Nos. 08-6127, 08-6128

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**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *et al.*,

*Plaintiffs/Appellees*,

v.

W.A. DREW EDMONDSON *et al.*,

*Defendants/Appellants in 08-6127*,

and

THOMAS E. KEMP, JR. *et al.*,

*Defendants/Appellants in 08-6128*.

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On Appeal from the United States District Court
for the Western District of Oklahoma
Case No. CIV-08-109-C (Robin J. Cauthron, C.J.)

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# CONSOLIDATED BRIEF OF PLAINTIFFS/APPELLEES

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ORAL ARGUMENT REQUESTED
(1 Attachment in Scanned PDF format)

## CORPORATE DISCLOSURE STATEMENT

None of the appellees are publicly traded corporations. There are no parent corporations or other publicly held corporations that own 10% or more of any appellee.

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## STATEMENT OF RELATED CASES

Two related appeals (Nos. 08-6127 and 08-6128) challenge the same district court order. There are no prior appeals or other related appeals.

## INTRODUCTION

Enacted in 1986, the federal Immigration Reform and Control Act (IRCA), represented a sea change in our Nation's regulation of the employment of aliens. Pub. L. No. 99-603, 100 Stat. 3359 (1986). Prior to IRCA it could fairly be said that federal law (in the form of the then-controlling Immigration and Nationality Act, ch. 447, 66 Stat. 163 (1952)) had only "a peripheral concern with employment of illegal entrants." *De Canas v. Bica*, 424 U.S. 351, 360 (1976). IRCA radically changed this. It created 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 Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (alterations and quotation marks omitted). President Reagan hailed the law as "the most comprehensive reform of our immigration laws since 1952," and "the product of one of the longest and most difficult legislative undertakings in recent memory." Statement of the President Upon Signing S. 1200, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1, -4.

The statute broadly and deeply regulates the employment of aliens. Most directly relevant here, it created the I-9 Form process, "an extensive 'employment verification system' … [that] is critical to the IRCA regime." *Hoffman Plastic*, 535 U.S. at 147-48. This system establishes the exclusive requirements for verify-

ing the work eligibility of every employee in the United States, *see* 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b), including a federal system for determining employer violations and assessing penalties, *see* 8 U.S.C. § 1324a(a)(1)-(3), (e); 28 C.F.R. pt. 68. IRCA, however, did not singlemindedly target undocumented workers at all costs; it also balanced other, sometimes competing concerns. So at the same time it regulated the employment of aliens, it was mindful of the burdens those measures would impose on businesses. Congress also recognized that this focus on aliens could lead to discrimination, which IRCA instituted measures to prevent. H.R. Rep. No. 99-682(I), at 56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5660; S. Rep. No. 99-132, at 8-9 (1985); *see* 8 U.S.C. § 1324b.

Having regulated the field of alien employment with such specificity, and in a way that carefully balanced Congress's multiple policy goals, IRCA leaves no room for states to regulate the employment of aliens. It expressly preempts state and local laws that impose civil or criminal sanctions on employers of illegal aliens, 8 U.S.C. § 1324a(h)(2), and it likewise preempts state statutes that conflict with Congress's chosen methods, or that reset the balance of objectives Congress so carefully struck. That, however, is precisely what Oklahoma sought to do when it enacted the Taxpayer and Citizen Protection Act of 2007 (the "Act" or "HB

1804"). A108-124.[1] The Act would impose sanctions on employers, in clear violation of IRCA's express preemption provision; it would intrude into the domain of alien employment that IRCA "comprehensive[ly]" regulated, *Hoffman Plastic*, 535 U.S. at 147; and, perhaps most seriously, it would impose requirements that are flatly at odds with the ones chosen by Congress. Specifically, it would limit the status verification options enacted by Congress, mandating use of an experimental form of verification that Congress expressly made voluntary in place of the I-9 Form process that Congress requires every employer to use; it would require employment verification for non-employees, which federal law does not authorize; and it would impose civil liability on employers whom the state deems to have employed illegal aliens (knowingly or not). These provisions are preempted by federal law, as the district court properly held.

[1] References to the appendix filed by the Attorney General and Human Rights Commissioners in No. 08-6127 are denominated "A___." The Tax Commissioners' Appendix in No. 08-6128 is denoted "TA___."

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

To understand IRCA's preemptive force, and the defects inherent in HB 1804, it is necessary first to consider the sweeping federal regime that governs here, and the particular provisions of the Oklahoma statute that are preempted.

## I. FEDERAL STATUTORY AND REGULATORY BACKGROUND

### A. The Enactment Of The Immigration Reform And Control Act, And The I-9 Form Process.

Beginning in 1971, and every year thereafter, Congress conducted "[e]xtensive and comprehensive hearings" on prohibiting the employment of illegal aliens. *See, e.g.*, H.R. Rep. No. 99-682(I), at 52-56, 1986 U.S.C.C.A.N. at 5656-60; S. Rep. No. 99-132, at 18-26. These efforts produced a voluminous record detailing the competing considerations that arise from the employment of illegal workers, and ultimately led to a monumental effort of legislative compromise. Statement of the President, 1986 U.S.C.C.A.N. at 5856-1, -4. Congress sought to balance a number of goals, and crafted a comprehensive federal verification scheme to accommodate them. Congress intended that IRCA would deter illegal immigration, but not at all costs; it also sought a system that was "the least disruptive to the American businessman and … also minimize[s] the possibility of employment discrimination." H.R. Rep. No. 99-682(I), at 56, 1986 U.S.C.C.A.N. at 5660; S. Rep. No. 99-132, at 8-9; *see Collins Foods Int'l, Inc., v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("the legislative history of section 1324a indicates that

Congress intended to minimize the burden and the risk placed on the employer in the verification process").[2] The statute thus represents "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected." *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991).

IRCA and its implementing regulations reflect this balance. Of particular relevance here is the I-9 Form process, the "keystone and major element" of the statute. Statement of the President, 1986 U.S.C.C.A.N. at 5856-1; *see Hoffman Plastic*, 535 U.S. at 147-48. The statute makes it unlawful "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)(A). Employers discharge their responsibilities under this section by completing an I-9 Form and inspecting documents that establish the employee's identity and eligibility to work. 8 C.F.R. § 274a.2(b); A126-29 (I-9 Form). An employer must accept any document on a list promulgated by the federal government that "reasonably appears on its face to be genuine." Employees are under no obligation to present any particular docu-

[2] Congress 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), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5841; S. Rep. No. 99-132 at 32.

ment, nor may employers ask them to do so. 8 U.S.C. § 1324a(b)(1)(A); 8 C.F.R. § 274a.2(b)(1)(ii)(A), (v). The law creates a substantial safe harbor for employers who "compl[y] in good faith" with the I-9 Form's requirements. 8 U.S.C. § 1324a(a)(3). Congress expressly intended that this system be enforced "uniformly" throughout the United States. IRCA § 115, 100 Stat. at 3384.

Federal law creates a detailed array of allowances and exceptions for individuals wishing to work in the United States, *see, e.g.*, 8 C.F.R. § 274a.12, and it vests federal agencies with exclusive authority to administer these requirements, including components of the Departments of State, Labor, Homeland Security (DHS), and Justice.[3] Determining whether an employer knowingly hired an illegal worker is committed to a specialized federal administrative review system, which affords employers the right to an adversarial hearing before a federal Administrative Law Judge at which the government bears the burden of proof. Every aspect of this procedure is spelled out in lengthy and detailed statutory and regulatory provisions. *See* 8 U.S.C. § 1324a(e); 28 C.F.R. pt. 68. For employers who are found to have knowingly employed an illegal alien, IRCA and its regulations specify civil and criminal sanctions, including graduated monetary penalties, civil injunctions against repeat offenders, and criminal fines of up to $3,000 per illegal

[3] *See, e.g.*, 6 U.S.C. §§ 236, 271 *et seq.*; 8 U.S.C. §§ 1103(a), 1103(g), 1151, 1153, 1182(a)(5), 1201; 8 C.F.R. § 274a.12; *id.* pt. 1003; 20 C.F.R. pts. 655, 656.

worker and six months in prison. 8 U.S.C. § 1324a(e)(4), (f); 8 C.F.R. § 274a.10(b)(1)(ii)(A). The ALJ's decision is subject to administrative appellate review, then federal judicial review. 8 U.S.C. § 1324a(e)(7), (8).

Congress has more than once revisited the subject of document-based verification in order to further refine the federal system and best effectuate its goals. Thus, in 1990, Congress prohibited employers from requesting more or different documents than those the employee chooses to present. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 535, 104 Stat. 4978, 5055 (codified at 8 U.S.C. § 1324b(a)(6)). This was done to prevent such requests from being made out of discriminatory motives. In 1996, Congress refined this provision, specifying that such conduct would be treated as discriminatory only if it was done "for the purpose or with the intent of discriminating." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, tit. IV, subtit. C, § 421, 110 Stat. 3009-546, 3009-670. There have been other refinements as well. *See, e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (restructuring the system for admitting legal immigrants, and adding penalties related to fraudulent documents).

Having carefully crafted these provisions to balance multiple considerations and to calibrate its chosen enforcement mechanisms, Congress went to great lengths to preserve its authority in this field. To that end, IRCA expressly pre-

empts "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." 8 U.S.C. § 1324a(h)(2). Even within the federal government, changes to the congressional design require significant study and advance warning. Specifically, IRCA requires the President to monitor the effectiveness 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. *Id.* § 1324a(d). Any change in the documents used to prove work authorization status is a "major change" that requires two years' written notice to Congress. *Id.* § 1324a(d)(3)(A)(iii), (D)(i).

**B. The Basic Pilot Program**

In 1996, Congress augmented IRCA by authorizing "Pilot Programs for Employment Eligibility Confirmation." IIRIRA, tit. IV, subtit. A, 110 Stat. at 3009-655.[4] IIRIRA authorized three pilot programs, only one of which—the "Basic Pilot Program" (sometimes called "E-Verify"[5])—exists today. *See id.* §§ 403(a), (b), (c). This program was designed "to determine, on a test basis, whether pilot verifi-

[4] Sections 401-405 of IIRIRA, which govern pilot programs, are codified in a note appended to 8 U.S.C. § 1324a.

[5] Federal statutes and Oklahoma's Act refer to this program as the Basic Pilot Program, and so we use that term here. In 2007, the Department of Homeland Security began using the name "E-Verify" as part of a rebranding initiative to broaden the program's appeal.

cation procedures can improve on the existing I-9 system by reducing false claims to U.S. citizenship and document fraud, discrimination, violations of civil liberties and privacy, and employer burden."[6] The desire to test additional verification systems was driven in part by concern that even the carefully considered sanctions regime in IRCA "had resulted in a widespread pattern of discrimination against authorized workers," which was one of the problems Congress sought to address in the Immigration Act of 1990.[7] At the same time, Congress was concerned that new verification systems would themselves give rise to discrimination and impose undue burdens on employers.[8]

Accordingly, Congress created Basic Pilot and expressly made it voluntary and experimental, as its name suggests. Section 402 of IIRIRA is entitled "*Voluntary* Election to Participate in a Pilot Program" (emphasis added). The statute authorizes employers to "*elect* to participate in that pilot program." *Id.* § 402(a) (emphasis added); *id.* § 402(c)(2)(A) (participating employer is an "electing person"). The federal government "*may not require* any person or other entity to participate,"

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[6] *Basic Pilot Evaluation–Summary Report* v, 4 (Jan. 29, 2002), *available at* http://www.uscis.gov/files/nativedocuments/INSBASICpilot_summ_jan292002.pdf.

[7] *Findings of the Basic Pilot Program Evaluation* 12 (June 2002), *available at* http://www.uscis.gov/files/article/4[1].a%20C_I.pdf; *see also* GAO, *Immigration Reform: Employer Sanctions and the Question of Discrimination* (Report to Congress) 3, 5-9, 37-39 (March 29, 1990).

[8] *Findings of the Basic Pilot Program Evaluation*, *supra*, at 21-24.

and the Secretary of Homeland Security is required to "widely publicize … the *voluntary* nature of the pilot programs." *Id.* § 402(a), (d)(2) (emphases added); *accord id.* § 402(d)(3)(A). In contrast, Congress made Basic Pilot mandatory for certain federal-government entities. *Id.* § 402(e)(1), (2).

Basic Pilot is voluntary for good reason: it is error-prone and imposes substantial burdens on employers. An employer wishing to use Basic Pilot enters into a Memorandum of Understanding (MOU) with the federal government, which allows the employer to access an Internet database of Social Security numbers thought to be valid. A131-39 (MOU); Expansion of the Basic Pilot Program, 69 Fed. Reg. 75,997, 75,999 (Dec. 20, 2004). This database provides only a "tentative nonconfirmation[]" of work authorization status, A172-73, because federal records often are inaccurate, as the government itself has recognized. *See* Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997) ("*Pilot Programs*"); A134 (MOU ¶¶ II.C.9-10), A172-73.

A report recently commissioned by DHS recognized that "improvements are needed … if the Web Basic Pilot becomes a mandated national program." This is because "the database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification." A201, 269-70. The study found an error rate among naturalized citizens of almost 10%, A205-06, 270, and that a foreign-born, work-authorized individual was 30 times more likely to receive

an erroneous tentative nonconfirmation than a U.S.-born individual. A205, 311. These problems subject foreign-born individuals, including naturalized citizens, to discrimination and "potential harm." A205. Moreover, receiving a tentative non-confirmation imposes substantial burdens on employers and employees. *See infra* at 24-25. Fixing these problems, the study found, "will take considerable time." A206, 363.

In addition, many employers—particularly small businesses and those that recently started using the program—have complained of serious problems. These include, among other things, unavailability of the system, the cost of training staff, and financial losses caused by the program's prohibition against taking adverse actions against an employee while he contests a tentative nonconfirmation. A202, 277, 279, 280-81, 283-93, 315; *see infra* at 24-25. Unsurprisingly, "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." A201, 208, 356.

Basic Pilot has always been authorized on a temporary basis. *See* Expansion of the Basic Pilot Program, 69 Fed. Reg. at 75,998. Congress recently approved a three-month extension until March 9, 2009. Pub. L. No. 110-329 §§ 106(3), 143, 122 Stat. 3574, 3575, 3580 (2008). Congress, however, has repeatedly rejected proposals to create a mandatory electronic verification system, *e.g.*, H.R. 98, 110th

Cong., § 5(a) (2007); H.R. 1951, 110th Cong., § 3 (2007), and has not acted on a bill that would extend the Basic Pilot Program's temporary authorization for five years, H.R. 6633, 110th Cong. (2008). And even that bill would reaffirm that Basic Pilot is voluntary and experimental, and would require further study of the ongoing problems caused by erroneous nonconfirmations and burdens on small businesses. *Id.* §§ 4, 5.

## II. THE OKLAHOMA STATUTE

In 2007, Oklahoma enacted HB 1804, the "Oklahoma Taxpayer and Citizen Protection Act." The Act is rooted in the Oklahoma legislature's fundamental disagreement with Congress's weighing of objectives in IRCA, and its conclusion that the I-9 Form process has failed to achieve one of those objectives—stemming the flow of illegal immigration—that the Oklahoma legislature would elevate above all others. The Act states this purpose expressly. HB 1804 § 2 (A110); *see* A698 ("House Bill 1804 was approved because of the complete failure of the federal government to enforce existing immigration laws…. Something had to be done."). In the district court, Appellants[9] repeatedly and forthrightly admitted that the law's

[9] All appellants were defendants below. Attorney General Edmondson and the Oklahoma Human Rights Commissioners have filed a brief in No. 08-6127 ("AG Br."), and the Oklahoma Tax Commissioners noticed a separate appeal and filed a brief ("Tax Br.") in No. 08-6128. We refer collectively to the appellants in 08-6127 as the "Attorney General," and the appellants in both appeals as "Appellants," unless otherwise noted.

purpose is to "eliminate the reasons the illegal aliens seek to come to this state … by discouraging employers from hiring illegal aliens." A518; AG Br. 3 ("The Legislature's purpose in passing HB 1804 was to protect Oklahoma residents from the adverse effects of illegal immigration."); A533 (same). The Act's drafters likewise made clear that it is aimed squarely at the employer verification regime; it is designed to "take a stand … by targeting employers" and "enacts employer penalties" to force compliance with more stringent verification requirements than those provided in federal law. A695-99. That purpose is manifest in the three provisions of the Act at issue here:

***Section 7(B)(2)*** (codified at 25 Okla. Stat. § 1313(B)(2)) requires every business that has a contract or subcontract with any "public employer" (including state or local governments, agencies, courts, schools, and police and fire departments, among others) to register and participate in the State's "Status Verification System." This effectively requires businesses to use the Basic Pilot Program because the only other verification options approved by HB 1804 are (1) an equivalent future program created by the federal government (which does not exist); (2) a "third-party" system that is at least as reliable as Basic Pilot (which also does not exist); or (3) the "Social Security Number Verification Service" (SSNVS), a data-

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Oklahoma Governor Brad Henry also is a defendant. Curiously, he has not appealed the decision below.

base created by the Social Security Administration (SSA) for use in year-end financial reporting (the use of which federal law forbids for verifying immigration status, *see infra* at 66 n.27). A114-15, 141, 143-44. Any employer who uses the federal I-9 Form process, and declines to use Oklahoma's Status Verification System, is automatically and permanently debarred from public contracts in the State of Oklahoma. A115.

***Section 7(C)*** (codified at 25 Okla. Stat. § 1313(C)) subjects employers who do not participate in the Status Verification System to the Oklahoma regulatory apparatus that otherwise is directed against acts of discrimination. Specifically, § 7(C) labels it a "discriminatory practice" whenever an employer "discharge[s] an employee working in Oklahoma who is a United States citizen or permanent resident alien while retaining an employee who the employing entity knows, or reasonably should have known, is an unauthorized alien." A116; *compare* 8 U.S.C. § 1324a(a)(1)(A) (prohibiting only "knowing" conduct). The statute thus subjects such employers to the same broad panoply of administrative and judicial procedures and sanctions levied against those who discriminate on the basis of race or gender, including investigation by the Oklahoma Human Rights Commission (HRC), *see* 25 Okla. Stat. § 1502; temporary injunctive relief sought by the HRC and imposed by a court, *id.* § 1502.1; cease-and-desist orders and affirmative relief, including reinstatement, backpay, costs and attorney's fees, *id.* § 1505(B), (C),

to be enforced by the HRC in court, *id.* § 1506(a)—and even ultimately a judicial action filed by the state Attorney General, *id.* § 1506.6.

***Section 9*** (codified at 68 Okla. Stat. § 2385.32) addresses the status verification of employees through highly unorthodox withholding and penalty mechanisms. In contrast to federal law, which expressly excludes non-employees (including independent contractors) from IRCA's verification requirements, *see* 8 C.F.R. § 274a.1(f), (j), Section 9 requires all businesses to verify the work authorization status of individual independent contractors. A119. A business that fails to do so must withhold from the consideration due the contractor an amount equal to "the top marginal income tax rate" allowed by Oklahoma law, or else itself be subject to a penalty in the same amount. *Id*. This requirement is a radical departure from normal practice under Oklahoma law; typically, each contracting party is responsible for its own taxes, and the law does not impose "any liability or responsibility for any unpaid taxes, wages, or penalties … upon any other contractor." 68 Okla. Stat. § 1701.1(A), (C).

## III. DISTRICT COURT PROCEEDINGS

Appellees (plaintiffs below) brought suit seeking a declaration that sections 7(B), 7(C) and 9 of the Act are preempted by federal law and to enjoin their enforcement. *See* Complaint (A24-53). Plaintiff-Appellees are national, state, and local chambers of commerce and trade groups that represent thousands of busi-

nesses of all sizes in Oklahoma, employing hundreds of thousands of individuals (collectively, the "Chambers"). Appellants opposed the motion for a preliminary injunction (A527-67; TA42-45), and moved to dismiss (A487-525; TA37-40).

The district court (Cauthron, C.J.) denied the motions to dismiss and preliminarily enjoined enforcement of the challenged provisions. It found that the Chambers had standing, noting they had "provided evidence that their members intend to do business with the State and that using one of the status verification systems will cause the member[s] harm" under Section 7(B)(2), and that they "will suffer a credible threat of injury from enforcement of" the other challenged sections. A774. The court held that the Eleventh Amendment is not implicated in this case because the "Complaint clearly seeks only prospective relief" and "[e]ach of the Defendants plays at least some role in enforcement of the challenged provisions." A775-76, 787. And it rejected the argument that the Tax Injunction Act bars federal court review of Section 9: Because it was "undisputed that the underlying purpose" of Section 9 is "to regulate behavior, not raise revenue," Section 9 does not come within the ambit of the TIA. A772-73.

Turning to the preliminary injunction, the district court held that the Chambers were substantially likely to prevail. Congress's legislative and regulatory scheme governing the employment of aliens is, as the court explained, "'comprehensive [and] central to the policy of immigration law.'" A777-78. HB 1804 op-

erates in an area "typically reserved for congressional action" and, after examining "the facts and law [that] exist today," the court concluded that each of the challenged provisions is likely preempted. A779-80, 782-83. It also held that the Chambers would be irreparably harmed absent an injunction, because they and their members would be "forced to comply with a law that may ultimately be found to be preempted," and the record established that the Act imposes significant costs that "no method of compensation can remedy." A781. These harms outweigh any injury to the state defendants "caused by the brief delay until the matter can be finally resolved," and the court concluded that "the need for uniformity among the States" favored an injunction. A782.

## SUMMARY OF ARGUMENT

1. Appellants' three jurisdictional objections are foreclosed by governing law. First, they assert the Chambers do not have standing to sue. This argument ignores the allegations of the Complaint and the numerous declarations and supporting documents submitted to the district court. Each of the challenged provisions of HB 1804 would cause real and substantial injury to the Chambers and their members. The numerous flaws inherent in the Basic Pilot Program impose costs. Switching to Basic Pilot imposes costs. Being debarred from government contracts imposes potentially debilitating costs. Being subjected to a regime of antidiscrimination enforcement unquestionably imposes real harms, as does the

imposition of non-proportional withholding requirements and penalties. The fact that certain of these provisions have not yet been enforced in no way undercuts the Chambers' standing to sue; it is commonplace that pre-enforcement review is available to challenge putative government regulation, which is certainly the case when preemption is at issue.

Appellants also assert Eleventh Amendment immunity. The Eleventh Amendment, however, does not foreclose claims for prospective injunctive or declaratory relief against state officials, and that is the only relief sought here, as Appellants concede. Their alternate argument—that the state officials are not sufficiently connected with the challenged provisions to render them amenable to suit—is insupportable. Governor Henry has not appealed the injunction, and so he has forfeited this argument and must remain a defendant for all the challenged sections of HB 1804. The Human Rights Commissioners are concededly proper parties as to Section 7(C), and the Tax Commissioners are concededly proper parties as to Section 9. And the Attorney General—the only party who contests his status as a defendant for each of the challenged provisions—has specific responsibilities under state law to enforce Sections 7(B)(2) and 7(C). This is more than sufficient to render him amenable to suit.

Finally, the Tax Injunction Act presents no barrier to challenging Section 9. The TIA prevents courts from enjoining "the assessment, levy or collection of any

tax under State law." 28 U.S.C. § 1341. A long line of cases, however, holds that when, as here, the state statute is regulatory in nature, it is not a "tax" within the meaning of the TIA regardless what terminology the state may choose. Section 9 is regulatory; unlike a typical tax provision, it is not a broad revenue-raising measure but rather would impose onerous withholding requirements and penalties on a narrow class of businesses for overtly regulatory purposes. Indeed, Appellants themselves have argued, just as HB 1804's authors have asserted, that the purpose of Section 9 (and the Oklahoma statute generally) is to prevent the hiring of undocumented workers and cause them to leave Oklahoma. This purpose is quintessentially regulatory, and thus it is outside the scope of the TIA.

2. Sections 7(B), 7(C) and 9 are preempted by federal law. *First*, they are expressly preempted. IRCA expressly 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). This provision plainly applies to Section 7(C), which imposes regulatory and administrative penalties for employing an undocumented worker and discharging a lawful one. Section 1324a(h)(2) also expressly preempts Sections 7(B)(2) and 9, both of which seek to regulate the employment of unauthorized aliens through verification requirements, and would levy penalties against employers on this basis. Section 7(B)(2) would do this by imposing the massive sanction of debarment on employ-

ers who use the I-9 system required by Congress instead of the state's preferred "Status Verification System," on the theory that employers will otherwise "employ illegal aliens." A545. Section 9 likewise would add a verification requirement that is excluded by federal law (verifying the status of independent contractors), again on the theory that this form of verification is essential to prevent the hiring of undocumented workers—and then would impose penal withholding requirements, and ultimately direct penalties, upon businesses who do not do so. In each case, the provision's purpose is to target employers perceived to be hiring undocumented workers and to impose sanctions upon them. This is precisely what § 1324a(h)(2) expressly preempts.

*Second*, these provisions are preempted because they seek to regulate employment status verification, a field that Congress has exclusively and pervasively occupied. Congress perceived a national problem, and implemented a comprehensive federal solution. Federal law regulates every aspect of this subject, and does so in extraordinary detail. It simply leaves no room for states to impose separate verification systems and penalties on employers.

*Third*, the challenged provisions are preempted because they conflict with Congress's goals and its carefully selected methods of implementing them. In enacting IRCA, Congress quite clearly balanced at least four objectives: creating uniformity in immigration enforcement, regulating the hiring of aliens, minimizing

burdens on business, and preventing discrimination. To that end, Congress acted in measured fashion, eschewing extreme solutions that, for instance, might have done more to limit the hiring of illegal aliens, but only by imposing greater burdens on employers and resulting in greater discrimination. Under circumstances like these, where Congress has not merely set minimum standards but rather has chosen the optimal level of regulation, state enactments that seek to employ different methods—even to accomplish Congress's stated goals—are preempted. Here, Oklahoma has done much more than that. Not only has it employed methods that differ markedly from those chosen by Congress—imposing different and greater sanctions, requiring the use of Basic Pilot, requiring status verification for independent contractors, etc.—but it has fundamentally reweighed the interests that Congress calibrated. Far from seeking to limit burdens on business, or to prevent discrimination, HB 1804 reflects a singleminded effort to root out unauthorized workers at all costs. This is not what Congress intended, and the conflicting Oklahoma enactment therefore is preempted.

## STANDARD OF REVIEW

This Court reviews a preliminary injunction order for abuse of discretion. *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1226 (10th Cir. 2005). "'The standard for abuse of discretion is high,'" requiring "'an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.'" *Schrier v. Univ. of Colo.*, 427

F.3d 1253, 1258 (10th Cir. 2005). It reviews questions of law *de novo* and factual determinations for clear error. *Id*. In reviewing the denial of a motion to dismiss, the allegations in the complaint must be accepted as true and all factual inferences are drawn in favor of the appellees. *Archuleta v. Wagner*, 523 F.3d 1278, 1282-83 (10th Cir. 2008).

## ARGUMENT

### I. APPELLANTS' THRESHOLD JURISDICTIONAL ARGUMENTS FAIL.[10]

#### A. The Chambers Have Standing To Sue.

The test for standing is familiar. "[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1223 (10th Cir. 2008). The injury must be "fairly traceable to the challenged action of the defendant," and "it must be likely … that the injury will be redressed by a favorable decision." *Id.* at 1224.

[10] In addition to the three arguments addressed in the text, the Tax Commissioners raise a fourth argument that merits only brief discussion. They assert that the Chambers "bring their suit as a civil rights suit under 42 U.S.C. § 1983," which they say does not confer a cause of action. Tax Br. 9-10. On the contrary, each claim arises under the Supremacy Clause, *see* A46-51, and "[a] federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law. A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004).

Importantly, "the injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Davis v. FEC*, 128 S. Ct. 2759, 2769 (2008). The Chambers have sued in their capacity as associations, A26-28, 36-37 (some also have sued in their own capacity as employers, A37-38), and an association has standing to sue on behalf of its members when it can be "supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 422 U.S. 490, 515 (1975).[11]

This test is satisfied here because the Chambers and their members are subject to, and harmed by, the challenged provisions of HB 1804. The Chambers have submitted multiple sworn declarations from each of the plaintiff organizations and from their members. These declarations, which are accompanied by hundreds of pages of supporting documentation, explain in detail the harms they and their members would suffer if the challenged provisions are enforced. A433-86.

1. ***Section 7(B)(2).*** As employers with public contracts, multiple Appellees will be harmed by Section (7)(B)(2). Under that provision, an employer who uses the federal I-9 Form process instead of switching to the state's Status Verification System will be permanently debarred from public contracts. Debarment would se-

[11] Although the Attorney General couches his standing argument in terms of associational standing, *see* AG Br. 25-27, he does not make any argument related to the associational component of the test.

riously harm the Chambers and their members. A434-35, 442, 449-50, 454, 458-59, 462-63, 467-68, 476; A38-39 (Compl. ¶¶ 45-49).

Adopting the Status Verification System also entails substantial harms. That system effectively requires employers to use the Basic Pilot Program: the unrebutted record establishes that of the four verification options approved by HB 1804, two do not exist, and federal law forbids using the third option (SSNVS) for the purpose Oklahoma suggests. A143-44; *see also* A434, 442, 449, 458, 467, 476, 484; *infra* at 66 n.27. As we set forth in detail above (at 8-12), Basic Pilot is error-prone and inefficient, and burdens employers even when it works properly. For example, when a prospective employee's Social Security Number does not register in the Basic Pilot database, the employer receives a "tentative nonconfirmation." Upon such a result, the employer must suspend action on the employee for 8-10 work days to allow the employee to challenge the result, and "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; A134 (MOU ¶ II.C.10); A172-73. The employer also must suspend action during any subsequent period "while SSA or [DHS] is processing the verification request." A134 (MOU ¶ II.C.10). According to a review of Basic Pilot commissioned by DHS itself, the average time to resolve such a challenge ranges from 19 to 74 days. A291-92.

Here, the Chambers submitted detailed declarations, containing concrete examples from the Chambers' and their members' businesses, that Basic Pilot would impose costs that the I-9 Form process does not. These include:

- an artificially restricted pool of legal workers, particularly among naturalized citizens and work-authorized non-citizens, which will increase recruitment costs and harm employers' ability to fill their workforces in Oklahoma's tight labor market;

- sunk costs in training new employees during periods where their work authorization status is uncertain but they cannot be terminated;

- unrecoverable costs due to the diversion of employee time and attention during periods where tentative nonconfirmations are in dispute; and

- 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.

A434-36, 442-43, 449-50, 453-54, 458-60, 462-63, 467-68, 474-76, 484-85. These harms more than suffice to establish the minimal requirement of injury in fact. *See Craig v. Boren*, 429 U.S. 190, 194 (1976); *Warth*, 422 U.S. at 523-25.

The Attorney General responds that "no Plaintiff has claimed or alleged that they intend to enter into a contract with the Oklahoma Attorney General's Office or the Oklahoma Human Rights Commission." AG Br. 29-30. This is beside the point; the Chambers and their members have contracts with government entities, A38 (Compl. ¶ 45), 434, 442, 450, 458, 462-63, 467, 474, and relief is available against the Attorney General because of his responsibilities in enforcing Section

7(B)(2). We address this issue in greater detail below, in the context of Appellants' substantially similar Eleventh Amendment argument. *Infra* at 35.

Second, the Attorney General argues that the Chambers do not have standing because they "are not required to do business with the State." AG Br. 30. "That is," he asserts, "the freedom of contract." *Id.* Whether this is meant to invoke *Lochner*, the Contract Clause of the Constitution, or simply to tell the Chambers and their members to take their business elsewhere, the fact remains (and the record reflects) that if the Chambers are debarred from entering into public contracts because of Section 7(B)(2), they will be seriously injured. *Supra* at 23-34. As the district court recognized, whatever freedom Oklahoma may have to "set guidelines controlling the eligibility for contracts," it "cannot create or impose guidelines that conflict with the Constitution or federal law." A780. This is clearly correct. *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2417 (2008) ("it is not 'permissible' for a State to use its spending power to advance an interest that ... frustrates the comprehensive federal scheme established by th[e] Act"); *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 287 (1986) (rejecting claim that state law "escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power").[12]

[12] The Attorney General also suggests that certain "additional 'business costs'" imposed by Section 7(B)(2) "can be passed on to the State." AG Br. 30. Regardless whether the Attorney General has authority to volunteer every public employer to

2. ***Section 7(C).*** The Chambers likewise would be harmed by Section 7(C). Unlike federal law, which penalizes only "knowing" actions by employers, this cause of action would impose liability under a vague "reasonably should have known" standard. A116. The statute creates a safe harbor for employers who use the "Status Verification System," and that of course is the point of this provision—to push employers into the Basic Pilot Program. As explained above, the record reflects substantial costs imposed by Basic Pilot, and such economic harm is clearly sufficient to confer standing. *Warth*, 422 U.S. at 523-25. The Attorney General responds that the costs and burdens associated with Basic Pilot are "tenuous," AG Br. 32, but this is epithet rather than argument. The State Appellants nowhere assert that such costs do not confer standing, nor could they.

Moreover, this provision will expose employers to the monetary and reputational harms suffered as a result of being accused—even wrongly—of employing illegal aliens, and to the inevitable rise of claims by former employees seeking to exploit this leverage and extract settlements. A437-39, 444-46, 452-54, 461-63, 468-69, 476-77, 483-84; A42-43 (Compl. ¶ 55(a)-(g)). Section 7(C) (unlike federal law) imposes liability on employers regardless whether they actually know an employee is illegal, and (also unlike federal law) it has no exception for good-faith

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pay higher contract prices (a dubious proposition), he does not explain how businesses could monetize the numerous intangible harms caused by this provision.

compliance with the I-9 Form process. A116; A36, 42 (Compl. ¶¶ 38, 55(a)). This harms the Chambers and their members: even when they comply in good faith with federal law and do not knowingly employ illegal workers, they are still subject to Oklahoma administrative action and substantial penalties. The Chambers' membership includes businesses that are particularly likely to suffer these harms because they have periodic turnover in their workforces and hence numerous potential complainants. A476-77. Thus, as the declarations in the record reflect, these employers will be forced to divert funds, to set aside reserves to account for these risks, and to purchase additional liability insurance, and will necessarily expend significant time, money, and legal fees addressing the impact of this law and managing the resulting risks. A437-39, 444-46, 452-54, 461-63, 468-69, 476-77, 483-84; A42-43 (Compl. ¶ 55(a)-(g)).

Notwithstanding these harms, Appellants assert that the Chambers should be denied standing until they "'knowingly'" violate the law. AG Br. 32-33. This misstates Section 7(C)'s *scienter* requirement, *supra* at 27, but more to the point, it neglects that the very real dangers of government investigations and administrative action created by the statute are ample to confer standing: "[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *Medimmune, Inc. v. Genen-*

*tech, Inc.*, 127 S. Ct. 764, 772 (2007) (emphasis omitted); *Hays v. City of Urbana*, 104 F.3d 102, 104 (7th Cir. 1997) ("businesses potentially affected by a regulation may pursue pre-enforcement challenges to learn whether they must incur the costs of compliance"). As this Court has recognized, "'[p]arties need not … await the imposition of penalties under an unconstitutional enactment in order to assert their constitutional claim for an injunction in federal court.'" *United States v. Colo. Supreme Court*, 87 F.3d 1161, 1166 (10th Cir. 1996).

3. ***Section 9.*** Finally, the Chambers and their members will be harmed by Section 9, which requires businesses either to verify the work authorization of certain non-employees ("individual independent contractors") or suffer significant adverse consequences: take inflated, non-proportional withholdings from contracts with such contractors, or become liable for penalties in the same amount. A119. The Attorney General argues (AG Br. 28) that the Chambers do not have standing to challenge Section 9 because "the only injury" alleged by the Chambers is "the requirement to use an SVS," and Section 9 does not contain such a requirement.[13] This is simply mistaken: the use of Basic Pilot is *not* the only harm alleged in the Complaint and set forth in the declarations, which show that Section 9 will indeed cause substantial harms. The record demonstrates that, contrary to what Section 9

[13] He also argues that these are not proper defendants because they do not have any enforcement power. AG Br. 28-29. We address these assertions in the context of Appellants' identical Eleventh Amendment arguments. *See infra* Section I.B.

would require, under federal law employers are not supposed to verify independent contractors. *See* 8 C.F.R. § 274a.1(f) (verification of work authorization status is limited to "employees," which "does not mean independent contractors"); A134 (users of the Basic Pilot Program may not verify non-employees); A143 (same for SSNVS). Indeed, to verify the work status of independent contractors threatens liability under federal law—precisely because verifying the status of such workers is not contemplated, the decision to do so may subject the employer to claims of discrimination. 8 U.S.C. § 1324b(a)(6) (demanding documentation other than that required by federal law may give rise to a claim for immigration-related discrimination).

Accordingly, Section 9 effectively forces Oklahoma businesses that contract with individual independent contractors to withhold money from the consideration due under the contract at a high rate or incur penalties. A436, 444, 451, 460, 470, 478, 482; A43-44 (Compl. ¶¶ 56-59). This results in substantial harm: Section 9 makes it more expensive for individual independent contractors to do business in the State, and more difficult for businesses to use their services. It poses an impediment to completing jobs on time; exposes contracting entities to potential breach-of-contract suits from their customers; and costs businesses significant sums in either lost services or higher overhead expenses associated with paying the penalty or paying individual independent contractors more money to offset the

non-proportional withholding requirement. A436-37, 443-44, 451-52, 454, 460-61, 463, 470-71, 478-79, 482-83; A44-45 (Compl. ¶ 59(a)-(c)). At the very least, businesses will be forced to incur training and other personnel costs to have their employees calculate and remit the new withholdings or penalties required by the Act, which have heretofore been precluded under Oklahoma law. A437, 452, 461; *see* 68 Okla. Stat. § 1701.1(A), (C). This is ample to confer standing.

**B. The Eleventh Amendment Does Not Bar This Suit.**

Both Appellants' briefs summarize general principles concerning sovereign immunity, and discuss cases concerning damages actions brought directly against a state rather than, as here, state officials. AG Br. 14-15; Tax Br. 10-13. All of this is irrelevant—because this case seeks prospective equitable relief against state officers in their official capacities, Eleventh Amendment sovereign immunity is not implicated. *See Ex parte Young*, 209 U.S. 123 (1908). Recognizing this, Appellants instead challenge whether certain of them are proper defendants as to certain claims, and whether the Attorney General is a proper defendant at all. AG Br. 19-20; Tax Br. 19-20. There are, however, multiple proper defendants for each challenged provision of HB 1804.

1. As an initial matter, Governor Henry was named a defendant and was found by the district court to have a sufficient nexus to the enforcement of each of the challenged sections of HB 1804. A28 (Compl. ¶11); A787. He has not ap-

pealed, *see* AG Br. 15 n.1, and therefore has conceded that he is a proper defendant. *Villescas v. Abraham*, 311 F.3d 1253, 1256 (10th Cir. 2002). At a bare minimum, therefore, this suit can proceed against him.

2. The Human Rights and Tax Commissioners have conceded that they are proper defendants with respect to Sections 7(C) and 9, respectively. With respect to Section 7(C), they admit that "[t]he HRC is connected because they are given the authority to enforce the statute by investigating claims of discriminatory conduct and issuing remedies." AG Br. 20; *id.* at 14. This is plainly correct. *See* 25 Okla. Stat. §§ 1501(3), 1502.1, 1505, 1506; *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1227 (Okla. 1992) (describing the HRC's authority to enforce Title 25, which includes Section 7(C)). They also agree that the Tax Commissioners have "authority to enforce" Section 9. AG Br. 19; Tax Br. 4 (only seeking "immunity from suit with respect to" Sections 7(B) and 7(C)). This, too, is correct. *See* 68 Okla. Stat. §§ 102, 105(C), 226; *Okla. Tax Comm'n v. Smith*, 610 P.2d 794, 803 (Okla. 1980).[14]

[14] The Human Rights and Tax Commissioners' real complaint appears to be that the district court's order could be read as enjoining them on all claims, and they object to being nominally enjoined from doing things they do not do. Thus, the Human Rights Commissioners argue that they should not be enjoined from enforcing Section 9 because they do not enforce it; the Tax Commissioners argue likewise as to Section 7(C). AG Br. 19-20; Tax Br. 2 n.1, 4, 19-20. There is no reason, however, to believe that the injunction operates in the way they argue, nor would the relief they seek—piecemeal dismissals as to certain aspects of the injunction, while retaining them as concededly proper parties as to others—

3. The only real dispute, then, is whether the Attorney General is a proper defendant. It is well established that "[s]tate officers sued in *Ex parte Young* cases must have 'some connection' to the enforcement of the allegedly defective act," meaning they "have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty." *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007). This connection may arise from a specific grant of authority in the challenged statute, or from the official's general powers; "'it is not necessary that the officer's enforcement duties be noted in the act.'" *Finstuen v. Crutcher*, 496 F.3d 1139, 1151 (10th Cir. 2007). The Attorney General contends that a state official cannot be named who "has no connection or an attenuated connection to the law," AG Br. 17, and cites cases that stand for the unremarkable proposition that attorneys general are not proper parties to entirely private actions such as personal tort claims or divorce,[15] or in which local officials are charged with enforcing the law.[16]

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accomplish anything: "[I]n issuing and enforcing an injunction, …. [i]f … no relief becomes necessary against [certain state officers], their joinder as individuals will prove harmless." *Browder v. Gayle*, 142 F. Supp. 707, 714 (M.D. Ala.) (three-judge panel), *aff'd* 352 U.S. 903 (1956); *id.* at 714 n.13; *Lee v. Bd. of Regents*, 306 F. Supp. 1097, 1100 (W.D. Wis. 1969) (same).

[15] *See Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc) (attorney general lacked connection to a "private cause of action against medical doctors performing abortions"); *Shell Oil Co. v. Noel*, 608 F.2d 208, 212 (1st Cir. 1979) (attorneys general usually are not proper parties in private actions like tort disputes, divorce, and child custody). In *Shell Oil*, the court held that the attorney general

These arguments are a straw man; the Oklahoma Attorney General has specific statutory duties to enforce Sections 7(B)(2) and 7(C). In addition to his general duty to enforce state law and to "initiate … any action in which the interests of the state … are at issue," 74 Okla. Stat. §§ 18b(A)(1), (3), he has specific enforcement power with respect to Section 7(B)(2). He is charged with drafting contract language to conform to Section 7(B)(2)'s requirements, 74 Okla. Stat. § 18b(A)(7); he is required to "enforce the proper application of [public] monies" expended under those contracts, *id.* § 18b(A)(9); and he "institute[s] civil actions against members of any state board or commission for failure of such members to perform their duties as prescribed by the statutes," including Section 7(B)(2), *id.* § 18b(A)(16). He has repeatedly demonstrated the power and willingness to carry out these duties, including by bringing actions to enforce state statutes requiring certain contract terms, *e.g.*, *State ex rel. Edmondson v. Cemetery Co.*, 122 P.3d 480 (Okla. Civ. App. 2005); representing state agencies in contractor disputes, *e.g.*, *Colclazier v. State ex rel. Okla. Indigent Defense Sys. Bd.*, 951 P.2d 622 (Okla. 1997); and su-

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*was* a proper defendant because (like here) the statute outlawed certain conduct, and the attorney general was empowered to enforce the law. 608 F.2d at 212.

[16] *See Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416-17 (6th Cir. 1996) (attorney general had an insufficient connection to a statute enforceable only by local prosecutors); *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (per curiam) (same); *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113 (3d Cir. 1993) (same; school district enforced the law).

ing public entities to recover money owed by contractors, *e.g.*, *State ex rel. Cartwright v. Dunbar*, 618 P.2d 900 (Okla. 1980).

The Attorney General likewise has enforcement duties with regard to Section 7(C). Section 7(C) creates enforceable rights under the Oklahoma Anti-Discrimination Act, 25 Okla. Stat. § 1101 *et seq.* Under that statute, once an "aggrieved person" has exhausted the Human Rights Commission's administrative process and wishes to pursue a remedy in court, "the Attorney General shall file a civil action on behalf of the aggrieved person in a district court seeking relief." 25 Okla. Stat. § 1502.15(A). The Attorney General has much more than "some connection" to the enforcement of Sections 7(B)(2) and 7(C), and he therefore is a proper defendant.

### C. The Tax Injunction Act Does Not Apply To Section 9.

Appellants' final jurisdictional argument is that the Tax Injunction Act (TIA) deprived the district court of jurisdiction over the preemption challenge to Section 9. AG Br. 20-25; Tax Br. 5-8. But the TIA does not apply to Section 9, for two reasons: (1) Section 9's withholding and penalty provisions have a regulatory purpose and so do not come within the ambit of the TIA; and (2) litigating the constitutionality of a threshold question that merely serves as a trigger for a later assessment—here, whether Section 9's verification provision is constitutional—does not "enjoin, suspend or restrain the assessment, levy or collection of any tax."

### 1. Section 9 Does Not Impose A "Tax" Within The Meaning Of The TIA.

The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Appellants erroneously argue that the TIA wholly "den[ies] federal courts jurisdiction over State taxation issues." AG Br. 25. To the contrary, the TIA does not immunize "all aspects of state tax administration" from review, *Hibbs v. Winn*, 542 U.S. 88, 105 (2004), as the district court properly recognized. A772-73 (rejecting the argument "that the statute focuses on issues of state taxation and is therefore beyond the jurisdiction of the Court").

"'The mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised.'" *Am. Petrofina Co. of Tex. v. Nance*, 859 F.2d 840, 841 (10th Cir. 1988); *see also* A772. The "critical inquiry" in determining whether the TIA applies is "the purpose of the assessment and the ultimate use of the funds." *Marcus v. Kan. Dep't of Revenue*, 170 F.3d 1305, 1311 (10th Cir. 1999). If the principal purpose of an assessment is regulatory, it is not a "tax" within the meaning of the TIA. *Id.* at 1310-11; *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) ("If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a

fee rather than a tax."). This is a question of federal law, and "[t]he label given by a state for an assessment or charge is not dispositive." *Marcus*, 170 F.3d at 1311.

Whether an assessment is regulatory for purposes of the TIA depends primarily on three factors: (1) whether the assessment falls on a narrow class of individuals or broadly "upon many, or all, citizens"; (2) whether it is imposed by the legislature, or instead by "an agency upon those subject to its regulation"; and (3) whether it serves "regulatory purposes," such as "deliberately discouraging particular conduct by making it more expensive." *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, J.); *Marcus*, 170 F.3d at 1311. Under this third factor, a penalty—even a "tax" penalty—"is not a 'tax' for TIA purposes." *RTC Commercial Assets Trust v. Phoenix Bond & Indem. Co.*, 169 F.3d 448, 457-58 (7th Cir. 1999) ("States do not assess penalties for the purpose of raising revenue; they assess them so that delinquent tax debtors will be deterred the next time around. … [A penalty is] a special purpose regulatory device.").

Section 9 is just the type of targeted provision that is "regulatory" under the *San Juan Cellular* test that this Court embraced in *Marcus*. Section 9 requires businesses to verify an "individual independent contractor['s]" employment status. If it does not, the business must withhold money at the top marginal tax rate from the consideration due to its contracting partner (without regard to the amount of any taxes actually owed), or become liable for a penalty in the same amount. Far

from a general revenue provision, this section directly targets a narrow class of businesses and individuals—individual independent contractors and the businesses that contract with them—that the state deems responsible for a particular regulatory problem (*i.e.*, "independent contractors who are working in the state illegally," AG Br. 22). As the district court recognized, "it is undisputed that the underlying purpose of [Section 9] is to prevent the employment of illegal aliens," and that the "clear purpose" of the assessment "is to regulate behavior, not raise revenue." A773. The Act's drafters themselves announced that the law was designed to "take a stand … by targeting employers" and "enacts employer penalties" to punish noncompliance with the prohibition on illegal workers. A695-99. Penalties are not taxes. *RTC Commercial Assets Trust*, 169 F.3d at 457-58.

Indeed, the statute imposes these penalties with the clear regulatory purpose of "discouraging particular conduct by making it more expensive." *San Juan Cellular*, 967 F.2d at 685. Appellants themselves have explained that Section 9 "is clearly designed to prevent businesses from hiring an individual laborer who is not authorized to work in the United States." A553. They admitted that the law's purpose was to "eliminate the reasons the illegal aliens seek to come to this state … by discouraging employers from hiring illegal aliens." A518. By its plain terms, Section 9 was enacted "pursuant to the prohibition against the use of unauthorized labor," A119, which accords with the stated purposes of HB 1804 to address the per-

ceived "economic hardship and lawlessness" caused by illegal immigrants and to discourage them from residing in Oklahoma. A110. As the district court correctly concluded, these are regulatory objectives, not revenue objectives. A773.

Appellants themselves demonstrate the TIA's inapplicability when they assert that Section 9 "is not itself an actual tax," but rather "a method of tax collection." AG Br. 23. Courts have recognized that even when a statute has a broad revenue purpose—which this one does not—such indirect "methods" of collecting tax are not subject to the TIA. In *Wells v. Malloy*, for instance, the Second Circuit held that the TIA does not foreclose jurisdiction over a constitutional challenge to an indirect method of enforcing tax compliance (there, suspension of a driver's license). 510 F.2d 74, 77 (2d Cir. 1975); *see also Luessenhop v. Clinton County*, 466 F.3d 259, 268 (2d Cir. 2006) (TIA does not apply to a constitutional challenge to an aspect of the tax enforcement process).

Appellants do not cite these cases or discuss these foundational principles. The Attorney General states in conclusory fashion that Section 9 "is not regulatory in nature," and quotes general statements about the importance of federalism. AG Br. 21, 24-25. The Tax Commissioners wrongly assert that "[t]here is no challenge [in this case] to the definition of [a] tax," and dismiss the controlling authority as "bits and pieces of language … that differentiated between 'regulatory fees' and state taxes." Tax Br. 7. They hang their hat on a Third Circuit case, *Sipe v. Ame-*

*rada Hess Corp.*, 689 F.2d 396 (3d Cir. 1982), but that case concerned a challenge to the direct withholding of state unemployment compensation taxes from all employees and, more fundamentally, it had nothing to do with whether the statute's purpose was regulatory. The district court properly concluded that the Tax Injunction Act does not apply here.

### 2. The TIA Does Not Divest The District Court Of Jurisdiction Over The Chambers' Request For Declaratory Relief.

Even if the TIA did foreclose an injunction, it would not apply to the Chambers' claim for a declaratory judgment that the threshold verification requirement in Section 9 is preempted. *See* A25-26, 48-50, 52 (Compl. ¶¶ 1, 3, 68(c), 69(d), Prayer for Relief (A)). Appellants squarely admitted as much below, *see* A522-23, and properly so: such relief would simply resolve a threshold controversy arising under federal constitutional law—namely, whether the verification requirement is preempted by federal law—and would not itself "enjoin, suspend or restrain the assessment, levy or collection of any tax," 28 U.S.C. § 1341. Courts have consistently recognized that the TIA does not bar federal courts from resolving threshold issues that precede the determination whether taxes are owed. *See, e.g.*, *Luessenhop*, 466 F.3d at 268; *Mobil Oil Corp. v. Tully*, 639 F.2d 912, 917-18 (2d Cir. 1981); *Harvey & Harvey, Inc. v. Del. Solid Waste Auth.*, 600 F. Supp. 1369, 1375-76 (D. Del. 1985); *McKay v. Horn*, 529 F. Supp. 847, 858-59 (D.N.J. 1981). The district court did not reach this issue because it concluded that the TIA did not ap-

ply, and granted a preliminary injunction. If this Court concludes that the TIA does apply, it therefore must remand the case for the district court to consider in the first instance the Chambers' alternative request for declaratory relief.

## II. THE DISTRICT COURT PROPERLY ENJOINED ENFORCEMENT OF HB 1804.

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 their favor, and that the public interest favors relief. *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). In a preemption challenge, the likelihood of success on the merits is paramount, because complying with a preempted law constitutes irreparable harm, and neither the public interest nor the balance of harms is served by enforcing an invalid statute. *See infra* Section II.D. Here, there is much more than a mere likelihood of success on the merits; the challenged provisions of HB 1804 are indeed preempted. They are subject to the express preemption provision contained within IRCA; they attempt to regulate in a field that Congress exclusively occupied; and their singlemided focus on enforcement conflicts with the carefully calibrated balance of goals that Congress sought to achieve and with the methods Congress chose to achieve that balance. The preliminary injunction should be affirmed.

### A. IRCA Expressly Preempts Sections 7(B), 7(C) and 9 of HB 1804.

The Constitution provides that the laws of the United States "shall be the supreme Law of the Land[,] any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Accordingly, it has been recognized since at least *McCulloch v. Maryland* that federal law preempts contrary state enactments. 17 U.S. (4 Wheat.) 316, 405-06, 425-37 (1819). Preemption may be either express or implied, and applies equally whether the federal provision is a statute or a regulation; in either case, if the state law hinders or frustrates federal objectives, the state law is invalid. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 885 (2000); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). We discuss implied preemption (both field preemption and conflict preemption) in Sections II.B and II.C below. Express preemption arises when a federal statute expressly precludes action by the states; state laws that come within the scope of an express preemption provision are void. *PG&E v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983). 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." 8 U.S.C. § 1324a(h)(2).[17] That

[17] The parenthetical savings clause is plainly inapplicable. No licenses are at issue, and no party has argued otherwise.

provision displaces each of the challenged provisions, as the district court properly held. A779-80.

1. Through operation of Oklahoma's antidiscrimination laws (title 25 of the Oklahoma Statutes), Section 7(C) would impose administrative and judicial penalties on an employer who employs an illegal alien and discharge a legal worker. This provision therefore falls squarely within IRCA's preemption provision. As the district court explained, Section 7(C) "imposes penalties of … facing a civil lawsuit for wrongful termination [that] are dependent on failing to follow the State's regime for regulating the employment of illegal aliens." A780. It targets only those who employ unauthorized aliens, A116; it authorizes a range of civil damages penalties against them (including backpay and attorney's fees), *see, e.g.*, 25 Okla. Stat. § 25-1505(B), (C); *supra* at 14-15; and an adverse finding under this section is grounds for excluding an employer from government contracts, *see* Okla. Admin. Code § 580:20-1-9(b)(6).

These are certainly "civil sanction[s]" within the meaning of 8 U.S.C. § 1324a(h)(2). A "sanction" is "a restrictive measure used to punish a specific action or to prevent some future activity." *Webster's Third New Int'l Dictionary* 2009 (1971); *accord Black's Law Dictionary* 1341 (7th ed. 1999) ("[a] penalty or coercive measure that results from failure to comply with a law, rule, or order"). That is precisely the purpose and effect of Section 7(C). As the Supreme Court re-

peatedly has recognized, civil liability may "disrupt[] [a] federal scheme no less than state regulatory law to the same effect," and so is equally preempted. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008); *see Aetna Health Inc. v. Davila*, 542 U.S. 200, 204, 208 (2004); *Geier*, 529 U.S. at 881-82.

Appellants respond that Section 7(C) imposes no "sanction" on the theory that this term is limited to "a civil fine or criminal penalty." AG Br. 46. Their argument relies on a snippet of legislative history that focused on a different topic—the savings clause—and ignores the statute's plain meaning and Supreme Court precedent. Indeed, Appellants have offered no reasoned basis for the surprising theory that Congress meant to forestall only the limited sorts of monetary penalties they identify, but to throw wide the doors for unlimited civil liability. The sole case they cite, *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219 (2d Cir. 2006), is not to the contrary. *Madeira* merely held that IRCA does not preempt a worker's personal-injury claim against his employer that (unlike Section 7(C)) depends in no way on the worker's immigration status. 469 F.3d at 239-40, 242.

The Attorney General further contends that Section 7(C) does not impose a sanction for employing unauthorized workers, but rather "create[s] a state action for the termination of legal residents." AG Br. 45 (emphasis omitted). This is wordplay, and Congress's preemptive intent surely cannot be circumvented by this

sort of gamesmanship. Liability under Section 7(C) falls *only* on employers of illegal workers, and it applies *because* they employ illegal workers. This is plain from the statute, and the Attorney General has admitted as much. A506 (Section 7(C) is meant to "prevent[] the hiring of illegal aliens" and applies "***only if*** the employer retains an illegal alien" (emphasis in original)). This, of course, is what Oklahoma intends: the purpose of the statute in general (and Section 7(C) in particular) is to penalize and deter employment of illegal aliens. A506, 545 & n.2, 566-67. Because this provision imposes liability "upon those who employ … unauthorized aliens," 8 U.S.C. § 1324a(h)(2), it is preempted.

2. Sections 7(B)(2) and 9 also are expressly preempted, as the district court properly concluded. *See* A780 (Section 7(B) "imposes penalties of loss of contract" which "are dependent on failing to follow the State's regime for regulating the employment of illegal aliens"); *id.* (Section 9 "imposes a penalty of increasing the tax rate on an employer who doesn't comply with the State's immigration law"). Both sections seek to regulate employment verification: Section 7(B)(2) would require employers to use Basic Pilot, thereby limiting Congress's approved options for verifying employees to a single experimental system, and Section 9 would for the first time require verification for non-employee contractors. And both sections would impose penalties on businesses that follow federal instead of state law. Section 7(B)(2) would automatically and permanently debar employers

from all public contracts in Oklahoma, which is not only a sanction, but a particularly draconian one. Section 9 imposes a special burden on contracting entities: Whereas *no* withholding typically is required of a contracting entity for independent contractors, 68 Okla. Stat. § 1701.1(A), (C), Section 9 imposes an exceptionally high, non-proportional withholding requirement on contracting entities that fail to verify non-employees (without regard to the amount of any tax actually owed), and makes the entity itself subject to penalties for failing to do so.

Oklahoma imposed these verification requirements and accompanying penalties with the express purposes of regulating the hiring of undocumented workers and imposing penalties on that basis. HB 1804 justifies both sections as ways of addressing the perceived "economic hardship and lawlessness" caused by illegal immigrants and discouraging them from residing in Oklahoma, A110, and Section 9 by its terms states that it is enacted "pursuant to the prohibition against the use of unauthorized labor," A119. Indeed, Appellants themselves have argued that both sections are meant to penalize hiring illegal aliens: Section 7(B)(2), they argue, applies to employers who "are going to … hire an illegal alien" and "prevents state agencies from hiring contractors who employ illegal aliens," and Section 9 "tax[es] state employers who hire illegal aliens." A505, 517-18, 545.[18] Appellants further

[18] This is also clear from Appellants' own explanation of Section 9, which they justify on the theory that the federal system is inadequate to ensure that businesses are

explain that these sections are meant to "discourage[e] employers from hiring illegal aliens," A518, and are necessary because the system enacted by Congress is inadequate to prevent businesses from hiring illegal aliens (even if, like the Chambers and their members, they follow federal law and do not knowingly do so). A698.

The Attorney General now argues that Section 7(B)(2) does not impose a "sanction" because debarment is not in the nature of a civil fine or criminal penalty. AG Br. 42-43. This is an extraordinary contention. Levying debarment against a contractor is manifestly a "penalty or coercive measure," *Black's*, *supra*, and a particularly severe one for many of the Chambers' members, who depend on public contracts as integral to their business, *see* A37-39 (Compl. ¶¶ 41, 43, 45, 48); *see also* A434-45, 442, 450, 458, 462-63, 467, 474. Alternatively, Appellants reprise their "freedom of contract" argument, contending that debarment cannot be a sanction because Oklahoma is free to contract with whomever it wishes. AG Br. 40-43. But as explained above (and as the district court properly held), whatever power Oklahoma has to make contracting decisions, the Supremacy Clause prevents it from doing so by means of preempted legislation. *Supra* at 26. The Attorney General also argues that Section 9 "is not a penalty for hiring an illegal alien, it

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hiring only documented workers, thus requiring increased withholdings. AG Br. 22-23.

is a penalty for not performing a tax withholding." This argument simply ignores that the clear purpose and effect of these provisions—as Appellants themselves have argued—is to penalize and prevent employment of illegal aliens. This is precisely what Congress intended to forbid in § 1324a(h)(2): imposing "civil or criminal sanctions … upon those who employ … unauthorized aliens." Sections 7(B)(2) and 9 therefore are preempted.

### B. IRCA Preempts The Field Of Employment Status Verification.

Sections 7(B), 7(C) and 9 of the Oklahoma statute also are preempted because they would operate in a field that federal law occupies exclusively: verifying the immigration status of workers in the United States. Field preemption exists when, as here, "the federal interest is so dominant" and the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); *Housing Auth. of City of Ft. Collins v. United States*, 980 F.2d 624, 632 (10th Cir. 1992) (field is preempted "'if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority'"). When field preemption applies, state enactments are invalid, "no matter how well they comport with substantive federal policies." Laurence Tribe, *American Constitutional Law* § 6-27, at 497 (3d ed. 2000).

To consider whether federal law preempts a given field, courts evaluate the breadth and depth of "Congressional legislation, agency regulation, and agency adjudication," *Sw. Bell Wireless, Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185, 1190 (10th Cir. 1999), to determine whether the federal law's "'structure and purpose'" show a "pre-emptive intent." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996). Field preemption is particularly likely "where a multiplicity of federal statutes or regulations govern and densely criss-cross a given field." Tribe, *supra*, § 6-31, at 1206-07. In that circumstance, "the pervasiveness of such federal laws will help to sustain a conclusion that Congress intended to exercise exclusive control over the subject matter." *Id.*; *see Amalgamated Ass'n of Street Employees of Am. v. Lockridge*, 403 U.S. 274, 296 (1971); *Norfolk S. Ry. Co. v. Shanklin,* 529 U.S. 344 (2000). When federal law does occupy a field, the court must consider the "purpose and effect of the state law at issue" to determine whether it falls within the preempted field. *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1248 (10th Cir. 2004).[19]

[19] These implied preemption principles operate in their "ordinary" fashion regardless of the existence of an express preemption provision or savings clause, as the Supreme Court has explained. *Geier*, 529 U.S. at 869. The Ninth Circuit's mistaken conclusion to the contrary in *Chicanos Por La Causa, Inc. v. Napolitano*, a recent decision permitting Arizona to mandate the use of Basic Pilot, is irreconcilable with this binding precedent, and is but one of the many flaws in that decision. *See* __ F.3d __, 2008 WL 4225536, at *7 (9th Cir. Sept. 17, 2008) (finding no implied preemption because "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation"). *See also infra* at 56 n.22, 65 n.26.

The field of employment status verification is one in which the federal government's province is exclusive. As outlined above (at 4-12), federal law regulates this field in precisely the "dense" and "pervasive" fashion that characterizes field preemption. *See Amalgamated Ass'n*, 403 U.S. at 296; *Rice*, 331 U.S. at 230. Federal law defines in exquisite detail who is authorized to work, *see*, *e.g.*, 8 C.F.R. § 274a.12, and the manner in which every employer in the country must verify that a prospective employee is authorized to work. Before any prospective employee may be hired anywhere in the country, the prospective employer must "verif[y] that the individual is not an unauthorized alien." 8 U.S.C. § 1324a(b)(1)(A). The prospective employee must present documents that establish his employment authorization and identity, *id.* § 1324a(b)(1)(B), (C), (D), and must attest under penalty of perjury that he is authorized to work, *id.* § 1324a(b)(2).

This process is accomplished through the familiar federal I-9 Form. 8 C.F.R. § 274a.2(a)(2); A126-29 (I-9 form). Federal regulations specify the manner in which identification documents must be examined and the I-9 Form completed, including the precise documents that may be presented. 8 C.F.R. § 274a.2(b). Employees may choose which of the approved documents they wish to present, and an employer may not require the presentation of other documents. 8 U.S.C. § 1324a(b)(1)(A). This is in part to limit the danger that requests for additional

documents will be used to mask discriminatory treatment. *See id.* § 1324b(a)(6); A126 (I-9 Form; "It is illegal to discriminate against work eligible individuals. Employers *cannot* specify which document(s) they will accept from an employee."); H.R. Conf. Rep. No. 1000, at 87, 1986 U.S.C.C.A.N. at 5842-43. Federal law does not contemplate verifying the status of independent contractors, who are excluded by definition from the verification requirements. 8 C.F.R. § 274a.1(f), (j).[20]

Furthermore, federal law sets the metes and bounds of appropriate prohibitions and sanctions on employers. It forbids an employer from hiring an alien knowing he is unauthorized to work, or without complying with the I-9 Form process. 8 U.S.C. § 1324a(a)(1)(A), (B). It provides a defense to liability to employers who comply in good faith with the I-9 Form process. *Id.* § 1324a(a)(3); 8 C.F.R. § 274a.4. Determining whether an employer knowingly hired an unauthorized worker is committed to a specialized federal administrative review system, which permits complaints to be filed and gives federal officials substantial discretion to determine which violations to pursue. 8 U.S.C. § 1324a(e)(1); 8 C.F.R. § 274a.9.

[20] Federal law further delves into such specific eventualities as lost verification documents, 8 C.F.R. § 274a.2(b)(1)(vi); expired employment verification, *id.* § 274a.2(b)(1)(vii); verifying work authorization after changes in employment status, *id.* § 274a.2(b)(1)(viii); and verifying the status of a previous employee, *id.* § 274a.2(c). It even specifies how employers must retain I-9 Forms. 8 U.S.C. 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2), (e).

If the federal government determines to pursue a suspected violation, then every aspect of the resulting procedure is spelled out in lengthy and detailed provisions—everything from the manner in which such proceedings are commenced (via a "Notice of Intent to Fine") to the required method of serving such a notice. They even specify the rules of procedure, which in many ways mirror federal court proceedings, including the right to an adversarial hearing before a federal Administrative Law Judge and placing the burden of proof on the government. 8 U.S.C. § 1324a(e); 8 C.F.R. § 274a.9; 28 C.F.R. pt. 68. At the end of this process, IRCA and its regulations carefully set civil and criminal sanctions for violations, including calibrated and graduated monetary penalties, fines, and civil injunctions against repeat offenders. 8 U.S.C. § 1324a(e)(4), (f); 8 C.F.R. § 274a.10(b). The ALJ's decision is subject to administrative appeal, then federal judicial review. 8 U.S.C. § 1324a(e)(7), (8).

Congress also regulated the manner in which this detailed process could be changed. It required ongoing study, and specified procedures to be followed before aspects of the work authorization process may be modified. It mandated ongoing reports about the implementation of § 1324a. *See* IRCA § 402, 100 Stat. at 3441 (codified in 8 U.S.C. § 1324a note). The President is required to monitor the effectiveness of the verification system, and to transmit to designated House and Senate committees written reports of proposed changes well in advance of their ef-

fective date, 8 U.S.C. § 1324a(d)(1)(A), (d)(3), which trigger mandatory congressional hearings under certain circumstances, *id.* § 1324a(d)(3)(C). Any change in the documents used to prove work authorization status is a "major change" that requires two years' written notice to Congress. *Id.* § 1324a(d)(3)(A)(iii), (D)(i), (D)(ii).

And there is more. Having established these detailed and exclusive procedures in service of its explicitly stated goal of national uniformity, *see* IRCA § 115, 100 Stat. at 3384, Congress went on to specify the very limited experimentation with employment verification it would permit. In 1996, it authorized the creation of "pilot programs for employment eligibility confirmation." 8 U.S.C. § 1324a note. Concern about whether IRCA had adequately satisfied Congress's goals led it to approve some experimentation; anxiety as to whether the experiments might worsen those problems caused Congress carefully to delimit the appropriate scope of experimentation. *See supra* at 7, 9. The use of pilot programs could be used *only* at the election of employers, and indeed the federal government is forbidden from requiring employers other than federal entities and statutory violators to participate in the pilot programs. *Id.*; IIRIRA § 402(a), (e), 110 Stat. at 3009-656, -659.

Simply put, Congress perceived the employment of illegal aliens to be a national problem, and so implemented a national solution through finely reticulated

statutes and regulations that carefully balance multiple goals. This federal statutory and regulatory scheme is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement or change it. This is precisely when field preemption applies. *See Ramah Navaho Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 839-40 (1982) (finding field preemption where "[f]ederal regulation … is both comprehensive and pervasive" and reflects a "'major national goal of the United States'"); *Sw. Bell*, 199 F.3d at 1192 (finding preemption where the subject area was "a federal interest and requires a national approach to regulate the field"); *cf. Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 85 n.41 (1st Cir. 1997) ("a congressional determination to effect a nationally uniform standard presents 'a situation similar in practical effect to that of federal occupation of a field'").

Each of HB 1804's challenged provisions, however, would directly intrude into the domain of employment status verification. This is manifest in the statute. Section 7(B)(2) would change Congress's verification methods and priorities by requiring the use of Basic Pilot to the exclusion of other approved verification options and debarring from public contracts all businesses that do not comply. Section 7(C) would affect status verification by subjecting employers who do not use Basic Pilot to administrative investigations and penalties if they are found to employ an illegal alien. And Section 9 likewise seeks to directly regulate status verification, imposing burdensome non-proportional withholding requirements or pen-

alties on employers who do not verify the work authorization of individual independent contractors. These provisions clearly regulate the hiring of aliens, which was HB 1804's stated purpose. *See supra* at 12-13, 38, 43-46. Because this field is exclusively occupied by the federal government, each of the challenged provisions is expressly preempted.

### C. The Challenged Provisions Conflict With Congress's Goals And Its Chosen Methods For Accomplishing Them.

Finally, even if the field of status verification were not preempted, the challenged provisions are preempted because they conflict with the goals that Congress sought to balance, and the methods it specifically chose to do so. IRCA represents a careful balance of multiple goals, effectuated through designated methods, and Oklahoma's own goals and methods are starkly at odds with the choices Congress enacted into law.

1. The Supreme Court has explained that "even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Conflict preemption applies "where 'under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 372-73 (altera-

tions omitted).[21] This is particularly true in matters of immigration. Congress has "superior authority in this field," and where it "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 v. Davidowitz*, 312 U.S. 52, 66-67 (1941); *see Galvan v. Press*, 347 U.S. 522, 531 (1954) ("[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.").[22]

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[21] *Accord Savage v. Jones,* 225 U.S. 501, 533 (1912) (a "state law must yield" if it prevents "the purpose of" a federal law from being accomplished or "frustrate[s]" the federal law's "operation"); *Houston v. Moore,* 18 U.S. (5 Wheat.) 1, 22 (1820) (Supremacy Clause overrides state laws whenever their enforcement would "thwart[]" or "oppose[]" the "will of Congress").

[22] The Ninth Circuit's reliance on *De Canas v. Bica*, 424 U.S. 351 (1976), for the contrary proposition was mistaken. *See Chicanos Por La Causa*, 2008 WL 4225536, at *5. *De Canas* found "uniform national rules" and "general sanctions" for status verification to be lacking at the time it was decided, 424 U.S. at 360 n.9, but that case predated the enactment of IRCA by a decade, and IRCA enacted just such rules and sanctions. *See Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-29 (1981) (a decision preceding the enactment of the relevant federal statute "can hardly be viewed as an authoritative construction" of the subsequent enactment for preemption purposes). For similar reasons, the Ninth Circuit was mistaken to employ the so-called "presumption against preemption." 2008 WL 4225536, at *5. That presumption does not apply "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). The federal presence here is longstanding.

Relevant here, conflict preemption commonly arises when Congress has carefully balanced multiple and competing goals, and employed particular methods for achieving its chosen balance. In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, for instance, the Supreme Court evaluated a preemption claim regarding the federal patent laws. Because those statutes "strike [a] balance" among goals, the states may not "second-guess" that judgment. 489 U.S. 141, 144, 152 (1989); *accord Biotech. Indus. Org. v. Dist. of Columbia*, 496 F.3d 1362, 1372-74 (Fed. Cir. 2007). In *National Foreign Trade Council v. Natsios*, a Massachusetts law that would have limited trade with Burma was held preempted where Congress's chosen policy "attempt[e]d to balance various concerns," and "constructed" a "carefully balanced path." 181 F.3d 38, 76 (1st Cir. 1999), *aff'd sub nom. Crosby*, 530 U.S. at 377-78 (noting Congress's decision to "'steer a middle path'" by means of careful "calibration"). And in *Rogers v. Larson*, the Third Circuit held the Virgin Islands' law regulating alien workers to be preempted by the Immigration and Nationality Act because it "strike[s] a [different] balance" between the goals of "assur[ing] an adequate labor force on the one hand and to protect the jobs of citizens on the other." 563 F.2d 617, 626 (3d Cir. 1977). *See also Brown*, 128 S. Ct. at 2412 (preemption where Congress "struck a balance"); *Riegel*, 128 S. Ct. at 1006-08 (preemption where federal agency balanced costs and benefits); *Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981); *Colacicco v. Apo-*

*tex*, 521 F.3d 253, 271-72 (3d Cir. 2008) (pre emption where FDA "balanc[ed] the benefits and risks"), *petition for cert. filed* No. 08-437 (Oct. 2, 2008).

States likewise may not recalibrate Congress's selected balance by alteri ng the methods Congress chose t o achieve that balance. Accordingl y, conflict pre-emption occurs when state law "interfere s with the methods by whic h the federal statute was designed to reach [its ] goal." *Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 494 (1987). This is so even when the state law purports to serve the same end as federal law: "[t]he fact of a common end hardly neutralizes conflicting means." *Crosby*, 530 U.S. at 379; *Gade v. Nat'l Solid Wastes Mgmt. Ass'n* , 505 U.S. 88, 103 (1992). As Justice Holmes explained, "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & W. Carolina Ry. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).

2. IRCA represented a painstaking effort to accomplish mu ltiple purposes, and to do so by parti cularized means. At its inception, IRCA was the result of extensive study and a m onumental effort of legislative co mpromise. *See supra* at 1, 4; *Nat'l Ctr. for Immigrants' Rights* , 913 F.2d at 1366 (IRCA represents "a carefully crafted political co mpromise which at every level balances specifically chosen measures discouraging unauthorized employment with measures to protect

those who might be adversely affected"). Beginning in 1971, and in every year thereafter, Congress conducted "[e]xtensive and comprehensive hearings" on proposals to prohibit employment of illegal aliens. H.R. Rep. No. 99-682(I), at 52-56, 1986 U.S.C.C.A.N. at 5655-60; S. Rep. No. 99-132, at 18-26. When after 15 years of study Congress finally enacted IRCA, it sought to accomplish at least four critical goals: to prevent the hiring of illegal aliens, while being "the least disruptive to the American businessman and … also minimiz[ing] the possibility of employment discrimination," H.R. Rep. No. 99-682(I), at 56, 1986 U.S.C.C.A.N. at 5660; S. Rep. No. 99-132, at 8-9, 32, all within a framework of uniform national enforcement, IRCA § 115, 100 Stat. at 3384. *See supra* at 4-6.

These goals were accomplished through particular methods. Limiting the hiring of illegal aliens was accomplished by means of the document-based I-9 Form process and the employer sanctions regime, and the implementing regulations for both. *See supra* at 5-6. But this goal was not elevated above all others. A deliberate decision was made to limit burdens on employers. Statutory violations were limited to "knowing" violations, 8 U.S.C. § 1324a(a)(1)(A), and good-faith compliance with the I-9 Form process was established as a defense, *id.* § 1324a(a)(3). The process for adjudicating employer violations was carefully delineated, including numerous procedural protections, *id.* § 1324a(e); 8 C.F.R. § 274a.9; 28 C.F.R. pt. 68, and employer sanctions were graduated and calibrated,

not only to limit burdens on employers, but also because over-sanctioning employers could result in discrimination against certain applicants, *see* A195-96, 204-06. Congress likewise limited the burdens on employers through its decision to create a nationally uniform system, which facilitates uniform nationwide enforcement, and alleviates the burden on national employers that would result from having to comply with multiple employee verification standards in different jurisdictions.

The goal of preventing discrimination was embodied in the statute's robust prohibition against discrimination in hiring. 8 U.S.C. § 1324b. Additionally, Congress made it a discriminatory practice to "request more or different documents" than § 1324a requires, or to "refus[e] to honor documents tendered that on their face reasonably appear to be genuine" *id.* § 1324b(a)(6), for fear that such requests would mask discrimination. And independent contractors are excluded from the scope of IRCA's verification requirements, for good reason: this avoids discrimination that could result from screening before contracts are signed, [23] and also avoids burdens on businesses from the continuing verification of job-specific con-

[23] *See* 8 C.F.R. § 274a.1(f), (j); A134 (E-Verify MOU ¶¶ II.C.7, 8) ("The Employer is prohibited from initiating verification procedures before the employee has been hired [or] for pre-employment screening of job applicants."); A143 (SSNVS Handbook) ("It is illegal to use the service to verify SSNs of potential new hires or contractors."); *see Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 526 (M.D. Pa. 2007) ("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).

tractors (which Congress expressly sought to avoid, *see* H.R. Rep. 99-682(I), at 57, 1986 U.S.C.C.A.N. at 5661).

Likewise, Congress's decisions to authorize pilot programs for study, and to keep those programs deliberately voluntary, stemmed from a recognition that online verification is extremely burdensome for some employers; that such systems may themselves lead to discrimination; and that further study was needed. *See supra* at 7, 9; A195-96, 204-06. Simply put, this is not a situation in which Congress "create[d] only a floor" and thereby left state law "room … to operate." *Geier*, 529 U.S. at 868; *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000). Rather, it selected the particular regulatory scheme that it determined would best accomplish its specified goals.

3. HB 1804, however, would thwart Congress's goals by enacting substantive requirements and enforcement methods fundamentally different from Congress's, thereby shifting the balance of objectives Congress sought to achieve. Whereas Congress sought to reconcile numerous goals, Oklahoma pursues only one: keeping undocumented workers out of Oklahoma at all costs. Leaving aside the very real questions about the efficacy of Oklahoma's chosen method, it is clear that this is the singular goal of HB 1804. *See supra* at 12-13, 38, 43-46; AG Br. 3 ("The Legislature's purpose in passing HB 1804 was to protect Oklahoma residents from the adverse effects of illegal immigration."); A698 (HB 1804 "was ap-

proved because of the complete failure of the federal government to enforce existing immigration laws"); *accord* A518, 533, 695-99.

To that end, HB 1804 "would stand as an obstacle to the federal government's chosen method[s]." *Geier v. Am. Honda Motor Co.*, 166 F.3d 1236, 1241 (D.C. Cir. 1999), *aff'd* 529 U.S. 861 (2000). It would effectively make Basic Pilot mandatory for numerous employers, notwithstanding that Congress expressly made it voluntary. (The idea that the Oklahoma legislature could make Basic Pilot mandatory, where the Secretary of Homeland Security is forbidden from doing so, is more than passing strange.) Unlike federal law, Oklahoma attempts to enforce its conflicting verification requirements by imposing multiple penalties on employers: debarment from public contracts, the creation of administrative liability for "discriminatory practices," and onerous withholding requirements and penalties. Furthermore, whereas federal law contains a good-faith defense for statutory violations, HB 1804 does not; the only safe harbor in Oklahoma law is use of the Basic Pilot Program. Federal law limits liability to "knowing" violations; Oklahoma law requires only the lessened *scienter* of "reasonably should have known" under Section 7(C). The federal system entrusts the determination of employer violations to an administrative system that observes numerous procedural protections, and which is rooted in federal agencies' specialized expertise to address issues of alienage and employment status, *see supra* at 6 & n.3; the Oklahoma statute creates

no such safeguards, and would have these quintessentially federal determinations handled by the Oklahoma Human Rights Commission, 25 Okla. Stat. §§ 1502, 1502.1, 1506(a).[24] Federal law excludes the verification of independent contractors from its coverage; Section 9 effectively requires it.

The result of this Oklahoma regime would be to impose substantial burdens on employers that Congress did not contemplate, and to upset the careful balance of competing goals Congress sought to achieve. Under circumstances like these, where Congress has acted with deliberate nuance but the state "cho[oses] a blunt instrument to further only a single goal," state law is preempted. *Natsios*, 181 F.3d at 76; *see also Edgar v. Mite Corp.*, 457 U.S. 624, 634 (1982) (preemption results when a state "upset[s] the careful balance struck by Congress"). This is impermissible in its own right, and it is made all the worse by the fact that if Oklahoma is permitted to act in this domain, so too can every state. *See Bonito Boats*, 489 U.S. at 161 (considering the "prospect" of action by "all 50 States" in evaluating preemption); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001)

[24] *See also Lozano*, 496 F. Supp. 2d at 536 (states "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] immigration judge."); *Gutierrez v. City of Wenatchee*, 662 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).

(same).[25] This departure from what Congress contemplated is flatly impermissible. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 230 (1986) ("incongruous is the idea that a Congress seeking uniformity … would intend to allow widely divergent state law").

4. Relatedly, the challenged provisions conflict with federal law because they would limit the options for employment verification that specifically are authorized under federal law, thereby "present[ing] an obstacle to the variety and mix of [verification methods] that the federal regulation sought." *Geier*, 529 U.S. at 881. The Supreme Court long has recognized that when Congress has preserved an array of options, a state law limiting those options is preempted. In *Geier*, for instance, a federal motor vehicle safety standard "deliberately provided … manufacturer[s] with a range of choices among different passive restraint devices" to install, and did so for a variety of policy reasons: "a mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer pas-

[25] Indeed, such Balkanization already has begun. Illinois has passed a law *forbidding* employers from using Basic Pilot. A416-17. Numerous other states have enacted or are considering a variety of disparate verification regimes. A381, 385-89 (Nat'l Conf. of State Legis., *2007 Enacted State Legislation Related to Immigrants and Immigration* (Nov. 29, 2007)) (reporting that 244 employer-related immigration bills were introduced in 45 states in 2007, and 20 states enacted legislation). This patchwork is precisely what Congress sought to avoid.

sive restraint systems." *Id.* at 875, 879. The Supreme Court rejected the plaintiffs' argument that, "the more airbags, and the sooner, the better," *id.* at 874, and held preempted a tort suit for negligent design, precisely because that result would interfere with the choices that federal law deliberately preserved.[26] Numerous decisions hold likewise. *See Wissner v. Wissner*, 338 U.S. 655 (1950) (California inheritance law is preempted where federal law granted policyholders the right to select a beneficiary and state law did not); *Griffith v. Gen. Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002) (where federal law gives choices, "a state suit that depends on foreclosing one or more of those options is preempted").

Oklahoma law would limit the choices preserved by federal law, as Chief Judge Cauthron recognized. Section 7(B)(2) "attempts to restrict the documents adequate to verify a potential employee[']s status, [even though] this restriction is contrary to the instructions set by federal law for using the I-9 Form." A781. The process for verifying employment eligibility is the I-9 Form process, unless a par-

[26] In its recent decision in *Chicanos Por La Causa*, the Ninth Circuit held *Geier* inapplicable because it could not find "strong evidence of Congress's intent to promote competition and balance federal goals in a competitive environment encouraging alternative systems." 2008 WL 4225536, at *8. But this is entirely beside the point. The relevant preemption inquiry is whether Congress sought to balance multiple goals and selected an array of options to achieve them, not whether this regulatory regime sought to promote the *same* goals as the regulatory regime in *Geier*. And on the proper inquiry, this case and *Geier* are on all fours—just as in *Geier*, Congress here plainly intended to accomplish and to balance multiple goals, and it preserved a variety of permissible means to reach those ends.

ticular employer has chosen to use Basic Pilot—a choice that is deliberately reserved to employers, for the reasons we have explained. *Supra* at 8-12, 23-26, 53. What is more, within the I-9 Form process, IRCA and its implementing regulations guarantee to prospective employees the choice of which documents to present. Employers may only examine whether the documents presented "reasonably appear on [their] face to be genuine," 8 U.S.C. § 1324a(b)(1)(A)(ii), and asking for additional documents is forbidden and may be treated as an "unfair immigration-related employment practice," *id.* § 1324b(a)(6); *supra* at 5-7, 29-30. This policy choice, too, was deliberate—Congress amended IRCA in 1990 and 1996 to add these provisions, in order to ensure that requests for additional documents could not be used to mask discrimination. *See supra* at 5-7, 9. Whereas Congress has deliberately preserved these choices for employees and employers, Section 7(B)(2) and Section 7(C) (insofar as it imposes liability on businesses that fail to adopt Basic Pilot) would prevent employers and employees from exercising them. For this reason, too, Sections 7(B)(2) and 7(C) are preempted.[27]

[27] The inclusion of SSNVS in Oklahoma's Status Verification System is preempted for an additional reason: "it is impossible for a private party to comply with both state and federal requirements." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). 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 mandates that SSNVS be used *solely* to assist employers in complying with year-end wage reporting requirements, *see* Agency Information Collection Activities, 70 Fed. Reg. 8125, 8128 (Feb. 17, 2005), it is "illegal" to use the

Section 9 is preempted for a different reason. Rather than *restricting* the range of verification options Congress approved (as Section 7(B)(2) and 7(C) do), it would *expand* the verification requirement beyond what Congress intended. This is impermissible. When, as here, Congress sought to achieve its objectives by deliberately excluding from regulation a class of businesses, "no such regulation is appropriate or approved pursuant to the policy of the statute, [and] States are not permitted to use their police power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). HB 1804 also purports to impose burdensome withholding requirements and other penalties for failure to comply with those inconsistent state requirements, which is equally preempted. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-21 (1948) (a state may not enforce penalties for failure to follow preempted regulations); *Hines*, 312 U.S. at 73-74 (the enforcement of a state statute that conflicts with the "uniform national system" of immigrant registration is preempted).

### D. The Remaining Requirements for a Preliminary Injunction Are Satisfied.

Having established a strong likelihood of prevailing on the merits of this preemption case, the remaining preliminary injunction factors are easily met. As the district court explained, in preemption cases the merits determination largely

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system for any other purpose, and the system "does not make any statement about [an] employee's immigration status." A143-44 (SSNVS Handbook).

subsumes the other factors (irreparable harm, balance of harms, and the public interest) relevant to preliminary relief. A781-82. When plaintiffs are "forced to comply with a law that may ultimately be found to be preempted," there is irreparable harm. A781; *see Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 785 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990) (enforcement of state laws regulating airlines "would violate the Supremacy Clause, causing irreparable injury to the airlines" by "depriving [them] of a federally created right to have only one regulator"). Businesses in Oklahoma are entitled to rely on Congress's weighing of the benefits and burdens of immigration verification and enforcement, and to use the same uniform, nationwide verification system Congress created for all employers. Moreover, the Chambers submitted ample evidence—all of it unrebutted and credited by the district court—of the numerous harms HB 1804 would cause. *Supra* Section I.A. Many of those harms are financial, and because the state is immune from a suit for money damages if the law is deemed unconstitutional, "no method of compensation can remedy these harms." A781.

Appellants do not confront the rule that preempted legislation imposes irreparable harm, and their sole response to the additional harms is to call them "speculative" and "not imminently harmful." AG Br. 51-52. They cite no facts to support these conclusions, which are at odds with the district court's findings, and their assertions are contrary to the evidence. With respect to Section 7(B)(2), for

example, Appellants focus narrowly on the out-of-pocket costs required to operate the Basic Pilot Program, *see* AG Br. 53, but they ignore the many other costs and harms that the Basic Pilot Program entails, which are set forth in detail in the Chambers' declarations and the documentary evidence. *See supra* at 8-12, 23-26. The assertion that "Plaintiff [*sic*] has not established any other costs" besides these administrative expenses, AG Br. 53, is demonstrably false. For Section 7(C), their argument hinges on a misstatement of law—they assert that Section 7(C) applies only if a business "knowingly hire[s] illegal aliens in violation of federal law," *compare* AG Br. 54, *with supra* at 14—and again they ignore the unrebutted documentary and testimonial evidence establishing the harms caused by this section. *See supra* at 27-29. As to Section 9, they offer nothing but attorney argument to respond to the Chambers' evidence detailing the harms that will necessarily result from this section *regardless* whether an individual independent contractor is work-authorized. *Compare* AG Br. 52, *with supra* at 29-31.[28] Mere assertion does not show any abuse of discretion.

[28] The Attorney General also argues that Section 9 went into effect shortly before the Chambers filed suit, and so asserts that no harms actually have resulted. AG Br. 52. This argument is contrary to the district court's finding that "Plaintiffs have offered evidence through affidavits establishing that [Section 9] is now causing and will likely continue to cause irreparable harm." A781. Moreover, it ignores that Section 9 was enacted shortly before the end of the taxable year, and that plaintiffs filed suit at the beginning of the next taxable year. Appellants' real argument is that the Chambers should not be able to seek a preliminary injunction

The balance of harms and the public interest likewise weigh in favor of enjoining a preempted statute. As to the former, when a state statute is preempted, plaintiffs are "entitled to injunctive relief no matter what the harm to the State." *Bank One, Utah v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999); *see* A781; *Mattox*, 897 F.2d at 784; *Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1179 (D. Colo. 2001) ("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."). The assertion that an injunction is "a substantial indignity to the state," AG Br. 55, is therefore misplaced.[29] Moreover, because federal law already prohibits the employment of illegal aliens, and provides comprehensive requirements for verifying work authorization status, any "harm" that the state might claim from a delay in enforcing its preferred system of verification and penalties is marginal, as the district

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until the statute is enforced against them—which, as explained above, is not the law. *Supra* at 28-29.

[29] The Attorney General further relies on *Barnes v. E-Systems, Inc. Grove Hospital Medical & Insurance Plan*, 501 U.S. 1301 (1991) for the proposition that "[i]nterference" with a tax law "will always entail a likelihood of substantial harm to the state." AG Br. 55. *Barnes*, however, was merely a one-justice order regarding a stay pending a petition for certiorari, which ultimately was denied, *see* 502 U.S. 981 (1991). And, more fundamentally, that case (unlike this one) did not address whether the relevant provision was a "tax" within the meaning of the TIA. Here, it is not, and so enjoining its enforcement cannot harm the state.

court found. A781-82. It surely does not outweigh the harm caused by having to comply with an unconstitutional law.

As to the public interest, "[that] 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; *Bank One*, 190 F.3d at 848 ("the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law"). The public interest is never served by enforcing an unconstitutional law. *See Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001).

## CONCLUSION

For the foregoing reasons, the District Court's order granting a preliminary injunction should be affirmed.

October 14, 2008

Respectfully submitted,

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## STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs/Appellees respectfully request oral argument in this appeal pursuant to Tenth Circuit Rule 28.2(C)(4). This case involves important issues of federal preemption that have nationwide consequences. Plaintiffs/appellees believe that oral argument will assist the Court in addressing and deciding these issues.

## CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(B), this Consolidated Brief of Plaintiffs/Appellants is proportionally spaced, has a typeface of 14 points or more, and contains 17,480 words as permitted by this Court's August 29, 2008 order.

October 14, 2008

/s/ Robert A. Parker
Robert A. Parker

## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

(1) There are no privacy redactions made to this Brief;

(2) The hard copy and electronic copy of this Brief are identical; and

(3) The electronic copy of thi s Brief has been checked for viruses using McAfee VirusScan Enterprise 8.5i, and is free of viruses according to that program.

October 14, 2008

/s/ Robert A. Parker
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## CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2008, I caused the foregoing CONSOLIDATED BRIEF OF PLAINTIFFS/APPELLEES to be filed with the United States Court of Appeals for the Tenth Circuit by electronic transmission to esubmission@ca10.uscourts.gov, with the original and seven copies filed with the Clerk by Federal Express.

On the same date, I served the foregoing Brief by electronic transmission upon the following:

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