵ *Id.* at 764-5, *see generally* Sections 4(b), 5(b), 5(c), 6(b), 6(c), 7(a), 7(b), 7(c), 7(d), 7(e), 8(a), 8(b), and 8(c).

¹¹⁶ *Id.* at 765.

¹¹⁷ *Id.* at 765; *see generally* Sections 5(b), 6(b), and 7(d), which the LULAC I Court referred to as the “classification provisions”.

¹¹⁸ *Id.* at 765; *see generally* Sections 4(b)(1), 5(c), 6(c), 7(b), 7(c), and 8(b), which the LULAC I Court referred to as the “remaining verification provisions”.

b. NOTIFICATION PROVISIONS

The LULAC I Court also identified “[Proposition 187] provisions which require[d California S]tate officials to notify individuals that they are apparently present in the United States unlawfully and that they must ‘either obtain legal status or leave the United States.’”¹¹⁹

c. COOPERATION/REPORTING PROVISIONS

The LULAC I Court further identified “[Proposition 187] provisions which require[d California S]tate agencies to report immigration status information to state and federal authorities.”¹²⁰ Such provisions also required California State agencies “to cooperate with the INS regarding persons whose immigration status is suspect.”¹²¹

d. BENEFIT DENIAL

The LULAC I Court also identified “[Proposition 187] provisions which require[d] facilities to deny social services, health care services, and public education to individuals based on immigration status.”¹²²

e. CRIMINAL PENALTIES PROVISIONS

The LULAC I Court further identified Proposition 187 provisions that imposed “criminal penalties for falsifying immigration documents.”¹²³

2. APPLICATION OF THE DECANAS TESTS TO PROPOSITION 187’S PROVISIONS

a. DECANAS TEST #1: REGULATION OF IMMIGRATION

The Plaintiffs contended that “[Proposition 187] as a whole [was] a regulation of immigration because it force[d S]tate employees to make judgements as to an individual’s immigration status, [gave] them the power to effectuate removal of immigrants from the country, and thereby establishe[d] California’s own INS.¹²⁴ Therefore, the Plaintiffs argued that because “the entirety of Proposition 187 constitute[d] a scheme to regulate immigration[, it was] therefore preempted.”¹²⁵

The Defendants countered that “pursuant to *DeCanas*, ‘regulation of immigration’ ha[d] a ‘narrow, technical meaning.’”¹²⁶ The Defendants further emphasized “that a facial challenge to [Proposition 187] require[d] a ‘painstaking line-by-line analysis’ of the statute.”¹²⁷ Consequently, the Defendants asserted that “such analysis [would] reveal [] that, standing alone, none of Proposition 187’s individual sections or subsections [were] ‘essentially a determination of who should or should not be admitted into the country and on what terms those lawfully admitted can remain here.’”¹²⁸

1. HOLDING OF THE COURT

My analysis will show that the LULAC I Court evaluated Proposition 187’s provisions based on which of the five classification groups (described in the preceding section) the LULAC I Court assigned the provision(s) to. Consequently, the LULAC I Court determined that the first *DeCanas* test preempted some of Proposition 187’s provisions, while other Proposition 187 provisions were not preempted by the first *DeCanas* test.

¹¹⁹ *Id.* at 765; *see generally* Sections 4(b)(2); (5)(c)(2); and 6(c)(2), which the LULAC I Court referred to as the “notification” provisions”.

¹²⁰ *Id.* at 765.

¹²¹ *Id.* at 765; *see generally* Sections 4(b)(3); 5(c)(3); 6(c)(3); 7(e); 8(c); and 9, which the LULAC I Court referred to as the “cooperation/reporting provisions”.

¹²² *Id.* at 765; *see generally* Sections 5(b), 5(c)(1); 6(b); 6(c)(1); 7(a); 7(b); 7(c); 8(a); and 8(b), which the LULAC I Court referred to as the “benefit denial provisions”.

¹²³ *Id.* at 765; *see generally* Sections 2 and 3, which the LULAC I Court referred to as the “criminal penalties provisions”.

¹²⁴ *Id.* at 769.

¹²⁵ *Id.* at 769.

¹²⁶ *Id.* at 769.

¹²⁷ *Id.* at 769.

¹²⁸ *Id.* at 769 (citing *DeCanas*, 424 U.S. at 355).

a. SECTION 7: PREEMPTED BY PLYER V. DOE

The LULAC I Court analyzed Section 7 of Proposition 187 differently than the remainder of Proposition 187. Rather than subject Section 7 to each of the three *DeCanas* tests, the LULAC I Court considered the impact of the United States Supreme Court’s decision in *Plyer v. Doe* on Proposition 187’s Section 7.¹²⁹ The LULAC I Court explained that the majority in *Plyer v. Doe* held “that the Equal Protection Clause of the fourteenth Amendment prohibits states from excluding undocumented alien children from public schools”¹³⁰ Consequently, the LULAC I Court held that “[S]ection 7 in its entirety conflicts with and is therefore preempted by federal law.”¹³¹

b. CLASSIFICATION, NOTIFICATION, AND COOPERATION/REPORTING PROVISIONS

The LULAC I Court distinguished Proposition 187 from the statute under consideration in *DeCanas v. Bica*, noting that “the Supreme Court found that [Section 2805(a)] did not constitute an immigration regulation, but rather, had only ‘some purely speculative and indirect impact on immigration.’”¹³² On the other hand, the LULAC I court first determined that Proposition 187’s verification, notification and cooperation/notification requirements “ha[d] much more than a ‘purely speculative and indirect impact on immigration.’”¹³³ The LULAC I Court further emphasized that “Proposition 187’s verification, notification and cooperation/notification requirements directly regulate[d] immigration by creating a comprehensive scheme to detect and report the presence and effect the removal of illegal aliens.”¹³⁴ Consequently, the LULAC I Court determined that “Proposition 187’s [verification, notification and cooperation/notification requirements] ha[d] a direct and substantial impact on immigration.”¹³⁵

The LULAC I Court also noted that “certain of Proposition 187’s provisions require[d S]tate agents to make *independent* determinations of who [was] subject to the initiative’s benefit denial, notification, and cooperation/reporting provisions and who may remain lawfully in the United States.”¹³⁶ The LULAC I Court explained that, by comparison, “the statute at issue in *DeCanas* . . . adopted *federal standards* to determine whether an individual’s immigration status subjected an employer to liability”¹³⁷ However, the LULAC I Court found that “Proposition 187’s classification provisions create[d] an entirely *independent set* of criteria by which to classify individuals based on immigration status.”¹³⁸ Consequently, the LULAC I Court held that “the classification, notification and cooperation/reporting provisions of [Proposition 187, contained in [S]ections 4 through 9 and in the preamble, which [were] aimed solely at regulating immigration, are preempted.”¹³⁹

c. BENEFIT DENIAL PROVISIONS

Unlike their holding with respect to the first *DeCanas* test and Proposition 187’s classification, notification and cooperation/reporting provisions, the LULAC I Court stated that “[Proposition 187’s] benefit denial provisions of [S]ections 5 through 8 may be likened to the statute at issue in *DeCanas*.”¹⁴⁰ The LULAC I Court acknowledged that “the denial of benefits to persons not lawfully present in the United States may indirectly or incidentally affect immigration by causing such persons to leave the state, or deterring them from entering California in the first place .

¹²⁹ *Id.* at 774, *see generally* Proposition 187’s Section 7 in Appendix A.

¹³⁰ *Id.* at 774 (citing *Plyer v. Doe*, 457 U.S. 202 (1982)).

¹³¹ *Id.* at 774 (however, the LULAC I Court continued applying the *DeCanas* tests to Section 7, despite the fact that the provision was already preempted by federal law. I have provided the LULAC I Court’s analysis as it pertains to Section 7 throughout my analysis in Part III.)

¹³² *Id.* at 769 (citing *DeCanas*, 424 U.S. at 355).

¹³³ *Id.* at 769.

¹³⁴ *Id.* at 769 (noting that “the scheme requires state agents to question all arrestees, applicants for medical and social services, students, and parents of students about their immigration status; to obtain and examine documents relating to the immigration status of such persons; to identify “suspected” “illegal” immigrants in California; to report suspected “illegal” immigrants to state and federal authorities; and to instruct people suspected of being in the United States illegally to obtain “legal status” or “leave the country”).

¹³⁵ *Id.* at 769.

¹³⁶ *Id.* at 769-70.

¹³⁷ *Id.* at 770.

¹³⁸ *Id.* at 770 (referring to Proposition 187’s Sections 5(b), 6(b), and 7(d)).

¹³⁹ *Id.* at 771 (the LULAC I Court examined provision of Proposition 187 individually on ppg. 771-75 when determining whether each provision was preempted as a regulation of immigration by the first *DeCanas* test. Also, the LULAC I Court mentioned Proposition 187’s preamble (Section 1) in this cited quote, but did not provide any specific analysis in the opinion describing the exact basis in which Section 1 was preempted by the first *DeCanas* test. In fact, the LULAC II Court’s analysis proceeded as if Section 1 had not been preempted in LULAC I).

¹⁴⁰ *Id.* at 770.

...¹⁴¹ However, the LULAC I Court emphasized that “such a denial does not amount to a ‘determination of who should or should not be admitted into the country.’”¹⁴²

The LULAC I Court stressed that “state agents are unqualified -- and also unauthorized -- to make independent determinations of immigration status. Congress has exclusively reserved that power to the INS and to immigration judges pursuant to the INA.”¹⁴³ The LULAC I Court further explained that “determinations of immigration status by state agents amounts to immigration regulation whether made for the purposes of notifying aliens of their unlawful status and reporting their presence to the INS or for the limited purpose of denying benefits.”¹⁴⁴

However, the Defendants contended “that . . . state agents [were] required to and [did] make determinations of immigration status in administering benefits under certain federal-state cooperative program, eligibility for which Congress has conditioned on lawful immigration status.”¹⁴⁵ Based upon such determinations, Defendants maintained that state agents should also be permitted to make such determinations “for purposes of denying benefits under Proposition 187.”¹⁴⁶

The LULAC I Court noted the Systematic Alien Verification for Entitlement Program (SAVE), “an existing federal eligibility system used to verify status for various federal-state cooperative programs . . . under which eligibility depends on lawful immigration status.”¹⁴⁷ The LULAC I Court emphasized that such benefit programs “require[d] S]tate agents to verify immigration status by accessing federal immigration status information through SAVE.”¹⁴⁸ However, the LULAC I Court explained that with respect to administering state-federal cooperative programs, “[S]tate agents merely access INS information to verify an applicant’s immigration status -- no independent determinations are made and no state-created criteria are applied.”¹⁴⁹ Therefore, the LULAC I Court concluded that State agents, “[i]n administering federal-state cooperative benefits programs . . . perform a *ministerial rather than a discretionary* (emphasis added) function in verifying immigration status.”¹⁵⁰

The LULAC I Court discussed that “[a] requirement that state agents merely *verify* information status by referring to INS information is much different from a requirement that state agents actually make determinations as to who is, and who is not deportable under federal law.”¹⁵¹ Specifically, the LULAC I Court contended that “[p]ermitt[ing] state agents, who are untrained -- and unauthorized -- under federal law to make immigration status decisions, incurs the risk that inconsistent and inaccurate judgements will be made.”¹⁵² However, the LULAC I Court reasoned that “[o]n the other hand, requiring state agents simply to verify a person’s status with the INS involves no independent judgement on the part of state officials and ensures uniform results consistent with federal determinations of immigration status.”¹⁵³

The LULAC I Court concluded that “state regulations implementing Proposition 187 could require state agencies to verify immigration status through reference to INS information and could deny state actors discretion to apply non-federal criteria for benefits eligibility”¹⁵⁴ Consequently, the LULAC I Court held that “Proposition 187’s benefit denial provisions [were] not an impermissible regulation of immigration and therefore withstand scrutiny under the first *DeCanas* test.”¹⁵⁵

d. CRIMINAL PENALTIES PROVISIONS

The LULAC I Court also addressed whether the criminal penalties provisions of Proposition 187 constituted a regulation of immigration. The LULAC I Court noted that the criminal penalties provisions, which

¹⁴¹ *Id.* at 770.

¹⁴² *Id.* at 770 (citing *DeCanas*, 424 U.S. at 355).

¹⁴³ *Id.* at 770 (citing 8 U.S.C. § 1252(b); 8 C.F.R. § 242.1(a)).

¹⁴⁴ *Id.* at 770.

¹⁴⁵ *Id.* at 770.

¹⁴⁶ *Id.* at 770.

¹⁴⁷ *Id.* at 770 (explaining that SAVE is 42 U.S.C. § 1320b-7, and the LULAC I Court specifically cited Aid to Families with Dependent Children (AFDC), Food Stamps, Medicaid, and Unemployment Compensation Programs under which eligibility depends on lawful immigration status); see 42 U.S.C. § 1320b-7(b)(1) and 45 C.F.R. § 233.50 (AFDC); 42 U.S.C. §§ 1320b-7(b)(2) and 1396b(v)(1) (Medicaid); 7 U.S.C. § 2015(f) and 42 U.S.C. § 1320b-7(b)(4) (Food Stamps)).

¹⁴⁸ *Id.* at 770.

¹⁴⁹ *Id.* at 770.

¹⁵⁰ *Id.* at 770.

¹⁵¹ *Id.* at 770.

¹⁵² *Id.* at 770.

¹⁵³ *Id.* at 770.

¹⁵⁴ *Id.* at 770-71.

¹⁵⁵ *Id.* at 771.

“criminalize making and using false documents ‘to conceal’ the ‘true citizenship or resident alien status’ of a person, may indirectly affect immigration in some way”¹⁵⁶ However, the LULAC I Court reasoned that “[the criminal penalties] provisions, though they may indirectly affect immigration in some way, can hardly be said to be a ‘determination of who should or should not be admitted in the country.’”¹⁵⁷ Moreover, the LULAC I Court asserted that “[l]ike the benefit denial provisions, the criminal penalties, criminalizing conduct that is dishonest and deceptive, are a legitimate exercise of the police power of the [S]tate.”¹⁵⁸ Finally, the LULAC I Court found that “[a]bsent the verification, notification, and cooperating/reporting elements of [Proposition 187] . . . the criminal penalties do not serve the impermissible goal of ensuring that ‘illegal’ aliens leave the country.”¹⁵⁹ Consequently, the LULAC I Court held that “[the criminal penalties provisions were] not preempted under the first *DeCanas* test.”¹⁶⁰

b. DECANAS TEST #2: CLEAR AND MINIFEST PURPOSE OF CONGRESS TO EFFECT A COMPLETE OUSTER OF POWER

1. HOLDING OF THE COURT

The LULAC I Court began its analysis of Proposition 187’s provisions with respect to the second *DeCanas* test by emphasizing that “even if a statute is not an impermissible regulation of immigration, it may still be preempted if there is a showing that Congress intended to ‘occupy the field’ which the statute attempts to regulate.”¹⁶¹ Therefore, Proposition 187’s provisions were either preempted by the second *DeCanas* test, or allowed to remain in force depending on the purpose(s) of the provision(s).

a. CLASSIFICATION, NOTIFICATION, AND COOPERATION/REPORTING PROVISIONS

The LULAC I Court relied upon the Ninth Circuit’s decision in *Gonzales v. City of Peoria*, 722 F.2d 468 in determining whether part or all of Proposition 187 was preempted by the second *DeCanas* test. Quoting *Gonzales v. City of Peoria*, the LULAC I Court noted that “[w]e assume that the civil provisions of the [INA] regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”¹⁶² Consequently, the LULAC I Court concluded that “Congress has fully occupied the field of immigration regulation through enactment and implementation of the INA.”¹⁶³

Therefore, the LULAC I Court re-emphasized that “the classification, notification, and cooperation/reporting requirements contained in Sections 1 and 4 through 9 constitute[d] a scheme to regulate immigration”¹⁶⁴ Furthermore, just as the first *DeCanas* test preempted the classification, notification, and cooperation/reporting requirements contained in Sections 1 and 4 through 9 as an immigration regulation scheme, “those provisions [were] necessarily preempted under the second *DeCanas* test as well.”¹⁶⁵

b. BENEFIT DENIAL PROVISIONS

The LULAC I Court continued by considering whether the second *DeCanas* test preempted Proposition 187’s benefit denial provisions. They noted that the second *DeCanas* test would preempt the benefit denial provisions “only if they regulate[d] a field in which Congress intended a ‘complete ouster’ of state power, even if a state regulation in that field [was] not in conflict with federal law.”¹⁶⁶

The LULAC I Court relied upon the *DeCanas v. Bica* holding to illustrate the limitations of Congress’ occupation of the field of immigration regulation. The LULAC I Court noted that “[i]n *DeCanas*, the Supreme Court defined the field on which the statute in question touched not as the broad field of immigration regulation, but,

¹⁵⁶ *Id.* at 775; see generally Proposition 187 Sections 2 and 3 in Appendix A.

¹⁵⁷ *Id.* at 775.

¹⁵⁸ *Id.* at 775.

¹⁵⁹ *Id.* at 775.

¹⁶⁰ *Id.* at 775.

¹⁶¹ *Id.* at 775 (citing *DeCanas*, 424 U.S. at 357).

¹⁶² *Id.* at 775-76 (citing *Gonzales*, 722 F.2d 468).

¹⁶³ *Id.* at 776.

¹⁶⁴ *Id.* at 776.

¹⁶⁵ *Id.* at 776.

¹⁶⁶ *Id.* at 776 (citing *DeCanas*, 424 U.S. at 356-7).

rather, the more narrow field of employment of illegal aliens.”¹⁶⁷ Furthermore, “the [*DeCanas*] Court refused to ‘presume that Congress . . . intended to oust state authority to regulate the employment relationship covered by the [statute]’, and held that the statute was not preempted.”¹⁶⁸ Applying that reasoning, and “[f]inding that nothing in the INA . . . indicated Congressional intent to preclude state regulation touching on the employment of illegal aliens . . .”, the *DeCanas v. Bica* Court held that the statute was not preempted.¹⁶⁹

Similarly, the LULAC I Court found that Proposition 187’s benefit denial provisions did not touch the broad field of immigration regulation.¹⁷⁰ Rather, the LULAC I Court found that Proposition 187’s benefit denial provisions touched “the public benefits field, specifically alien eligibility for public benefits.”¹⁷¹ The LULAC I Court also reviewed the wording and legislative history of the INA, concluding that “nothing . . . ‘unmistakably confirms’ an intent to oust state authority to regulate in the public benefits field . . .”¹⁷² Moreover, the LULAC I Court, citing *DeCanas v. Bica*, further reasoned that “such an intent cannot be ‘derived from the scope and detail of the INA . . . governing entry and stay of aliens . . .’”¹⁷³ Consequently, the LULAC I Court held that “Proposition 187’s benefit denial provisions [were] not preempted under the second *DeCanas* test.”¹⁷⁴

c. CRIMINAL PENALTIES PROVISIONS

The LULAC I Court next considered whether the second *DeCanas* test preempted Proposition 187’s criminal penalties provisions. The LULAC I Court concluded that the “Plaintiffs made no showing . . . that Congress intended to effect a ‘complete ouster of state power -- including state power to promulgate laws not in conflict with federal laws’ with respect to criminalizing the falsification and use of forged identification documents.”¹⁷⁵

The LULAC I Court also determined that “[t]he field on which [S]ections 2 and 3 touch is not the broad field of immigration regulation but, rather, the field of criminal law as it relates to false documents.”¹⁷⁶ Consequently, finding that “[s]ince nothing in the legislative history of the INA, or the INA itself, reveale[d] an intent to oust state authority to criminalize the production or use of false identification, [S]ections 2 and 3 [were] not preempted under the second *DeCanas* test.”¹⁷⁷

c. DECANAS TEST #3: OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF THE FULL PURPOSES OF CONGRESS

1. HOLDING OF THE COURT

The LULAC I Court began its analysis of Proposition 187’s provisions with respect to the third *DeCanas* test by focusing on the classification, notification, and cooperation/reporting provisions. In addition, the LULAC I Court also considered how the classification, notification, and cooperation/reporting provisions affected the benefit denial provisions’ viability. The LULAC I Court further considered whether the criminal penalties provisions were preempted by, the last hurdle that the criminal penalties provisions needed to clear to avoid being preempted by federal law.

a. CLASSIFICATION, NOTIFICATION, AND COOPERATION/REPORTING PROVISIONS

The LULAC I Court began analyzing whether the third *DeCanas* test preempted portions of or all of Proposition 187 by focusing on the classification, notification, and cooperation/reporting provisions. The LULAC I

¹⁶⁷ *Id.* at 776 (citing *DeCanas*, 424 U.S. at 356-7).

¹⁶⁸ *Id.* at 776 (citing *DeCanas*, 424 U.S. at 356-7).

¹⁶⁹ *Id.* at 776 (citing *DeCanas*, 424 U.S. at 356-7).

¹⁷⁰ *Id.* at 776.

¹⁷¹ *Id.* at 776.

¹⁷² *Id.* at 776.

¹⁷³ *Id.* at 776 (citing *DeCanas*, 424 U.S. at 359).

¹⁷⁴ *Id.* at 776.

¹⁷⁵ *Id.* at 776 (citing *DeCanas*, 424 U.S. at 357).

¹⁷⁶ *Id.* at 776.

¹⁷⁷ *Id.* at 776.

Court emphasized that “[t]he INA specifies an exclusive list of grounds of deportation¹⁷⁸ . . . and provides that that procedure shall be the “sole and exclusive procedure for determining the deportability of an alien.”¹⁷⁹

However, the LULAC I Court noted that “Proposition 187’s classification, notification, and cooperation/reporting provisions directly contradict[ed] the INA’s mandate that the procedure outlined in the INA ‘shall be the sole and exclusive procedure for determining the deportability of an alien.’”¹⁸⁰ Moreover, the LULAC I Court determined that Proposition 187’s classification, notification, and cooperation/reporting provisions “create[d] a new, wholly independent procedure, pursuant to which state law enforcement, welfare, health care, and education officials -- rather than federal officials and immigration judges -- were required to determine the deportability of aliens, and effect their deportation.”¹⁸¹ By doing so, the LULAC I Court noted that “[Proposition 187’s] classification, notification, and cooperation/reporting provisions delegate[d] to state agents tasks which federal law delegates *exclusively* to federal agents.”¹⁸² Therefore, the LULAC I Court held that “[Proposition 187’s classification, notification, and cooperation/reporting] provisions [were] in direct conflict with and [were] preempted by federal law.”¹⁸³

b. BENEFIT DENIAL PROVISIONS

The Plaintiffs asserted that the “classification provisions define[d] legal immigration status more narrowly than federal law, and [that] the remaining verification provisions require[d] State agents to classify persons’ immigration status based on ‘suspicion.’”¹⁸⁴ Therefore, the Plaintiffs argued that Proposition 187’s classification and remaining verification provisions “[would] result in the denial of benefits to persons who fail to meet *state* criteria but [were] . . . lawfully present in the United States under *federal* law.”¹⁸⁵ The Plaintiffs emphasized that such a scenario would make it impossible to comply with both state and federal law. Consequently, the Plaintiffs urged that Proposition 187’s benefit denial provisions, because of the impact of the classification and remaining verification provisions, should also be preempted along with the classification and remaining verification provisions. More information regarding the classification and remaining verification provisions with respect to the third *DeCanas* test is in the subsections below.

However, the “Defendants argue[d] that [Proposition 187] ‘[did] not set up a classification system’ at all . . .”¹⁸⁶ The Defendants further asserted “that the classification provisions, like the remaining verification provisions which [were] tied to federal standards, should be construed as applying only to persons who are present in the United States in violation of federal immigration laws.”¹⁸⁷

The LULAC I Court noted that “Proposition 187 require[d], for the implementation of its benefit denial provisions, that public social service agencies, public health care facility personnel, public school districts and postsecondary educational institutions classify or verify the immigration status of applicants for benefits and services.”¹⁸⁸ Therefore, the LULAC I Court considered the effect of Proposition 187’s classification and remaining verification provisions on Proposition 187’s denial of benefits provisions. Consequently, the LULAC I Court’s analysis of the benefit denial provisions with respect to the third *DeCanas* test was tied to Proposition 187’s classification and remaining verification provisions. Therefore, I will examine how the LULAC I Court analyzed the benefit denial provisions in conjunction with the classification provisions, and how the LULAC I Court analyzed the benefit denial provisions in conjunction with the remaining verification provisions in separate headings below.

¹⁷⁸ *Id.* at 777 (citing 8 U.S.C. § 1251(a)).

¹⁷⁹ *Id.* at 777 (citing 8 U.S.C. § 1252(b) (emphasis added) (The LULAC I Court, with respect to the “procedure”, noted that among other things, that only a “special inquiry officer” (i.e. an immigration judge) may conduct deportation proceedings (*Id.*); The INA’s accompanying regulations require “[e]very proceeding to determine the deportability of an alien in the United States [to be] commenced by the filing of an order to show cause with the Office of the Immigration Judge.” (8 C.F.R. § 242.1(a); 8 U.S.C. § 1252(a)); The authority to issue such orders is delegated to a discrete list of federal officers (*Id.*); Only specified federal officials can commence deportation proceedings, and only an immigration judge in deportation proceedings can determine that an alien is deportable and order the alien to leave the United States (*Id.*; 8 U.S.C. §§ 1252(a), 1252(b)); Then, after a “final order” of deportation issues, only the Attorney General may “effect the alien’s departure from the United States.” (8 U.S.C. § 1252(c))).

¹⁸⁰ *Id.* at 777.

¹⁸¹ *Id.* at 777.

¹⁸² *Id.* at 777.

¹⁸³ *Id.* at 777.

¹⁸⁴ *Id.* at 777 (for the specific classification and remaining verification provisions, *see generally* Proposition 187 Sections 4(b)(1), 5(b), 5(c), 6(b), 6(c), 7(b), 7(c), 7(d), and 8(c) in Appendix A).

¹⁸⁵ *Id.* at 777.

¹⁸⁶ *Id.* at 777.

¹⁸⁷ *Id.* at 777.

¹⁸⁸ *Id.* at 777; *see generally* Proposition 187 Sections 5, 6, 7, and 8 in Appendix A.

1. THE CLASSIFICATION PROVISIONS

The LULAC I Court noted that “Proposition 187 establishe[d] three state-created categories of lawful immigration status on which the benefit denial provisions [was] based.”¹⁸⁹ However, the LULAC I Court stressed that “the [State Categories] . . . fail[ed] to recognize several *federal* categories of persons who are not citizens, not admitted as permanent residents, and not admitted for a temporary period of time but who were nevertheless present in the United States”¹⁹⁰ The LULAC I Court further emphasized that persons in the Federal Categories were also “authorized to remain in [the United States] and even [to be] eligible for certain benefits in accordance with federal law.”¹⁹¹ The LULAC I Court asserted that federal law authorized the persons covered by the Federal Categories “to remain in the United States permanently, indefinitely, or temporarily.”¹⁹² The LULAC I Court concluded that that “[n]one of [the Federal Categories are] accounted for by Proposition 187’s classification scheme.”¹⁹³

Consequently, the LULAC I Court concluded that the third *DeCanas* test preempted Proposition 187’s classification provisions as used to deny social and health services under Proposition 187 Sections 5 and 6, and education under Section 7.¹⁹⁴ However, the LULAC I Court also held that the classification provisions could be severed from Proposition 187’s remaining provisions.¹⁹⁵

2. THE REMAINING VERIFICATION PROVISIONS

The LULAC I Court determined that “because [Proposition 187 Sections 5(c), 6(c), 7(b) and 8(b)] require[d] verification by reference to federal immigration standards, conflict with that law [was] not readily apparent.”¹⁹⁶ However, the Plaintiffs asserted that:

[T]he verification procedure required by [Proposition 187 Sections 5(c) and 6(c)], based on the reasonable suspicion of state agents, [could] not be constitutionally implemented because denying benefits to those merely suspected of being present in violation of federal law conflict[ed] with federal law which entitles individuals lawfully present in the United States to the receipt of certain benefits.¹⁹⁷

In other words:

[B]ecause benefits [could] be denied under Proposition 187 to individuals who [were] in fact lawfully present in the United States if the administering agent merely reasonably suspect[ed] that they [were] present in violation of federal law, the verification procedure [in Proposition 187] conflicted and impeded the objective of federal law with respect to immigrant benefit eligibility.¹⁹⁸

Therefore, the Plaintiffs urged the LULAC I Court to hold that the third *DeCanas* test preempted Sections 5(c) and 6(c).

¹⁸⁹ *Id.* at 777-78 (for the specific classification provisions in question, *see generally* Proposition 187 Sections 5(b)(1)-(3), 6(b)(1)-(3), 7(d)(1)-(3) in Appendix A (i.e. the “State Categories” referred to in the text refers to persons defined as “legal” and entitled to receive benefits if they (1) are citizens of the United States, (2) aliens lawfully admitted as permanent residents, and (3) aliens lawfully admitted for a temporary period of time).

¹⁹⁰ *Id.* at 778.

¹⁹¹ *Id.* at 778; *see generally* 8 U.S.C. §§ 1101(a)(42), 1157 (certain refugees); 8 U.S.C. § 1101(a)(42)(A), 1158 (asylees); 8 U.S.C. § 1253(h) (persons granted withholding of deportation); 8 U.S.C. § 1182(d)(5) (parolees); 8 C.F.R. § 242.6 (persons protected by “family unity” status); 8 U.S.C. § 1254(a) (persons present under temporary protected status); 57 Fed.Reg. 28700-28701 (persons granted deferred enforced departure (“DED”)); 8 U.S.C. §§ 1105a(a)(3) (stay), 1254(a)(suspension) (persons eligible for suspension or stay of deportation) 8 U.S.C. § 1154 (battered immigrant women and children) for information on the persons included in the “Federal Categories”.

¹⁹² *Id.* at 778.

¹⁹³ *Id.* at 778.

¹⁹⁴ *Id.* at 778.

¹⁹⁵ *Id.* at 779.

¹⁹⁶ *Id.* at 779 (explaining that “[s]ubsection (c) of [S]ections 5 and 6 provides that if any public entity ‘determines or reasonably suspects, based on the information provided to it,’ that an applicant for benefits or services is an ‘alien in the United States in violation of federal law,’ the entity shall deny the benefits or services.” Moreover, “[s]ubsection (b) of [S]ections 7 and 8 likewise calls for verification of status based on federal immigration standards by requiring school districts and postsecondary educational institutions to verify that students and/or parents are ‘authorized under federal law to be in the United States.’”)

¹⁹⁷ *Id.* at 779.

¹⁹⁸ *Id.* at 779.

The LULAC I Court agreed with the Plaintiffs. The LULAC I Court reasoned that “the only constitutional implementation of Proposition 187’s benefit denial provisions would [have] require[d] state agents to utilize federal determinations of immigration status”¹⁹⁹ The LULAC I Court further held that a “[S]tate agent’s ‘reasonable suspicion’ of lawful immigration status [was] not the same as a federal determination of immigration status”²⁰⁰ Therefore, the LULAC I Court held that “the ‘reasonably suspects’ language [in Proposition 187 Sections 5(c) and 6(c)] conflict[ed] with federal law” and was preempted by the third *DeCanas* test.²⁰¹ However, the LULAC I Court further held that “[t]he ‘reasonably suspects’ language in [Sections 5(c) and 6(c)] could] be severed from the remainder of [Sections 5(c) and 6(c)].”²⁰²

The LULAC I Court then considered the remaining verification provisions in Proposition 187 Sections 7 and 8, which pertained to the denial of public education. In doing so, the LULAC I Court distinguished Proposition 187 Sections 7 and 8 from Sections 5 and 6 “because public school authorities [would] merely [be] required to *verify* a student’s immigration status as lawful under federal law.”²⁰³ The LULAC I Court further distinguished Proposition 187 Sections 7 and 8 from Sections 5 and 6 because no “reasonable suspicions” would be involved.²⁰⁴ The LULAC I Court explained that immigration status could be verified “by reference to INS information . . . through programs such as SAVE.”²⁰⁵ Thus, the LULAC I Court held that “the remaining verification provisions in [S]ections 7 and 8 [were] not conflict with federal law”²⁰⁶ Consequently, the LULAC I Court also held that the third *DeCanas* test did not preempt Proposition 187 Sections 7 and 8.²⁰⁷

3. THE BENEFIT DENIAL PROVISIONS CONSIDERED INDEPENDENTLY FROM THE CLASSIFICATION AND REMAINING VERIFICATION PROVISIONS

The LULAC I Court considered the benefit denial provisions in Sections 5 and 6 together when determining whether the third *DeCanas* test preempted them. Moreover, the LULAC I Court determined that “the benefit denial provisions of [S]ections 5 and 6, even if implemented to deny benefits and services only to persons present in the United States in violation of federal immigration laws, appear[ed] to conflict with various federal laws.”²⁰⁸ Specifically, the LULAC I Court contemplated that the benefit denial provisions of Sections 5 and 6 appeared to conflict with various federal laws that “applied to federally funded programs and federally funded health care facilities”²⁰⁹

Therefore, the LULAC I Court held that “[S]ection 5’s benefit denial provisions conflict[ed] with federal law as applied to public social services funded in any part by the federal government and made available to persons under the authorizing federal statutes regardless of immigration status.”²¹⁰ However, the LULAC I Court also held that “Section 5, to the extent that it denie[d] benefits under wholly state-funded programs and under federal-state cooperative programs such as Medicaid, Food Stamps, AFDC, eligibility for which Congress had already conditioned on lawful immigration status, [did] not appear to conflict with federal law.”²¹¹ Consequently, the LULAC I Court made “no determination . . . as to whether [S]ection 5’s benefit denial provision [was] wholly preempted.”²¹² Specifically, the LULAC Court explained that “[a] further showing would be required to reach [that] conclusion.”²¹³ I shall explain how this determination was made later in Part III.

With respect to the benefit denial provisions in Section 6, the LULAC I Court held that “[S]ection 6 must be construed to require all publicly-funded health care facilities to deny *all* medical services, except emergency screening and treatment procedures required by federal law, to persons not lawfully present in the United States under federal law.”²¹⁴ The LULAC I Court further held that to the extent that:

¹⁹⁹ *Id.* at 779.

²⁰⁰ *Id.* at 779.

²⁰¹ *Id.* at 779.

²⁰² *Id.* at 779.

²⁰³ *Id.* at 779.

²⁰⁴ *Id.* at 779.

²⁰⁵ *Id.* at 779.

²⁰⁶ *Id.* at 779-80.

²⁰⁷ *Id.* at 779-80.

²⁰⁸ *Id.* at 780 (although the LULAC I Court did not elaborate on which specific “various federal laws” they were referring to).

²⁰⁹ *Id.* at 780.

²¹⁰ *Id.* at 782.

²¹¹ *Id.* at 781-2.

²¹² *Id.* at 782.

²¹³ *Id.* at 782.

²¹⁴ *Id.* at 784.

[S]ection 6’s [benefit denial provision] applie[d] to facilities that receive federal funding under programs such as the Hill-Burton and Public Health Services Act and require[d] denial of non-emergency medical services to persons unlawfully present where the federal legislation is silent with respect to the immigration status of medical care recipients, [S]ection 6 conflict[ed] with federal law.²¹⁵

However, the LULAC I Court also held that “to the extent that [S]ection 6 applie[d] to wholly *state-funded* health care facilities, if in fact such facilities in fact exist, the denial of non-emergency health services to persons unlawfully present in the United States [did] not appear to conflict with any federal law.”²¹⁶ Furthermore, the LULAC I Court also held that although they recognized potential conflicts, “the Court [could] not determine on the record before it whether [S]ection 6’s [benefit denial] provision [was] entirely preempted or preempted only to the extent that it applie[d] to federal grant recipient health care facilities.”²¹⁷

With respect to the benefit denial provisions in Section 8, the LULAC I Court determined that “[the] Plaintiffs [did] not identify any provision of federal law that conflicted with [S]ection 8’s denial of education.”²¹⁸ Moreover, the LULAC I Court stated that “[o]n its face, [Section 8(a) was] consistent with the INS statement permitting aliens ‘considered to be residing permanently in the United States under color of law’ to study within the country.”²¹⁹ Consequently, the LULAC I Court held that “[Section 8(a) was not preempted under the third *DeCanas* test.”²²⁰

c. CRIMINAL PENALTIES PROVISIONS

The Plaintiffs asserted that Proposition 187’s criminal penalties provisions conflicted with federal law because the provisions “imposed different penalties than those already imposed by federal laws regulating the production or use of false citizenship, naturalization and alien registration papers and the misuse or forgery of passports and visas.”²²¹ However, the LULAC I Court found that despite the differences in penalties, the Plaintiffs did not show “that the criminal penalties contemplated by [Proposition 187’s criminal penalties provisions] conflict[ed] with or impede[d] the objectives of federal law.”²²² Therefore, the LULAC I Court held that “[Proposition 187’s criminal penalties provisions were] not preempted under the third *DeCanas* test.”²²³

3. PROPOSITION 187 AFTER LULAC I: SUMMARY OF THE APPLICATION OF THE DECANAS TESTS TO PROPOSITION 187’S PROVISIONS

Understanding the impact that the LULAC I Court’s decision had on Proposition 187 requires a brief review of how the LULAC I Court’s application of the *DeCanas* tests impacted Proposition 187’s provisions. For example, the LULAC I Court granted the Plaintiffs’ motions for summary judgement with respect to the classification, notification, and cooperation/reporting provisions in Sections 4, 5, 6, 7, 8, and 9.²²⁴ In addition, the LULAC I court, because of the United States Supreme Court’s holding in *Plyer v. Doe*, also held that federal law preempted all of Proposition 187’s Section 7. Consequently, federal law preempted Proposition 187’s classification, notification, and cooperation/reporting provisions in Sections 4, 5, 6, 8, and 9, as well as all of Section 7.

However, the LULAC I Court also denied the Plaintiffs’ motions for summary judgement with respect to the benefit denial provisions in Sections 5, 6, and 8. The LULAC I Court further denied the Plaintiffs’ motions for summary judgement with respect to the criminal penalties provisions in Sections 2 and 3. The LULAC I Court’s

²¹⁵ *Id.* at 784-85 (explaining that the Hill-Burton Act, 42 U.S.C. § 291 *et seq.*, provides for allocation of federal funds to states for the rehabilitation, construction or modernization of public and non-profit hospitals; the Public Health Services Act, 42 U.S.C. § 201 *et seq.*, makes grants of federal funds available to public and nonprofit private entities for projects to plan and develop “community health centers” to serve medically underserved populations).

²¹⁶ *Id.* at 785.

²¹⁷ *Id.* at 785.

²¹⁸ *Id.* at 786.

²¹⁹ *Id.* at 786.

²²⁰ *Id.* at 786.

²²¹ *Id.* at 786; *see generally* 8 U.S.C. § 1306(d) (false alien registration cards); 18 U.S.C. §§ 1424, 1425 (false papers in naturalization proceedings); 18 U.S.C. § 1028 (production, possession or use of false identification documents); 18 U.S.C. § 1426 (false naturalization, citizenship or alien registration papers); 18 U.S.C. §§ 1542-1543 (forgery or false use of passport); 18 U.S.C. § 1544 (misuse of passport); 18 U.S.C. §§ 1546 (fraud and misuse of visas); 18 U.S.C. § 911 (false claim to citizenship).

²²² *Id.* at 786.

²²³ *Id.* at 786.

²²⁴ *Id.* at 787.

holding reflected its findings that none of the three *DeCanas* tests preempted Proposition 187's benefit denial provisions in Sections 5, 6, and 8, nor the criminal penalties provisions in Sections 2 and 3. Furthermore, the LULAC I Court did not use the three *DeCanas* tests to examine Section 1 (the preamble) and Section 10 (severability and amendment provision of Proposition 187), so Sections 1 and 10 were not preempted by any of the three *DeCanas* tests. Moreover, because the LULAC I Court did not invalidate Sections 1 and 10 for any other reasons either, the Plaintiffs' motions for summary judgement were denied with respect to Sections 1 and 10.

However, the LULAC I Court's denial of the Plaintiffs' motions for summary judgement with respect to Proposition 187's criminal penalties provisions in Sections 2 and 3; the benefit denial provisions in Sections 5, 6, and 8; and Sections 1 and 10 did not mean that those provisions went into effect. In fact, the LULAC I Court ruled that "[t]he preliminary injunction entered by the Court on December 14, 1994, [would] remain in effect until further order of the Court."²²⁵ Consequently, Proposition 187's criminal penalties provisions in Sections 2 and 3; the benefit denial provisions in Sections 5, 6, and 8; and Sections 1 and 10 were enjoined.

C. PROPOSITION 187 AFTER LULAC I, AND RELATED EVENTS

1. PASSAGE OF THE PRA

After Proposition 187 was passed in 1994, federal legislation was implemented which had a significant impact on the provisions of Proposition 187 that survived LULAC I. On August 22, 1996, President Bill Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "PRA") into law.²²⁶ The United States District Court in California's Central District (the "Court") described the PRA as a "comprehensive regulatory scheme for determining aliens' eligibility for federal, state, and local benefits and services."²²⁷ The Court further remarked that the PRA "categorizes all aliens as 'qualified' or not 'qualified', and then denies public benefits based on the characterization."²²⁸ Moreover, the Court stressed that "[i]n the PRA, Congress expressly stated a national policy of restricting the availability of public benefits to aliens."²²⁹

2. OTHER POST-LULAC I EVENTS LEADING UP TO LULAC II

Passage of the PRA prompted the LULAC I Plaintiffs and Defendants to act to their respective advantages. For example, "[o]n November 1, 1996, the Court denied the Plaintiffs' application for a restraining order against the [S]tate's promulgation of regulations pursuant to the PRA."²³⁰ In addition, "[o]n January 10, 1997, [the D]efendants, relying on the PRA, moved for reconsideration of part of the [LULAC I Court's] . . . decision."²³¹ Specifically, "[the] Defendants asked the Court to reconsider only the 'reporting and cooperation provisions' . . . and [Section] 9 of the initiative."²³² However, the Court denied the motion on March 3, 1997.²³³

However, "[o]n March 24, 1997, [the D]efendants brought a motion for partial judgement on the pleadings as to [the criminal penalties provisions] of Proposition 187."²³⁴ Consequently, "[t]he Court granted the [Defendants'] motion as to [S]ection 2 and denied it with respect to [S]ection 3."²³⁵ In addition, the Defendants stated in a status conference in May 1997 that they "[did] not intend to promulgate regulations to implement Proposition 187, and wish[ed] for the Court to decide the issues without the benefit of any curative effect the

²²⁵ *Id.* at 787.

²²⁶ 8 U.S.C. § 1601 et seq. (2000).

²²⁷ *LULAC II*, 997 F.Supp. 1244 at 1251.

²²⁸ *Id.* at 1251 (noting that "Congress defines 'qualified alien' as follows: For the purposes of this chapter the term 'qualified alien' means an alien who, at the time the alien applies for, receives or attempts to receive a Federal public benefits is (1) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C. § 1101 ET SEQ.], (2) an alien who is granted asylum under [S]ection 208 of such Act [8 U.S.C.A. § 11580], (3) a refugee who is admitted to the United States under [S]ection 207 of such Act [8 U.S.C.A. § 1157], (4) an alien who is paroled into the United States under [S]ection 212(d) of such Act [8 U.S.C.A. § 1182(d)(5)] for a period of at least 1 year, (5) an alien whose deportation is being withheld under [S]ection 243(h) of such Act [8 U.S.C.A. § 1153(a)(7)]" (citing 8 U.S.C. § 1641(b)).

²²⁹ *Id.* at 1251.

²³⁰ *Id.* at 1252 (citing *LULAC I*, 908 F.Supp. 755).

²³¹ *Id.* at 1252.

²³² *Id.* at 1252 (specifically, the Defendants asked the court to only reconsider Proposition 187's Sections 4(a), 4(b)(3), 4(c), 5(c)(3), 6(c)(3), 8(c) (first sentence only).

²³³ *Id.* at 1252.

²³⁴ *Id.* at 1252.

²³⁵ *Id.* at 1252.

regulations might have had.”²³⁶ The Defendants’ position reflected their recognition that “California [needed to] enact regulations *pursuant to the PRA*, not pursuant to Proposition 187.”²³⁷

D. APPLICATION OF THE DECANAS TESTS TO PROPOSITION 187’S PROVISIONS IN LULAC II

Following the Plaintiffs’ and Defendants’ actions described in the preceding section, the LULAC II Court once again examined the provisions of Proposition 187 which survived LULAC I by applying the *DeCanas* tests. As I stated earlier in Part III of this article, the LULAC I court denied the Plaintiffs’ motion for summary judgement with respect to the benefit denial provisions in Proposition 187 Sections 5, 6, and 8. Moreover, the LULAC I Court further denied the Plaintiffs’ motions for summary judgement with respect to the criminal penalties provisions in Sections 2 and 3. Consequently, although several of Proposition 187 provisions survived the holding in LULAC I, those provisions also needed to withstand scrutiny under all three *DeCanas* tests once again, given the passage of the PRA, to avoid being preempted by federal law. As my analysis will illustrate in the upcoming sections, some of Proposition 187’s provisions managed to do so, while others were preempted by the *DeCanas* tests in LULAC II.

1. THE BENEFIT DENIAL PROVISIONS

a. APPLICATION OF THE FIRST DECANAS TEST

The LULAC II Court began their analysis of the benefit denial provisions by again applying the first *DeCanas* test. However, unlike the LULAC I Court’s analysis the LULAC II Court analyzed the benefit denial provisions in light of the PRA. Nevertheless, the LULAC II Court, as did the LULAC I Court, noted “[t]he federal government’s exclusive control over immigration is derived from the Constitution”²³⁸ In so ruling, the LULAC II Court emphasized that the federal government’s control over immigration, because it is derived from the Constitution, was unaffected by passage of the PRA.²³⁹ Therefore, the LULAC II Court held that the first *DeCanas* test still did not preempt Proposition 187’s benefit denial provisions.

b. APPLICATION OF THE SECOND DECANAS TEST

1. BENEFIT DENIAL PROVISIONS IN SECTION 5 AND 6

The LULAC II Court began its analysis of the benefit denial provisions with respect to the second *DeCanas* test by noting that the LULAC I Court did not preempt the benefit denial provisions in Sections 5 and 6 because “[the P]laintiffs had failed to cite any authority that indicated Congress’ intent to completely oust [California’s] power to grant or deny aliens public benefits paid for exclusively with state funds.”²⁴⁰

However, the LULAC II Court asserted that “in enacting the PRA, Congress has made clear that it is the immigration policy of the United States to deny public benefits to all but a narrowly defined class of immigrants which does not include illegal immigrants.”²⁴¹ Moreover, the LULAC II noted that “the intention of Congress to occupy the field of regulation of government benefits to aliens is declared throughout Title IV of the PRA.”²⁴² Furthermore, the LULAC II Court emphasized that “[w]hatever the level of government extending the benefits and whatever the source of the funding of the benefits -- federal, state, or local -- they are all included within the expansive reach of the PRA.”²⁴³ Consequently, the LULAC II Court determined that “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.”²⁴⁴

²³⁶ *Id.* at 1252.

²³⁷ *Id.* at 1252.

²³⁸ *Id.* at 1253 (citing *LULAC I*, 908 F.Supp. at 770, 772).

²³⁹ *Id.* at 1253.

²⁴⁰ *Id.* at 1254 (citing *LULAC I*, 908 F.Supp. at 787).

²⁴¹ *Id.* at 1254.

²⁴² *Id.* at 1253 (the LULAC II Court did not identify which specific portion(s) of Title IV of the PRA they were referring to).

²⁴³ *Id.* at 1253 (referring to statements of national policy regarding the denial of public benefits to illegal immigrants (8 U.S.C. § 1601); rules regarding imminent eligibility for federal, state, and local benefits, including definitions of the benefits covered (i.e. 8 U.S.C. §§ 1611, 1621); a description of state legislative options in the area of immigrant eligibility for state and local benefits (8 U.S.C. § 1621(d)); and a system for verifying immigration status to determine eligibility for benefits and services (8 U.S.C. § 1642)).

²⁴⁴ *Id.* at 1253-4.

In addition, the LULAC II Court noted that Congress, by passing the PRA, “ousted state power in the field of regulation of public benefits to immigrants by enacting legislation that denies federal, state, and local health, welfare, and post-secondary education benefits to aliens who are not ‘qualified.’”²⁴⁵ Moreover, the LULAC II Court determined that “[f]ederal, state, and local public benefits, as defined in the PRA, include social service and health services, which are the same benefits covered by [S]ections 5 and 6 of Proposition 187.”²⁴⁶

Consequently, the LULAC II Court found that “[b]ecause the PRA is a comprehensive regulatory scheme that restricts alien eligibility for all public benefits, however funded, the states have no power to legislate in this area.”²⁴⁷ Furthermore, the LULAC II Court held that “states have no power to effectuate a scheme parallel to that specified in the PRA, even if the parallel scheme doesn’t conflict with the PRA.”²⁴⁸

However, the LULAC II Court elaborated that “Congress’ intention to displace state power in the area of regulation of public benefits is manifest in the careful designation of the limited instances in which states have the right to determine alien eligibility for state or local public benefits.”²⁴⁹ Moreover, the LULAC II Court also stated that “Section 1622 provides states with the option of further restricting the eligibility of ‘qualified’ aliens for state public benefits.”²⁵⁰ However, the LULAC II Court asserted that because “[t]he PRA defines the full scope of permissible state legislation in the area of regulation of government benefits and services to aliens”, states may only act pursuant to Sections 1621(d) and 1622.²⁵¹

Consequently, the LULAC II Court held that passage of the PRA resulted in the second *DeCanas* test preempting Proposition 187’s benefit denial benefit provisions in Section 5 and 6.

2. **BENEFIT DENIAL PROVISIONS IN SECTION 8**

The LULAC II Court remarked that “Section 8 of Proposition 187 denies public postsecondary education to anyone not a “citizen of the United States, an alien lawfully admitted as a permanent resident, in the United States, or a person who is otherwise authorized under federal law to be present in the United States.”²⁵² However, the LULAC II Court observed that “the PRA denies federal postsecondary education benefits to any alien who is not a ‘qualified’ alien.”²⁵³ Furthermore, the LULAC II Court reasoned that the PRA “denies state and local postsecondary education benefits to any alien who is not a ‘qualified’ alien, a nonimmigrant under the INA, or an alien paroled into the United States under [S]ection 212(d)(5) of the INA.”²⁵⁴ Consequently, the LULAC II Court determined that “[f]or all practical purposes, the preemption analysis with respect to [Proposition 187’s S]ection 8 is the same as the analysis for [Proposition 187’s S]ections 5 and 6.”²⁵⁵ Therefore, the LULAC II Court determined that “Congress has occupied the field of regulation of public postsecondary education benefits to aliens.”²⁵⁶

The LULAC II Court further noted that on September 30, 1996, “Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (‘IRA’).”²⁵⁷ The LULAC II Court observed that “[t]he IRA regulates alien eligibility for postsecondary education benefits on the basis of residence within a state.”²⁵⁸ Consequently, the LULAC II Court found that “[b]ecause the IRA defines alien eligibility for postsecondary education, it also manifests Congress’ intent to occupy this field.”²⁵⁹

Consequently, the LULAC II Court held that passage of the PRA and IRA resulted in the second *DeCanas* test preempting the benefit denial benefit provision in Section 8.

²⁴⁵ *Id.* at 1254; *see generally* 8 U.S.C. §§ 1611, 1621.

²⁴⁶ *Id.* at 1255.

²⁴⁷ *Id.* at 1255.

²⁴⁸ *Id.* at 1255 (citing 8 U.S.C. § 1642(a)).

²⁴⁹ *Id.* at 1255 (citing 8 U.S.C. § 1621(d), which provides that a state may override the general bar in Section 1621(a) only by enacting a state law after August 22, 1996 that provides for state and local benefits to aliens that are “not qualified” under the PRA).

²⁵⁰ *Id.* at 1255 (citing 8 U.S.C. § 1622).

²⁵¹ *Id.* at 1255.

²⁵² *Id.* at 1255; *see generally* Proposition 187 Section 8 in Appendix A.

²⁵³ *Id.* at 1256 (citing 8 U.S.C. § 1611).

²⁵⁴ *Id.* at 1256 (citing 8 U.S.C. § 1621).

²⁵⁵ *Id.* at 1256.

²⁵⁶ *Id.* at 1256.

²⁵⁷ *Id.* at 1256.

²⁵⁸ *Id.* at 1256 (citing 8 U.S.C. § 1623(a)).

²⁵⁹ *Id.* at 1256.

c. APPLICATION OF THE THIRD DECANAS TEST

By the time that the LULAC II Court applied the third *DeCanas* test, the second *DeCanas* test had already preempted the benefit denial provisions in Sections 5 and 6. However, the LULAC II Court analyzed the provisions further to determine if the third *DeCanas* test also preempted them.

The LULAC II Court noticed that Proposition 187 and the PRA seemed to apply different standards. Specifically, “Sections 5 and 6 of Proposition 187 den[ied] public social services and health benefits to persons ‘in the United States in violation of federal law.’”²⁶⁰ Alternatively, “[t]he PRA denies federal benefits to aliens who are not ‘qualified.’”²⁶¹ The LULAC II Court also noted that “[t]he PRA denies state and local benefits to aliens who are not ‘qualified’; non-immigrants under the INA; or aliens who are paroled into the United States under [S]ection 212(d)(5) of the INA for less than one year.”²⁶²

In addition, the LULAC II Court found that “[w]ithout further definition, the terms used in [S]ections 5 and 6 of Proposition 187, ‘alien in the United States in violation of federal law,’ is vague.”²⁶³ Consequently, the LULAC II Court held that “the term from [Proposition 187 S]ection 5 and 6, ‘alien in the United States in violation of federal law’, conflict[ed] with the classifications in the PRA, making compliance with both laws impossible.”²⁶⁴ Therefore, the LULAC II Court held that the third *DeCanas* test also preempted Proposition 187 Sections 5 and 6.²⁶⁵

E. PROPOSITION 187 AFTER LULAC II: SUMMARY OF THE APPLICATION OF THE DECANAS TESTS TO PROPOSITION 187’S PROVISIONS

The LULAC II Court’s holding invalidated several of Proposition 187’s provisions that survived the LULAC I Court’s holding. Specifically, the LULAC II Court held that the second and third *DeCanas* tests preempted the benefit denial provisions in Proposition 187 Sections 5, 6, and 8. Consequently, the benefit denial provisions in Sections 5, 6, and 8 did not survive LULAC II.

The LULAC II Court’s invalidation of Proposition 187’s benefit denial provisions also affected Section 1 of Proposition 187. Although Section 1 survived the LULAC I Court’s holding, the LULAC II Court asserted that Section 1 was no longer separately enforceable “[b]ecause . . . Proposition [187] no longer containe[d] provisions relating to . . . Section 1”²⁶⁶ Consequently, the LULAC II Court held that Proposition 187 Section 1 was no longer separately enforceable, and that Section 1 could not be upheld.²⁶⁷

However, the LULAC II Court did reconsider the Defendants’ motion of March 24, 1997 (“Defendants’ Motion”) to grant partial summary judgement on the pleadings with respect to Proposition 187 Section 3.²⁶⁸ The LULAC II Court reminded that “the [LULAC I] Court denied [the P]laintiffs’ motion for summary judgement as to Section 3, holding that [S]ection 3 was not preempted under the three *DeCanas* tests.”²⁶⁹ The LULAC II Court noted that when Defendants’ Motion was filed, “[the P]laintiffs’ continued to argue that federal law preempt[ed] S]ection 3.”²⁷⁰ However, after reconsidering the Defendants’ Motion, the LULAC II Court held that “the motion should have been granted as to Section 3.”²⁷¹ Consequently, Section 3 (along with Section 2) survived the LULAC I and LULAC II decisions.

The LULAC II Court also decided upon the validity of Proposition 187’s severability and amendment provision (i.e. Section 10). The LULAC II Court held that “[b]ecause Sections 2 and 3 are enforceable, [S]ection 10 is also enforceable.”²⁷² Consequently, of Proposition 187’s ten original provisions, only Sections 2, 3 and 10 are enforceable following the LULAC I and II holdings.

²⁶⁰ *Id.* at 1256 (citing Proposition 187’s Sections 5(c) and 6(c)).

²⁶¹ *Id.* at 1256 (citing 8 U.S.C. § 1611).

²⁶² *Id.* at 1256 (citing 8 U.S.C. § 1621).

²⁶³ *Id.* at 1256.

²⁶⁴ *Id.* at 1257.

²⁶⁵ *Id.* at 1257.

²⁶⁶ *Id.* at 1261 (citing Proposition 187 Section 1).

²⁶⁷ *Id.* at 1261.

²⁶⁸ *Id.* at 1261.

²⁶⁹ *Id.* at 1261.

²⁷⁰ *Id.* at 1261.

²⁷¹ *Id.* at 1261.

²⁷² *Id.* at 1261.

F. PASSAGE OF PROPOSITION 200, AND FRIENDLY HOUSE

As I mentioned in Part I of this article, Arizona voters approved Proposition 200 on November 2, 2004. However, Proposition 200's passage was far from the end of the story. Within days of its passage, it was necessary for the Arizona Attorney General to issue an opinion as to Proposition 200's scope.²⁷³ Furthermore, Proposition 200 soon faced legal challenges, one with respect to its scope involving proponents of the measure, and another from Proposition 200's opponents seeking to enjoin its enforcement.

1. PROPOSITION 200'S NUTS AND BOLTS

As I stated earlier in my article, passage of Proposition 200 added Section 46-140.01 to the Arizona Revised Statutes. Proposition 200 sought "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 in violation of federal immigration law."²⁷⁴

Proposition 200 further provided that any "[f]ailure to report discovered violations of federal law by an employee is a Class 2 misdemeanor."²⁷⁵ Furthermore, "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."²⁷⁶

2. THE ARIZONA ATTORNEY GENERAL ATTEMPTS TO DEFINE PROPOSITION 200'S SCOPE

On November 12, 2004 the Arizona Attorney General Terry Goddard ("Goddard") issued a ruling in an attempt to clarify Proposition 200's scope. Goddard stated that "the scope of A.R.S § 46-140.01, as added by Proposition 200, is largely determined by the meaning of the phrase 'state and local public benefits.'"²⁷⁷ However, Goddard explained that the prior to the passage of Proposition 200, the "Legislative Council advised voters that 'Proposition 200 does not define the term 'state and local public benefits that are not federally mandated.'"²⁷⁸

Therefore, Goddard referred to several sources when making his determination. For instance, Goddard indicated that "[b]ecause of the dominant role of federal law in the immigration area, it is important to consider related federal legislation when implementing Proposition 200."²⁷⁹ Goddard specifically noted that "the legislation most directly relevant to Proposition 200 is the [PRA] . . . "²⁸⁰

In addition, Goddard also explained that significance of the location of the term "state and local public benefits that are not federally mandated" within the Arizona Revised Statutes. Goddard stated that "Arizona's statutes are divided into titles, each of which is dedicated to a specific subject."²⁸¹ Goddard further noted that "the drafters [of Proposition 200] placed the portions . . . that concerned state and local benefits in Title 46, which is entitled 'Welfare' and addresses specific government programs."²⁸² Goddard also indicated that Proposition 200 did not amend portions of other titles within the Arizona Revised Statutes.²⁸³ Consequently, Goddard explained that the "[p]lacement of [Proposition 200's provision] governing 'state and local public benefits' in Title 46 indicates that the statute applies to the programs in that title, but not to programs governed by other titles that comprise the Arizona Revised Statutes."²⁸⁴

²⁷³ The Attorney General's Opinion was to clarify the scope and meaning of "state and local public benefits that are not federally mandated" as applied in ARIZ. REV. STAT. § 46-140.01(A).

²⁷⁴ Order [Denying Plaintiffs' Application for Preliminary Injunction] at 6, *Friendly House v. Napolitano*, CV 04-649 TUC DCB (*see generally* ARIZ. REV. STAT. § 46-140.01(A) in Appendix B).

²⁷⁵ *Id.* at 7 (*see generally* ARIZ. REV. STAT. § 46-140.01(B) in Appendix B).

²⁷⁶ *Id.* at 7 (*see generally* ARIZ. REV. STAT. § 46-140.01(C) in Appendix B).

²⁷⁷ Attorney General Opinion by Terry Goddard Re. State and Local Public Benefits Subject to Proposition 200, Attorney General at 4, No. I04-010 (R04-036).

²⁷⁸ *Id.* at 5 (citing *Arizona Secretary of State, Ballot Propositions and Judicial Performance Review* 44 (Nov. 2, 2004) ("Publicity Packet")).

²⁷⁹ *Id.* at 3.

²⁸⁰ *Id.* at 3.

²⁸¹ *Id.* at 7.

²⁸² *Id.* at 7-8.

²⁸³ *Id.* at 8 (explaining that "[t]he Proposition did not amend Title 36, which governs public health programs, or Title 1, which establishes principles attributable throughout all of state law, or Title 38, which establishes requirements generally applicable to public officers in state and local government.")

²⁸⁴ *Id.* at 8.

Goddard explained that because Proposition 200's "state and local public benefits" provisions were limited to Title 46, the federal definition of "state and local public benefits" addressed matters beyond the scope of Proposition 200.²⁸⁵ For example, "8 U.S.C. § 1621 applies to professional licenses. But Proposition 200 does not alter the screening procedures for applicants for a contractor's license."²⁸⁶ Goddard explained that "[t]o do so, Proposition 200 should have amended Title 32 (which governs most professional licenses, including those for contractors) or some statute that applies generally to all state agencies instead of amending only the statutes that govern certain welfare programs."²⁸⁷

Consequently, Goddard concluded that "the programs subject to Proposition 200 are those within Title 46 [of the Arizona Revised Statutes] that are subject to the eligibility restrictions in 8 U.S.C. § 1621."²⁸⁸

3. CONFLICTS BETWEEN PROPONENTS OF PROPOSITION 200

The first legal action taken following Proposition 200's passage arose between proponents of the measure. In fact, "[f]ollowing voter approval of Proposition 200, Anthony D. Rogers, Director of the Arizona Health Care Cost Containment System (AHCCCS) requested [Terry Goddard's Opinion referred to in the previous section]."²⁸⁹ Consequently, on November 18, 2004, Yes on Proposition 200 filed a lawsuit in the Superior Court of Maricopa County, Arizona.²⁹⁰ Yes on Proposition 200 was joined as Plaintiffs by The Federation For American Immigration Reform,²⁹¹ Randall Pullen,²⁹² Willa Key,²⁹³ George Ramoz Childress,²⁹⁴ and Robert K Park²⁹⁵ (collectively referred to as the "Plaintiffs").²⁹⁶ Named in the lawsuit are Arizona Governor Janet Napolitano, Janice K. Brewer, and Terry Goddard.²⁹⁷

The Plaintiffs "sought, among other relied, declaratory and injunctive relief in regard to Attorney General Opinion 104-010."²⁹⁸ On March 14, 2005, the Superior Court ruled in favor of the Defendants.²⁹⁹ Presently, the lawsuit is being reviewed in the Arizona Court of Appeals, District One.³⁰⁰ This dispute is presently unresolved, and the remainder of my analysis of Proposition 200 in Part III of this article will not focus on this particular dispute.

²⁸⁵ *Id.* at 11.

²⁸⁶ *Id.* at 11.

²⁸⁷ *Id.* at 11.

²⁸⁸ *Id.* at 11 (referring to 8 U.S.C. § 1621).

²⁸⁹ Yes on Proposition 200 v. Napolitano, CV2004-092999 (Ariz. Super. Ct. 2004), *appeal docketed*, No. CV 05-0235 (Ct. App. Div. 1 Apr. 28, 2005), from the Web site of the Superior Court of Arizona, Maricopa County, *available at* <http://www.superiorcourt.maricopa.gov/publicInfo/rulings/rulingsReaditem.asp?autonumb=...> (Aug. 5, 2005).

²⁹⁰ *Id.*

²⁹¹ This organization, also known as "FAIR", describes itself as "a national, nonprofit, public-interest, membership organization of concerned citizens who share a common belief that our nation's immigration policies must be reformed to serve the national interest", *at* http://www.fairus.org/site/PageServer?pagename=about_aboutmain (last visited Aug. 10, 2005).

²⁹² Mr. Pullen is listed as the Chair of Yes on Proposition 200, described on their web site as a "[c]ommittee supporting Proposition 200", *at* <http://www.yesonprop200.com/info/about.html> (last visited Aug. 10, 2005).

²⁹³ Willa Key is listed as a "Prop 200/Protect Arizona Now (PAN) spokeswoman" in "*Prop 200 Spokeswoman Suggests Boycotting Bank One, Other Enablers of Lawbreaking*", THE ARIZONA CONSERVATIVE, *at* <http://www.azconservative.org/Boycott.htm> (last visited Aug. 10, 2005); Protect Arizona NOW describes itself on their web site as "a non-partisan association of Arizonans from all walks of life. We've seen our state increasingly burdened by the negative effects of illegal aliens coming to this state against the laws of our country. We the taxpayers have been forced to pay for expensive benefits given away to illegal aliens. Often these benefits are denied to our own citizens.", *at* <http://www.pan2004.com/about.htm> (last visited Aug. 10, 2005).

²⁹⁴ I was unable to locate any additional information about Mr. Childress.

²⁹⁵ I was unable to locate any additional information about Mr. Park.

²⁹⁶ *Supra* note 289.

²⁹⁷ *Id.*

²⁹⁸ *Id.* (specifically, "[the] Plaintiffs requested from [the Superior] Court 'a declaration that the term of 'state and local public benefits no[t] mandated by federal law' ARIZ. REV. STAT § 46-140.[01] must be declared to apply to all benefits described in 8 U.S.C. § 1621, regardless of which particular state or local government agency administers or regulates the provision of such benefits; A declaration that the Attorney General's Opinion is mistaken . . . ; and An injunction directing the Attorney General to formally and immediately advise the Governor and all appropriate officials of the State of Arizona and its political subdivisions that they are mandated to conduct eligibility verification for appropriate benefits . . ." (the "Complaint")).

²⁹⁹ *Id.* (The Plaintiffs filed an amended complaint seeking the same relief they set forth in the Complaint, although they additionally requested that the court issue "A Preliminary and then permanent injunction in the nature of a special action writ of mandamus requiring the Arizona Attorney General formally and immediately advise the Governor – and all of the various officials of the State of Arizona and its political subdivisions that the Arizona Attorney General is authorized to advise – that they are mandated to conduct eligibility verification for appropriate benefits and to promptly issue regulations and administrative directives in accordance with such advice, in consultation with the Attorney General, and further directing that such injunction in the nature of a writ of mandamus if enforceable to the full extent of this Court's jurisdiction and authority." The Court held that "[a]s correctly noted by the Defendants in their reply to the Motion to Dismiss the Original Complaint, mandamus may lie to compel a public officer to act in a manner involving discretion, but 'it may not designate how that discretion is to be exercised.'")

³⁰⁰ Information found at <http://www.cofad1.state.az.us/casefiles/cv/cv050235.pdf>

4. ACTIONS BY THE OPPONENTS OF PROPOSITION 200

On November 30, 2004 the Plaintiffs “filed this lawsuit challenging the constitutionality of Proposition 200”³⁰¹ In addition “to requesting declaratory and permanent injunctive relief, [the] Plaintiffs filed an Application for a Temporary Restraining Order and Preliminary Injunction” in the United States District Court in the District of Arizona to temporarily enjoin Proposition 200’s implementation.³⁰²

In addition to applying the *DeCanas* tests to Proposition 200, the Friendly House Plaintiffs made, and the Friendly House Court also considered other arguments that the Friendly House Plaintiffs made against Proposition 200.³⁰³ However, the upcoming analysis regarding Friendly House shall be limited to that portion of the decision that relates to application of the *DeCanas* tests.

a. PLAINTIFFS’ APPLICATION FOR A TEMPORARY RESTRAINING ORDER

The Friendly House Court explained that “[t]o obtain a temporary restraining order (“TRO”) 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 tip sharply in favor of the moving party.”³⁰⁴

The Friendly House Court concluded that “there are ‘serious questions’ regarding whether or not Proposition 200 is preempted by federal law.”³⁰⁵ The Friendly House Court further held that “there are ‘serious questions’ regarding whether or not Proposition 200 passe constitutional muster.”³⁰⁶ The Friendly House Court also noted that “if Proposition 200 were to become law, it would have a dramatic chilling effect upon undocumented aliens who would otherwise be eligible for public benefits under federal law.”³⁰⁷ Specifically, the Friendly House Court explained that “an undocumented alien who is eligible for public benefits might refrain from availing himself or herself of those benefits out of fear of the implications of Proposition 200.”³⁰⁸ Additionally, the Friendly House Court also determined that “the balance of hardships tips sharply in favor of [the] Plaintiffs.”³⁰⁹

Therefore, the Friendly House Court held that “[I]t is ordered that [the] Plaintiffs’ Application for [TRO] is [granted] and Defendants are temporarily enjoined from implementing Proposition 200.”³¹⁰ However, the Friendly House Court emphasized that “[their] decision to grant the TRO should not be construed in any way as a comment on the merits or legality of the Proposition 200”³¹¹

b. PLAINTIFFS’ APPLICATION FOR A PRELIMINARY INJUNCTION

The Friendly House Court stated that “[t]o 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 tip sharply in favor of the moving party.”³¹² The Friendly House Court also emphasized the necessity of utilizing the *DeCanas* tests to determine whether Proposition 200 was preempted by federal law.

³⁰¹ *Supra* note 28, in Defendants’ Answering Brief at 2, Friendly House v. Napolitano, CV 04-649 (Ariz. D. 2004), *appeal docketed*, No. 05-1505 (9th Cir. Dec. 29, 2004).

³⁰² *Id.* at 2 (I shall refer to the Plaintiffs in the present case as the “Friendly House Plaintiffs” throughout this Article).

³⁰³ Specifically, the Friendly House Plaintiffs argued that Proposition 200 was invalid in two other ways: (1) The Plaintiffs argued that Proposition 200, as it was drafted and before it was implemented, was unconstitutionally vague and amounted to a violation of the due process rights of Plaintiffs who are or may be applicants for State and local public benefits; (2) With respect to State and local officials, the Plaintiffs claimed that Proposition 200 is impermissibly vague because it failed to set forth a culpable mental state for failure to report discovered violations of federal immigration law. However, neither argument resulted in the Friendly House Court granting the Friendly House Plaintiffs’ request for a preliminary injunction.

³⁰⁴ Order [Granting Plaintiffs’ Application for Temporary Restraining Order] at 2, Friendly House v. Napolitano, CV 04-649 TUC DCB (citing *Tillamook County v. U.S. Army Corps of Engineers*, 288 F.3d 1140, 1143 (9th Cir. 2002)).

³⁰⁵ *Id.* at 2.

³⁰⁶ *Id.* at 2.

³⁰⁷ *Id.* at 2.

³⁰⁸ *Id.* at 2.

³⁰⁹ *Id.* at 2.

³¹⁰ *Id.* at 3.

³¹¹ *Id.* at 3.

³¹² *Supra* note 274, at 2 (this is the same test that was applied when the Friendly House Court considered the Plaintiffs’ request for a TRO).

1. APPLICATION OF THE FIRST DECANAS TEST

The Friendly House Court articulated that “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.”³¹³ However, referring to the District Court in the Eastern District of Virginia (the “District Court”), the Friendly House Court emphasized that “[e]ssential 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.’”³¹⁴ The District Court further elaborated that:

[I]t 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.”³¹⁵

Consequently, the Friendly House Court determined that “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 standards, or instead create standards different from, or in excess of federal standards.”³¹⁶ In fact, the Friendly House Court stated that “if the latter was true, Proposition 200 may be preempted by the Supremacy Clause.”³¹⁷

a. IMPACT OF THE PRA IN THE PRESENT CASE

The Friendly House Court stated that “[u]nder the PRA, a State or political subdivision of a State is not required to adopt any particular eligibility criteria for state-funded programs.”³¹⁸ Rather:

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 government interest of assuring that aliens be self-reliant in accordance with national immigration policy.”³¹⁹

In addition, the Friendly House Court contended that “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 political subdivision of a State.’”³²⁰ However, the Friendly House Court cautioned that the “authority . . . 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.’”³²¹ In other words, “under the PRA, a state is authorized to impose limitations on the eligibility of qualified aliens for

³¹³ *Id.* at 9 (citing *DeCanas*, 424 U.S. at 353).

³¹⁴ *Id.* at 10 (citing *Equal Access to Education v. Merten* (hereinafter *Merten I*), 305 F.Supp.2d 585, 602 (E.D. Va. 2004), quoting *DeCanas*, 424 U.S. at 356)(emphasis original)).

³¹⁵ *Id.* at 10 (citing *Merten I*, 305 F.Supp.2d at 602-03, quoting *DeCanas*, 424 U.S. at 355).

³¹⁶ *Id.* at 10.

³¹⁷ *Id.* at 10.

³¹⁸ *Id.* at 10; *see generally* 8 U.S.C. § 1622(a) (explaining that “[n]otwithstanding any other provision of law and except as provided in subsection (b) of this section, a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien (as defined in section 1641 of this title), a non-immigrant under the Immigration and Nationality Act [8 U.S.C. § 1101 et seq.] or an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C.A. § 1182(d)(5)] for less than one year”).

³¹⁹ *Id.* at 10, *see generally* 8 U.S.C. § 1601(7) (commenting that “[w]ith respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance 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”).

³²⁰ *Id.* at 10 (citing 8 U.S.C. § 1624(a)).

³²¹ *Id.* at 10-11 (citing 8 U.S.C. § 1624(b)).

State-funded welfare benefits, so long as such limitations are not more restrictive than comparable Federal limitations.”³²²

However, the Friendly House Court noted that “Congress clearly intended that State and local governments would insure that illegal aliens not receive public benefits.”³²³ The Friendly House Court noted that the Congress, in a Conference Report, explained that:

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.³²⁴

b. PLAINTIFFS’ ARGUMENTS, AND DETERMINATIONS OF THE FRIENDLY HOUSE COURT

The Plaintiffs asserted that “no express provision in the PRA . . . requires State or local agents to notify federal immigration authorities of alleged violations of federal immigration law.”³²⁵ Consequently, the Plaintiffs contended that “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.”³²⁶ Therefore, the Plaintiffs argued that Proposition 200’s reporting provision was a regulation of immigration, and thus is preempted by the first *DeCanas* test.³²⁷

However, the Friendly House Court explained that the “PRA . . . expressly remove[s] 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.’”³²⁸ The Friendly House Court also explained that “[b]y 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.”³²⁹ In fact, the Friendly House Court elaborated that “[i]ndeed, by removing all such restrictions, Congress *encourages* such communication.”³³⁰ In support of its holding, The Friendly House Court relied upon a Conference Report, which explained that:

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.³³¹

In addition, the Friendly House Court noted that “Congress may not directly compel states or localities to enact or administer federal programs or policies.”³³²

However, the Friendly House Court further noted that the reporting provisions in the Act present a potential problem, in “that State or local officials ‘cannot assume that an alien who admits he lacks proper documentation has violated’ federal immigration law.”³³³ However, the Friendly House Court determined that “the court in *Gonzalez*

³²² *Id.* at 11 (citing *Doe v. Commissioner of Transitional Assistance*, 773 N.E.2d 404, 406 n.3 (Mass. 2002)).

³²³ *Id.* at 12.

³²⁴ *Id.* at 12 (citing H.R. CONF. REP. No. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2771 (emphasis added)).

³²⁵ *Id.* at 12.

³²⁶ *Id.* at 12.

³²⁷ *Id.* at 12.

³²⁸ *Id.* at 13 (citing 8 U.S.C. § 1644).

³²⁹ *Id.* at 13.

³³⁰ *Id.* at 13.

³³¹ *Id.* at 13 (H.R. Conf. Rep. No. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2771).

³³² *Id.* at 13 (citing *New York v. United States*, 505 U.S. 144, 166 (1992), explaining that “even 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 pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts.”)

³³³ *Id.* at 14 (citing *Gonzalez*, 722 F.2d at 476).

was concerned only with what would provide an *arresting* officer with ‘probable cause of the criminal violation of illegal entry.’³³⁴

Additionally, the Friendly House Court explained that “[u]nder Proposition 200, State and local officials are neither required nor authorized to arrest or detain applicants they believe to be in violation of federal immigration law.”³³⁵ Rather, the Friendly House Court concluded that “[State and local] officials are only required to *inform* federal immigration authorities of immigration violations, something that [State and local officials] are already expressly authorized to do under [federal immigration law].”³³⁶

c. FRIENDLY HOUSE DISTINGUISHED FROM LULAC I

The Friendly House Court specifically addressed and distinguished the LULAC I holding when it analyzed whether the first *DeCanas* test invalidated Proposition 200. The Friendly House Court stated that “[i]f [they] were to follow the decision in [LULAC I] . . . 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.’”³³⁷ The Friendly House Court further remarked that:

[A]s in LULAC I, Proposition 200 requires state and local agents to question all 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.³³⁸

However, the Friendly House Court determined that LULAC I differed from the present case in several ways. The Friendly House Court pointed out that unlike Proposition 200, Proposition 187 was passed and “LULAC I . . . was decided *before* the enactment of the PRA, thereby distinguishing it from the present case.”³³⁹ Consequently, The Friendly House Court emphasized that “under the PRA, ‘[a] State or political subdivision of a State is authorized to require an applicant . . . to provide proof of eligibility.’”³⁴⁰ The Friendly House Court reminded that “[n]o such express authorization existed in LULAC I.”³⁴¹

The Friendly House Court further distinguished the present case from LULAC I by emphasizing that “under the PRA, a State is not required to follow the federal classification criteria in determining the eligibility of qualified aliens for public benefits.”³⁴² The Friendly House Court commented that “[r]ather, if [the State] . . . follows the federal criteria, a State is only presumed to have chosen the least restrictive means available for determining eligibility.”³⁴³ The Friendly House Court reminded that “[a]gain, in LULAC I, there was no federal statute giving the States such discretion.”³⁴⁴ Consequently, the Friendly House Court distinguished Proposition 187 from Proposition 200 largely because the PRA did not exist when Proposition 187 was passed, or when LULAC I was decided.

d. HOLDING OF THE COURT

Based on their analysis of Proposition 200, in light of the passage of the PRA, and based on the present case being distinguished from LULAC I with respect to applying the first *DeCanas* test, the Friendly House Court held that the first *DeCanas* test did not preempt any portion of Proposition 200.

³³⁴ *Id.* at 14 (citing *Gonzalez*, 722 F.2d at 476).

³³⁵ *Id.* at 14.

³³⁶ *Id.* at 14 (citing 8 U.S.C. § 1357(g)(10)).

³³⁷ *Id.* at 11 (citing *LULAC I*, 908 F.Supp. at 769).

³³⁸ *Id.* at 11-12 (see generally ARIZ. REV. STAT. § 46-140.01).

³³⁹ *Id.* at 12.

³⁴⁰ *Id.* at 12 (citing 8 U.S.C. § 1625 (“A State or political subdivision of a State is authorized to require an applicant for State or local benefits (as defined in section 1621(c) of this title) to provide proof of eligibility”)).

³⁴¹ *Id.* at 12.

³⁴² *Id.* at 12 (citing 8 U.S.C. § 1601(7)).

³⁴³ *Id.* at 12 (citing 8 U.S.C. § 1601(7)).

³⁴⁴ *Id.* at 12.

2. APPLICATION OF THE SECOND DECANAS TEST

a. THE FRIENDLY HOUSE COURT'S INTERPRETATION OF THE LULAC II COURT'S APPLICATION OF THE SECOND DECANAS TEST

The Friendly House Court began the analysis by reminding that “the Constitution commits the power to regulate immigration exclusively to the federal government.”³⁴⁵ However, the Friendly House Court also determined that “there is no ‘specific indication either in the wording or in the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general.’”³⁴⁶ Still, the Friendly House Court asserted that “the federal government, through the INA, ‘has certainly occupied the field for formulating the governing definitions and standards for determining a person’s immigration status.’”³⁴⁷ Consequently, “under the Supremacy Clause, it would be impermissible for state or local officials to classify aliens as ‘undocumented’ or ‘illegal’ in a manner that differs than the federal government.”³⁴⁸

The Friendly House Court referred to LULAC II by explaining that “[a]ccording 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.”³⁴⁹ The Friendly House Court recognized that “[a]s the court explained in LULAC II, ‘[w]hatever the level of government extending the benefits and whatever the source of funding for the benefits – federal, state, or local – they are all included within the expansive reach of the PRA.’”³⁵⁰ Moreover, the Friendly House Court acknowledged that “[a]ccording to the [LULAC II C]ourt ‘[the provisions of the PRA] both demarcate a field of comprehensive federal regulation within which states may not legislate, and define federal objectives with which states may not interfere.’”³⁵¹ Consequently, the Friendly House Court also understood that that the LULAC II Court emphasized that “[i]n 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.”³⁵² Therefore, the Friendly House Court understood that “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.’”³⁵³

b. THE FRIENDLY HOUSE COURT'S APPLICATION OF THE SECOND DECANAS TEST DISTINGUISHED FROM THE HOLDING OF THE LULAC II COURT

The Friendly House Court interpreted and applied the second *DeCanas* test very differently than the LULAC II Court.³⁵⁴ Specifically, the Friendly House Court identified several sections of federal law that they held evidenced that Congress did not intend to occupy the field of regulation of public benefits to aliens. Consequently, the Friendly House Court drew different conclusions than the LULAC II Court did.

For example, the Friendly House Court noted that “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.’”³⁵⁵ The Friendly House Court remarked that “[i]n making such determinations, a State is not required to follow federal standards, but if it does so, it is entitled to a presumption of having chosen ‘the least restrictive means’ if it [follows federal standards].”³⁵⁶ The Friendly House Court concluded that “Congress would not have vested State and local governments with such discretion had it intended to occupy the field.”³⁵⁷

³⁴⁵ *Id.* at 15 (citing *DeCanas*, 424 U.S. at 354).

³⁴⁶ *Id.* at 15 (citing *DeCanas*, 424 U.S. at 358).

³⁴⁷ *Id.* at 15-16 (citing *Merten I*, 605 F.Supp.2d at 605 n.20).

³⁴⁸ *Id.* at 16 (citing *Merten I*, 605 F.Supp.2d at 605 n.20).

³⁴⁹ *Id.* at 16 (citing *LULAC II*, 997 F.Supp at 1253, *Merten I*, 605 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.”))

³⁵⁰ *Id.* at 16 (citing *LULAC II*, 997 F.Supp at 1253).

³⁵¹ *Id.* at 16 (citing *LULAC II*, 997 F.Supp at 1253-54; *see generally* 8 U.S.C. §§ 1601, 1611, 1621, 1621(d), 1642).

³⁵² *Id.* at 16 (citing *LULAC II*, 997 F.Supp at 1254; *see generally* U.S.C. § 1601).

³⁵³ *Id.* at 16 (citing *LULAC II*, 997 F.Supp at 1254).

³⁵⁴ *Id.* at 16 (explaining with respect to the LULAC II holding, that “[a] careful reading of both the language and legislative history of the PRA, however, leads this Court to a different conclusion.”)

³⁵⁵ *Id.* at 16-17 (citing 8 U.S.C. § 1622(a)).

³⁵⁶ *Id.* at 17 (citing 8 U.S.C. § 1601(7)).

³⁵⁷ *Id.* at 17.

The Friendly House Court also noted that “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.’”³⁵⁸ The Friendly House Court explained that “in other words, through affirmative legislation, a State may exceed the PRA and provide state or local public benefits even to illegal aliens.”³⁵⁹ The Friendly House Court concluded that “[t]he fact that Congress so empowered States further belies the argument that Congress intended to occupy the field.”³⁶⁰

Moreover, the Friendly House Court emphasized that “a State ‘is authorized to prohibit or otherwise limit or restrict the eligibility aliens or classes of aliens’ for State or local programs of general cash public assistance.”³⁶¹ However, the Friendly House Court noted that “[t]his authority is only limited to the extent that any prohibitions, limitations, or restrictions are not more restrictive than those imposed under comparable Federal programs.”³⁶² Consequently, the Friendly House Court emphasized that “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.”³⁶³

The Friendly House Court further noted that “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.”³⁶⁴ Therefore, the Friendly House Court determined that “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.”³⁶⁵

Finally, the Friendly House Court contended that “the legislative history of the PRA provides further evidence that Congress did not intend to completely occupy the field.”³⁶⁶ To support their contention, the Friendly House Court asserted that “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.’”³⁶⁷ The Friendly House Court emphasized that “forcing aliens to be self-reliant is the declared national policy regarding welfare and immigration.”³⁶⁸ The Friendly House Court concluded that “[h]ad 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.”³⁶⁹

c. HOLDING OF THE COURT

The Friendly House Court emphasized that “[c]learly, any state statute which purported to regulate State or local benefits mandated under Federal law would be preempted.”³⁷⁰ However, the Friendly House Court determined that “by its express terms, Proposition 200 does not apply to State or local benefits that are federally mandated.”³⁷¹

The Friendly House Court further asserted that the examples identified in the previous section of this article illustrate that “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.”³⁷² The Friendly House Court contended that “[r]egarding State or local benefits that are not federally mandated, the PRA vests States with considerable discretion in determining who is eligible for such benefits”³⁷³ Moreover, the Friendly House Court explained that “[States] may even extend such benefits to illegal aliens who would not otherwise be eligible.”³⁷⁴

³⁵⁸ *Id.* at 17 (citing 8 U.S.C. § 1621(d)).

³⁵⁹ *Id.* at 17.

³⁶⁰ *Id.* at 17.

³⁶¹ *Id.* at 17 (citing 8 U.S.C. § 1624(a)).

³⁶² *Id.* at 17 (citing 8 U.S.C. § 1624(b)).

³⁶³ *Id.* at 17.

³⁶⁴ *Id.* at 17 (citing 8 U.S.C. § 1632(a)).

³⁶⁵ *Id.* at 17.

³⁶⁶ *Id.* at 18.

³⁶⁷ *Id.* at 18 (citing H.R. CONF. REP. No. 104-651, at 3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2184).

³⁶⁸ *Id.* at 18 (citing 8 U.S.C. § 1601).

³⁶⁹ *Id.* at 18.

³⁷⁰ *Id.* at 18.

³⁷¹ *Id.* at 18 (citing ARIZ. REV. STAT. § 46-140.01(A) (“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”))

³⁷² *Id.* at 18.

³⁷³ *Id.* at 18.

³⁷⁴ *Id.* at 18.

Consequently, the Friendly House Court concluded that “it would *not* appear that the PRA occupies the field that Proposition 200 seeks to regulate.”³⁷⁵ Therefore, the Friendly House Court held that the second *DeCanas* test did not preempt any portion of Proposition 200.

3. APPLICATION OF THE THIRD DECANAS TEST

The Friendly House Court began its analysis of the Proposition 200 under the third *DeCanas* test by explaining that “under the . . . test, a state statute is preempted if it ‘stands as an obstacle to the accomplishment and execution of the full purpose of Congress.’”³⁷⁶ The Friendly House Court elaborated by stating that “[p]ut another way, Proposition 200 will be preempted if ‘compliance with both federal and state regulations is a physical impossibility.’”³⁷⁷

However, the Friendly House Court explained that the Proposition 200 and the PRA are harmonious, and that “it is not physically impossible to comply with the Proposition 200 and the PRA.”³⁷⁸ The Friendly House Court clarified further that “Proposition 200 deals only with those State and local public benefits that ‘are not federally mandated.’”³⁷⁹ Therefore, The Friendly House Court concluded that “Proposition 200 does not touch upon such “federally mandated” public benefits”³⁸⁰

The Friendly House Court acknowledged that “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.”³⁸¹ The Friendly House Court reasoned that “[w]hile this may require education of State and local officials, it does render in physically impossible to comply with both Proposition 200 and the PRA.”³⁸² In fact, the Friendly House Court noted that “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.”³⁸³

Consequently, the Friendly House Court determined that Proposition 200 was not preempted, holding that “it is not ‘physically impossible’ to comply with [it] and the PRA.” Therefore, the Friendly House Court found that the third *DeCanas* test did not preempt any portion of the Act.

5. THE FRIENDLY HOUSE COURT’S DECISION

The Friendly House Court, by determining that no portion of the Act was preempted by the *DeCanas* tests, denied the Plaintiffs’ Application for Preliminary Injunction on December 22, 2004.³⁸⁴ In addition, the Friendly House Court also ordered that the District’s Court’s Temporary Restraining Order be lifted that same day.³⁸⁵

G. THE CURRENT STATUS OF PROPOSITION 200

Prior to denying the Plaintiffs’ request for a preliminary injunction on December 22, 2004, the Friendly House Court granted two separate motions to intervene as defendants.³⁸⁶ One group of intervenors includes Kathy McKee and Claudia Bloom, statutory officers of PAN (“Protect America Now”).³⁸⁷ PAN was an unincorporated committee that arranged to place Proposition 200 on the November 2004 ballot.³⁸⁸

³⁷⁵ *Id.* at 18.

³⁷⁶ *Id.* at 18 (citing *DeCanas*, 424 U.S. at 363).

³⁷⁷ *Id.* at 18-19 (citing *Florida Lime & Avacado Growers*, 373 U.S., at 142-43).

³⁷⁸ *Id.* at 19.

³⁷⁹ *Id.* at 19.

³⁸⁰ *Id.* at 19 (referring to public elementary education (*Plyer 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)).

³⁸¹ *Id.* at 19 (explaining that “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.”)

³⁸² *Id.* at 19.

³⁸³ *Id.* at 19.

³⁸⁴ *Id.* at 28.

³⁸⁵ *Id.* at 28.

³⁸⁶ Brief of Intervenors-Defendants/Appellees Kathy McGee and Claudia Bloom at 3-4, *Friendly House v. Napolitano*, CV 04-649 (Ariz. D. 2004) (No. 05-15005).

³⁸⁷ *Id.* at 4.

³⁸⁸ *Id.* at 4.

The other group of intervenors included one individual (Randy Pullen) and two organizations (Yes on Proposition 200, and the Federation for American Immigration Reform, or FAIR) that supported passage of Proposition 200.³⁸⁹

After the Friendly House Court, the Plaintiffs filed their notice of appeal on December 29, 2004.³⁹⁰ The Plaintiffs also filed an emergency motion for a stay pending their appeal on January 3, 2005.³⁹¹ However, the motions panel denied the Plaintiffs' emergency motion on January 14, 2005.³⁹² The Plaintiffs proceeded to file their opening brief with the Ninth Circuit on January 26, 2005. In response, the Defendants filed their Answering Brief on February 23, 2005. Furthermore, Intervenors-Defendants/Appellees Kathy Mcgee and Claudia Bloom filed a brief on March 7, 2005.

On August 9, 2005 the Ninth Circuit issued a ruling in which they dismissed the Plaintiffs' appeal for want of jurisdiction.³⁹³ The Ninth Circuit noted that "[t]he district court record reveals that there was no case or controversy between plaintiffs and the State of Arizona when pleadings went before the district court."³⁹⁴ More specifically, the Ninth Circuit emphasized that "[p]laintiffs have not met their burden of demonstrating an injury-in-fact."³⁹⁵ Consequently, with respect to the District Court's order denying the Plaintiffs' request for a preliminary injunction, the Ninth Circuit held that "[w]e therefore vacate the order below and remand with instructions to dismiss without prejudice."³⁹⁶

IV. POTENTIAL SCENARIOS WITH RESPECT TO PROPOSITION 200'S ULTIMATE FATE, AND ACA 6 AS A STATE MEASURE LIKELY TO WITHSTAND CONSTITUTIONAL MUSTER UNDER THE DECANAS TESTS

DeCanas v. Bica, LULAC I, LULAC II, and Friendly House (although the District Court's holding has since been vacated without prejudice by the Ninth Circuit Court of Appeals) each illustrated different ways in which the *DeCanas* tests impacted the state measures that the tests were applied to. Those cases further demonstrate how any or all of the three *DeCanas* tests may still potentially preempt part or all of Proposition 200. Therefore, relying on *DeCanas v. Bica*, LULAC I, and LULAC II, I shall examine Proposition 200 and each of the three *DeCanas* tests to determine whether one or more of the tests preempts part or all of Proposition 200. Doing so shall allow me to effectively demonstrate how ABA 6 should be able to withstand constitutional scrutiny under the *DeCanas* tests.

A. PROPOSITION 200'S ULTIMATE FATE: FUTURE APPLICATION OF THE DECANAS TESTS IN POTENTIAL SUBSEQUENT LITIGATION INVOLVING PROPOSITION 200

In light of the Ninth Circuit Court of Appeals vacating the Friendly House Court's decision on August 9, 2005, is it uncertain whether Proposition 200's validity will once again be challenged in the courts. However, it is possible that opponents of Proposition 200 will simply wait until they have standing before attacking the measure's legality. Therefore, it is still useful to consider how the *DeCanas* tests may or may not preempt part or all of Proposition 200 if its opponents initiate another challenge. Consequently, I shall examine potential outcomes with respect to all three of the *DeCanas* tests.

1. APPLICATION OF THE FIRST DECANAS TEST

After considering the holdings in *DeCanas v. Bica*, LULAC I and II, and the Friendly House Court's denial of the Plaintiffs' Request for a Preliminary Injunction, it seems that the first *DeCanas* test may or may not preempt part or all of Proposition 200 based largely on whether Proposition 200 is or is not determined to be a comprehensive scheme that has more than a purely speculative and indirect impact on immigration.

³⁸⁹ *Id.* at 4.

³⁹⁰ Plaintiffs-Appellants' Opening Brief, at 4, *Friendly House v. Napolitano*, CV 04-649 (Ariz. D. 2004) (No. 05-15005).

³⁹¹ *Id.* at 4.

³⁹² *Id.* at 4.

³⁹³ Order [Dismissing Plaintiffs' Appeal] at 10234, *Friendly House v. Napolitano*, CV 04-649 (Ariz. D. 2004) (No. 05-15005).

³⁹⁴ *Id.* at 10234-5 (citing *San Diego County Gun Rights Comm'n v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996)).

³⁹⁵ *Id.* at 10235 (the Ninth Circuit further explained that "[a]lthough it is not necessary for a plaintiff to subject himself to actual arrest or prosecution in order to establish standing (see, e.g. *Culinary Workers Union, Local 226 v. Del Pap*, 200 F.3d 614, 617-618 (9th Cir. 1999)), a plaintiff must at least show a 'genuine threat of imminent prosecution.'" (see *San Diego County*, 98 F.3d. at 1126).

³⁹⁶ *Id.* at 10235.

a. REVISITING LULAC I AND DECANAS V. BICA IN SUPPORT OF PROPOSITION 200

1. PURELY SPECULATIVE AND INDIRECT IMPACT ON IMMIGRATION

The *DeCanas v. Bica* holding seems to offer support in favor of the first *DeCanas* test not preempting any portion of Proposition 200. As I indicated earlier in Part III of my article, Justice Brennan emphasized in the *DeCanas v. Bica* majority opinion that “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.”³⁹⁷ Therefore, Proposition 200’s proponents can stress that standing alone, and without a greater showing by Proposition 200 opponents, the fact that aliens are the subject of Proposition 200 *does not render it a regulation of immigration*.

Justice Brennan continued by emphasizing that California implemented Section 2805 to strengthen its economy *by adopting federal standards* in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country.³⁹⁸ Justice Brennan further noted that even if *such local regulation has some purely speculative and indirect impact on immigration*, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.³⁹⁹

2. DENIAL OF BENEFITS DOES NOT AMOUNT TO A DETERMINATION OF WHO SHOULD OR SHOULD NOT BE ADMITTED TO THE U.S.

The LULAC I holding also seems to support a finding in favor of the first *DeCanas* test not preempting any portion of Proposition 200. The LULAC I Court acknowledged that Proposition 187’s benefit denial provisions might indirectly or directly affect immigration by causing such persons to leave the state, or deterring them from entering California in the first place.⁴⁰⁰ However, as I noted in Part III of this article, *such a denial does not amount to a “determination of who should or should not be admitted to this country.”*⁴⁰¹ Therefore, the LULAC I Court relied on that analysis as an additional justification for holding that Proposition 187’s benefit denial provisions were not invalidated by the first *DeCanas* test. Consequently, Proposition 200’s proponents can assert that even if Proposition 200, like Proposition 187’s denial of benefits provisions, indirectly or directly affects immigration by causing such persons to leave Arizona, or deterring them from entering Arizona in the first place, the LULAC I holding supports a determination that *such a denial does not amount to a “determination of who should or should not be admitted to this country”* (emphasis added).

3. THE PRA ALLOWS ARIZONA TO REQUIRE APPLICANTS TO PROVIDE PROOF OF ELIGIBILITY IN ENFORCING PROPOSITION 200

Proposition 200’s provisions, as with Proposition 187’s benefit denial provisions, requires Arizona State agents to merely perform ministerial tasks. Proposition 200’s proponents can point out that Proposition 200 requires agencies of the state and all of its local subdivisions to verify the identity of applicants for, and verify that applicants are eligible for “state and local public benefits that are not federally mandated.”⁴⁰² Proposition 200 also requires agencies of the state and all of its local subdivisions verify the immigration status of any applicants for “state and local public benefits that are not federally mandated.”⁴⁰³

However, it is worth noting, as Proposition 200 opponents themselves might, that unlike Proposition 187’s benefit denial provisions, Proposition 200’s language is silent as to whether Arizona state agents are required to verify immigration status by verifying immigration status by assessing federal immigration status information through SAVE.⁴⁰⁴ Consequently, it is unclear whether by verifying as required by Proposition 200, Arizona State agents would merely be performing “ministerial tasks”.

³⁹⁷ *DeCanas*, 424 U.S. at 355.

³⁹⁸ *Id.* at 355-56.

³⁹⁹ *Id.* at 355-56.

⁴⁰⁰ *LULAC I*, 908 F.Supp at 770.

⁴⁰¹ *Id.* at 770 (citing *DeCanas*, 424 U.S. at 355)(emphasis added).

⁴⁰² ARIZ. REV. STAT. § 46-140.01(A)(1).

⁴⁰³ ARIZ. REV. STAT. § 46-140.01(A)(2).

⁴⁰⁴ In fact, Proposition 187’s language was also silent; however, the LULAC I Court held that performing pursuant to Proposition 187’s benefit denial provisions required State agents to verify immigration status by verifying immigration status by assessing federal immigration status information through SAVE.

It is also significant that the PRA was passed subsequent to the LULAC I holding with respect to Proposition 187's benefit denial provisions. Specifically, the PRA states that "[a] state or political subdivision of a State is authorized to require an applicant . . . to provide proof of eligibility."⁴⁰⁵ In addition, under the PRA a State is not required to follow the federal classification criteria in determining the eligibility of qualified aliens for public benefits.⁴⁰⁶ Rather, if the State follows the federal criteria, a State is merely presumed to have chosen the least restrictive means available for determining eligibility.⁴⁰⁷ Consequently, whether Arizona state agents are or are not performing mere "ministerial tasks" by performing pursuant to Proposition 200 seems to be a moot point because the PRA has authorized States to require an applicant to provide proof of eligibility whether or not the State follows the federal criteria.

b. REVISITING LULAC I AND DECANAS V. BICA IN OPPOSITION TO PROPOSITION 200

1. PROPOSITION 200 HAS A "DIRECT AND SUBSTANTIAL IMPACT" ON IMMIGRATION, AND IS THEREFORE A REGULATION OF IMMIGRATION

Although the Ninth Circuit Court of Appeals vacated the Friendly House Court's decision, the arguments used by the Friendly House Plaintiffs still offers guidance as to future potential arguments against Proposition 200's validity. For instance, the Friendly House Plaintiffs explained that the LULAC I Court determined that Proposition 187's verification, notification and cooperation/notification requirements had a much more than a "purely speculative and indirect impact on immigration".⁴⁰⁸ The LULAC I Court further emphasized that Proposition 187's verification, notification and cooperation/notification requirements directly regulated immigration by creating a comprehensive scheme to detect and report the presence and effect the removal of illegal aliens.⁴⁰⁹ Consequently, the LULAC I Court determined that Proposition 187's verification, notification and cooperation/notification requirements had a direct and substantial impact on immigration.⁴¹⁰ Therefore, the LULAC I Court held that the first *DeCanas* test preempted Proposition 187's verification, notification and cooperation/notification requirements as a regulation of immigration.

The Friendly House Plaintiffs, in their appeal to the Ninth Circuit, asserted be that Proposition 200 incorporates all of the necessary aspects of an "immigration scheme."⁴¹¹ Consequently, the Friendly House Plaintiffs argued that Proposition 200, as with Proposition 187's classification, notification, and cooperation/reporting provisions, have a "direct and substantial impact on immigration,"⁴¹² unlike the statute at issue in *DeCanas v. Bica*. Therefore, Friendly House Plaintiffs urged that Proposition 200 should be preempted as a regulation of immigration.

Because the Friendly House Plaintiffs' appeal to the Ninth Circuit was denied because the Plaintiffs lacked standing, the merits of this argument were not considered; thus, opponents of Proposition 200 could conceivably rely on such an argument in the future in support of the first *DeCanas* test preempting part or all of Proposition 200. Therefore, the first *DeCanas* test may preempt part or all of Proposition 200 if a court determines that Proposition 200 directly regulates immigration by creating a comprehensive scheme to detect and report the presence and effect the removal of illegal aliens. Consequently, Proposition 200 may be preempted if it is determined that the measure has a "direct and substantial impact on immigration".

⁴⁰⁵ 8 U.S.C. § 1625 (2000) ("A State or political subdivision of a State is authorized to require an applicant for State or local benefits (as defined in section 1621(c) of this title) to provide proof of eligibility").

⁴⁰⁶ 8 U.S.C. § 1601(7) (2000).

⁴⁰⁷ 8 U.S.C. § 1601(7) (2000).

⁴⁰⁸ *LULAC I*, 908 F.Supp at 769 (noting that "the scheme requires state agents to question all arrestees, applicants for medical and social services, students, and parents of students about their immigration status; to obtain and examine documents relating to the immigration status of such persons; to identify "suspected" "illegal" immigrants in California; to report suspected "illegal" immigrants to state and federal authorities; and to instruct people suspected of being in the United States illegally to obtain "legal status" or "leave the country").

⁴⁰⁹ *Id.* at 769.

⁴¹⁰ *Id.* at 769.

⁴¹¹ Plaintiffs-Appellants' Opening Brief, at 13, *Friendly House v. Napolitano*, CV 04-649 (Ariz. D. 2004) (No. 05-15005) (asserting that state and local employees are empowered and required – under pain of criminal penalty – to investigate (by verifying immigration status), cooperate in investigations (by assisting others in the verification of immigration status), sanction (by, in effect, denying services), and expel individuals (by reporting them).

⁴¹² *Id.* at 13; *see also* note 134 and *LULAC I*, 908 F.Supp. at 769 for specific details on how Proposition 187's classification, notification, and cooperation/reporting provisions, have a "direct and substantial impact on immigration".

2. APPLICATION OF THE SECOND DECANAS TEST

Of the three *DeCanas* tests, I believe that the second *DeCanas* test elicits the most striking contrast between the interpretations of Proposition 200's proponents and opponents. The contrasting interpretations were based on Congress' intent to occupy the field of regulation with respect to public benefits to aliens. Moreover, the conflict was evident based on the Friendly House Plaintiffs' reliance on LULAC II, while the Friendly House Court disagreed sharply with LULAC II when they denied the Friendly House Plaintiffs' preliminary injunction.

Consequently, Proposition 200's ultimate fate with respect to the second *DeCanas* test may be determined based on which of the two interpretations is more persuasive as to Congress' intent to occupy the field of regulation with respect to public benefits to aliens. However, Proposition 200's ultimate fate with respect to the second *DeCanas* test may also depend on which field(s) parts or all of Proposition 200 is held to occupy.

a. DECANAS V. BICA, AND CONGRESS' ABILITY TO COMPLETELY OCCUPY A FIELD

Prior to examining the *DeCanas v. Bica*, LULAC I, II, and Friendly House holdings, it shall be helpful to consider the *DeCanas v. Bica* Court's holding with respect to Congress' ability to completely occupy a field. Justice Brennan noted that a state regulation designed to protect vital state interests must give way to paramount federal legislation.⁴¹³ However, Justice Brennan emphasized that such a state regulation would give way to paramount federal legislation only where it Congress' clear and manifest purpose to demonstrate a complete ouster of state power, including state power to promulgate laws not in conflict with federal laws.⁴¹⁴ Therefore, *DeCanas v. Bica* suggests that part or all of Proposition 200 may be preempted by paramount federal law only where it is Congress' clear and manifest purpose to demonstrate a complete ouster of Arizona's power, including Arizona's power to promulgate laws not in conflict with federal laws.

b. CONGRESSIONAL INTENT TO OCCUPY THE FIELD OF GOVERNMENT BENEFITS TO ALIENS? THE FRIENDLY HOUSE PLAINTIFFS AND THE FRIENDLY HOUSE COURT'S DIFFERING PERSPECTIVES

The Friendly House Plaintiffs, relying on LULAC II, stressed that whether level of government extending benefits, or the source of funding for the benefits (i.e. federal, state, or local), the PRA encompassed all of them.⁴¹⁵ The Friendly House Plaintiffs further buttressed their position by emphasizing that PRA "both demarcate(s) a field of comprehensive federal regulation within which states may not legislate, and define federal objectives with which states may not interfere."⁴¹⁶ Therefore, it seems the Friendly House Plaintiffs did, and that challengers to Proposition 200 could press for a broad interpretation of the PRA, such that it evidences Congress' intention to occupy the entire field of regulation with respect to public benefits to aliens.

Alternatively, the Friendly House Court, in denying the Plaintiffs' request for a preliminary injunction, cited several examples within the PRA that indicated just the opposite. The Friendly House Court's holding appeared to have been based on portions of the PRA that give states the ability to exercise their own discretion with respect to determining eligibility for State public benefits.⁴¹⁷ Therefore, the Friendly House Court's holding reflected a view that Congress, by giving states limited ability to determine guidelines with respect to state or local public benefits, did not intend to entirely occupy the field of field of regulation of public benefits to aliens. Furthermore, although the Ninth Circuit vacated the Friendly House Court's holding, such a holding is not precluded in the future should a court reach the same conclusions.

⁴¹³ *DeCanas*, 424 U.S. at 357.

⁴¹⁴ *Id.* at 357.

⁴¹⁵ LULAC II, 997 F.Supp at 1253 (referring to statements of national policy regarding the denial of public benefits to illegal immigrants (8 U.S.C. § 1601); rules regarding imminent eligibility for federal, state, and local benefits, including definitions of the benefits covered (i.e. 8 U.S.C. §§ 1611, 1621); a description of state legislative options in the area of immigrant eligibility for state and local benefits (8 U.S.C. § 1621(d)); and a system for verifying immigration status to determine eligibility for benefits and services (8 U.S.C. § 1642)).

⁴¹⁶ *Supra* note 274, at 16 (citing LULAC II, 997 F.Supp at 1253-54).

⁴¹⁷ See generally 8 U.S.C. §§ 1622(a), 1601(7), 1621(d), 1624(a), 1624(b), 1632(a), all of which were cited in *id.* at 16-18.

c. DEFINING THE APPLICABLE FIELD: ANALYSIS OF DECANAS V. BICA AND LULAC I

The Friendly House Plaintiffs and Defendants made compelling arguments in support of Congress either intending or not intending to occupy the field of regulation of government benefits to aliens. However, Proposition 200's fate with respect to the second *DeCanas* test may also be based on which field(s) a court believes that Proposition 200 seeks to occupy. *DeCanas v. Bica* and LULAC I each examines state measures in which part or all of the measure was held not to occupy the same field that Congress intended to occupy, and how such portions of a state measure were not preempted by the second *DeCanas* test.

1. DECANAS V. BICA

The *DeCanas v. Bica* Court did not define the field in Section 2805 as the broad field of immigration. Rather, the LULAC I Court noted that the *DeCanas v. Bica* Court held that the statute in question touched on the narrower field of employment of illegal aliens.⁴¹⁸ Consequently, the LULAC I Court further remarked that the *DeCanas v. Bica* Court held that because nothing in the INA indicated congressional intent to preclude state regulation touching on the employment of illegal aliens, the second *DeCanas* test did not preempt the statute at issue in *DeCanas v. Bica*.⁴¹⁹

2. LULAC I

Relying on *DeCanas v. Bica*, the LULAC I Court held that, by virtue of the fields that certain Proposition 187 provisions sought to occupy, and because nothing in the INA "unmistakably confirmed" an intent to oust state authority in those fields, that those provisions did not seek to occupy the field of immigration regulation. Consequently, those provisions were not preempted by the second *DeCanas* test. To illustrate my point, I shall examine Proposition 187's benefit denial, and criminal penalties provisions.

a. PROPOSITION 187'S BENEFIT DENIAL PROVISIONS

The LULAC I Court examined whether Proposition 187's benefit denial provisions sought to occupy the field of immigration regulation. The LULAC I Court held that Proposition 187's benefit denial provisions touched the public benefits field, and specifically alien eligibility for public benefits, rather than the field of immigration regulation.⁴²⁰ The LULAC I Court, after reviewing the wording and legislative history of the INA, further reasoned that nothing in the INA "unmistakably confirmed" an intent to oust state authority to regulate the field of public benefits.⁴²¹ The LULAC I Court, citing *DeCanas v. Bica*, further reasoned that intent to oust state authority to regulate in the public benefits field cannot be "derived from the scope and detail of the INA . . . governing entry and stay of aliens".⁴²² Consequently, the LULAC I Court held that the second *DeCanas* test did not preempt Proposition 187's benefit denial provisions.

b. PROPOSITION 187'S CRIMINAL PENALTIES PROVISIONS

Furthermore, the LULAC I Court held that Proposition 187's criminal penalties provisions touched not on the field of immigration regulation, but rather the field of criminal law as it relates to false documents.⁴²³ Moreover, finding that neither Congress nor the INA intended to completely oust state authority to criminalize the falsification and use of false identification documents, the LULAC I Court held that the second *DeCanas* test did not preempt Proposition 187's criminal penalties provisions either.⁴²⁴

⁴¹⁸ LULAC I, 908 F.Supp at 776 (citing *DeCanas*, 424 U.S. at 356-7).

⁴¹⁹ *Id.* at 776 (citing *DeCanas*, 424 U.S. at 357).

⁴²⁰ *Id.* at 776 (emphasis added).

⁴²¹ *Id.* at 776.

⁴²² *Id.* at 776 (citing *DeCanas*, 424 U.S. at 359).

⁴²³ *Id.* at 776 (emphasis added).

⁴²⁴ *Id.* at 776.

d. HOW THE SCOPE OF THE FIELD IMPACTS PROPOSITION 200'S ULTIMATE FATE

Friendly House illustrated the potential conflict over whether Congress does or does not intend to occupy the field of immigration regulation. Furthermore, although the Friendly House decision was vacated, a court is not prohibited from making the same holding in the future should Proposition 200 be challenged again. However, nor is a court prohibited from holding in a manner consistent with LULAC II should Proposition 200 be challenged in the future.

In addition, the *DeCanas v. Bica* and LULAC I holdings illustrate how state measures were held to occupy fields other than the field of immigration regulation, and thus avoided being preempted by the second *DeCanas* test. Consequently, Proposition 200's ultimate fate with respect to the second *DeCanas* may depend on which field Proposition 200 is held to occupy, as well as whether Congress intended to occupy that field.

3. APPLICATION OF THE THIRD DECANAS TEST

With respect to the third *DeCanas* test, Proposition 200's ultimate fate may rest in large measure upon Attorney General Terry Goddard's Opinion of November 12, 2004, as well as perhaps the LULAC II holding.

a. IT IS NOT IMPOSSIBLE TO COMPLY WITH PROPOSITION 200 AND THE PRA

The Friendly House Court stated that the third *DeCanas* test only preempts state law where complying with both federal and state regulations is a physical impossibility.⁴²⁵ Consequently, the Friendly House Court, in denying the Plaintiffs' request for a preliminary injunction, held that it is not physically impossible to comply with both the PRA and Proposition 200 because Proposition 200 deals only with those State and local benefits that "are not federally mandated".⁴²⁶ Furthermore, the Friendly House Court went so far as to assert that Proposition 200 and the PRA were "harmonious".⁴²⁷ The Friendly House Court's relied, as the basis of Proposition 200's scope, Attorney General Terry Goddard's Opinion (i.e. the programs subject to Proposition 200 are those within Title 46 of the Arizona Revised Statutes that are also subject to the eligibility restrictions in 8 U.S.C. § 1621).⁴²⁸ Consequently, the Friendly House Court held that the third *DeCanas* test did not preempt part or all of Proposition 200.

b. AMBIGUITY IN PROPOSITION 200'S LANGUAGE, AND THE LULAC II HOLDING COULD RESULT IN THE THIRD DECANAS TEST PREEMPTING PROPOSITION 200

Despite the Friendly House Court's holding, it is significant that, as the Legislative Council emphasized, and as Goddard himself stated in his Opinion, Proposition 200 did not define the meaning of "state and local public benefits that are not federally mandated."⁴²⁹ In fact, because Proposition 200's language is silent as to its meaning, the scope of "state and local benefits that are not federally mandated" seems to be an open question. In fact, its meaning is currently being litigated among proponents of Proposition 200 in the Arizona State Courts.⁴³⁰ More significant, however, is that as the Friendly House Court reminded, "[t]he Attorney General's opinion, while entitled to respect, is advisory only and non-binding."⁴³¹ Therefore, opponents of Proposition 200 could assert that the scope of "state and local public benefits that are not federally mandated" is ambiguous within Proposition 200's language, so much so that Proposition 200's supporters are contesting its scope. Moreover, opponents of Proposition 200 could also contend that the scope suggested by the Arizona Attorney General and which was relied upon by the Friendly House Court is advisory only, and not binding.

Consequently, opponents of Proposition 200 may be able to rely on the LULAC II Court's reasoning to preempt at least part or all of Proposition 200 with respect to the third *DeCanas* test. The LULAC II Court, in examining Proposition 187's benefit denial provisions in Sections 5 and 6, noted that by denying public social services and health benefits to "alien[s] who are in the United States in violation of federal law", Proposition 187

⁴²⁵ *Supra* note 274, at 19 (citing *Florida Lime & Avocado Growers*, 373 U.S. at 142-3).

⁴²⁶ *Id.* at 19.

⁴²⁷ *Id.* at 19.

⁴²⁸ See generally *supra* note 277.

⁴²⁹ *Supra* note 274, at 5 (explaining that "[i]n its analysis, Legislative Council advised voters that 'Proposition 200 does not define the term 'state and local public benefits that are not federally mandated.'")

⁴³⁰ See generally *supra* note 289.

⁴³¹ *Supra* note 274, at 7 n.2.

applied standards different than the PRA.⁴³² Specifically, the LULAC II Court noted that Proposition 187's benefit denial provisions in Sections 5 and 6 applied different standards than either the PRA's standards with respect to *federal benefits to aliens*,⁴³³ as well as the PRA's standards with respect to *state and local benefits to aliens*.⁴³⁴

The differences in standards were significant because the LULAC II Court also held that *the differences in the standards amounted to a conflict* between Proposition 187's benefit denial provisions in Sections 5 and 6 and the PRA's classifications.⁴³⁵ The LULAC II Court further *held that the conflict between Proposition 187's benefit denial provisions in Sections 5 and 6 and the PRA's classifications made it impossible to comply with both laws*.⁴³⁶ Consequently, the LULAC II Court held that the third *DeCanas* test preempted Proposition 187's benefit denial provisions in Sections 5 and 6.

Therefore, Proposition 200 risks being preempted by the third *DeCanas* test in two significant ways. First, Proposition 200's scope, as applied by the Friendly House Court, is non-binding on subsequent courts, potentially leaving "state and local benefits that are not federally mandated" undefined by the language Proposition 200. Consequently, a subsequent court applying the LULAC II Court's analysis with respect to the third *DeCanas* test could preempt part or all of Proposition 200 by finding that "state and local benefits that are not federally mandated" is a different standard than the PRA's standards with respect to state and local benefits to aliens. Consequently, such a court could find that differences would result in a conflict, and that the conflict in turn would make it impossible to comply with both laws. Therefore, Proposition 200 could be preempted in part or in whole just as Proposition 187 was by the LULAC II Court.

4. CONCLUDING COMMENTS REGARDING PROPOSITION 200

I have just elaborated on how part or all of Proposition 200 may possibly be preempted by one or more of the *DeCanas* tests. Although the Friendly House Court's holding was vacated, and although Proposition 200 may not be opposed again in the courts, examining possible outcomes in the event that Proposition 200 is challenged in the future served a useful purpose by contrasting Proposition 187 and Proposition 200. Examining the possible outcomes also shed light on some potential weaknesses that may be evident if opponents again challenge Proposition 200's validity. Consequently, analyzing the possible outcomes shall provide a context in which to examine ABA 6's ability to withstand constitutional scrutiny under the *DeCanas* tests.

B. ACA 6: THE PROTOTYPE FOR STATE MEASURES SEEKING TO DETER UNDOCUMENTED IMMIGRATION, AND WITHSTAND CONSTITUTIONAL SCRUTINY UNDER DECANAS

Mark Wyland, a Republican member of the California Assembly from Del Mar, attempted to amend the California State Constitution with ACA 6. Specifically, Wyland sought to add the following language to Article XX of the California State Constitution, and I shall limit my analysis of ACA 6 to this language (which I shall refer to as "ACA 6" for the remainder of this article).⁴³⁷

The state shall not . . . provide any health, special, or other state or local public benefit as defined pursuant to subsection (c) of Title 8 of Section 1621 of the United States Code, to a person who is neither a citizen of the United States nor an alien lawfully present in the United States, except to the extent that a privilege, service, or benefit encompassed by this subdivision is required, pursuant to federal law, to be provided.⁴³⁸

⁴³² *LULAC II*, 997 F.Supp at 1256.

⁴³³ *Id.* at 1256 (referring to 8 U.S.C. § 1611 (i.e. to those who are not "qualified"))(emphasis added).

⁴³⁴ *Id.* at 1256 (referring to 8 U.S.C. § 1621 (i.e. to those who are not "qualified", to non-immigrants under the PRA, or to aliens who are paroled into the United States under section 212(d)(5) of the INA for less than one year))(emphasis added).

⁴³⁵ *Id.* at 1257 (emphasis added).

⁴³⁶ *Id.* at 1257 (emphasis added).

⁴³⁷ At the present time, ACA 6 is not being considered. Therefore, by referring to ACA 6's language as "ACA 6", I am referring only to the language that I have identified, in whatever form that language may be utilized in the future (i.e. as with a ballot initiative or otherwise); consequently, I am not referring to any existing movement to amend the California Constitution using ACA 6's language.

⁴³⁸ The wording is a portion of language that Mr. Wyland sought to have added Section 26(a) to Article XX (the full language of Section 26 would have read "The State shall not issue any driver's license or state identification card, subsidize in-state tuition or fees for postsecondary education, grant any privilege, or provide any health, special, or other state or local public benefit as defined pursuant to subsection (c) of Title 8 of Section 1621 of the United States Code, to a person who is neither a citizen of the United States nor an alien lawfully present in the United States, except to the extent that a privilege, service, or benefit encompassed by this subdivision is required, pursuant to federal law, to be provided", at http://www.leginfo.ca.gov/pub/bill/asm/ab_0001-0050/aca_6_bill_20050628_amended_asm... (July 7, 2005).

However, the Judiciary Committee voted down the amendment on July 5, 2005.⁴³⁹ Still, Wyland said “there would be efforts to put their proposals on the ballot [in 2006] as an initiative.”⁴⁴⁰ However, even if ACA 6’s language is introduced and passed as a voter initiative in 2006, ACA 6 would still need to satisfy all three of the *DeCanas* tests in order for all of ACA 6 to avoid being preempted. Opponents of ACA 6 have already opposed the measure relying in part on *DeCanas v. Bica*.⁴⁴¹ Therefore, I shall examine how ACA 6 will likely withstand constitutional scrutiny under the *DeCanas* tests.

1. APPLICATION OF THE FIRST DECANAS TEST

ACA 6’s authors, because of the way that ACA 6 was drafted, have better enabled the measure to withstand scrutiny under the first *DeCanas* test than Proposition 187 or Proposition 200. For example, when compared with Proposition 187 and Proposition 200, ACA 6 is not as specific in terms of what State Agents are required to do. Instead, ACA 6’s language only states that:

The state shall not . . . provide any health, special, or other state or local public benefit as defined pursuant to subsection (c) of Title 8 of Section 1621 of the United States Code, to a person who is neither a citizen of the United States nor an alien lawfully present in the United States, except to the extent that a privilege, service, or benefit encompassed by this subdivision is required, pursuant to federal law, to be provided.

By not providing the same degree of detail in its language, ACA 6’s authors may manage to dodge attacks that Proposition 187’s opponents levied at Proposition 187, and that the Friendly House Plaintiffs levied against Proposition 200. I shall examine the attacks that I am referring to by briefly analyzing LULAC I with respect to Proposition 187’s verification, notification and cooperation/notification requirements; and the Friendly House Plaintiffs’ arguments.

a. LULAC I

With respect to Proposition 187, the LULAC I Court determined that Proposition 187’s verification, notification and cooperation/notification requirements had much more than a “purely speculative and indirect impact on immigration.” The LULAC I Court listed the following activities required by Proposition 187’s verification, notification and cooperation/notification requirements in justification of their holding: State agents were required to question all arrestees, applicants for medical and social services, students, and parents of students about their immigration status; to obtain and examine documents relating to the immigration status of such persons; to identify “suspected” “illegal” immigrants in California; to report suspected “illegal” immigrants to state and federal authorities; and to instruct people suspected of being in the United States illegally to obtain “legal status” or “leave the country. Consequently, the LULAC I Court was able to draw their conclusions based on the specific requirements listed in the language of Proposition 187’s verification, notification and cooperation/notification requirements. Thus, the LULAC I Court held that the verification, notification and cooperation/notification requirements directly regulated immigration by creating a comprehensive scheme to detect and report the presence and effect the removal of illegal aliens. Therefore, the LULAC I Court held that the verification, notification and cooperation/notification requirements had a direct and substantial impact on immigration.

b. ARGUMENTS OF THE FRIENDLY HOUSE PLAINTIFFS

As for Proposition 200, the Friendly House Plaintiffs asserted that Proposition 200 represents an “immigration scheme” by stressing that that state and local employees are empowered and required – under pain of criminal penalty – to investigate (by verifying immigration status), cooperate in investigations (by assisting others in the verification of immigration status), sanction (by, in effect, denying services), and expel individuals (by reporting

⁴³⁹ Steve Lawrence, *Two Immigration Measures Halted*, SAN DIEGO UNION TRIB., July 6, 2005 at A4, (referring to a 4-2 party line vote, although the author did not indicate which party those who supported ACA 6 belonged to, nor which party those opposed to ACA 6 belonged to).

⁴⁴⁰ *Id.* at A4.

⁴⁴¹ Hearing on a *Constitutional Amendment to Bar Public Benefits to Undocumented Immigrants Before the Assembly Committee on Judiciary*, 2005 Leg. (2005) (stating that “[o]pponents argue that [ACA 6] violates . . . the Supremacy Clause, by stepping on ground preempted by federal immigration law . . . opponents cite [LULAC I and] *DeCanas v. Bica* . . .”, at http://www.leginfo.ca.gov/pub/bill/asm/ab_0001-0050/aca_6_cfa_20050701_151402_asm_... (July 7, 2005).

them). Consequently, the Friendly House Plaintiffs reasoned that Proposition 200, as with Proposition 187's classification, notification, and cooperation/reporting provisions, have a "direct and substantial impact on immigration", and therefore that Proposition 200 should be preempted as a regulation of immigration.

c. IMPACT OF LULAC I, AND OF THE FRIENDLY HOUSE PLAINTIFFS' ARGUMENTS

The LULAC I holding and Friendly House Plaintiffs' arguments underscores that where a state statute (as demonstrated by what State agents are required to do to enforce the provisions of the state statute according to the language of the statute) has a direct and substantial impact on immigration, such a state statute is a regulation of immigration by virtue of the state statute being a comprehensive scheme to detect and report the removal of illegal aliens.

d. WHY FIRST DECANAS TEST WILL BE NOT PREEMPT ACA 6

It is necessary to consider *DeCanas v. Bica*'s language, which held that if a local regulation has *some purely speculative and indirect impact on immigration*, it does not thereby become a constitutionally proscribed regulation of immigration. The meaning of "purely speculative and indirect impact on immigration", as used by the *DeCanas v. Bica* Court, is vague, and it is worth noting that the LULAC I Court, by examining what State agents were required to do by Proposition 187's verification, notification and cooperation/notification requirements, concluded that such requirements had a direct and substantial impact on immigration.

However, the *DeCanas v. Bica* Court did not hold that state measures of the scope of Proposition 187's verification, notification and cooperation/notification requirements had more than a purely speculative and indirect impact on immigration. Consequently, the LULAC I Court's holding is no guarantee that a court considering ACA 6 would rely upon the LULAC I Court's reasoning in determining if ACA 6, as with Proposition 187's verification, notification and cooperation/notification requirements, had more than a purely speculative and indirect impact on immigration as required by *DeCanas v. Bica*. In fact, a court may be able to determine that ACA 6 has as much of an impact on immigration as Proposition 187's verification, notification and cooperation/notification requirements, and still have a purely speculative and indirect impact on immigration as intended by *DeCanas v. Bica*. In other words, a court considering ACA 6's impact on immigration is not bound to utilize LULAC I's "direct and substantial impact on immigration" standard when determining whether ACA 6 might have more than a "purely speculative and indirect impact on immigration" as intended by *DeCanas v. Bica*.

In addition, ACA 6's language does not have the degree of detail with respect to what state agents are required to do to act pursuant to ACA 6 that either Proposition 187 or Proposition 200 had. Such detail gave opponents of Proposition 187 and Proposition 200 ammunition to use in arguing that each measure was a regulatory scheme that has a direct and substantial impact on immigration. However, ACA 6 gives potential opponents no such information with respect to what state agents are required to do pursuant to ACA 6 for use in arguing that ACA 6 is a regulatory scheme that has a direct and substantial impact on immigration. Therefore, ACA 6 is less likely to be preempted by the first *DeCanas* test in a manner that Proposition 187's verification, notification and cooperation/notification requirements were, and in which part or all of Proposition 200 might be preempted.

As I indicated in Part III of this article, the *DeCanas v. Bica* Court specified that "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."⁴⁴² In the event that ACA 6's opponents are unable to demonstrate that ACA 6 would have more than a purely speculative and indirect impact on immigration by showing that ACA 6 is a regulatory scheme, then the fact that aliens are the subject of ACA 6 would effectively be left standing alone. Consequently, ACA 6 would not be rendered a regulation of immigration on that basis alone. Furthermore, the language of ACA 6 is not a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain; rather, ACA 6 merely identifies a group of persons who shall not receive state or local public benefits pursuant to ACA 6. Therefore, it is less likely that the first *DeCanas* test will preempt part or all of ACA 6.

2. APPLICATION OF THE SECOND DECANAS TEST

I believe that ACA 6's authors, by way of the manner in which they drafted ACA 6, placed themselves in as good a position as possible to avoid being preempted by the second *DeCanas* test. However, whether the second

⁴⁴² *DeCanas*, 424 U.S. at 355.

DeCanas test does or does not preempt part or all of ACA 6 will depend almost entirely on a court's interpretation of the holdings in *DeCanas v. Bica*, LULAC I, LULAC II, and *Friendly House*, rather than ACA 6's language. Those prior holdings are important because they will likely provide the framework for determining which field(s) a court determining ACA 6's validity seeks to occupy.

a. ACA 6 SEEKS TO OCCUPY THE FIELD OF IMMIGRATION REGULATION

For example, it is possible that, as with LULAC II and *Friendly House*, a court determining ACA 6's validity may determine that ACA 6 seeks to occupy the field of immigration regulation of public benefits to aliens. Consequently ACA 6's fate, as with Proposition 200's in *Friendly House*, would be based on whether Congress either did or did not seek to occupy the field of immigration regulation of public benefits to aliens themselves. Although the Ninth Circuit vacated *Friendly House* Court's holding, another court determining ACA 6's validity is not prohibited from making the same determination as to Congress not occupying the field of immigration regulation of public benefits to aliens. However, because such a holding would be at odds with the LULAC II Court's determination that Congress did seek to entirely occupy the field of immigration regulation of public benefits to aliens, the question of whether Congress does or does not seek to occupy the field of immigration regulation entirely remains an open question.

It is worth noting however that the LULAC II and *Friendly House* cases were each decided after the PRA was enacted, and that the courts in each of the disputes determined that the state sought to occupy the field that Congress also sought to occupy. It is also noteworthy that the LULAC II Court held that Proposition 187's benefit denial provisions, which the LULAC I Court found to occupy the *public benefits field*, and specifically *alien eligibility for public benefits*, instead occupied the field of immigration regulation. Consequently, LULAC II and *Friendly House* may illustrate a trend in which courts determine that by virtue of the PRA, Congress will or will not occupy a field that a state implementing a measure designed to deter illegal immigration also occupies. Under such circumstances, the dispute may be based on the LULAC II/*Friendly House* interpretations of whether Congress does or does not occupy the field of immigration regulation, rather than over whether the state statute may possibly occupy a field that Congress does not occupy.⁴⁴³

b. ACA 6 SEEKS TO OCCUPY THE FIELD OTHER THAN IMMIGRATION REGULATION

It is also possible that a court considering ACA 6's validity may still determine that ACA 6 occupies a field other than immigration regulation. The *DeCanas v. Bica* Court did exactly that when it determined that Section 2805 did not seek to occupy the field of immigration, but rather that Section 2805 touched on the *narrower field of employment of illegal aliens*, a field that Congress did not seek to occupy. Consequently, the second *DeCanas* test did not preempt Section 2805(a). Relying on *DeCanas v. Bica*, the LULAC I Court held that Proposition 187's benefit denial provisions touched the *public benefits field*, and specifically *alien eligibility for public benefits*, another field that Congress did not occupy, rather than the field of immigration regulation. Consequently, the second *DeCanas* test did not preempt Proposition 187's benefit denial provisions as decided by the LULAC I Court.

When compared to Section 2805 and Proposition 187's benefit denial provisions, ACA 6 seems to resemble Proposition 187's benefit denial provisions more closely. Therefore, if a court considering ACA 6's validity utilizes the *DeCanas v. Bica* and LULAC I Courts' reasoning, the second *DeCanas* test will likely not preempt ACA 6 if it is determined that ACA 6 occupies the *public benefits field*, and specifically *alien eligibility for public benefits*, rather than the field of immigration regulation.

3. APPLICATION OF THE THIRD DECANAS TEST

The ACA 6's drafters seem to have gone to some lengths to avoid one of Proposition 187's actual, and one of Proposition 200's potential weaknesses. With respect to Proposition 187, the LULAC II Court made a point of commenting on Proposition 187's "poor draftsmanship" as the cause of the conflict between the measure's benefit denial provisions and federal law.⁴⁴⁴ Moreover, by not defining the meaning of "state and local public benefits that

⁴⁴³ In other words, a court would determine that the state occupies the field of immigration regulation, and the dispute would be based on whether Congress also sought to occupy the field; such analysis is contrasted with *DeCanas v. Bica* and LULAC I, in which the courts determined that the states occupied fields other than immigration regulation, fields that Congress did not also occupy.

⁴⁴⁴ *LULAC II*, 997 F.Supp at 13 n.14 (explaining that "[t]he difference between the classification scheme in [S]ections 5 and 6 and the classification scheme in [S]ections 7 and 8 is an example of the Proposition's poor draftsmanship. Sections 5 and 6 refer to a "citizen of the United States," an "alien lawfully admitted as a permanent resident," an "alien lawfully admitted for a temporary period of time" and an "alien in

are not federally mandated”, a court following the LULAC II Court’s holding may conclude that Proposition 200 applies a different standard than the PRA’s standards with respect to state and local benefits to aliens. Consequently, because such a court could find that the differences between Proposition 200 and the PRA would result in a conflict, and that the conflict would make it impossible to comply with both laws, Proposition 200 could be preempted in part or in whole on that basis. Therefore, the third *DeCanas* test may preempt Proposition 200 in part or entirely because of ambiguity in its language, and lack of specificity in its scope.

a. ACA 6’S EXPLICIT LANGUAGE AND CONCISE STANDARD AVOIDS AMBIGUITY THAT MIGHT RESULT IN A CONFLICT WITH FEDERAL LAW

However, by explicitly defining any “state or local public benefit as defined pursuant to subsection (c) of Title 8 of Section 1621”, ACA 6 avoids Proposition 200’s potential problems. First, by explicitly referencing Section 1621(c) of Title 8, ACA 6’s drafters avoided the uncertainty of having the meaning of “state or local public benefits” rely on something similar to the opinion of the Arizona Attorney General (as with Proposition 200). Rather, ACA 6’s language with respect to state or local public benefits is clear. Moreover, ACA 6 lists one clear standard, as opposed to the multiple definitions offered by Proposition 187’s drafters. Consequently, there are fewer bases in which ACA 6 might conflict with federal law than with Proposition 187’s benefit denial provisions.

b. ACA 6’S EXPLICIT LANGUAGE REFERENCES THE PRA’S VERY OWN STANDARD

Furthermore, ACA 6 references the PRA’s very own standard as it pertains to state or local benefits. Such precise drafting seems to undermine, if not preempt altogether arguments by opponents of ACA 6 that there is a conflict between ACA 6’s classification of “state or local public benefits” and the PRA. Thus, opponents of ACA 6 are unlikely to successfully further demonstrate that such a conflict would make it impossible to comply with both the terms of the PRA and also ACA 6. Therefore, unlike Proposition 187’s benefit denial provisions in Sections 5 and 6, a court determining ACA 6’s validity is unlikely to find a conflict between the ACA 6 and federal standards, such that compliance with both standards is impossible. Consequently, it is unlikely that the third *DeCanas* test would preempt ACA 6.

**V.
CONCLUSION**

The Valenzuelas and undocumented immigrants represent not just a group of persons with supporters and detractors, but they embody an issue so complex that even our two major political parties are conflicted about how to properly address it. What is clear is that undocumented immigration has prompted states to enact measures designed to deter it. It is also clear that such a state measure must withstand scrutiny under each of the *DeCanas* tests in order for the state measure to avoid being preempted in part or in whole by federal law.

What is less clear is how courts, even after examining *DeCanas v. Bica*, LULAC I, LULAC II, and Friendly House, will apply the *DeCanas* tests in determining whether such state measures are or are not preempted by federal law. However, based on an examination of *DeCanas v. Bica*, LULAC I, LULAC II, and Friendly House, and an analysis of Proposition 187, Proposition 200 and ACA 6, ACA 6 seems to have been drafted in a manner that will allow it to withstand scrutiny under the *DeCanas* tests. Consequently, by virtue of being specific enough to avoid being preempted, and yet not so detailed that it is likely to be preempted, ACA 6 represents an example of state measure designed to deter undocumented immigration likely to withstand scrutiny under the *DeCanas* tests.

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the United States in violation of federal law,” while Sections 7 and 8 refer to a “citizen of the United States, an alien lawfully admitted as a permanent resident, in the United States, or a person who is otherwise authorized under federal law to be present in the United States.” There is no apparent explanation for this inconsistency.”)

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