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Via Facsimile and U.S. Mail

Esther R. Estrada, Council Member
Dennis J. Baxter, Council Member
Gordon McGinnis, Council Member
Neil Derry, Council Member
Chas A. Kelley, Council Member
Rikke Van Johnson, Council Member
Wendy McCammack, Council Member
James F. Penman, City Attorney
300 N. "D" Street
San Bernardino, CA 92418

Re: City of San Bernardino Illegal Immigration Relief Act Ordinance

Dear Council Members Estrada, Baxter, McGinnis, Derry, Kelley, Van Johnson, and McCammack, and City Attorney Penman:

The ACLU Foundation of Southern California writes to urge you, in the strongest possible terms, to reject the initiative proposal entitled "City of San Bernardino Illegal Immigration Relief Act Ordinance" (the "Initiative"). If it were enacted, this ill-conceived and unnecessary proposal would not only have untold human impacts, but it would ultimately be struck down as unconstitutional, at significant expense to the City. While the Initiative raises numerous legal issues due to its far-reaching impacts, we here highlight two significant constitutional infirmities. As explained in greater detail below, the Initiative unlawfully infringes upon the federal government's authority over immigration, in violation of the Supremacy Clause, and it unlawfully prohibits public officials and employees from communicating in non-English languages even when necessary or desirable to convey information, deliver services or exchange ideas, in violation of the First Amendment rights of both public employees/officials and limited English proficient (LEP) residents, and in violation of LEP residents' rights to equal protection. As a result, if enacted, each of the Initiative's substantive sections – sections 4, 5, 6, 7, and 8 – would be stricken, and the Initiative rendered null and void. Since the Initiative commits the City to defend it until all appeals have been exhausted, requiring a potentially substantial commitment of resources for many years to come, its numerous and plain legal defects take on added significance.

I. BACKGROUND

The Initiative consists of 11 sections: a short title (section 1); findings and declaration of purpose (section 2); definitions (section 3); severability of the initiative (section 9); enforcement

actions (section 10); duty of the City to defend (section 11); and five substantive sections (sections 4, 5, 6, 7, and 8), described below.

A. Section 4: Day Laborer Agencies

The Initiative would place new requirements on how private day laborer agencies operate. The Initiative would require them, among other things, to collect a completed Employment Eligibility Verification Form I-9 for each prospective day laborer, conduct extensive background checks on each prospective day laborer to verify the veracity of all identification information and to ensure that each applicant is legally authorized to work in the United States, and assume strict liability with respect to ensuring day laborers are legally authorized to work in the United States.

The Initiative mandates a fine of not less than \$1,000 for each violation of this section. Each day that a violation continues constitutes a separate and distinct offense. In addition, any licensee who violates any provision of this chapter is subject to suspension or revocation of any licenses and permits.

B. Section 5: Solicitations of Day Laborers

The Initiative states that “[a]ny person or his or her servant, agent, or employee who owns, leases, conducts or maintains any vehicle used to solicit day laborers is guilty of creating a nuisance.” It further states that unless hired at a day laborer agency or at the legal residence of the day laborer, “any vehicle used to solicit or attempt to solicit the services of a day laborer is declared a nuisance and the vehicle shall be enjoined and abated by seizure and impoundment.”

C. Section 6: Business Permits, Contracts or Grants

The Initiative seeks to restrict the award of permits, contracts or grants by the City of San Bernardino. Any for-profit business, including the parent company or subsidiaries, “that aids and abets illegal aliens or illegal immigration shall be denied approval of a business permit, the renewal of a business permit, city contracts or grants for a period not less than five years from its last offense.” The Initiative defines aiding and abetting as including, “but not limited to, the hiring or attempted hiring of illegal aliens, renting or leasing to illegal aliens, or funding or aiding in the establishment of a day laborer center that does not verify legal work status.” Significantly, the Initiative regulates any acts that aid and abet undocumented immigrants within the United States, not just within City limits.

D. Section 7: Renting to Illegal Aliens

The Initiative prohibits undocumented immigrants “from leasing or renting property” in the City of San Bernardino. The Initiative also provides that “[a]ny property owner or renter/tenant/lessee in control of property, who allows an illegal alien to use, rent or lease their property shall be in violation of this section, irrespective of such person's intent, knowledge or negligence.” By removing the intent requirement, such violations become strict liability offenses. The Initiative mandates that every owner is “required to submit a copy of the lease or rental agreement to the City Clerk's Office within 45 days of execution.” The penalty for each violation is a fine of at least \$1,000.

E. Section 8: English Only

The Initiative requires that “[u]nless explicitly mandated by the federal government, the state of California or the county of San Bernardino, all official city business, forms, documents, signage, telecommunication or electronic communication devices will be conducted or written in or utilize English only.”

II. ANALYSIS

A. Sections 4, 5, 6, and 7 are preempted by federal law.

The Supreme Court’s decision in *De Canas v. Bica*, 424 U.S. 351 (1976), governs whether the Initiative’s immigration-related provisions – sections 4, 5, 6, and 7 – are preempted. See *LULAC v. Wilson*, 908 F.Supp. 755, 768 (C.D. Cal. 1995) (“*LULAC I*”); *LULAC v. Wilson*, 997 F.Supp. 1244, 1252-53 (C.D. Cal. 1997) (“*LULAC II*”). In *De Canas*, the Court articulated three separate tests for determining whether a state law related to immigration is void under the Supremacy Clause. 424 U.S. at 354-63. A statute failing *any* of the three tests is preempted. *Id.*; *LULAC I*, 908 F.Supp. at 1253. The Initiative’s immigration-related provisions independently fail *each* of the three tests laid out in *De Canas*.

1. Sections 4, 5, 6, and 7 impermissibly regulate immigration.

The first test considers whether the state statute constitutes a “regulation of immigration.” *Id.* at 354. The Supreme Court, in *De Canas* and other cases, has repeatedly emphasized that a statute that regulates immigration is “constitutionally proscribed” because the “[p]ower to regulate immigration is unquestionably exclusively a federal power.” *Id.* at 354, 356. Thus, the first test turns on whether a law is “constitutionally proscribed state regulation of immigration that would be invalid even absent federal legislation” in the area of immigration. *Id.* at 354 n.3.

It is well settled that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.” *De Canas*, 424 U.S. at 354. This exclusive federal authority to regulate aliens’ entry, exit, and treatment within the United States derives from the Constitution’s grants of federal power “[t]o establish [a] uniform Rule of Naturalization,” U.S. Const. art. I, § 8, cl. 4, and to “regulate Commerce with foreign Nations.” *Id.*, cl. 3. Thus, as Justice White has pointed out, illegal immigration “essentially poses questions of national policy and is chiefly the business of Congress and the Executive Branch.” *United States v. Brignoni-Ponce*, 422 U.S. 899, 915 (1975) (White, J., concurring).

As a result of this constitutional assignment of exclusive power, immigration regulation is strictly off-limits to states, without regard to the adequacy or even the existence of any federal legislation. See *De Canas*, 424 U.S. at 354 n.3 (first test is whether law is “constitutionally proscribed state regulation of immigration that would be invalid even absent federal legislation”). Whatever a state’s frustration level with federal immigration policy, “[g]iven that the States’ power to regulate in this area is so limited, and that this is an area of such peculiarly strong federal authority, the necessity of federal leadership seems evident.” *Plyler v. Doe*, 457 U.S. 202, 237 n.1 (1982) (Powell, J., concurring). A state-enacted scheme that amounts to “essentially a determination of who should or should not be admitted into the country, and the

conditions under which a legal entrant may remain” is impermissible. *De Canas*, 424 U.S. at 355. Thus, the Supreme Court has preempted those state laws burdening aliens already in the interior that “equate with the assertion of a right . . . to deny entrance and abode.” *Graham v. Richardson*, 403 U.S. 365, 380 (1971) (alien residency requirements for receipt of welfare benefits “encroach upon exclusive federal power”); *see also Truax v. Raich*, 239 U.S. 33, 42 (1915) (state denial of alien right to employment “tantamount to the assertion of the right to deny them entrance and abode”).

In *LULAC I*, the district court granted plaintiffs’ motions for summary judgment as to Proposition 187’s so-called “verification,” “notification” and “cooperation/reporting” provisions because these provisions created an impermissible state scheme to regulate immigration and were therefore preempted by federal law. 908 F.Supp.2d at 786-87. The court distinguished these provisions of Proposition 187 from the state statute upheld by the Supreme Court in *De Canas*. In *De Canas*, a provision of the California Labor Code prohibited knowing employment of undocumented immigrants “if such employment would have an adverse effect on lawful resident workers.” 424 U.S. at 352. The Supreme Court concluded that the statute was not an immigration regulation, having, at best, only “some purely speculative and indirect impact on immigration.” *Id.* at 355. The court in *LULAC I* found, by contrast, that “Proposition 187’s verification, notification and cooperation/reporting requirements directly regulate immigration by creating a comprehensive scheme to detect and report the presence and effect the removal of illegal aliens.” 908 F.Supp. at 769. Accordingly, the court held that “Proposition 187’s scheme has a direct and substantial impact on immigration” and impermissibly regulates immigration. *Id.*

The Initiative’s immigration-related provisions likewise impermissibly regulate immigration. The Initiative affirmatively states its focus on “illegal immigration” and seeks to “abate the nuisance of illegal immigration.” Its attempt to “aggressively prohibit[] and punish[] . . . the people and businesses that aid and abet illegal aliens” equates with the assertion of a right to deny undocumented immigrants entrance and abode. Indeed, the Initiative seeks to deny them the opportunity to earn a living through day labor or to find a place to live anywhere in the city. *See Truax*, 239 U.S. at 42 (state denial of right to employment “tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work”). In doing so, the Initiative’s immigration-related provisions, in intent and effect, have a substantial and direct impact on immigration. They work together to establish a “scheme designed to deter illegal aliens from entering or remaining in the [city].” *See LULAC I*, 908 F.Supp.2d at 765. As such, they are preempted. *See id.*; *In re Alien Children Education Litigation* 501 F.Supp. 544, 578 (S.D. Texas 1980) (“Measures intended to increase or decrease immigration, whether legal or illegal, are the province of the federal government.”)

Accordingly, the Initiative’s provisions designed individually and collectively to deter illegal immigration – sections 4, 5, 6, and 7 – are preempted under the first *De Canas* test.

2. Congress has occupied the fields regulated by Sections 4, 5, 6 and 7.

The second test directs that a statute is preempted, even if not a constitutionally impermissible “regulation of immigration,” where it was the “clear and manifest purpose of Congress” to effectuate a “complete ouster of state power — including state power to promulgate

laws not in conflict with federal laws.” *De Canas*, 424 U.S. at 357. As to such field preemption, “[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Even where fully compatible, state law must yield to federal law once Congress stakes out a particular field. See *LULAC I*, 908 F. Supp. at 768, 786.

The Supreme Court has held that Congress’ intent to supersede state law may be found from: (1) “a ‘scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it’”; (2) “‘because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject’”; or (3) “‘because ‘the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.’” *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983) (citations omitted). Here, Congress’ intent to supersede state or local law can be found both from the pervasiveness of the scheme of federal regulation and the federal government’s dominant interest in immigration.

The constitutional setting here is one of exclusive and plenary federal authority over immigration-related areas. In furtherance of this power over immigration, Congress has comprehensively regulated the field. The centerpiece of Congress’ immigration policy is the INA, 8 U.S.C. § 1101 *et seq.* With respect to the INA, the Ninth Circuit has expressly recognized the pervasiveness of Congress’ exercise of its exclusive authority in the field of immigration: “We 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.” *Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999) (en banc); see also *Toll v. Moreno*, 458 U.S. 1, 13 (1982) (INA is “‘comprehensive and complete code covering all aspects of admission of aliens’”) (quoting *Elkins v. Moreno*, 435 U.S. 647, 664 (1978)). In *De Canas* itself, the Court noted that the “comprehensiveness” of the INA “was to be expected in light of the nature and complexity of the subject.” 424 U.S. at 359; see also *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963) (“nature of the regulated subject matter” is one touchstone of field preemption). Congress, moreover, has only enlarged the comprehensiveness of the INA – and, by extension, the scope of the federally-occupied field – since *De Canas*, *Gonzales*, and these other cases were decided.

In *De Canas*, the Court concluded that employment of undocumented immigrants fell outside the federally-occupied field only when it found but one federal provision obliquely addressing the same subject – indeed, the provision merely mentioned employment in the context of defining the illegal harboring of an alien. *De Canas*, 424 U.S. at 360 (“It is true that a proviso to 8 U.S.C. § 1324, making it a felony to harbor illegal entrants, provides that “employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.”). As the Court held, “this [wa]s at best evidence of a peripheral concern with employment of illegal entrants” *Id.* (emphasis added). Moreover, the Court found that federal law expressly permitted and sanctioned supplemental state legislation. *Id.* at 363 (“affirmative evidence . . . that Congress sanctioned concurrent state legislation”); *id.* at 361-62 (federal provisions “intended to supplement State action”).

a. Congress has occupied the field of providing assistance to undocumented immigrants.

Here, there are comprehensive federal statutes in the specific field in which San Bernardino has attempted to regulate, and there is no reason to believe that Congress sanctioned concurrent state legislation regarding the “aiding or abetting” of undocumented immigrants. San Bernardino therefore has no authority to establish its own scheme to prohibit “the aiding and abetting” of undocumented immigrants.

In the exercise of its plenary power over immigration, Congress has established a comprehensive scheme to prohibit unlawful aid and assistance to undocumented immigrants. It has broadly prohibited the unlawful “landing,” “bringing of,” and “bringing in and harboring” of aliens. See 8 U.S.C. §§ 1321, 1322, 1323, 1324. It has specifically established liability and criminal penalties for: (i) concealing, harboring or shielding from detection, or attempting to conceal, harbor or shield from detection, an alien with knowledge or in reckless disregard that the alien has come to, entered, or remains in the country in violation of law; (ii) encouraging or inducing an alien to come, enter, or reside in the country with knowledge or in reckless disregard that the alien has come to, entered, or remains in the country in violation of law; and (iii) aiding and abetting commission of these acts. 8 U.S.C. § 1324(a)(1)(A)(iii)-(v). “Harboring” encompasses any conduct that substantially facilitates an undocumented migrant’s unlawful presence in the United States. See, e.g., *United States v. Acosta de Evans*, 531 F.2d 428 (9th Cir. 1976) (holding that harboring means affording shelter to such aliens and is not limited to clandestine sheltering only); see also *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977); *United States v. Lopez*, 521 F.2d 437 (2d Cir. 1975). Courts have interpreted “harboring” to include affording shelter to an undocumented migrant; it is not limited to clandestine sheltering. See *Acosta de Evans*, 531 F.2d 428.

Because Congress has exercised its authority over immigration to establish a comprehensive scheme to prohibit the unlawful assistance of undocumented immigrants, there is no room for supplementary state or local regulation in this area. See *Pacific Gas & Elec.*, 461 U.S. at 203-04. Accordingly, sections 4, 5, 6, and 7 are preempted.

b. Congress has occupied the field of employment of undocumented immigrants.

Here, there are comprehensive federal statutes in the specific field in which San Bernardino has attempted to regulate, and there is no reason to believe that Congress sanctioned concurrent state legislation regarding the employment of undocumented immigrants. San Bernardino therefore has no authority to regulate the employment of undocumented immigrants, let alone to establish its own system of employment verification and sanctions.

Through IRCA, Congress has enacted “a comprehensive scheme” prohibiting the employment of undocumented immigrants in the United States. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). According to the Supreme Court:

IRCA “forcefully” made combating the employment of illegal aliens central to “[t]he policy of immigration law.” It did so by

establishing an extensive “employment verification system,” § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3). This verification system is critical to the IRCA regime. To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. § 1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1).

Hoffman, 535 U.S. at 147-48 (citation and footnote omitted). Moreover, IRCA expressly provides that “[t]he provisions of [8 U.S.C. § 1324a] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee employment, unauthorized aliens.” 8 U.S.C. § 1324a(h)(2).

Accordingly, because Congress has established a comprehensive regulatory scheme that restricts the employment of aliens and because Congress expressly left no room for supplementary state regulation, Sections 4, 5, and 6 of the Initiative are preempted.

3. Sections 4, 5, 6, and 7 stand as an obstacle to federal law and its objectives.

Under the third test, a state immigration-related law is preempted if compliance with it and federal law is “a physical impossibility,” *Florida Lime & Avocado Growers*, 373 U.S. at 142-43, or where the state or local law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *De Canas*, 424 U.S. at 363 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Obstacles form a basis of preemption “[e]ven where Congress has not entirely displaced state regulation in a specific area.” *Pacific Gas & Elec.*, 461 U.S. at 204. “[I]t is not enough to say that the ultimate goal of both federal and state law’ is the same. ‘A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal.’” *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 103 (1992) (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

Judged by these standards, Section 7 of the Initiative stands as an obstacle to the accomplishment and execution of the full purposes and objectives of federal law. IRCA’s legislative history makes plain that Congress viewed employer sanctions as not only the most effective, but also the most humane way to control immigration. Congress chose to “close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions.” H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5650. Congress concluded that “[e]mployment is the magnet that attracts aliens here illegally” and that “[e]mployers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally” *Id.* Congress underscored that “legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.” *Id.*

Section 7 seeks to control immigration not only by different means than Congress, but by means that are less “humane.” If San Bernardino may deny undocumented immigrants the opportunity to find housing within their city limits, every city in California may do the same. As a result, it is entirely appropriate to consider the aggregate impact of the authority the City claims.

Section 7 threatens great human and social cost, not only by dispossessing undocumented immigrants, but by denying their children the opportunity to receive an education. If the Initiative were enacted, undocumented parents would be unable to establish residence within city limits and consequently would be unable to enroll their children, whether citizens or undocumented, in city schools.¹ In striking down a state attempt to deny undocumented children access to an education, the Supreme Court emphasized the unfairness of punishing children for something over which they have no control, and the harm of denying a group the means to absorb the values and skills on which our society depends, particularly when many of them will eventually become lawful residents or citizens of the United States. As the Court stated, “By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.” *Plyler*, 457 U.S. at 223. Even as Congress has sought to restrict immigrant access to public benefits, whether at the federal, state, or local level, it has made plain the federal objective of maintaining “alien eligibility for a basic public education.” See 8 U.S.C. § 1643(a)(2).

Accordingly, Section 7 generally contradicts federal policy to address immigration in a humane way, and more specifically threatens to undermine and frustrate the federal objective of maintaining immigrant access to a public education. For these reasons, it is preempted.²

B. Section 8 Violates the First Amendment.

In purpose and effect, Section 8 bars government officials and employees from

¹ This is no unintended or unforeseeable consequence. Joseph Turner, the Initiative’s author, has made plain that the Initiative seeks to undermine the Supreme Court’s decision in *Plyler v. Doe*, 457 U.S. 202 (1982), which upheld the constitutional right of undocumented children not to be denied a public elementary and secondary education. The Initiative therefore improperly seeks to accomplish indirectly what it could not accomplish directly. See *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (“Constitutional rights would be of little value if they could be . . . indirectly denied.”) (citation omitted); *U.S. Term Limits v. Bryant*, 514 U.S. 779, 829 (1995) (“The Constitution ‘nullifies sophisticated as well as simple-minded modes’ of infringing on constitutional protections.”) (citation omitted).

² By making property owners, renters, and landlords subject to sizeable fines for renting, leasing, or allowing the use of their property to undocumented immigrants, without providing any guidance or notice as to what is required, Section 7 creates an unduly broad and undifferentiated risk of liability. It assumes property owners, renters, and landlords can be and will be familiar with myriad immigration laws. It suggests no process for a property owner, renter, or landlord to follow to verify that an immigrant is documented. It offers no good-faith defense, making property owners, renters, and landlords liable for any mistakes. Faced with this situation, property owners, renters, and landlords, may decide to avoid renting or leasing to individuals who appear or sound foreign or are identifiable with major immigrant groups in an attempt to comply with the Initiative. This may open property owners, renters, landlords, and the City to complaints of unlawful discrimination on the basis of national origin. See 42 U.S.C. § 1981; 42 U.S.C. 3601 et seq.

communicating with thousands of Limited English Proficient (LEP) persons in terms they can understand. As of the 2000 census, 32,716 (19.6%) of San Bernardino residents age 5 or older spoke English "not well" or "not at all."³ Of those LEP residents, the vast majority are speakers of Spanish (27,922) or Asian and Pacific Island languages (3,421).⁴ To meet the needs of its LEP residents, the City has undertaken to provide a wide array of multi-lingual information and services. The City's website includes information in Spanish about whom to contact about city services – everything from reporting a dangerous or unsanitary animal, a fallen electrical line or tree, or a broken street light to uncollected garbage or gang activity.⁵

1. Section 8 infringes upon the fundamental, inalienable rights to petition government and to express views and opinions.

Section 8 infringes upon the fundamental rights to petition government and to express views and opinions. The right to petition for redress of grievances lies at the core of our democracy. *McDonald v. Smith*, 472 U.S. 479, 482-83, 485 (1985); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217, 222 (1967) (right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights"); *U.S. v. Cruikshank*, 92 U.S. (2 Otto) 542, 552 (1876) (the right of the people to assemble and to petition their government for a redress of grievances is inherent in the concept of a republican form of government). The right broadly protects "[g]reat secular causes[] with small ones" – causes that are "not confined to any field of human interest," *Thomas v. Collins*, 323 U.S. 516, 531 (1945) – and bars State or local interference with access to the government and its various branches and agencies. It is expressly recognized as an "inalienable" right under the California Constitution.

Through Section 8, the Initiative stands this right on its head. Far from facilitating communication between the people and the government, it erects a permanent linguistic barrier between non-English speakers and every branch and agency of their government on an almost limitless variety of subjects. It interferes not only with direct attempts to communicate with elected officials, but also with everyday activities and communications most citizens take for granted, burdening the non-English speaking resident who seeks to take issue with her municipal utility charges, to contest an eviction from public housing, or to challenge the suspension of her child from school. In this way, the Initiative offends fundamental constitutional values essential to the functioning of our democracy. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777 (1978); *Thomas*, 323 U.S. at 529-32.

Furthermore, by categorically prohibiting public employees and officials from communicating in any non-English language, the Initiative effectively bars language minorities from receiving important, often vital, governmental information. Under the Initiative, government employees are no longer able to convey in Spanish or Vietnamese information about a proposed redevelopment project, a water conservation program, consumer fraud, job training

³ U.S. Census Bureau, Profile of Selected Social Characteristics: 2000 – San Bernardino.

⁴ *Id.*

⁵ City of San Bernardino, *¿A Quien Va a Llamar? [Who are you going to call?]*. Available at <http://www.ci.san-bernardino.ca.us/civica/filebank/blobload.asp?BlobID=2213>.

opportunities, wage and hour laws, the contemplated closure of a local school, or countless other subjects. The initiative thus impairs the public's right "to receive information and ideas." See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)).

Finally, the Initiative "effectively cuts off governmental communication with thousands of limited-English-proficient and non-English-speaking persons in [San Bernardino], even when the officials and employees have the ability and desire to communicate in a language understandable to them." See *Ruiz v. Hull*, 957 P.2d 984, 997 (Ariz. Sup. Ct. 1998). While the Initiative purports to permit communications in languages other than English to the extent required by law, it bans voluntary communication in any non-English language. The Initiative would prevent elected and appointed officials from speaking their constituents' primary language, even when necessary to communicate effectively. This "contravenes core principles and values undergirding the First Amendment." See *id.* at 998.

Accordingly, Section 8 is unconstitutional.

2. Section 8 is impermissibly vague.

Section 8 is impermissibly vague because it fails to give fair notice of what is prohibited and chills the exercise of constitutionally protected activity.

A law is unconstitutionally vague if "a person of normal intelligence must guess at its meaning and differ as to its application." *Connally v. General Constr.*, 269 U.S. 385, 391 (1926); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."). The degree of vagueness that the Constitution tolerates depends on the nature of the law. As the Supreme Court has emphasized, "where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were closely marked." *Grayned*, 408 U.S. at 109 (citations and internal quotation marks omitted). Accordingly, where a law threatens to chill free speech rights, "a more stringent vagueness test" applies. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights."); *NAACP v. Button*, 371 U.S. 415, 432-33, 438 (1963) (stating that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms" and "standards of permissible statutory vagueness are strict in the area of free expression").

Judged by these standards, the Initiative is unconstitutionally vague. The exemption for communication in languages other than English when "explicitly mandated by the federal government, the state of California or the county of San Bernardino" fails to provide the necessary degree of precision because it leaves City officials and employees to guess at what is prohibited and what permitted. See *Grayned*, 408 U.S. at 108; *Connally*, 269 U.S. at 391; *Rubin v. Santa Monica*, 823 F. Supp. 709, 713 (C.D. Cal. 1993) ("[T]he ordinance's First Amendment exception fails to provide notice to either individuals or administrators of what conduct is

permissible and what conduct is prohibited."). It is no different than Professor Tribe's classic example of a vague statute: "It shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments." See L. Tribe, *AMERICAN CONSTITUTIONAL LAW* §§ 12-29, at 1031 (2d ed. 1988) (concluding that such a statute is "patently vague"). It assumes that persons of ordinary intelligence will be not only familiar with a vast and complicated area of constitutional law, but also capable of applying it to specific situations that even legal scholars can find debatable. That renders the Initiative impermissibly vague. See *Winters v. New York*, 333 U.S. 507, 518 (1948) ("[C]ourts must do their best to determine whether or not the vagueness is of such a character that 'men of common intelligence must necessarily guess at its meaning.'") (citation omitted).

C. Section 8 Violates Equal Protection.

Section 8 not only impinges upon the fundamental rights of San Bernardino's LEP residents, but it purposefully and systematically discriminates against them – virtually all of whom are ethnic and national origin minorities. It thus violates equal protection.

1. Section 8 impinges upon fundamental rights.

Section 8 is subject to strict scrutiny because it impinges upon fundamental rights. *Clark v. Jeter*, 486 U.S. 456, 461 (1990); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 2 (1973); *Harper v. Board of Elections*, 383 U.S. 663, 670 (1966). Strict scrutiny has been applied to classifications that infringe upon such fundamental rights as the right to participate in the political process (*Harper*, 383 U.S. at 670; *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982)), freedom of speech (*Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96-97 (1972); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980)), and the right to engage in political expression (*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990)). Importantly, the application of strict scrutiny does not require the outright denial or substantive violation of the fundamental right affected by the classification; all that is required to trigger strict scrutiny is that the classification infringe substantially upon a fundamental right.

Section 8 infringes upon the right of non- and limited-English proficient San Bernardino residents to receive information from and communicate with governmental agencies and officials. Its sweeping interference with the right to receive important governmental information infringes upon the right to free speech. *Ruiz*, 957 P.2d at 997; *United States v. NTEU*, 513 U.S. 454, 470 (1995); *Virginia Bd. Of Pharmacy*, 425 U.S. at 757. It also substantially burdens their right to petition for redress of grievances, a fundamental right protected by the First Amendment. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) ("the whole concept of representation depends on the ability of the people to make their wishes known to their representatives"). "By permanently implementing a linguistic barrier between person and the government they have a right to petition, the [statute] substantially burdens First Amendment rights." *Ruiz*, 957 P.2d at 1002.

2. Section 8 discriminates on the basis of a suspect classification.

Laws involving "suspect" classifications, e.g., those founded on race, national origin, or alienage, are also subject to strict scrutiny, and will survive only if they are narrowly tailored to

serve a compelling state interest. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Hernandez v. Texas*, 347 U.S. 475, 480 n.12 (1954) (national origin); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage).

Suspect classification analysis applies to Section 8 for two reasons. First, the close nexus between language and national origin and the statute's purposeful singling out for disparate treatment non-English-speakers counsel treating the statute's discrimination against language minorities as functionally equivalent to discrimination on the basis of national origin. Second, the social and political characteristics the courts have traditionally recognized to be indicia of "suspectness" establish that language minorities, as a group, are precisely the type of discrete, insular and vulnerable minority that the "suspect classification" analysis was designed to identify and protect.

3. Section 8 cannot survive strict scrutiny because it is not narrowly tailored to achieve a compelling state interest.

Section 8 neither serves nor is narrowly tailored to serve a compelling state interest. It is therefore unconstitutional.

Today's immigrants are already learning English as fast, if not faster, than prior generations of immigrants. Studies show, for instance, that half of all recent Mexican immigrants in California already speaks English. Among first-generation native born Mexican-Americans, 95% are proficient in English; for second-generation Mexican-Americans the transformation is even more dramatic – at least 50% having lost proficiency in their native tongue and thus speak *only* English. Kevin F. McCarthy and R. Burciaga Valdez, *CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA* (The Rand Corp. 1985). Comprehensive studies demonstrate that the rate of linguistic assimilation of immigrants is just as rapid as it has been in previous generations. See Siobhan Nicolan and Rafael Valdivieso, "The Veltman Report: What it Says, What it Means," intro. to Calvin Veltman, *The Future of Spanish Language in the United States* (New York, Wash. D.C.: Hispanic Policy Dev. Project, 1988) at i-x.

Section 8 is not needed to encourage immigrants to learn English. Immigrants more than any other Americans fully appreciate the importance of learning English. Each day they must negotiate the daily hardships of surviving in a society that is largely monolingual English, whether it is looking for a job, trying to get information about their children's school, communicating with health providers, law enforcement officers or a bus driver, or even buying groceries or clothing. Immigrants are limited not by the lack of desire but if anything by the lack of opportunity to learn English.⁶ Terminating the few services that are provided in other languages will do nothing to enhance their English proficiency.

⁶ A study conducted in the Miami area found that 98% of Latino parents surveyed, as compared to 94% of Anglo parents, felt it was essential for their children to read and write English perfectly. See *The 1985 South Florida Latin Market* (Strategy Research Corp. 1985). Throughout the United States, the demand for English as a Second Language training far outstrips supply, resulting in long lines and waiting lists for those classes that are available. See William B. Bliss, "Providing Adult Basic Education Services to Adults with Limited English Proficiency," *Report by Project on Adult Literacy of Southport Institute for Policy Analysis* (1988).

Furthermore, even if there were a real basis for concern about the rate of English acquisition by current immigrants, Section 8 is not narrowly tailored to furthering that interest. It effectively penalizes all San Bernardino residents not proficient in English – barring them from access to government services, information, and communication – regardless of their circumstances, abilities or needs. It indiscriminately sweeps within its reach elderly residents who no longer have the same capacity to learn a new language,⁷ recent immigrants who have not had an opportunity to learn English, and migrant workers who because of limited time and resources cannot enroll in adult English classes. For these individuals and many others, language might as well be an immutable characteristic. The burdens that Section 8 imposes on these groups bear no substantial or reasonable relationship to its asserted goals.

Accordingly, Section 8 is unconstitutional.

III. CONCLUSION

For all the reasons stated above, since the Initiative's substantive provisions are constitutionally infirm and, if enacted, would ultimately be struck down, we urge you to reject the Initiative. Measures like this, which are subject to costly litigation and ultimately serve only to make a symbolic point, are in no one's best interests.

Sincerely,



Hector O. Villagra
Director, ACLU Orange County Office

⁷ Younger immigrants tend to learn English more quickly than their elders. See S. Pinker, *The Language Instinct: How the Mind Creates Language* 290-91 (1994).