UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; the OKLAHOMA STATE CHAMBER OF COMMERCE AND ASSOCIATED INDUSTRIES; the GREATER OKLAHOMA CITY CHAMBER OF COMMERCE; the METROPOLITAN TULSA CHAMBER OF COMMERCE, INC.; the OKLAHOMA RESTAURANT ASSOCIATION; and the OKLAHOMA HOTEL AND LODGING ASSOCIATION, *Plaintiffs*, v. BRAD HENRY, in his official capacity as Governor of the State of Oklahoma; W.A. DREW EDMONDSON, in his official capacity as Attorney General of the State of Oklahoma; KEITH MCARTOR, STAN EVANS, MARK ASHTON, ANN CONG-TANG, ELVIA HERNANDEZ, RITA MAXWELL, TERESA RENDON, SAMMIE VASQUEZ, SR., and JUANITA WILLIAMS, in their official capacities as Members of the Oklahoma Human Rights Commission; and THOMAS E. KEMP, JR., JERRY JOHNSON, and CONSTANCE IRBY, in their official capacities as Members of the Oklahoma Tax Commission, *Defendants*.	Case No. CIV-08-109-C

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The Chamber of Commerce of the United States of America, the Oklahoma State Chamber of Commerce and Associated Industries, the Greater Oklahoma City Chamber of Commerce, the Metropolitan Tulsa Chamber of Commerce, the Oklahoma Restaurant Association, and the Oklahoma Hotel and Lodging Association respectfully submit this Brief in support of their Motion for a Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. As explained herein, the Oklahoma Taxpayer and Citizen Protection Act of 2007 (the "Act"), H.B. 1804 (Exhibit A to Declaration of Phillip G. Whaley which is attached hereto as Exhibit 1), is preempted by federal law and unconstitutional under the Federal Constitution's Supremacy Clause. Plaintiffs will be irreparably harmed by the Act, the State will suffer no harm from suspension of the Act's provisions pending disposition of this case on the merits, and the public interest favors a preliminary injunction in this case. The preliminary injunction should be granted.

FACTUAL BACKGROUND

On May 8, 2007, defendant Brad Henry, Governor of Oklahoma, signed into law Oklahoma House Bill 1804, which purports to regulate broadly the employment of illegal aliens in the State. This law contains three provisions relevant here:

- Section 7(B) (to be codified at Okla. Stat. tit. 25, § 1313) requires all contractors and subcontractors with the State or its subdivisions to "register[] and participate[] in the Status Verification System," defined as (1) the federal "Basic Pilot Program";[1] (2) an equivalent future program created by the federal government; (3) a "third-party" system that is at least as reliable as Basic Pilot; or (4) the "Social Security Number Verification Service" ("SSNVS") used by

[1] The Basic Pilot Program was recently renamed "E-Verify." Because the Act refers to the program as the Basic Pilot Program, plaintiffs use that term.

the federal Social Security Administration. Act § 6(1). Only the Basic Pilot Program and SSNVS are currently in operation.

- Section 7(C) of the Act allows a new type of discrimination claim against an employer who knew or "reasonably should have known" it was employing an illegal alien. The law exempts from liability employers who participate in the "Status Verification System" defined in Section 6. *See* Act § 7(C)(1), (2).

- Section 9 of the Act (to be codified at Okla. Stat. tit. 68, § 2385.32) requires all businesses to verify the work authorization status of individual independent contractors. If the independent contractor does not provide proper verification, the business must withhold state taxes from the independent contractor's pay "at the top marginal income tax rate" allowed by Oklahoma law, or "be liable [to the State] for the taxes required to have been withheld." Act § 9(A), (B).

Plaintiffs represent thousands of businesses of all sizes throughout the State of Oklahoma, many of whom will be subject to these provisions. *See* Declaration of Steven J. Law ¶¶ 7-9 (Exhibit 2) (Law Decl.); Declaration of Richard Rush ¶¶ 4, 6-7 (Exhibit 3) ("Rush Decl."); Declaration of Roy H. Williams ¶¶ 6-8 (Exhibit 4) ("Williams Decl."); Declaration of Mike Neal ¶¶ 6-8 (Exhibit 5) ("Neal Decl."); Declaration of James Hopper ¶¶ 3, 5-6 (Exhibit 6) ("Hopper Decl."); Declaration of Michael Webb ¶¶ 2-7, 16, 23 (Exhibit 7) ("Webb Decl."); Declaration of Caleb McCaleb ¶¶ 2-3, 5, 15 (Exhibit 8) (McCaleb Decl.). As explained herein, these provisions are unconstitutional and will cause significant irreparable harm to plaintiffs and their members.

FEDERAL STATUTORY BACKGROUND

Pursuant to the Constitution's grant of authority to Congress to "establish a uniform Rule of Naturalization" (U.S. Const. art. I, § 8, cl. 4), Congress initially chose not to enlist employers in enforcing the nation's immigration laws. Beginning in 1971, and in every year thereafter, Congress conducted "[e]xtensive and comprehensive

hearings" on proposals to prohibit employment of illegal aliens, and heard testimony from numerous witnesses. *See, e.g.*, H.R. Rep. No. 99-682(I), at 52-56 (1986), 1986 U.S.C.C.A.N. 5649, 5655-60; S. Rep. No. 99-132, at 18-26 (1985). These efforts produced a voluminous record detailing the competing considerations of how best to deal with the problems arising from the employment of illegal workers.

Ultimately, Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.). This statute provides a "*comprehensive* scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (citing 8 U.S.C. § 1324a) (emphasis added). The IRCA makes it unlawful for a person or other entity "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1). Before sanctions may be imposed, the federal government has the burden of proving a violation in an adversarial hearing before an impartial federal Administrative Law Judge. *See* 8 U.S.C. § 1324a(e); 28 C.F.R. pt. 68; *see also* H.R. Rep. No. 99-682(I), at 57, 1986 U.S.C.C.A.N. at 5661.

The IRCA also creates a uniform, nationwide system for verifying work authorization status—the "I-9 Form process". Under this process, the employer must complete an I-9 Form and inspect documents that establish both the applicant's identity and eligibility to work in the United States. *See* 8 C.F.R. § 274a.2(b) (explaining the I-9 Form process); Dep't of Homeland Security, Form I-9 (Employment Eligibility Verification) (Exhibit 1.B). An employer must accept any document on a list

promulgated by the federal government as long as that document "reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(b)(1)(A).[2] The law creates a substantial safe harbor for employers who "compl[y] in good faith" with these employment verification provisions. *Id.* § 1324a(a)(3).

The IRCA also creates an extensive procedure that must be followed before altering any of the federal verification requirements. Specifically, the statute requires the President continually to monitor the effectiveness and security of the verification system, and to transmit to the House and Senate Judiciary Committees detailed written reports of proposed changes well in advance of the effective date of any change. *Id.* § 1324a(d). Of particular relevance here, any modification of the types of documents that are acceptable as proof of work authorization status is a "major change" that requires written notice to Congress at least two years before implementation. *Id.* § 1324a(d)(3)(A)(iii), (D)(i).

Moreover, the IRCA expressly preempts "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 for employment, unauthorized aliens." *Id.* § 1324a(h)(2).

In enacting this statute, Congress deliberately struck a careful balance among deterring illegal immigration, avoiding undue burdens on businesses, and minimizing the potential for discrimination against lawful workers. Congress explained that it intended

[2] An employer need only "[p]hysically examine the documentation presented by the individual establishing identity and employment eligibility … and ensure that the documents presented appear to be genuine and to relate to the individual." 8 C.F.R. § 274a.2(b)(1)(ii)(A). The regulation lists a variety of documents that are acceptable proof of identity and/or work eligibility. *See id.* § 274a.2(b)(1)(v).

that the IRCA would deter illegal immigration while being "the least disruptive to the American businessman and would also minimize the possibility of employment discrimination." H.R. Rep. No. 99-682(I), at 56, 1986 U.S.C.C.A.N. at 5660; *see* S. Rep. No. 99-132, at 8-9 (1985).[3] It expressed particular concern that the law not impose excessive burdens on small businesses or for isolated violations. *See, e.g.*, H.R. Conf. Rep. No. 99-1000, at 86 (1986), 1986 U.S.C.C.A.N. 5840, 5841 ("The Conferees expect the [INS] to target its enforcement resources on repeat offenders and that the size of the employer shall be a factor in the allocation of such resources."); S. Rep. No. 99-132, at 32 ("The Committee seeks to avoid placing an undue burden on [small] businesses, which are estimated to represent 50 percent of employers but only 5 percent of employees."). The law thus struck a careful balance—through an intricate, uniform, and comprehensive regulatory scheme—between the need to enforce the Nation's immigration laws and the need to avoid undue burdens on the Nation's businesses.

SUMMARY OF ARGUMENT

Under the familiar standard for a preliminary injunction, plaintiffs must show a likelihood of success, irreparable harm to plaintiffs or their members, that the balance of harms tilts in favor of plaintiffs, and that the public interest favors preliminary injunctive relief. *See, e.g.*, *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). Plaintiffs easily satisfy these criteria.

[3] Congress enacted at the same time a broad antidiscrimination law that forbids discrimination in hiring based on national origin or citizenship status, and identifies classes of "protected individuals," including citizens, lawful permanent residents, lawful temporary residents, refugees, asylees, and immigrants who are "actively pursuing naturalization." 8 U.S.C. § 1324b(a)(3)(B).

1. The issues raised by this case are not new. In *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), the District Court confronted a municipal ordinance that contained virtually the same provisions as Sections 7 and 9 of Oklahoma's Act. That Court, relying on established Supreme Court precedent, found each provision to be preempted by federal law and void under the Supremacy Clause. *See id.* at 520-23, 526-27, 536. Oklahoma's Act is invalid for much the same reasons. The Act's requirement that employers use the State's new "Status Verification System," or else be debarred from contracting with public entities, is preempted because of numerous conflicts with federal law. The claim against employers of illegal aliens for employment discrimination is expressly preempted by the IRCA and conflicts with several provisions of federal immigration laws. The requirement that businesses verify the immigration status of non-employee individual independent contractors conflicts directly with federal law, and the alternative tax penalty and withholding requirement is an impermissible obstacle to Congress's comprehensive regulatory scheme. Moreover, each of these provisions intrudes into a field that Congress has already occupied fully by enacting a comprehensive, uniform, and nationwide law regulating the employment of non-citizens, and there is simply no room for supplemental or conflicting state regulation. At every turn, Oklahoma's attempt to regulate the employment of illegal aliens is preempted, unconstitutional, and void.

2. Plaintiffs and their members will suffer irreparable harm if Oklahoma's disruption of Congress's comprehensive scheme is allowed to continue pending this Court's decision on the merits. Being subject to a preempted state regulatory scheme is

per se irreparable harm, *see Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990), and plaintiffs and their members have amply shown that they will suffer numerous other harms that cannot be redressed if Oklahoma's law goes into effect as planned. These include: (1) exposure to unconstitutional forms of civil liability and resultant costs, (2) forced use of a flawed verification system, (3) restriction of the pool of legal workers, (4) significant costs due to long periods of uncertainty about employees' status and the need to retrain employees who use existing verification systems to understand and implement the State's new system, and (5) a forced choice between potentially violating federal verification laws and incurring tax consequences that will be highly detrimental to businesses' ability to hire individual independent contractors. None of the costs to employers and businesses imposed by this law, including costs that necessarily will be borne before Sections 7 and 9 are implemented, could be recovered from defendants if the law is implemented before being deemed unconstitutional.

3. In contrast, the State will suffer no harm from delaying implementation of Sections 7 and 9 of the Act while this Court finally decides their constitutionality. There is no state interest in enforcing a law that is preempted or otherwise unconstitutional, and the interest in enforcing Oklahoma's preferred verification system and prophylactic penalties is *de minimis* insofar as federal law already prohibits the employment of illegal aliens and comprehensively regulates employers' obligations to verify work authorization status. It is also well established that the public interest is never served by enforcing a preempted or potentially unconstitutional law. Plaintiffs' request for a preliminary injunction should be granted.

ARGUMENT

To obtain a preliminary injunction, plaintiffs must establish four things: "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." *Davis*, 302 F.3d at 1111 (internal quotation marks and alterations omitted); *Comanche Nation, Okla. v. United States*, 393 F. Supp. 2d 1196, 1210 (W.D. Okla. 2005). "[T]he more likely a movant is to succeed on the merits, the less the balance of irreparable harms need favor the movant's position" to qualify for a preliminary injunction. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1002 (10th Cir. 2004) (en banc) (Seymour, J., concurring in part, with Tacha, C.J., and Porfilio, Henry, Briscoe, and Lucero, JJ.) (internal quotation marks and alteration omitted); *see also Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007) (same); *In re Microsoft Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003) (same); *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 811 (7th Cir. 2002) (same).[4]

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS.

Under the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2), federal law may expressly or implicitly preempt state or local law. *See*

[4] The same four factors apply in cases where the preliminary injunction would alter the status quo, but the Tenth Circuit requires a "strong showing" of likelihood of success and irreparable harm in such cases. *See Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048-49 (10th Cir. 2007). The only provision of Oklahoma's law that has gone into effect (and would thus be altered by a preliminary injunction) is Section 9.

Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 713 (1985). In cases of express preemption, Congress "ma[kes] its intent known through explicit statutory language." *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). Implied preemption arises in one of two circumstances: "field preemption" occurs when a state or municipality purports to "regulate[] conduct in a field that Congress intended the Federal Government to occupy exclusively," and "conflict preemption" occurs either when "it is impossible for a private party to comply with both state and federal requirements, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 79 (internal citation and quotation marks omitted); *United States v. Wagoner County Real Estate*, 278 F.3d 1091, 1096 (10th Cir. 2002). Notably, "federal and state law need not be contradictory on their faces for preemption to apply. It is sufficient that the state law 'impose[s] … additional conditions' not contemplated by Congress." *Surrick v. Killion*, 449 F.3d 520, 532 (3d Cir. 2006) (quoting *Sperry v. Florida*, 373 U.S. 379, 385 (1963)). Where "a substantive rule of federal law [is] addressed to the object also sought to be achieved by the challenged state regulation," the state law must yield. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978).

Although there is a "presumption against pre-emption in areas of traditional state regulation," *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001), no such presumption applies in the immigration context for the fundamental reason that "the formulation of these policies is entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954). The federal government has "superior authority in this field," and when "the

national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect" of federal law. *Hines v. Davidowitz*, 312 U.S. 52, 62-63, 66 (1941).

Plaintiffs are substantially likely to prevail in this action on several grounds.

A. Oklahoma's "Status Verification System" Is Preempted By Conflict With Federal Law.

Section 7 of the Act requires all contractors and subcontractors doing business with Oklahoma public entities to use Oklahoma's newly defined "Status Verification System," which is effectively limited to the federal Basic Pilot Program and the SSNVS.[5] If an employer does not adopt the State's preferred verification system (and instead continues to use the I-9 Form process Congress created), it is automatically and permanently debarred from contracting with any public entity in the State of Oklahoma. Oklahoma's attempt to rewrite Congress's comprehensive and uniform verification scheme and impose penalties on businesses that fail to comply clearly conflicts with federal law and interferes with Congress's purpose in enacting the IRCA.

1. No State may require employers to use the Basic Pilot Program.

The comprehensive federal I-9 Form process expressly allows employers to rely on a variety of designated documents and combinations of documents that "reasonably appear[] … to be genuine." 8 U.S.C. § 1324a(b)(1)(A); 8 C.F.R. § 274a.2(b)(1)(ii)(A).

[5] As stated, the Act also recognizes the possibility of a future federal database, or a private third-party verification system that is as accurate. *See* Act § 6(1). Plaintiffs are not aware of any current systems that would satisfy these criteria.

Employees are under no obligation to present a particular document, and employers may not ask them to do so. *See* 8 U.S.C. § 1324a(b)(1)(A) (stating that upon examining any document allowed by the I-9 Form list, an employer may not "solicit the production of any other document" or require further verification). The statute mandates that any change to this list of verification options must be preceded by at least two years' notice to Congress and a detailed report by the President on the reasons for the change. *Id.* § 1324a(d).

One of the verification options employers may select is the "Basic Pilot Program," which is experimental and is strictly voluntary as a matter of federal law: "the Attorney General may not require any person or other entity to participate in a pilot program." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 402(a), 110 Stat. 3009-546, 3009-656.[6] This program provides certain employers the option of entering voluntarily into a Memorandum of Understanding with the federal government that allows them to access remotely a federal computer database containing Social Security numbers thought to be valid. *See* Expansion of the Basic Pilot Program, 69 Fed. Reg. 75,997, 75,998 (Dec. 20, 2004); E-Verify Memorandum of Understanding ("MOU") (Exhibit 1.C). While voluntary participation in this program may be advantageous for some employers, there are significant drawbacks as well. *See* Part II *infra*.

[6] Congress has considered, *but has not adopted*, proposals that would create a new electronic verification system and require employers to use it. *See, e.g.*, H.R. 98, 110th Cong., § 5(a) (2007); H.R. 1951, 110th Cong., § 3 (2007).

The Oklahoma law effectively requires employers in the State to use the Basic Pilot Program, thus stripping employers of their choice whether to participate in the Program and restricting the range of verification options Congress has expressly approved. This violates the Supremacy Clause. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Supreme Court held that a state or local law that requires industry to adopt a standard that is merely one of several options approved by Congress "present[s] an obstacle to the variety and mix of [standards] that the federal regulation sought," and thus conflicts with federal law and is preempted. *Id.* at 881. There, the Department of Transportation allowed automobile manufacturers to choose among several types of passive restraint systems for their vehicles, which the Court held preempted state-law actions seeking to impose tort liability on the manufacturers for failing to use airbags. Here, likewise, Congress chose deliberately to allow employers and employees flexibility in the documents and methods used to verify identity and work status as a way of promoting enforcement while not placing undue burdens on employers. It also chose to allow employers access to the experimental Basic Pilot database on a strictly voluntary basis.

By requiring employers to use Basic Pilot upon penalty of debarment from public contracts,[7] Oklahoma has, as in *Geier*, eliminated employer flexibility that Congress clearly embraced, and has thereby erected an obstacle to one of Congress' core objectives

[7] As explained in Part I.A.2 *infra*, it is illegal under federal law to use SSNVS (the only other currently available method approved for use under the Status Verification System) to verify work authorization status. Oklahoma law thus effectively requires employers to use the Basic Pilot Program.

in enacting the IRCA. At the least, Oklahoma's Act frustrates Congress's purpose in enacting a uniform regulatory scheme that regulates every employer in the country. *See Ray*, 435 U.S. at 165 (holding a state law that imposed safety conditions on oil tankers was preempted because "[e]nforcement of the state requirements would at least frustrate … the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers").

The Court in *Lozano* reached precisely this conclusion. The Court held that no employer can be required to participate in the Basic Pilot Program by state or local law, and a municipal ordinance that made "participation in the Basic Pilot Program … at times mandatory" was in conflict with the IRCA and void. *Lozano*, 496 F. Supp. 2d at 527. Section 7 of Oklahoma's Act is to the same effect. It strips employers of their choice whether to participate in the Basic Pilot Program upon penalty of debarment from all public contracts, attempts to make mandatory that which Congress has expressly chosen to make voluntary, and seeks to revise and restrict the verification options Congress expressly made available to employers and employees as part an exhaustively considered and carefully balanced comprehensive scheme regulating the employment of non-citizens in the United States. This is impermissible. *Geier*, 529 U.S. at 881; *Int'l Paper Co. v. Ouelette*, 479 U.S. 481, 494 (1987) (the Supremacy Clause does not "allow respondents to circumvent [Congress's] system, thereby upsetting the balance of public and private interests so carefully addressed by the Act"). The Act also "'impose[s] … additional conditions' not contemplated by Congress." *Surrick*, 449 F.3d at 532 (quoting *Sperry*, 373 U.S. at 385). The federal government applies to every employer in the country a

uniform and consistent verification regime that strikes a careful balance between enforcement of our national immigration laws and the need to avoid undue burdens on the nation's businesses. Oklahoma's attempt to alter that balance is preempted.[8]

2. No State may require employers to use SSNVS to verify their employees' work authorization status.

Oklahoma's attempt to conscript SSNVS into service as an immigration verification tool is equally impermissible. SSNVS is not an approved method for verifying work authorization status under 8 U.S.C. § 1324a or its implementing regulations. Far from it: the Social Security Administration ("SSA") mandates that SSNVS is to be used *solely* to assist employers in complying with Internal Revenue Service regulations that require each "employee's wage and tax data to be properly posted to their Earnings Record" for year-end tax purposes. *See* SSA, Agency Information Collection Activities, 70 Fed. Reg. 8125, 8128 (Feb. 17, 2005). SSA clearly forbids the use of SSNVS for the purposes contained in Oklahoma's Act:

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[8] Oklahoma's law also threatens to balkanize the verification compliance programs of multistate employers. For example, Illinois recently enacted a state law *forbidding* employers from using the Basic Pilot Program. *See* Ill. H.B. 1744 (Exhibit 1.H). Other states have enacted or are considering other disparate verification regimes. *See, e.g.*, Nat'l Conf. of State Legis., *2007 Enacted State Legislation Related to Immigrants and Immigration* 2, 6-10 (Nov. 29, 2007) (Exhibit 1.G) (reporting that 244 employer-related immigration bills were introduced in 45 states in 2007, and 20 states enacted legislation). This patchwork of parochial immigration legislation is precisely the result Congress sought to avoid in enacting a comprehensive nationwide verification program. And it is critical to the preemption analysis, which requires consideration of the full range of state and local regulation that may flow from a determination of no preemption. *See, e.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (considering the possible consequences of "50 States' tort regimes"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (considering the "prospect" of action by "all 50 States").

> SSNVS should *only* be used for the purpose for which it is intended.
>
> - SSA will verify SSNs and names *solely* to ensure that the records of current or former employees are correct for the purpose of completing Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement).
>
> - It is *illegal* to use the service to verify SSNs of potential new hires or contractors or in the preparation of tax returns.
>
> * * *
>
> - [The system's] response does not make *any* statement about your employee's immigration status.

Social Sec. Admin., *Social Security Number Verification Service (SSNVS) Handbook* 3-4 (rev. Sept. 2007) (emphases added) (Exhibit 1.D) (hereinafter "*SSNVS Handbook*").

Oklahoma's law ignores these restrictions and attempts to import into Congress's scheme a new verification method that the administering federal agency has expressly rejected for that purpose. In fact, if the President of the United States were to decide that SSNVS should be added to the list of approved verification methods, he would be required by statute to submit a detailed report to the House and Senate Judiciary Committees stating the reasons for the addition at least two years before the change. *See* 8 U.S.C. § 1324a(d). Oklahoma simply cannot do an end-run around federal law by unilaterally changing Congress's approved list of verification options.

Moreover, SSNVS (like Basic Pilot) is an "*optional*" service for "employers who … elect to use [it]." Agency Information Collection, 70 Fed. Reg. at 8128 (emphasis added). Thus, even if SSNVS were approved as a work authorization verification method under federal immigration laws (which it is not), Oklahoma would still be prohibited

from restricting the "variety and mix" of verification options allowed by federal law. *Geier*, 529 U.S. at 881. The Supremacy Clause forbids Oklahoma from restricting employers to a single verification method when federal law allows them to rely on a variety of documents and combinations of documents to establish identity and work authorization status, so long as they "reasonably appear[] … to be genuine." *See* 8 U.S.C. § 1324a(b)(1)(A); 8 C.F.R. § 274a.2(b)(1)(ii)(A). Oklahoma's reliance on SSNVS as a substitute for Basic Pilot conflicts with federal law and is clearly preempted.

B. Oklahoma's Novel Claim For Employment Discrimination Is Expressly Preempted And Conflicts With Federal Law.

Next, Section 7(C) of the Act creates a novel claim under state law for employment discrimination if an employer discharges a U.S. citizen or lawful permanent resident while retaining an employee in the same job classification that the employer knows or "reasonably should have known" was an illegal alien. The provision contains a safe harbor only for employers who participate in Oklahoma's "Status Verification System" described *supra*. Act § 7(C)(2). The part of the Oklahoma Statutes in which the cause of action is created provides that complaints by discharged employees are investigated by the Oklahoma Human Rights Commission, which may then sue the employer to recover civil damages. *See* Okla. Stat. tit. 25, § 1502(A). The State's attempt to create such liability is preempted.

First, this provision is expressly preempted by federal law. As explained above, *see supra* at 4, the IRCA preempts "any State or local law imposing civil or criminal sanctions … upon those who employ, or recruit or refer for a fee for employment,

unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Oklahoma's claim for civil damages against employers of illegal aliens falls squarely within this prohibition. The Court in *Lozano* struck down a nearly identical cause of action, holding that it "certainly falls within the express pre-emption clause" of 8 U.S.C. § 1324a(h)(2) and is unconstitutional. *Lozano*, 496 F. Supp. 2d at 520. The result is no different here.[9]

Second, the provision conflicts with federal law. The claim allowed by Section 7(C) requires an Oklahoma state court (or, initially, the Oklahoma Human Rights Commission) to determine that a retained employee is an illegal alien, and that the employer knew this or "reasonably should have known" it. *See* Act § 7(C)(1). But a state court or administrative agency has no authority to decide these questions. Determination of a person's authorization to be in the United States is the responsibility of the federal government: federal authorities have "sole and exclusive" jurisdiction over whether an alien should be admitted into the United States and allowed to remain. 8 U.S.C. § 1229a(a)(3). State courts "do not have the authority to determine an alien's immigration status. Federal law makes no provision for a state court to make a decision regarding immigration status. Such status can only be determined by [a federal]

[9] The savings clause of 8 U.S.C. § 1324a(h)(2) (exempting "licensing and similar laws") is inapplicable. As *Lozano* recognizes, a cause of action of this sort "does not involve licensing or anything similar to licensing." *Lozano*, 496 F. Supp. 2d at 520. Moreover, Congress intended that the savings clause merely preserve the authority of state and local governments to restrict licenses of those who are "*found to have violated* the sanctions provisions in *this legislation*." H.R. Rep. No. 99-682(I), 1986 U.S.C.C.A.N. at 5662 (emphases added). Oklahoma's Act does not require any pre-existing determination of federal liability under 8 U.S.C. § 1324a, which can only be made by a federal Administrative Law Judge. *See* 8 U.S.C. § 1324a(e); 28 C.F.R. pt. 68; *see also Lozano*, 496 F. Supp. 2d at 519-20.

immigration judge." *Lozano*, 496 F. Supp. 2d at 536; *Gutierrez v. City of Wenatchee*, 622 F. Supp. 821, 824 (E.D. Wash. 1987) ("[t]here is simply no jurisdictional authority" for a state court to determine whether an alien is lawfully present in the United States); *cf. Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("States enjoy no power with respect to the classification of aliens[, as] [t]his power is committed to the political branches of the Federal Government.") (internal citation and quotation marks omitted).

Moreover, determinations of whether an employer knowingly employed an illegal alien are committed to an elaborate administrative review system created by the IRCA, which affords employers an express right to an adversarial hearing before a federal Administrative Law Judge. 8 U.S.C. § 1324a(e)(3); 28 C.F.R. pt. 68. The ALJ's decision is then subject to administrative appellate review and judicial review in the federal courts. 8 U.S.C. § 1324a(e)(7), (8). Again, state courts and commissions have no authority or power to decide these questions.

Third, the law's safe harbor for businesses that comply with Oklahoma's "Status Verification System," *see* Act § 7(C)(2), is an impermissible obstacle to Congress's legislative objectives. Congress decided presumptively to exempt from liability all employers who "compl[y] in good faith" with the I-9 Form provisions. 8 U.S.C. § 1324a(a)(3). Oklahoma's law is entirely different: it exposes employers to civil liability unless they use the Status Verification System, without regard to their compliance with the comprehensive federal regulatory scheme. As explained above, Oklahoma may not rewrite the federal safe harbor provision and verification requirements, and attempt to force employers to adopt Oklahoma's preferred verification

method (and forego the range of options Congress expressly allows) by threatening them with exposure to civil liability if they do not.

Fourth, and relatedly, Section 7(C) disregards the federal *scienter* requirement. Federal law imposes civil liability only on an employer who has actual or constructive knowledge that an employee is illegal. 8 U.S.C. § 1324a(a)(1); 8 C.F.R. § 274a.1(l)(1). An employer who complies in good faith with the I-9 requirements is not liable, *see* 8 U.S.C. § 1324a(a)(3), and thus "constructive knowledge" is defined narrowly to include only bad-faith actions such as failing to complete an I-9 form or recklessly allowing another person to place an unauthorized worker in the workforce. 8 C.F.R. § 274a.1(l)(1). Section 7(C), by contrast, limits the safe harbor to use of the Status Verification System, and applies whether or not the employer complied in good faith with its I-9 responsibilities (and thus could not have had actual or constructive knowledge as a matter of federal law). Oklahoma's law creates instead a new "reasonably should have known" standard that does not appear in federal law and is much broader than the narrow *scienter* requirement contained in the IRCA. As explained, Oklahoma cannot disrupt Congress's regulatory scheme by broadening the circumstances in which an employer may be found liable for civil damages for employing an illegal alien.

For each of these reasons, Section 7(C) of Oklahoma's Act is preempted and void under the Supremacy Clause.

C. Oklahoma's Contractor Verification Rule Is Preempted By Federal Law.

Finally, Section 9 of Oklahoma's Act requires businesses to verify the work authorization status of all individual independent contractors. If the independent

contractor is not verified, the business must withhold state taxes from the contractor's compensation "at the top marginal income tax rate" allowed by Oklahoma law, or "be liable [to the State] for the taxes required to have been withheld." Act § 9(A), (B).[10] This provision, like Oklahoma's effort to rewrite federal verification requirements and impose novel forms of civil liability on the employers of unauthorized workers, is expressly preempted by, and conflicts with, federal law.

Oklahoma's law ignores the fact that the federal verification system is limited to "employers" for verification of "employees," defined as "an individual who provides services or labor for an employer for wages or other remuneration *but does not mean independent contractors*." 8 C.F.R. § 274a.1(f) (emphasis added); *see also id.* § 274a.1(g) ("In the case of an independent contractor or contract labor or services, the term *employer* shall mean the independent contractor or contractor and *not* the person or entity using the contract labor.") (second emphasis added). Indeed, even the Basic Pilot Program and SSNVS—which Oklahoma seeks to force employers to use—expressly forbid the verification of non-employees. *See* MOU ¶¶ II.C.7-8 (Exhibit 1.C) ("The Employer is prohibited from initiating verification procedures before the employee has been hired [or] for pre-employment screening of job applicants."); *SSNVS Handbook* at 3 (Exhibit 1.D) ("It is illegal to use the service to verify SSNs of potential new hires or

[10] Section 9 purports to enforce 8 U.S.C. § 1324a(a)(4). *See* Act § 9(A) (the provision is enacted "pursuant to the prohibition against the use of unauthorized alien labor through contract set out in 8 U.S.C., Section 1324a(a)(4)"). But § 1324a(a)(4) states merely that a person who *already knows* that a contractor is an unauthorized alien is considered to have "hired" the alien for purposes of liability under § 1324a(a)(1). Oklahoma's requirement that all individual independent contractors be verified does not implement the narrow exception to employer liability contained in § 1324a(a)(4); it rewrites it.

contractors."). And Section 9 itself states that it does not "creat[e] an employer-employee relationship between a contracting entity and an individual independent contractor." Act § 9(C).

Section 9 thus requires employers to do that which federal law does not allow, much less require: use the I-9 Form process, Basic Pilot, or SSNVS to verify the work authorization status of non-employees. *See Lozano*, 496 F. Supp. 2d at 526 (explaining that "under federal law, employers need not verify the immigrant status of … independent contractors," and a municipal ordinance that purported to require verification of those workers was preempted by federal law). Oklahoma may not rewrite federal verification requirements, nor may it augment or alter the standards contained in federal law. *See Geier*, 529 U.S. at 881; *see also Ray*, 435 U.S. at 165 (where "a substantive rule of federal law [is] addressed to the object also sought to be achieved by the challenged state regulation," the state law is invalid). It may not "upset[] the balance of public and private interests so carefully addressed" in the IRCA by "'impos[ing] … additional conditions' not contemplated by Congress." *Int'l Paper*, 479 U.S. at 494; *Surrick*, 449 F.3d at 532 (quoting *Sperry*, 373 U.S. at 385). It certainly may not enact or enforce a state legislative requirement that is at odds with the requirements and responsibilities imposed on employers under federal law. *See, e.g.*, *English*, 496 U.S. at 79; *Wagoner County Real Estate*, 278 F.3d at 1096. Oklahoma's verification requirement for non-employees must yield.

A business's only option, then, is to submit to the Act's onerous tax provisions, and withhold from individual independent contractors the highest marginal tax rate

allowed by Oklahoma law or pay a tax penalty in the same amount. As explained in Part II *infra*, both of these options will cause serious harm to businesses. The IRCA provides expressly, however, that states cannot penalize businesses that do not comply with the verification requirements of federal law. *See* 8 U.S.C. § 1324a(h)(2). Oklahoma certainly cannot burden or penalize businesses that refuse to comply with an extraneous verification requirement created by the State that conflicts with federal law. *See, e.g.*, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-21 (1948) (holding that a state may not enforce penalties for failure to follow preempted state fishing regulations); *Hines*, 312 U.S. at 73-74 (holding that the enforcement of a state statute that conflicts with the "uniform national system" of immigrant registration is preempted). As in *Lozano*, Oklahoma's attempt to impose new verification requirements on businesses and independent contractors, and significant adverse tax consequences for non-compliance, is preempted and unconstitutional.

D. Oklahoma's Act Impermissibly Invades A Field That Is The Exclusive Responsibility Of Congress.

Sections 7 and 9 of Oklahoma's Act are also preempted because Congress has comprehensively and exclusively occupied the field of immigration enforcement. A state law is void under field preemption principles where the federal scheme is "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation," and "the field is one 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." *Hillsborough County*, 471 U.S. at 713 (internal quotation marks omitted). The IRCA is a textbook example of a field occupied fully by federal law.

There is no question that the federal interest in the field of immigration is dominant. *See, e.g.*, *Hines*, 312 U.S. at 62-63; *see also Galvan*, 347 U.S. at 531 ("[T]hat the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."). The Supreme Court has recognized that the IRCA provides a "comprehensive scheme prohibiting the employment of illegal aliens in the United States" that "forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman Plastic*, 535 U.S. at 147 (internal alterations and quotation marks omitted).[11] Because Congress, "in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for [regulating] aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines*, 312 U.S. at 66-67.

As the Court recognized in *Lozano*,

> determining whether a foreign-born person enjoy[s] a legal right to remain in the United States demand[s] a detailed legal examination that involve[s] numerous federal statutes, several adjudicatory bodies, and a number of appeals and exceptions. More than one hundred years of federal regulation have made the federal supremacy over immigration an intricate affair.

[11] Before the IRCA was enacted, the Supreme Court permitted a state statute penalizing employers of illegal aliens because federal law at that time evinced "at best … a peripheral concern with employment of illegal entrants." *De Canas v. Bica*, 424 U.S. 351, 355-56, 360 (1976). Of course, the IRCA expressly preempted state laws, and *De Canas* is no longer controlling on that issue. *See Lozano*, 496 F. Supp. 2d at 524.

* * *

> IRCA occupies the field to the exclusion of State or local laws regarding employers hiring, employing, recruiting or referring for a fee for employment unauthorized aliens. … It leaves no room for state regulation[, and thus] any additions added by local governments would be either in conflict with the law or a duplication of its terms—the very definition of field pre-emption.

496 F. Supp. 2d at 521-23. Oklahoma's Act intrudes directly in this realm of exclusive federal control, and is therefore unconstitutional.

II. PLAINTIFFS WILL BE IRREPARABLY HARMED IF THIS COURT DOES NOT GRANT A PRELIMINARY INJUNCTION.

Plaintiffs and their members will suffer irreparable harm unless a preliminary injunction is granted. A party is irreparably harmed when it is subjected to state legislation that is preempted. In *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990), the Fifth Circuit confronted a situation remarkably similar to plaintiffs': several states attempted to regulate advertisements of airline fares, which the court held was likely preempted because these advertisements were already fully and comprehensively regulated by federal law.[12] The court of appeals held that the likelihood of success on the preemption question necessarily established irreparable harm:

> Congress has exercised its authority … to regulate airlines and by [statute] has chosen to preempt all enforcement of state laws relating to rates, routes or services of airlines. If the states were permitted to enforce their various laws, the airlines would be subjected to the

[12] The Fifth Circuit's preemption holding was subsequently upheld (after the District Court entered a permanent injunction in the case) by *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

> demands and criteria of numerous legislatures rather than being required to comply only with federal laws and regulations. *This would cause irreparable injury by depriving the airlines of a federally created right to have only one regulator in matters pertaining to rates, routes and services.* … [P]ermitting states to regulate airline advertising in the face of the preemption language of [federal law] would violate the Supremacy Clause, causing irreparable injury to the airlines.

Id. at 784 (emphasis added).

The same principles apply here. Oklahoma's Act is inconsistent with the uniform verification and enforcement scheme Congress created to govern the employment of non-citizens in the United States. As explained, Congress enacted the IRCA after 15 years of careful consideration of the competing interests involved, and expressly intended that its verification scheme would deter illegal immigration while being "the least disruptive to the American businessman and would also minimize the possibility of employment discrimination." H.R. Rep. No. 99-682(I), at 56, 1986 U.S.C.C.A.N. at 5660; *see* S. Rep. No. 99-132, at 8-9 (1985). Businesses in Oklahoma, just like businesses in any other state, are entitled to rely on Congress's weighing of the benefits and burdens of immigration verification and enforcement by employers, and all employers and employees are required to use the same uniform, nationwide verification system Congress created. Just like the airlines in *Mattox*, every employer in the United States has a single federal regulator for immigration purposes, and they are exposed to irreparable injury by divergent parochial legislation that fractures the uniform federal scheme and exposes employers to a patchwork of conflicting requirements. Plaintiffs have established irreparable injury.

Moreover, as explained in the attached declarations, there are several specific harms that businesses will suffer under Oklahoma's unconstitutional scheme.

A. Harms From Forced Use Of The "Status Verification System".

Employers (including plaintiffs and their members) will be automatically and permanently debarred from contracts with public entities if they do not use the State's unconstitutional "Status Verification System." Such debarment will cause them serious harm. *See* Law Decl. ¶¶ 10-12; Rush Decl. ¶¶ 8-9; Williams Decl. ¶¶ 9-11, 31; Neal Decl. ¶¶ 9-11, 30; Hopper Decl. ¶¶ 10, 17; Webb Decl. ¶ 15. Employers' only option is to use SSNVS as a verification method (which, as explained, would violate federal law), or use the Basic Pilot Program, which will likewise impose unrecoverable costs and burdens on employers.

Since employers cannot be made to use SSNVS in a manner that violates federal law, their only realistic option is to use the federal Basic Pilot Program. *See* Law Decl. ¶ 10; Rush Decl. ¶ 8; Williams Decl. ¶ 9; Neal Decl. ¶ 10; Hopper Decl. ¶ 10; Webb Decl. ¶ 14; McCaleb Decl. ¶ 17. This Program is experimental and does not provide actual proof of work eligibility. As the Department of Homeland Security has explained, the Program provides at best a "*tentative* nonconfirmation[]" of work status, since federal records are not in all cases accurate and nonconfirmation can be generated by many factors unrelated to a person's immigration status. *See* DHS, *Report to Congress on the Basic Pilot Program* 2-5 (June 2004) (emphasis added) (Exhibit 1.E) (hereinafter "DHS Report"). Federal law is clear:

> A tentative nonconfirmation received from [a federal agency] does *not* mean that the employee is not authorized to work, *and employers may not interpret it as such*. There are many reasons why a work-authorized individual may be the subject of a tentative nonconfirmation, including mistakes on the Form I-9 by either the employer or the employee, inaccurate data entry by the employer, legal change of the employee's name, or erroneous, incomplete, or outdated Government records.

Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997) (emphases added) (hereinafter "Pilot Programs"); *see also* DHS Report, at 2-3 (same); MOU ¶¶ II.C.9-10.

There are good reasons why the Basic Pilot Program is experimental and voluntary. For one, it exposes employers to long periods of uncertainty while federal agencies evaluate whether tentative nonconfirmations are correct. Whenever the system returns a tentative nonconfirmation, the employer must suspend action on the employee for 10 work days to allow the employee an opportunity to contest the result with SSA or DHS. *See* Pilot Programs, 62 Fed. Reg. at 48,312; DHS Report, at 2-3. The employer must further suspend action during any subsequent period "while SSA or the Department of Homeland Security is processing the verification request." MOU ¶ II.C.10. According to the most recent comprehensive review of the Basic Pilot Program commissioned by DHS, the average amount of time it takes for SSA or DHS to resolve a challenge to a tentative nonconfirmation ranges from 19 to 74 days. *Findings of the Web Basic Pilot Evaluation* 78-79 (September 2007) (Exhibit 1.F) (hereinafter "*Findings*"). "During this period, the employer may not terminate or take adverse action against the employee based upon his or her employment eligibility status." Pilot Programs, 62 Fed. Reg. at 48,312; DHS Report, at 2-3 (same); MOU ¶ II.C.10 (same).

The problems with the Basic Pilot Program have not been resolved. The most recent comprehensive evaluation of the Program found that, while there have been advances in the accuracy of the system since its inception, "further improvements are needed, especially if the Web Basic Pilot becomes a mandated national program…. Most importantly, the database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification." *Findings* at xxi, 56-57. The study found a rate of error among naturalized citizens of almost 10 percent, *id.* at xxv-xxvi, 57, and concluded that a foreign-born work-authorized individual was 30 times more likely to receive an erroneous tentative nonconfirmation than a U.S.-born individual—a rate that would, incidentally, be "much greater" were it not for the "time consuming" process of having federal authorities manually recheck some of these cases. *Id.* at xxi, xxv, 97, 100. These problems subject work-authorized foreign-born individuals, including naturalized citizens, to discrimination and "potential harm arising from the Web Basic Pilot process." *Id.* at xxv. Fixing these problems, the study found, "will take considerable time and will require better data collection and data sharing between SSA, USCIS, and the U.S. Department of State than is currently the case." *Id.* at xxvi, 149-50.

Moreover, many employers—particularly small businesses and those that had recently started using the Program—complained of serious problems, including:

- "unavailability of the system during certain times, problems accessing the system, or training new staff to do verifications using the system," *id.* at xxii, 66;
- "los[s of] their training investment … because they are not allowed to take adverse actions against employees while the employees are contesting tentative nonconfirmation findings," *id.* at xxii, 68;

- difficulty understanding and internalizing the Basic Pilot Program's special rules, resulting in a "substantial" rate of employer non-compliance with the applicable requirements and procedures, *id.* at xxii-xxiv, 70-80;

- employees diverting their attention from work to travel to SSA field offices and attempt to resolve errors in the database, *id.* at 64, 101; and

- unresponsive and unhelpful technical support from SSA and USCIS, and slow response times by those agencies when asked to review tentative nonconfirmations, *id.* at 66.

The report also noted that, although there is no fee to sign up for the Basic Pilot Program, there are costs associated with implementation and ongoing use. Not including intangible expenses such as diverted work hours, the report found that the monetary cost to set up the required computer systems and train personnel ranged from under $100 to over $500, with an average cost of $125, and maintaining the Program on ongoing basis cost an average of $728, with some employers reporting costs of well over $1,500. *Id.* at 104-06. It is perhaps not surprising that "most U.S. employers have not volunteered to use the pilot program," and expansion of the Program has led to continuing "downward trends in [employer] satisfaction and compliance." *Id.* at xxi, xxviii, 142.[13]

As explained in the attached declarations, these features of the Basic Pilot Program will cause plaintiffs and their members irreparable harm beyond that which they will already suffer by being forced to forego the range of options guaranteed by federal

[13] Indeed, as explained above, *see supra* at 14 n.8, the State of Illinois recently enacted a law that *forbids* employers to use the Basic Pilot Program, citing the errors and long delays associated with the program. *See* Ill. H.B. 1744 (Exhibit 1.H). The United States has sued Illinois to overturn this law, arguing that any attempt by states to impede or modify Congress's chosen verification provisions is preempted by federal law. *See* U.S. Compl., *United States v. Illinois* (Exhibit 1.I).

law, including: (1) an artificially restricted pool of legal workers, particularly among naturalized citizens and work-authorized non-citizens, that will increase recruitment costs and harm employers' ability to fill their workforces in Oklahoma's tight labor market; (2) irreparable sunk costs in training new employees during periods where their work authorization status is uncertain but they cannot be terminated; (3) unrecoverable costs due to the diversion of employee time and attention during periods where tentative nonconfirmations are in dispute; and (4) significant costs to employers to revamp their verification procedures (which are designed to comply with the federal I-9 Form process that has been in place for decades) to comply with the new, unconstitutional requirements of the Act. *See* Law Decl. ¶¶ 10-17; Rush Decl. ¶¶ 8-12; Williams Decl. ¶¶ 9-16, 29-32; Neal Decl. ¶¶ 9-16, 28-31; Hopper Decl. ¶¶ 10-17; Webb Decl. ¶¶ 7-15; McCaleb Decl. ¶¶ 17-21. None of these harms and costs can be recovered if the Act is found unconstitutional.

B. Harms From The New Claim For Employment Discrimination.

Employers will also be irreparably harmed by the new claim for employment discrimination under Section 7(C). This provision requires employers to expend significant sums in legal fees and other risk-management expenses to address the potent new risks to businesses under this law, even those (like plaintiffs and their members) who comply with federal law and do not knowingly hire illegal immigrants. As explained in the attached declarations, the specter of liability without intentionally or knowingly violating the law; the very real monetary and reputational harm suffered by businesses accused, even wrongly, of employing illegal aliens; and the inevitable rise of baseless

claims by disgruntled former employees seeking to exploit this leverage and extract undeserved settlements, are risks that every employer in Oklahoma will face even if they do not knowingly employ illegal workers. *See* Law Decl. ¶¶ 24-29; Rush Decl. ¶¶ 17-22; Williams Decl. ¶¶ 24-28, 33-34; Neal Decl. ¶¶ 24-27, 32-33; Hopper Decl. ¶¶ 18-22; Webb Decl. ¶¶ 16-22; McCaleb Decl. ¶¶ 14-17. These risks will result in imminent, necessary, and irreparable costs. Employers will be forced to divert funds and set aside reserves to account for these risks, will be required to purchase additional liability insurance, and will necessarily expend significant time, money, and legal fees fully examining the impact of this law on their businesses and the additional steps that must be taken to manage the resulting risks. *See* Law Decl. ¶¶ 25-26; Rush Decl. ¶¶ 19-20; Williams Decl. ¶¶ 25-26; Neal Decl. ¶¶ 25-26; Hopper Decl. ¶¶ 19-20; Webb Decl. ¶¶ 19, 21; McCaleb Decl. ¶¶ 15-16.[14] None of these harms can be undone, nor can the costs be recovered, if the law is found unconstitutional.

Employers' only other option is to sign up for Oklahoma's new Status Verification System (the only safe harbor provided by Section 7(C)), which, as explained, will itself cause other irreparable harms to businesses.

C. Harms From The Individual Independent Contractor Provision.

Plaintiffs' and their members will also be harmed by the requirements of Section 9. As explained, this provision requires businesses either to verify the work authorization

[14] Indeed, plaintiffs' members include businesses that are particularly likely to suffer these harms because although they do not knowingly hire illegal workers, the nature of their businesses requires periodic turnover in their workforces, which results in a larger number of potential complainants. *See, e.g.*, Webb Decl. ¶ 18.

of non-employees (which they are not supposed to do under federal law), or to suffer significant adverse tax consequences that include withholding from the contractors' compensation a high rate of taxes or paying a tax penalty in the same amount.

This provision presents employers with the same type of false choice as the inclusion of SSNVS in the Status Verification System: under federal law, verification of work authorization status is limited to verification of "employees" by "employers." *See, e.g.*, 8 C.F.R. § 274a.1(f). This does *not* include non-employees like independent contractors. *Id*. Indeed, both the Basic Pilot Program and SSNVS include specific prohibitions against the use of those systems to verify information of non-employees and contractors. MOU ¶¶ II.C.7-8 (Exhibit 1.C); *SSNVS Handbook* at 3 (Exhibit 1.D).

Oklahoma businesses that contract with individual independent contractors are thus forced, as a consequence of their inability to lawfully comply with Oklahoma's state-law verification requirement, to incur significant adverse tax consequences. As the attached declarations make clear, these tax provisions will cause irreparable harm: they will make it more expensive for individual independent contractors to do business in the State, make it more difficult for businesses to use their services, pose an impediment to completing jobs on time and expose contracting entities to potential breach-of-contract suits from their customers, and cost businesses significant sums in either lost services or higher overhead expenses associated with paying the tax penalty or paying individual independent contractors more money to offset the withholding requirement. *See* Law Decl. ¶¶ 18-23; Rush Decl. ¶¶ 13-16; Williams Decl. ¶¶ 17-23, 35-36; Neal Decl. ¶¶ 17-23, 34-35; Hopper Decl. ¶¶ 23-28; Webb Decl. ¶¶ 23-29; McCaleb Decl. ¶¶ 5-13. At the

very least, businesses will be forced to incur training and other personnel costs to have their employees calculate and remit the tax withholdings or penalties required by the Act. Law Decl. ¶ 23; Williams Decl. ¶ 23; Neal Decl. ¶¶ 22-23. Each of these options will impose significant burdens, harms, and costs on businesses that cannot be undone or recovered if the law is deemed unconstitutional.

These harms are more than sufficient to satisfy the irreparable harm requirement for a preliminary injunction; indeed, the potential monetary losses alone are enough to grant plaintiffs' motion. Plaintiffs have established irreparable harm.

III. THE BALANCE OF HARMS CLEARLY FAVORS THE PLAINTIFFS.

The State will suffer no harm in delaying implementation of Sections 7 and 9 of the Act pending this Court's decision whether those sections are unconstitutional. "In the context of an application for a preliminary injunction to enforce federal preemption, where a state purports to regulate an area preempted by Congress, there is no injury to the state to weigh." *Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1179 (D. Colo. 2001); *see also Mattox*, 897 F.2d at 784 ("Since Congress expressly preempted this area of regulation, the states are not injured by the injunction."); *Bank One, Utah v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999) (if a state statute is preempted by federal law, plaintiffs are "entitled to injunctive relief no matter what the harm to the State"). Moreover, federal law already prohibits the employment of illegal aliens and provides comprehensive requirements for verifying work authorization status. Whatever "harm" might befall the State from a delay in enforcing its preferred verification system and

prophylactic penalties is *de minimis* and, in any event, hardly outweighs the severe harm to the plaintiffs from having to comply with an unconstitutional State law.

IV. THERE IS NO PUBLIC INTEREST IN ENFORCEMENT OF A LAW THAT IS LIKELY UNCONSTITUTIONAL.

"The public interest element of an application for a preliminary injunction is satisfied when the injunction seeks to enforce express federal preemption from state encroachment because Congress has already found that exclusive federal regulation in such matters is in the public interest." *Bioganic*, 174 F. Supp. 2d at 1179; *see also Bank One*, 190 F.3d at 848 (in considering a preliminary injunction against a law that is likely preempted, "the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law"). It is also well established that the public interest is never served by enforcing an unconstitutional law. *See, e.g., Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1478 (D. Colo. 1988) ("[D]elaying the enforcement of unconstitutional regulations is not adverse to the public interest, but rather promotes the public interest."). As explained, plaintiffs have demonstrated a substantial likelihood that Sections 7 and 9 of Oklahoma's Act are preempted by federal law, and are thus void under the Federal Constitution's Supremacy Clause. There is no public interest in enforcement of the Act sufficient to overcome the irreparable harm plaintiffs will suffer if this unconstitutional law is enforced pending a final merits determination.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court preliminarily enjoin the State of Oklahoma from enforcing Sections 7 and 9 of the Oklahoma Taxpayer and Citizen Protection Act of 2007, pending a final decision on the merits of plaintiffs' claims.

DATED this 1st day of February, 2008.

Respectfully Submitted,

/s/*Phillip G. Whaley*

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