

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

(1) CHAMBER OF COMMERCE OF THE UNITED)
STATES OF AMERICA;)
(2) OKLAHOMA STATE CHAMBER OF)
COMMERCE AND ASSOCIATED INDUSTRIES;)
(3) GREATER OKLAHOMA CITY CHAMBER OF)
COMMERCE;)
(4) METROPOLITAN TULSA CHAMBER OF)
COMMERCE, INC.;)
(5) OKLAHOMA RESTAURANT ASSOCIATION;)
and)
(6) OKLAHOMA HOTEL AND LODGING)
ASSOCIATION,)

Plaintiffs,

v.

(1) BRAD HENRY, in his official capacity as Governor)
of the State of Oklahoma;)
(2) W.A. DREW EDMONDSON, in his official)
capacity as Attorney General of the State of Oklahoma;)
(3) KEITH MCARTOR, (4) STAN EVANS, (5) MARK)
ASHTON, (6) ANN CONG-TANG, (7) ELVIA)
HERNANDEZ, (8) RITA MAXWELL, (9) TERESA)
RENDON, (10) SAMMIE VASQUEZ, SR., and)
(11) JUANITA WILLIAMS, in their official capacities)
as Members of the Oklahoma Human Rights)
Commission; and)
(12) THOMAS E. KEMP, JR., (13) JERRY JOHNSON,)
and (14) CONSTANCE IRBY, in their official)
capacities as Members of the Oklahoma Tax)
Commission,)

Defendants.

No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs the Chamber of Commerce of the United States of America, the Oklahoma State Chamber of Commerce and Associated Industries (d/b/a The State Chamber of Oklahoma), the Greater Oklahoma City Chamber of Commerce, the Metropolitan Tulsa Chamber of Commerce (d/b/a the Tulsa Metro Chamber), the Oklahoma Restaurant Association, and the Oklahoma Hotel and Lodging Association (collectively “Plaintiffs”), by the undersigned attorneys, bring this civil action for declaratory and injunctive relief, and allege as follows:

PRELIMINARY STATEMENT

1. Plaintiffs bring this action to obtain declaratory and injunctive relief to prevent implementation of Sections 7 and 9 of the Oklahoma Taxpayer and Citizen Protection Act of 2007, H.B. 1804 (“H.B. 1804” or “the Act”), on the ground that they are preempted by federal law and unconstitutional under the Supremacy Clause of the United States Constitution. In particular, the Act (a) is expressly preempted by the Immigration Reform and Control Act of 1986 (“IRCA”), 8 U.S.C. § 1324a; (b) intrudes on a field reserved exclusively to the federal government insofar as Oklahoma seeks to legislate regarding employer verification of immigration status, an arena where the federal government, through numerous statutes and regulations, has exercised exclusive control; and (c) conflicts with the purposes and operation of federal law, including, *inter alia*, the Department of Homeland Security’s “Basic Pilot Program” and the Social

Security Administration's "Social Security Number Verification Service", and makes it impossible for businesses to comply with both federal and state law.

JURISDICTION AND VENUE

2. This case arises under the Constitution and laws of the United States, and thus this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983.

3. This Court has authority to issue a declaratory judgment and order other relief that is just and proper pursuant to 28 U.S.C. §§ 2201 and 2202.

4. The United States District Court for the Western District of Oklahoma is a proper venue for this action pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this action occurred in the Western District of Oklahoma.

PARTIES

5. Plaintiff the Chamber of Commerce of the United States of America ("U.S. Chamber") is a non-profit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Washington, D.C. The U.S. Chamber is the nation's largest federation of businesses and associations, with an underlying membership of more than three million businesses and professional organizations of every size and in every relevant economic sector and geographic region. The U.S. Chamber advocates for the business interests of its members, including filing lawsuits to protect its members' interests by challenging federal, state, and local laws that adversely affect those interests.

6. Plaintiff the Oklahoma State Chamber of Commerce and Associated Industries, which does business as The State Chamber of Oklahoma (“The State Chamber”), is a non-profit corporation incorporated under the laws of Oklahoma, with its headquarters in Oklahoma City, Oklahoma. The State Chamber is a membership organization with over 1,200 members in the State of Oklahoma. The State Chamber advocates for the business interests of its members, including challenging in court laws that adversely affect those interests.

7. Plaintiff the Greater Oklahoma City Chamber of Commerce (“Oklahoma City Chamber”) is a non-profit corporation incorporated under the laws of Oklahoma, with its headquarters in Oklahoma City, Oklahoma. The Oklahoma City Chamber, which employs over 60 people in the State of Oklahoma, is a membership organization with approximately 4,500 members in the State of Oklahoma. The Oklahoma City Chamber advocates for the business interests of its members, including challenging in court laws that adversely affect those interests.

8. Plaintiff the Metropolitan Tulsa Chamber of Commerce, which does business as the Tulsa Metro Chamber, is a non-profit corporation incorporated under the laws of Oklahoma, with its headquarters in Tulsa, Oklahoma. The Tulsa Metro Chamber, which employs 48 people in the State of Oklahoma, is a membership organization with approximately 2,800 members in the State of Oklahoma. The Tulsa Metro Chamber advocates for the business interests of its members, including challenging in court laws that adversely affect those interests.

9. Plaintiff the Oklahoma Restaurant Association (“ORA”) is a non-profit corporation incorporated under the laws of Oklahoma, with its headquarters in Oklahoma City, Oklahoma. The ORA, which employs 15 people in the State of Oklahoma, is a membership organization with approximately 1,200 members in the food service industry in the State of Oklahoma. The ORA advocates for the business interests of its members, including challenging in court laws that adversely affect those interests.

10. Plaintiff the Oklahoma Hotel and Lodging Association (“OH&LA”) is a non-profit corporation incorporated under the laws of Oklahoma, with its headquarters in Oklahoma City, Oklahoma. The OH&LA, which employs 15 people in the State of Oklahoma, is a membership organization with approximately 200 members in the hospitality industry in the State of Oklahoma. The OH&LA advocates for the business interests of its members, including challenging in court laws that adversely affect those interests.

11. Defendant Brad Henry (“Governor Henry”) is the Governor of the State of Oklahoma. Upon information and belief, Governor Henry has some responsibility for enforcing the provisions of H.B. 1804, including Sections 7 and 9. Governor Henry is sued in his official capacity based upon his duty to execute faithfully the laws of Oklahoma. *See* Okla. Const. art. 6, § 8.

12. Defendant W.A. Drew Edmondson (“Attorney General Edmondson”) is the Attorney General of the State of Oklahoma. Upon information and belief, Attorney General Edmondson has some responsibility for enforcing the provisions of H.B. 1804, including Sections 7 and 9. Attorney General Edmondson is sued in his

official capacity as the chief law enforcement officer of the state and based in part on his duty to prosecute and defend all actions and proceedings, civil and criminal, in which the State is an interested party. *See* Okla. Const., art. 6, § 1(a); Okla. Stat. tit. 74, §§ 18, 18b(A) (2007). Attorney General Edmondson's enforcement duties include civil actions against members of any state board or commission for failure to perform their duties as prescribed by statute. Okla. Stat. tit. 74, § 18b(A) (2007).

13. Defendants Keith McArtor, Stan Evans, Mark Ashton, Ann Cong-Tang, Elvia Hernandez, Rita Maxwell, Teresa Rendon, Sammie Vasquez, Sr. and Juanita Williams are members of the Oklahoma Human Rights Commission ("OHRC"). Upon information and belief, under Okla. Stat. tit. 25, § 1501 *et seq.* (2007), the OHRC is charged with, *inter alia*, receiving, investigating and passing upon complaints alleging violations under Section 7(C) of the Act.

14. Defendants Thomas E. Kemp, Jr., Jerry Johnson and Constance Irby are members of the Oklahoma Tax Commission ("OTC"). Upon information and belief, under Okla. Stat. tit. 68, §§ 102, 103, 105, 2385.2, 2385.15, and 2385.18 (2007), the OTC is charged with enforcing the tax laws of the State of Oklahoma, including Section 9 of the Act.

GENERAL ALLEGATIONS

Federal Government Regulation Of Immigration

15. Pursuant to the United States Constitution's grant of authority to Congress to establish a uniform rule of naturalization, and its exclusive powers over matters of immigration, over the past 200 years Congress has established a

comprehensive national framework for regulating admission and work authorization of aliens, protecting our country's national and economic security, and defining the role of U.S. employers in controlling illegal immigration.

16. Beginning with the Naturalization Act of 1790, the federal government has long occupied the field of immigration through a series of federal laws. The many major pieces of federal immigration legislation include the comprehensive 1952 Immigration and Nationality Act ("INA"), which serves as the foundation of current immigration law; the IRCA; the Immigration Act of 1990; the Anti-Terrorism and Effective Death Penalty Act of 1996; the Illegal Immigration Reform and Immigrant Responsibility Act of 1996; the American Competitiveness in the 21st Century Act of 2000; the USA PATRIOT Act of 2001; the Homeland Security Act of 2002; and the REAL ID Act of 2005.

17. These and other federal immigration statutes identify and establish a number of federal agencies—including the Department of Homeland Security, Department of State, Department of Justice, Citizenship and Immigration Service, Immigration and Customs Enforcement, and the Executive Office for Immigration Review—that are charged with the administrative tasks of admitting aliens into the United States, adjudicating immigration benefits, removing deportable aliens, protecting workers from unfair immigration-related employment practices, and enforcing rules against employers that knowingly employ unauthorized workers. These agencies have established a national system of processing centers and administrative tribunals to administer the comprehensive federal regulation of immigration matters. The federal

government occupies the field of immigration with its substantial volume of statutes, regulations, procedures and administrative guidance.

18. In addition to legislating the conditions of admission, employment and removal of individual aliens, after much legislative debate and consideration, Congress enacted the IRCA in 1986 to establish a uniform nationwide system for employers to verify the work authorization of their employees. Under that system (the “I-9 Form process”), employers must complete I-9 Forms and inspect applicant documents that establish both identity and eligibility to work in the United States. The statute requires that an employer must accept any document on a list promulgated by the federal government as long as that document reasonably appears on its face to be genuine.

19. Federal law defines the I-9 Form process as for use by “employers” to verify the information of their “employees.” It is not supposed to be used to verify non-employees, including independent contractors.

20. In addition to the I-9 Form process, which is mandatory, Congress has approved the creation of an experimental electronic verification system known as the “Basic Pilot Program,” recently renamed “E-Verify.” Congress has mandated, by statute, that no employer be forced to use this experimental program.

21. The Basic Pilot Program is designed to evaluate whether an automated employment verification system is a feasible and useful tool for assisting employers and the federal government in determining work authorization status.

22. The Basic Pilot Program allows employers to check identifying information and Social Security numbers provided by employees against an experimental federal database containing Social Security numbers thought to be valid. Federal evaluations of the Basic Pilot Program have revealed that this database is incomplete and contains errors, and particularly undercounts naturalized citizens and work-authorized non-citizens. It also does not correct adequately for Social Security numbers that have been erroneously entered, and for name changes.

23. Because of these problems, the Basic Pilot Program does not provide actual confirmation or nonconfirmation of work eligibility. Rather, a failure to match a name and Social Security number to the information in the database results in only a “tentative nonconfirmation.”

24. Federal law provides employees at least two work weeks in which to challenge tentative nonconfirmations and correct any perceived errors. This time may be extended for periods during which the Social Security Administration (“SSA”) or Department of Homeland Security (“DHS”) are reviewing the tentative nonconfirmation. During this time, employers may not treat the employee as unauthorized.

25. Unlike the I-9 Form Process—which allows an immediate determination of work authorization based on documents that reasonably appear to be genuine, actual nonconfirmation of work eligibility using the Basic Pilot Program is only possible if the tentative nonconfirmation is confirmed as a result of an administrative review by SSA or DHS, or the employee’s failure to contest the tentative nonconfirmation.

26. As with the I-9 Form process, federal law allows the Basic Pilot Program to be used only for the verification of employees; it is a violation of the Program's rules to use it to verify non-employees or independent contractors.

27. SSA has also created an electronic system known as the "Social Security Number Verification Service" ("SSNVS"), which assists employers in verifying the accuracy of their employees' Social Security numbers for purposes of year-end wage reporting. Use of this system is strictly voluntary.

28. Unlike the Basic Pilot Program, SSNVS is not an approved method of verifying immigration status or employment eligibility. SSNVS is not intended to, and does not, provide any information about immigration status, and it is illegal for employers to use it for any purpose other than year-end wage reporting.

29. It is also illegal to use SSNVS to check the Social Security numbers of any non-employee, including independent contractors.

30. In enacting the IRCA, Congress created a uniform set of civil and criminal enforcement penalties for employers who knowingly employ unauthorized workers, while simultaneously balancing the need to avoid unduly burdensome requirements on employers, and enacting safeguards to protect employees from discrimination based on national origin and alienage.

a. Under 8 U.S.C. § 1324(e)(4), any person or entity that knowingly hires an unauthorized alien or continues to employ an unauthorized worker once the employer becomes aware of the employee's status, "shall . . . pay a civil penalty in an amount of not less than \$250 and not more than \$2,000 for each unauthorized alien

with respect to whom a violation of either such subsection occurred, not less than \$2,000 and not more than \$5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or not less than \$3,000 and not more than \$10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph.”

b. Under 8 U.S.C. § 1324(f)(1), “any person or entity which engages in pattern or practice of violations of [the statute] shall be fined not more than \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both.”

31. Congress has also established a highly structured legislative process that the federal government must follow when attempting to make any changes to the national scheme of employment verification. To ensure that any changes in employer obligations under the IRCA take into account the delicate balance of national interests underlying the statute, the IRCA sets forth a detailed process for any modifications to the employment verification process. *See* 8 U.S.C. § 1324a(d). Specifically, the IRCA charges the President with monitoring and recommending changes to the employment verification system through detailed written reports to Congress, submitted up to two years in advance of any proposed change. *Id.*

Oklahoma’s Attempt To Regulate Immigration

32. On May 8, 2007, Governor Henry signed the Act into law. The Act became effective on November 1, 2007, with varying implementation dates for its provisions.

33. Among its many stated purposes, the Act seeks to remove “imped[iments] and obstruct[ions to] the enforcement of federal immigration law.” H.B. 1804, § 2.

34. Section 9 of the Act was implemented on November 1, 2007. It requires all businesses in the State of Oklahoma to verify the work authorization status of each individual independent contractor with whom they contract for the performance of physical services in the State. If an independent contractor does not provide proper verification, the contracting business must withhold, at the highest State marginal tax rate, taxes from the independent contractor’s payment, or be liable to the State for the taxes required to have been withheld.

35. Section 7(B) of the Act will be implemented on July 1, 2008. It requires that, in order to receive a contract to do business with the State of Oklahoma, or with any other public entity in the State, an employer must participate in a “Status Verification System” to verify the work authorization status of all new employees. The Act defines “Status Verification System” to include the Department of Homeland Security’s voluntary and experimental Basic Pilot Program, the United States Social Security Administration’s SSNVS, and other “similar” electronic verification systems that may exist in the future but do not currently exist.

36. Thus, under Section 7(B), after July 1, 2008, all departments, agencies, or instrumentalities of the State of Oklahoma or political subdivisions of the State of Oklahoma are forbidden from entering into a contract for the physical performance of services within Oklahoma unless the private contractor registers and

participates in the State's Status Verification System to verify the work eligibility status of all new employees.

37. Section 7(C) of the Act will likewise be implemented on July 1, 2008. It creates a new cause of action for employment discrimination against all employers in the State of Oklahoma. Only those employers who, at the time of discharge, are enrolled in the Status Verification System are exempt from such liability under the Act.

38. Section 7(C) allows the OHRC to investigate and bring suit for civil damages against any employer that (i) discharges a legal employee, and (ii) knows or "reasonably should have known" it was employing an unauthorized worker in the same job classification as the discharged employee. Section 7(C) imposes liability regardless whether the employer knows it is employing an illegal worker, and (unlike federal law) contains no safe harbor for good faith compliance with the I-9 Form requirements—the only safe harbor is for businesses that use the "Status Verification System" defined in Section 6 of the Act.

HARM TO PLAINTIFFS AND THEIR MEMBERS

39. Plaintiffs incorporate and reallege paragraphs 1 through 38 above, as if set forth fully herein.

40. As membership organizations, the U.S. Chamber, The State Chamber, the Oklahoma City Chamber, the Tulsa Metro Chamber, ORA, and OH&LA have suffered concrete injury caused by the credible threat of the imminent implementation of Sections 7 and 9 of the Act by defendants against their members.

Such injury may be redressed by an order of this Court declaring Sections 7 and 9 of the Act illegal and unconstitutional and enjoining their enforcement.

41. Each of the Plaintiffs have member businesses that, by virtue of employing individuals in the State of Oklahoma, contracting with individual independent contractors, and/or having or expecting to have contracts with public entities for the performance of services in the State, are subject to Sections 7 and 9 of the Act. These provisions could lead to debarment from State contracts, obligatory withholding of taxes from contractors or tax penalties, and liability for having unknowingly employed an unauthorized worker.

42. ORA, OH&LA, the Oklahoma City Chamber, and the Tulsa Metro Chamber have also suffered concrete injury as employers and businesses in the State of Oklahoma, caused by the credible threat of the imminent implementation of the Act by defendants against them. Such injury may be redressed by an order of this Court declaring Sections 7 and 9 of the Act illegal and unconstitutional.

43. Plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber are subject to Sections 7(B), 7(C), and 9 of the Act by virtue of employing individuals in the State of Oklahoma, contracting with individual independent contractors, and having and expecting to continue to have contracts with public entities for the performance of services in the State. Plaintiff OH&LA employs individuals in Oklahoma and has contracts with individual independent contractors, and thus is subject to Sections 7(C) and 9 of the Act. These provisions could lead to debarment from State

contracts, obligatory withholding of taxes from contractors or tax penalties, and liability for having unknowingly employed an unauthorized worker.

44. Plaintiffs' and plaintiffs' members' costs to comply with the Act, and other harms, cannot be recovered from the defendants or otherwise recompensed if the Act is declared unconstitutional.

Section 7(B): Status Verification System

45. Plaintiffs' members include businesses that have, and reasonably expect to obtain after July 1, 2008, contracts with the State of Oklahoma, its subdivisions, or other public entities for the performance of services in the State of Oklahoma. Plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber also have, and reasonably expect to obtain after July 1, 2008, contracts with the State of Oklahoma, its subdivisions, or other public entities for the performance of services in the State of Oklahoma.

46. Plaintiffs' members include businesses that comply with the comprehensive federal I-9 Form process that allows employers to rely on a variety of documents and combinations of documents that reasonably appear to be genuine, and do not use the Basic Pilot Program or SSNVS. Plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber likewise comply with the federal I-9 Form process and do not use the Basic Pilot Program or SSNVS.

Basic Pilot Program

47. If plaintiffs' members, and plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, do not agree to participate in the voluntary

Basic Pilot Program, they will be automatically debarred from contracts with all public entities, must forfeit contracts with public entities they have already won, and cannot bid on any future contracts with public entities.

48. Plaintiffs' members, and plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, rely on contracts with public entities as a source of revenue. They will be harmed if they are debarred from contracts with public entities.

49. Plaintiffs' members, and plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, will be harmed if they are required to use the Basic Pilot Program to avoid debarment from contracts with public entities.

a. Plaintiffs' members, and plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, will incur expenses retraining their employees and reorienting their verification procedures to use the Basic Pilot Program prior to the implementation date of Section 7(B), and implementing the Program on an ongoing basis and complying with its rules.

b. There is no fee to join the Basic Pilot Program. Nonetheless, upon information and belief, the costs to set up the Basic Pilot Program, on average, total several hundred dollars, not counting intangible costs such as work hours used to learn the rules of the program (which are not the same as the federal I-9 Form process) and the technical aspects of its use. Also upon information and belief, the annual operating costs for employers average about \$1,800. None of these expenses can be recovered from the defendants if the law is found unconstitutional.

c. The incompleteness of, and errors in, the Basic Pilot Program database artificially restrict the pool of workers to fewer than those who are actually authorized to work.

d. Upon information and belief, unemployment in Oklahoma is statistically very low, and the labor market is tight. The ability of plaintiffs' members, and plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, to fill their workforces will be harmed if they are required to hire from only those whose identifying information and Social Security number correctly appears in the Basic Pilot Program database.

e. During the waiting period following a tentative nonconfirmation of work authorization status, plaintiffs' members, and plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, will be forced to incur expenses training and orienting new employees, without being able to confirm whether the employees are actually authorized to work. None of these expenses and sunk costs can be recovered if the individual is later deemed unauthorized.

f. Plaintiffs' members, and plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, will also suffer harm when new employees are required to divert their attention and work-hours to addressing problems or discrepancies in the Basic Pilot Program database, rather than devoting their full attention to their responsibilities as employees. None of these expenses and sunk costs can be recovered, regardless whether the individual is later deemed authorized to work.

SSNVS

50. It is illegal to use SSNVS for purposes of employment eligibility verification, and the system does not provide any information on immigration status.

51. If plaintiffs, or their members, use SSNVS for the purposes required by the Act, they risk civil or criminal prosecution under federal law.

52. Even if use of SSNVS were not illegal under these circumstances, plaintiffs' members, and plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, will incur expenses retraining their employees and reorienting their verification procedures to use SSNVS prior to the implementation date of Section 7(B), and implementing SSNVS on an ongoing basis and complying with its rules. None of these costs can be recovered from the defendants if the Act is later deemed unconstitutional.

53. Even if use of SSNVS were not illegal under these circumstances, the database of identifying information and Social Security numbers upon which SSNVS relies is incomplete and prone to errors, and does not contain information on work eligibility. This will artificially restrict the pool of workers to fewer than those who are actually authorized to work.

54. Upon information and belief, unemployment in Oklahoma is statistically very low, and the labor market is tight. The ability of plaintiffs' members, and plaintiffs ORA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, to fill their workforces will be harmed if they are required to hire from only those whose

identifying information and Social Security number correctly appears in the SSNVS database.

Section 7(C): Claim for Employment Discrimination

55. Plaintiffs' members, and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, will be harmed by the provisions of Section 7(C) of the Act, which creates a new claim against them for employment discrimination.

a. Plaintiffs' members, and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, comply in good faith with federal law and do not knowingly employ illegal workers. But this is not enough to avoid liability under Oklahoma's law, which imposes civil damages on employers who lack knowledge and do not participate in the Status Verification System.

b. Any accusation of hiring illegal aliens will cause serious monetary and reputational harm to plaintiffs' members, and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber, even if the accusation is unmeritorious, wrong, and unfair.

c. These harms will create strong incentives to settle even baseless accusations to avoid the damage to business and reputation caused by being publicly identified as a suspected employer of illegal aliens.

d. To appropriately manage the increased risk of such harms, and the possibility of liability without knowledge of wrongdoing, plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber

will be required to set aside reserves, or purchase liability insurance, to account for the new risk of accusations, investigations and suits under this law.

e. These monetary costs are imminent and necessary as prudent means to manage the increases risks to businesses posed by the new claim created by Section 7(C). None of these expenses can be recovered from the defendants if the law is found unconstitutional.

f. The only option that plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber have for preventing the aforementioned business and reputational harms, avoiding liability for unknowing employment of an illegal alien, and avoiding the imminent and necessary risk-management costs that will result, is to use Oklahoma's Status Verification System. This is the only safe harbor under Section 7(C) of the Act.

g. As explained in paragraphs 45-54 (and subparagraphs) of this Complaint, use of the Status Verification System will likewise harm plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber. Those paragraphs are incorporated and realleged as if set forth fully herein.

Section 9: Individual Independent Contractor Provision

56. Plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber will be harmed by Section 9 of the Act, which requires them to verify the work authorization of all individual independent contractors, or be subject to adverse tax consequences that include withholding the

highest marginal rate of taxes from the contractors' pay, or paying a tax penalty in the same amount.

57. The services of individual independent contractors are critical to the businesses of plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber.

58. Under federal law, plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber are not supposed to verify the work authorization of non-employees.

59. Plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber must, therefore, suffer the adverse tax consequences provided under Section 9 of the Act. These tax provisions will harm plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber.

a. The withholding requirement will diminish the take-home pay of individual independent contractors and will make it more expensive to do business as an individual independent contractor in the State of Oklahoma. This will result in one of two harmful scenarios for plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber:

(i) fewer individual independent contractors will be willing or able to do business in Oklahoma, harming the ability of plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber to utilize their services, or

(ii) plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber will be required to increase the amount paid to individual independent contractors to offset the effects of the new state withholding requirements, which will cost money, result in lost profits, and make it more expensive (and thus more difficult) to do business with individual independent contractors.

None of these costs can be recovered from the defendants if the Act is declared unconstitutional.

b. The tax penalty option will, likewise, harm plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber. It will cost money, result in lost profits, and make it more expensive (and thus more difficult) to do business with individual independent contractors. None of these costs can be recovered from the State if the Act is declared unconstitutional.

c. The tax withholding and tax penalty provisions will require plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber to incur expenses related to hiring new employees or assigning new tasks to existing employees to calculate and to remit the new withholding or penalty amounts to the taxing authorities. None of these costs can be recovered from the State if the Act is declared unconstitutional.

* * *

60. Each of the foregoing harms will be suffered imminently through the implementation of the statute and will occur with a high degree of certainty, given the

61. Each of the foregoing harms to plaintiffs and their members are or will be caused by the execution and enforcement of the Act by defendants Governor Henry, Attorney General Edmonson, and the members of the OHRC and OTC, acting in their official capacities.

62. Each of the foregoing harms is likely to be redressed by a favorable order of this Court. By declaring Sections 7 and 9 of the Act unconstitutional and void, and enjoining their enforcement, the plaintiffs and their members will no longer be subject to the harms caused by enforcement of those Sections.

CLAIMS FOR RELIEF

First Claim For Relief

(Express Preemption under the Supremacy Clause, U.S. Const. art. VI, cl. 2)

63. Plaintiffs incorporate and reallege paragraphs 1 through 62 above, as if set forth fully herein.

64. The IRCA expressly preempts Sections 7 and 9 of the Act. Under 8 U.S.C. § 1324a(h)(2), the IRCA expressly “preempt[s] 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.”

65. Sections 7 and 9 of the Act impose civil penalties on employers who do not comply with Oklahoma's preferred verification system, or who employ aliens deemed unauthorized to work by Oklahoma's law, by (a) debarring employers from public contracts if they do not use Oklahoma's "Status Verification System" (Section 7(B)); (b) subjecting employers to OHRC investigations and/or lawsuits for civil damages based on the allegation that they know or "reasonably should have known" that they employ an illegal alien (Section 7(C)); and (c) imposing tax penalties and withholding requirements upon employers that do not comply with Oklahoma's novel verification requirement for individual independent contractors (Section 9). All three provisions are expressly preempted by federal law.

66. The provisions of Section 7 and 9 are not licensing or similar requirements, nor do they depend on a preexisting finding of liability for knowingly hiring an unauthorized worker under the IRCA.

Second Claim For Relief
(Conflict Preemption under the Supremacy Clause, U.S. Const. art. VI, cl. 2)

67. Plaintiffs incorporate and reallege paragraphs 1 through 66 above, as if set forth fully herein.

68. Sections 7(B), 7(C), and 9 of the Act conflict with federal law in violation of the Supremacy Clause because they require actions inconsistent with, and contrary to, federal law.

a. Federal law expressly forbids employers from demanding that employees produce specific documents from the list approved by Congress, or documents

that do not appear on that list. 8 U.S.C. § 1324a(b)(1)(A). By requiring employers who contract with the State to ensure a particular form of verification, Section 7(B) of the Act conflicts with federal law.

b. Congress has expressly mandated that no employer should be required to use the Basic Pilot Program, *see* Pub. L. No. 104-208, § 402(a), 110 Stat. 3009-546, 3009-656, and, under authority of law, the Social Security Administration has forbidden employers from using the SSNVS to verify immigration status, Social Sec. Admin., *Social Security Number Verification Service (SSNVS) Handbook* (rev. Sept. 2007). Insofar as Sections 7(B) and 7(C)(2) of the Act require employers to use such systems to verify an employee's immigration status, they make it impossible for employers to comply with both state and federal law.

c. Under federal law, only "employers" are supposed to verify the work authorization status of "employees." *See* 8 C.F.R. § 274a.1(f)-(g). Insofar as Section 9 of the Act requires businesses to verify the work authorization status of non-employees (*i.e.*, individual independent contractors), the Act conflicts with federal law.

69. The Act also conflicts with federal law in violation of the Supremacy Clause because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

a. By mandating that employers who seek to contract with public entities in Oklahoma use the Basic Pilot Program or SSNVS to verify their employees' work authorization status, Sections 7(B) and (C) of the state law restrict the range of verification options allowed by federal law, and thus alter the priorities Congress

has established with respect to the employers' methods of verifying work authorization status.

b. Under 8 U.S.C. § 1324, Congress comprehensively provides for all civil and criminal penalties employers face for knowingly employing illegal workers. These remedies reflect a careful assessment by Congress of the appropriate incentive structure that is necessary to balance the various policy objectives served by federal immigration law, and are intended to be exclusive. The State's cause of action for employment discrimination in Section 7(C) and its individual independent contractor provision in Section 9 impose additional civil penalties, and as such alter the federal incentive structure and frustrate the execution of the full purposes and objectives of Congress.

c. The State's new cause of action also conflicts with federal law insofar as it requires employers to use the "Status Verification System" as the only safe harbor from suit. Federal law contains no such provision; in fact, the IRCA states that employers are *not* subject to civil or criminal penalties stemming from their employment of illegal aliens if they have complied "in good faith" with *federal* verification regulations. 8 U.S.C. § 1324a(a)(1). Those regulations establish a different set of rules for avoiding liability than Oklahoma's "Status Verification System." This conflict undermines Congress's objectives in enacting comprehensive regulations.

d. Federal immigration law does not contemplate the verification of the immigration status of non-employees, including independent contractors. The Act's Section 9 requirement that employers verify the work

authorization of independent contractors—or withhold from their compensation the highest amount allowed by Oklahoma law, or pay a tax penalty to the State—thus undermines the object and purpose of federal law.

Third Claim For Relief
(Field Preemption under the Supremacy Clause, U.S. Const. art. VI, cl. 2)

70. Plaintiffs incorporate and reallege paragraphs 1 through 69 above, as if set forth fully herein.

71. The federal statutory and regulatory scheme governing immigration and work authorization for aliens is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement or change it. Congress has thus occupied the field that Section 7 and 9 of the Act seek to regulate.

72. Oklahoma's attempt to legislate immigration and employer sanctions requirements for employers operating in the State is preempted both by the pervasiveness of the federal regulation in these areas, as well as by the compelling federal interest in establishing a carefully balanced and uniform national immigration policy.

a. Through its enactment of the INA, IRCA, and other immigration legislation, Congress has occupied the field of immigration regulation, particularly relating to employer verification of employees' work authorization status. Congress has carefully considered and balanced the multiple functions of deterring illegal immigration, avoiding excessive burdens on American businesses, and minimizing the possibility of employment discrimination. It has left no room for states to upset this

balance through the enactment of state or local legislation addressing the same subjects upon which Congress has uniformly and comprehensively acted.

b. Oklahoma's Act impermissibly intrudes into this comprehensive federal regulatory scheme. Sections 7 and 9 of the Act completely disregard the mandates of the existing comprehensive federal system of employment verification, including its balance of immigration enforcement, burdens on employers, and antidiscrimination concerns; its range of verification options that employers are authorized and required to accept; and its carefully crafted process for making changes to the existing employment verification requirements and employer sanctions.

c. Furthermore, in enacting the IRCA, Congress created a uniform set of civil and criminal enforcement penalties for employers who violate the verification provisions of federal law and knowingly employ unauthorized workers, thus leaving no room for the State of Oklahoma to impose independent penalties, as it attempts to do in Sections 7 and 9 of the Act.

NECESSITY OF INJUNCTIVE RELIEF

73. Plaintiffs incorporate and reallege paragraphs 1 through 72 above, as if set forth fully herein.

74. The provisions of Section 7 and 9 of the Act are expressly preempted by the IRCA, are preempted by conflict with federal law, and are preempted by incursion in a field that is fully occupied by federal law. Sections 7 and 9 of the Act are therefore unconstitutional and void.

75. Plaintiffs' members and plaintiffs ORA, OH&LA, the Tulsa Metro Chamber, and the Oklahoma City Chamber will suffer irreparable harm if this Court does not enter an injunction. A party is irreparably harmed when it is subjected to state legislation that is preempted by a comprehensive federal scheme. In addition, the Act's imminent implementation imposes serious costs and burdens on employers.

76. An injunction will not adversely affect the public interest. Indeed, it will serve the public interest.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray:

- A. for a declaration pursuant to 28 U.S.C. § 2201 stating that Sections 7 and 9 of the Act are preempted by federal law, and are invalid, null and void;
- B. for a preliminary and permanent injunction against the defendants prohibiting execution and enforcement of Sections 7 and 9 of the Act; and
- C. that this Court grant plaintiffs such other and further relief as may be just and proper, including any other necessary and appropriate injunctive relief.

DATED this 1st day of February, 2008.

Respectfully Submitted,

Of Counsel:

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

/s/Phillip G. Whaley

Patrick M. Ryan, OBA No. 7864
Phillip G. Whaley, OBA No. 13371
Daniel G. Webber, Jr., OBA No. 16332
RYAN WHALEY COLDIRON SHANDY PC
900 Robinson Renaissance
119 North Robinson Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766
pwhaley@ryanwhaley.com

-and-

Carter G. Phillips, DC No. 264176
pro hac vice pending
Bradford A. Berenson, DC No. 441981
pro hac vice pending
Eric A. Shumsky, DC No. 477926
pro hac vice pending
Robert A. Parker, DC No. 975859
pro hac vice pending
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

ATTORNEYS FOR PLAINTIFFS