CASE NO. CIV-08-109-C

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

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and the OKLAHOMA STATE CHAMBER OF COMMERCE AND ASSOCIATED INDUSTRIES, *et al.*,

Plaintiffs,

vs.

BRAD HENRY, in his official capacity as Governor of the State of Oklahoma, W. A. DREW EDMONDSON, in his official capacity as Attorney General of the State of Oklahoma, *et al.*,

Defendants.

MOTION TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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COMES NOW, the Defendants, Governor Henry and Attorney General Edmondson, sued in their "official capacities" to move this Court to dismiss Plaintiffs' Complaint. In support of this Motion to Dismiss, Defendants would show this Court the following:

PLAINTIFFS' CLAIMS

Plaintiffs' (varies Chamber of Commerce and business associations) have filed their Complaint for Declaratory and Injunctive Relief against several State officials, all named only in their "official capacities." Plaintiffs seek this Court' s assistance to enjoin two sections of the Oklahoma Taxpayer and Citizen Protection Act of 2007 ("H.B. 1904" or "the Act") from being implemented. They allege section 7 (codified at 25 O.S. § 1313) and section 9 (codified at 68 O.S. § 2385.32) of that Act are preempted by federal law.

Title 25 O.S. § 1313 (i.e., section 7) effective July 1, 2008, provides:

> **Public Employers - Status Verification System - Unauthorized Aliens - Contracting and Employment Practices**
> A. Every public employer shall register with and utilize a Status Verification System as described in subparagraphs a or b of paragraph 1 of Section 6 of this act to verify the federal employment authorization status of all new employees.
> B. 1. After July 1, 2008, no public employer shall enter into a contract for the physical performance of services within this state unless the contractor registers and participates in the Status Verification System to verify the work eligibility status of all new employees.
> 2. After July 1, 2008, no contractor or subcontractor who enters into a contract with a public employer shall enter into such a contract or subcontract in connection with the physical performance of services within this state unless the contractor or subcontractor registers and participates in the Status Verification System to verify information of all new employees.
> 3. The provisions of this subsection shall not apply to any contracts entered into prior to the effective date of this section even though such contracts may involve the physical performance of services within this state after July 1, 2008.

C. 1. It shall be a discriminatory practice for an employing entity to discharge 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 hired after July 1, 2008, and who is working in Oklahoma in a job category that requires equal skill, effort, and responsibility, and which is performed under similar working conditions, as defined by 29 U.S.C., Section 206(d)(1), as the job category held by the discharged employee.
2. An employing entity which, on the date of the discharge in question, was currently enrolled in and used a Status Verification System to verify the employment eligibility of its employees in Oklahoma hired after July 1, 2008, shall be exempt from liability, investigation, or suit arising from any action under this section.
3. No cause of action for a violation of this subsection shall arise anywhere in Oklahoma law but from the provisions of this subsection.

Title 68 O.S. § 2385.32 (i.e., section 9) effective November 7, 2007, provides:

State Income Tax Withholding Requirement for Contracting Entity When Independent Contractor Fails to Provide Documents Verifying Employment Authorization
A. If an individual independent contractor, contracting for the physical performance of services in this state, fails to provide to the contracting entity documentation to verify the independent contractor's employment authorization, pursuant to the prohibition against the use of unauthorized alien labor through contract set forth in 8 U.S.C., Section 1324a(a)(4), the contracting entity shall be required to withhold state income tax at the top marginal income tax rate as provided in Section 2355 of Title 68 of the Oklahoma Statutes as applied to compensation paid to such individual for the performance of such services within this state which exceeds the minimum amount of compensation the contracting entity is required to report as income on United States Internal Revenue Service Form 1099.
B. Any contracting entity who fails to comply with the withholding requirements of this subsection shall be liable for the taxes required to have been withheld unless such contracting entity is exempt from federal withholding with respect to such individual pursuant to a properly filed Internal Revenue Service Form 8233 or its equivalent.
C. Nothing in this section is intended to create, or should be construed as creating, an employer-employee relationship between a contracting entity and an individual independent contractor.

Plaintiffs allege their member businesses have been (or will be) harmed by those statutes and challenge those Oklahoma statutes on three separate grounds pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201 and 2202.

Plaintiffs' "**First Claim For Relief**" alleges that the Immigration Reform and Control Act of 1986 ("IRCA") [8 U.S.C. § 1324a] preempts both statutes. Specifically, they allege that 8 U.S.C. § 1324a(h)(a) expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other then through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." (See Complaint "First Claim for Relief", para. 63-66). Apparently, Plaintiffs equate "civil sanctions" to mean (1) preventing their member business' from acquiring public contracts with the State if they do not use a federal "Status Verification System" pursuant to 25 O.S. § 1313(B), (2) subjecting their member businesses to Oklahoma Human Rights Commission ("OHRC") investigations and/or civil lawsuits if they knew or should have known they employ an illegal alien, but then terminate a legal worker without verifying the legal status of the illegal employee with the federal governement, and (3) imposing a state tax and withholdings at a higher level on those member businesses who do not comply with federal employment verification requirements.

Plaintiffs' "**Second Claim For Relief**" challenges those statutes on the ground that "[s]ections 7(B) [25 O.S. § 1313(B)] , 7(C) [25 O.S. § 1313(C)], and 9 [68 O.S. § 2385.32] of the Act conflict with federal law in violation of the Supremacy Clause because they require actions inconsistent with, and contrary to federal law." Specifically, they allege that

because 8 U.S.C. § 1324a(b)(1)(A) conflicts with both 25 O.S. § 1313 and 68 O.S. § 2385.32 the state statutes are preempted. They also allege that there is a conflict between the Social Security Administration laws (which forbids the use of social security numbers to verify immigration status) and those state statutes which require use of social security number verification for employment purposes if the employer wishes to do business with the State. They allege the Constitution's Supremacy Clause, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (See Complaint "Second Claim for Relief", para. 67-69).

Plaintiffs' "**Third Claim For Relief**" challenges those statutes on "Field Preemption". They claim that 25 O.S. § 1313 and 68 O.S. § 2385.32 are preempted by Congress' laws to regulate aliens through the creation of several federal agencies and its occupation of the entire field of immigration. (See Complaint "Third Claim for Relief", para. 70-76).

Plaintiffs are asking for a ***declaratory judgment*** that finds the challenged statutes preempted by federal law and for this Court to issue an ***injunction*** that would (1) prevent the State from ***taxing*** Plaintiffs' member businesses if they fail to comply with 68 O.S. § 2385.32; (2) that would protect them from liability under 25 O.S. § 1313(C); and (3) allow them to do business with the State despite 25 O.S. § 1313(B)'s requirements to verify the legal status of their employees. However, this Court should dismiss Plaintiffs' Complaint based on the following Propositions.

PROPOSITION I

THIS COURT DOES NOT HAVE JURISDICTION TO HEAR ANY CHALLENGE TO 68 O.S. § 2385.32

Title 68 O.S. § 2385.32(A) requires Plaintiffs' member businesses who do business with "an individual independent contractor" "for the physical performance of services in this state" to withhold state income tax at the top margin for such "individual independent contractor" if the "individual independent contractor" does not provide proper "employment authorization" pursuant to 8 U.S.C. § 1324a(a)(4). Contrary to Plaintiffs' allegations, Plaintiffs' member businesses can only be required to withhold such top margin income tax if the "individual independent contractor" does not verify their "employment authorization" pursuant to federal law. No state requirements will cause the Plaintiffs' member businesses to withhold such top margin income tax; only a determination pursuant to federal law will trigger such top margin income tax withholding. Title 68 O.S. § 2385.32(B) would hold any Plaintiff member business liable for the "top margin income tax" if they fail to comply with the federal "employment authorization" requirements, under subsection (A). This Court does not have jurisdiction to hear any claim challenging this state income tax requirement.

Federal District Courts are courts of limited jurisdiction. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S.Ct. 2611 (2005). They possess only that power authorized by the United States' Constitution and federal statute. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391

(1994). The Tax Injunction Act denies this Court jurisdiction to hear any challenge to a state tax.

The Tax Injunction Act [28 U.S.C. § 1341] 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." Long before the Tax Injunction Act was enacted, the Supreme Court held that:

> "No court of equity will ... allow its injunction to issue to restrain [state officers collecting state taxes], except where it may be necessary to protect the rights of the citizens whose property its taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, ... before the aid of a court of equity can be invoked." *Dows v. City of Chicago*, 11 Wall. 108, 110, 78 U.S. 108, 110, 20 L.Ed. 65 (1871).

The Tax Injunction Act "and the decisions of [the Supreme Court] which preceded [that Act], reflect the fundamental principle of ***comity*** between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 103, 102 S.Ct. 177, 179, 70 L.Ed.2d 271 (1981).

The Tax Injunction Act is the embodiment of ***federalism*** and ***comity***. As such, not even the legal fiction of *Ex parte Young* is allowed to overcome a State Official's sovereign immunity, especially when Congress has emphatically denied federal courts jurisdiction on issues of local taxation. *See, e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71-75, 116 S.Ct. 1114 (1996)(When Congress has enacted laws for an alternative method to remedy

a federal right, there is no need for the federal courts to use the *Ex parte Young* doctrine to accomplish the same objective; see also, Proposition III - for when ***Ex parte Young*** is appropriate). The Tax Injunction Act denies federal courts jurisdiction as long as there is a "plain, speedy, and efficient state remedy" available to the taxpayer. 28 U.S.C. 1341.

Congress' intent in enacting that Act was to deny federal courts jurisdiction over State taxation issues. It represents their belief that federal courts should first let the States decide their own tax issues. Plaintiffs can still appeal to the Supreme Court once their State administrative and judicial processes have been exhausted. (28 U.S.C.A. § 1257). Such reasoning satisfies both ***federalism*** and ***comity*** concerns by allowing the States to first address their own taxation issues, and at the same time preserves a claimant's rights through an appeal to the Supreme Court, if necessary. Granting the States the first opportunity to address taxation issues can many times avoid Constitutional issues by a mere interpretation of the State's own statutes or rules.

The "*federalism"* principles expressed in the Tax Injunction Act are merely an acknowledgment of a State's self- governing rights reflected in the Tenth Amendment. That Amendment prohibits the national government from exercising non-delegated powers that will infringe on the lawmaking autonomy of the states; it provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. "The Tenth Amendment was intended to confirm the understanding of the people at the time the

Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people." *United States v. Sprague*, 282 U.S. 716, 733 (1931).

Neither the Governor, the Attorney General, nor any member of the Oklahoma Human Rights Commission possess any enforcement authority under 68 O.S. § 2385.32 (See Proposition III - ***Ex parte Young***). But even if they did have enforcement power, the Tax Injunction Act denies this Court the jurisdiction to hear any challenge to the state taxes assessed under 68 O.S. § 2385.32. Therefore, this Court should dismiss Plaintiffs' claims challenging 68 O.S. § 2385.32.

PROPOSITION II

PLAINTIFFS DO NOT HAVE STANDING TO SUE THE STATE UNDER 25 O.S. § 1313

Plaintiffs do not have ***standing*** to challenge 25 O.S. § 1313, and any order issued by this Court would violate Article III's ***case or controversy*** requirements. *Hein v. Freedom From Religion Foundation, Inc.*, 127 S.Ct. 2553 (2007). Title 25 O.S. § 1313(A) applies only to "Public employers"; requiring them to "register with and utilize a Status Verification System as described in subparagraphs a or b of paragraph 1 of Section 6 [25 O.S. § 1312]of this act to verify the federal employment authorization status of all new employees." None of the Plaintiffs have alleged they are a "Public employer", therefore that section is not in issue in this case. Likewise, Plaintiffs' ***standing*** under subsections B and C of that statute is also dubious.

Title 25 O.S. § 1313(B)(1) prohibits the state from entering into any contract with a contractor unless that contractor registers and participates in an employee verification system set up by the federal government that is intended to authenticate the legal status of its employees. Title 25 O.S. § 1313(B)(2) prohibits any contractor or subcontractor wanting to do business with the state from entering into any contract with the state unless they register and participate in that federal employment verification system.

Title 25 O.S. § 1313(C)(1) creates a statutory wrongful discharge cause of action against any Oklahoma employer who discharges an employee but retains an illegal alien. Under that statute the employer can only be held liable if the employer "knows or reasonably should have known" the retained employee was an illegal alien. Title 25 O.S. § 1313(C)(2) creates a "safe harbor" or a complete defense to such cause of action if the employer has verified the retained illegal alien's employment status through a federal employment verification system.

Federal Court subject matter jurisdiction is determined by Article III of the United States Constitution. In order to invoke a federal court's Article III jurisdiction, a plaintiff must have *standing* to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)("[T]he core component of standing is an essential and unchanging part of the case-or- controversy requirement of Article III"); *Warth v. Seldin*, 422 U.S. 490, 499 (1975)("Standing" is the threshold question in every federal case, determining the power of the court to entertain the suit"). The question of *standing* presents a threshold jurisdictional issue, therefore a Court

may raise the issue *sua sponte*. See *Rector v. City and County of Denver*, 348 F.3d 935, 942 (10th Cir.2003). "Standing" has both constitutional and prudential components. See *id*. For a party to have constitutional standing, there must be: (1) an injury to the party's legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, ***not conjectural or hypothetical***; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be ***redressed*** by a favorable decision. *id.;* see also, *Hein v. Freedom From Religion Foundation, Inc.*, 127 S.Ct. 2553 (2007) (requiring both personal injury **traceable to defendants *and*** the availability of **meaningful relief**). A party has prudential standing if: (1) the party asserts its own rights, not those of third parties; (2) the party's claim is not a general grievance shared equally and generally by all or a large class of citizens; and (3) the party's injury is within the zone of interests the statute or common law claim intends to protect. See *Board of County Comm'rs v. Geringer*, 297 F.3d 1108, 1112 (10th Cir.2002). Associational or Organizational ***standing*** is available when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*., 432 U.S. 333, 343 (1977). If a party lacks standing, then the Court should dismiss the claim pursuant to FRCP 12(b)(1) for lack of Article III subject matter jurisdiction.

Where a declaratory judgment is sought, federal courts can not give a mere advisory opinion as to the validity of a statute or pass upon its constitutionality if no justifiable controversy is presented. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 80 L.Ed. 688, 56 S.Ct. 466 (1936). No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. *Raines v. Byrd*, 521 U. S. 811, 818 (1997) (*quoting Simon v. Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 37 (1976)).

Title 25 O.S. § 1313(B) prohibits the State of Oklahoma from contracting with any contractor or sub-contractor who hires illegal aliens. That is consistent with federal law. The State of Oklahoma does not try to define who is and who is not an illegal alien. The State merely requires contractors and sub-contractors who wish to do business with the state to verify the legal status of their employees through a federal program designed to assist employers in the verification of the legal status of employees it plans to hire after July 1, 2008. In order for Plaintiffs to have standing to seek an injunction or declaratory judgment under 25 O.S. § 1313(B), they would have to admit they are going to violate federal law and hire an illegal alien after July 1, 2008.

Even though Plaintiffs may have a business member who can prove they plan to seek a contract with the State of Oklahoma after July 1, 2008, they would still have to prove they plan to hire an illegal alien after July 1, 2008 and then refuse to verify that prospective employee's legal status through a federal program that is designed to assist them in not hiring

illegal aliens. Plaintiffs' assertion that they would be in violation of federal law if they use the federal verification system is absurd. Oklahoma's statute does not require "additional documentation", it only requires use of the federal verification system. Likewise for Plaintiffs to argue that they cannot use a prospective employee's social security number to verify the legal status of that employee is also absurd. Generally, every employer in the United States when they hire an employee is required to ask that employee for their social security number in order to hire them. (26 U.S.C. § 3402; 8 U.S.C. § 1324a(b)(1)(C)(i); 40 O.S. § 2-802). Oklahoma's statutes are not in contradiction to federal law, they are instead intended to implement and enforce federal law in the prevention of the hiring of illegal aliens in the State of Oklahoma. Plaintiffs' alleged injury is conditioned on too many variables that may or may not occur, or based on an assumption that they plan to hire illegal aliens in violation of federal law, and then seek a contract or subcontract with the State. They are in essence asking this Court to assist them to violate federal law. Plaintiffs' standing to challenge 25 O.S. § 1313(B), is too ***conjectural*** and ***hypothetical,*** and is premised on their intent to violate federal law.

Title 25 O.S. § 1313(C) creates a statutory wrongful termination cause of action for the benefit of Oklahoma employees who are terminated, ***but only if*** the employer retains an illegal alien "who is working in Oklahoma in a job category that requires equal skill, effort, and responsibility, and which is performed under similar working conditions, as defined by 29 U.S.C., Section 206(d)(1), as the job category held by the discharged employee", ***but only***

if their employer did not enrolled or use "a Status Verification System to verify the employment eligibility of its employees in Oklahoma hired after July 1, 2008," ***but only if*** that legal worker decides to sue Plaintiffs' members. Plaintiffs are asking this Court to issue an injunction against the Defendant State Officials, ***if*** Plaintiffs' hire an illegal alien and ***if*** Plaintiffs fail to verify the legal status of that illegal alien through a federal program set-up to determine the legal status of aliens, and ***if*** Plaintiffs terminate an employee "working in Oklahoma who is a United States citizen or permanent resident alien," and ***if*** that employee then sues one of their member businesses. Plaintiffs' requested relief is tenuously conditioned on four "***if's***" that may or may not happen. Plaintiffs' standing to challenge 25 O.S. § 1313(C), is too ***conjectural or hypothetical***. Therefore, this Court should dismiss Plaintiffs' challenge to both 25 O.S. § 1313(B) and (C).

PROPOSITION III

FEDERALISM AND COMITY PREVENTS THIS COURT FROM DECLARING THE CHALLENGED STATUTES PREEMPTED

"Dual sovereignty is a defining feature of our Nation's constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union with their sovereignty intact." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002). Justice Thomas, writing for the Court in *Northern Insurance Co. of New York v. Chatham County*, 126 S. Ct. 1689, 1695 (2006), explained "that the immunity of States from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which

they retain today ... except as altered by the plan of the Convention or certain constitutional Amendments. The term Eleventh Amendment immunity . . . is convenient shorthand, but something of a misnomer, **for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment**." [emphasis added] (Internal quotes and citations omitted) *Id*. Justice Thomas' astute insight on sovereign immunity is but one aspect of what the Courts have termed "***federalism***", because "[w]hen the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Alden v. Maine*, 527 U. S. 706, 713 (1999).

"Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S 779, 838 (1995) (Kennedy, J., concurring). When "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute"(*Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)), and such alteration must be premised on appropriate Constitutional authority. ((*City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kimel v. Florida Board of Regents,* 528 U.S. 62, 120 S.Ct. 631, (2000); *Board of Trustees of the University of Alabama, et al. v. Garrett, et al.*, 531 U.S. 356 (2001)). That ***clear statement principle*** applies when Congress "intends

to pre-empt the historic powers of the States" or when it legislates in "traditionally sensitive areas" that "affec[t] the federal balance." *Will*, *supra*, at 65, 109 S.Ct. 2304 (*quoting United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971)). In such cases, it is the ***clear statement principle*** which reflects "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 544 (2002).

Thus, applying the ***clear statement principle*** helps "assur[e] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Will*, supra, at 65, 109 S.Ct. 2304. This is obviously important when the underlying issue raises a serious constitutional doubt or problem. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000)(relying in part on clear statement principle to decide the False Claims Act, 31 U.S.C. §§ 3729-3733 (1994 ed.), did not authorize "an action in federal court by a qui tam relator against a State" and avoiding whether such a suit would violate the Eleventh Amendment, an issue raising a serious constitutional doubt); *Gregory*, *supra*, at 464, 111 S.Ct. 2395 (relying on clear statement principle to determine that state judges were excluded from the ADEA in order to "avoid a potential constitutional problem" given the constraints on the Court's "ability to consider the limits that the state-federal balance places on Congress'

powers under the Commerce Clause"); see also, *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 544 (2002).

The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
> U.S. Const. amend. XI.

The Supreme Court has long read that amendment to mean "that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Nelson v. Miller*, 170 F.3d 641, 646 (6th Cir.1999) (quoting *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347 (1974)). Nevertheless, courts have recognized that there is no Eleventh Amendment bar in three instances: (1) where the state has consented to suit; (2) where the application of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) and its progeny is appropriate; or (3) where Congress has abrogated the state's immunity. *Nelson*, 170 F.3d at 646.

Without a doubt, the State of Oklahoma has not waived is sovereign immunity in this case. Therefore, this Court must decide whether (1) *Ex parte Young* allows Plaintiffs to sue these state officials in federal court, and if it does, (2) has Congress, with appropriate Constitutional authority, abrogated the State's sovereign interests of self-government consistent with the principles of ***federalism*** and ***comity,*** taking into account the knowledge that our federal government is a government of limited power? [X Amend. Const.].

(1) Ex parte Young

In *Ex parte Young*, the Supreme Court created an exception to the Eleventh Amendment for suits seeking equitable or declaratory relief against state officials sued only in their "official capacity". The reasoning behind the *Ex parte Young* exception is that "a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State." *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426 (1985) (citation omitted). However, the ***Ex parte Young*** exception has been narrowly construed, in accordance with its rationale. The exception is, for example, limited to allegations that state officials violated federal rather than state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 911 (1984); *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1066 (6th Cir.1984). In addition, where a plaintiff seeks only to rectify a past wrong and there is no claimed continuing violation of federal law, declaratory relief is not available. *Green*, 474 U.S. at 73-74, 106 S.Ct. at 428-429.

Moreover, this procedure cannot be applied to an action against any random state official. As noted in *Ex parte Young*, there must be a connection between the state officer and the enforcement of the act or else the suit will merely make him a representative of the state and therefore improperly making the state a party to the suit. 209 U.S. at 157, 28 S.Ct. 441. A ***nexus*** between the violation of federal law and the individual accused of violating that federal law requires more than simply a broad general obligation to prevent a violation. See *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir.1979) (holding the governor or attorney

general of a state are not the proper defendants in every action attacking the constitutionality of a state statute merely because they have a general obligation to enforce state laws). When a violation of federal law is alleged, as here, the state official whose actions violate that law is the rightful party to the suit and prospective injunctive relief can only be had against him. See, e.g., *Dairy Mart Convenience Stores, Inc. v. Nickel* (*In re Dairy Mart Convenience Stores, Inc.*), 411 F.3d 367, 373 (2d Cir.2005) (State officials were subject to injunction where they refused to give effect to federal bankruptcy law that extended time deadlines for filing a reimbursement claim. A sufficient nexus was established because the state officers oversaw the fund and distribution of claims.)

In essence, the ***Ex parte Young*** doctrine simply bypasses the Eleventh Amendment's bar to the federal courthouse on **jurisdictional** grounds. ("The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, **the Laws of the United States**, and Treaties ...." [Article III, U.S. Const.]). It does not deny a state its reserved sovereign immunity rights under the Tenth Amendment. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [X Amend. U.S. Const.]). Therefore, despite the application of ***Ex parte Young***, a state official sued in his or her "official capacity" is still entitled to raise the sovereign immunity rights of the State as reserved in the Tenth Amendment especially when federalism and comity concerns are at stake.

(2) State Sovereign Interests, the Rational Basis Standard, and Congress' Constitutional Authority

Even though the Plaintiffs may have properly pled their way into this Court and eliminated the Eleventh Amendment's jurisdictional restrictions by suing the designated state officials in their official capacities asking only for prospective equitable relief, this Court must still determine if there is appropriate abrogation of the State of Oklahoma's sovereign immunity as reserved to it in the Tenth Amendment or whether Congress has overstepped its Constitutional authority in enacting 8 U.S.C. § 1324a(h)(2). See e.g., *New York v. U.S.*, 505 U.S. 144, 112 S.Ct. 2408 (1992). It may (at first glance) seem clear that Congress has expressly spoken and abrogated the State's sovereign immunity pursuant to 8 U.S.C. § 1324a(h)(2), but such expressed statement must still be based upon appropriate Constitutional authority [*Kimel; Garrett; City of Boerne*], and that Constitutional authority must still outweigh the State of Oklahoma's sovereign interests of self-government [X Amend.], because while Congress may have the power to enact laws under our duel system of government that affect the States, only the judiciary can interpret what is Constitutionally appropriate. *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kimel v. Florida Board of Regents,* 528 U.S. 62, 120 S.Ct. 631, (2000); *Board of Trustees of the University of Alabama, et al. v. Garrett, et al.*, 531 U.S. 356 (2001). There is a significant difference between statutory preemption and Constitutional preemption, because a federal law that has no Constitutional authority, or attempts to legislate in a traditional state governmental area, is not appropriate legislation under our Constitution. See *New York v. U.S.*, 505 U.S. 144, 112

S.Ct. 2408 (1992). Such is the situation in this case where the Plaintiffs are relying solely on statutory language for federal preemption, rather then appropriate constitutional authority to argue Oklahoma's statutes are preempted.

[a] Oklahoma's sovereign interests and the rational basis standard of review

The State of Oklahoma, as a separate sovereign entity from the national government, is guaranteed "a republican form of government" [U.S. Const., Art. IV, § 4], and "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [U.S. Const., X Amend.]; See also, *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854 (2006)("State policymakers retain broad discretion to make policy decisions concerning state spending in different ways depending on their perceptions of wise state fiscal policy and myriad other circumstances"); *Gonzales v. Oregon*, 126 S.Ct. 904, 163 L.Ed.2d 728 (2006)(The structure and limitations of federalism allow states great latitude under their police powers to legislate as to the protection of lives, limbs, health, comfort, and quiet of all persons); *Gregory v. Ashcroft*, 501 U.S. at 463, (1991)(It is a power reserved to the States under the Tenth Amendment and *guaranteed* them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4). Those Constitutional mandates enumerate, for all the individual States, the right to self-government as long as that self-government does not conflict with the Constitution, or a federal law that has appropriate constitutional authority. [Supremacy

Clause, Art. VI, cl. 2]. When there appears to be a conflict between the Constitution or a federal law, and a State statute, a Court must determine under what standard of review it must judge the conflict. If the state statute touches on a fundamental right or a specifically enumerated Constitutional mandate, then the Court must judge that conflict under a "strict scrutiny" standard of review. (*Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)). But State governmental classifications that do not target suspect classes or groups or fundamental interests, nor interfere with a constitutionally appropriate federal law, are subject only to the more deferential rational basis review. *(Fitzgerald v. Racing Ass'n of Central Iowa*, 123 S. Ct. 2156, 156 L. Ed. 2d 97 (U.S. 2003)).

[b] Preemption

Plaintiffs allege that 8 U.S.C. § 1324a(h)(2) preempts both 25 O.S. § 1313 and 68 O.S. § 2385.32. Title 8 U.S.C. § 1324a(h)(2) provides:

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

It is axiomatic that the federal government is a government of limited power. [X Amend. U.S. Const.]. Regardless of how a Court may interpret 8 U.S.C. § 1324a(h)(2)(See Proposition IV), the question remains: Where in the Constitution does Congress have the power to abrogate the State of Oklahoma's sovereign interests of self-government? Defendants therefore assert that the question before this Court is: Have the Plaintiffs requested relief that infringe on the lawmaking autonomy of the State of Oklahoma [10th

Amendment] by striking "at the heart of political accountability that is so essential to our liberty and republican form of government"[*Alden*, 527 U. S. 706, 713 (1999); see also, the *Guarantee Clause*], with appropriate constitutional authority? [*Boerne*, 521 U.S. 507 (1997); *Kimel,*528 U.S. 62 (2000); *Garrett*, 531 U.S. 356 (2001)].

Plaintiffs' Complaint alleges that the Constitution's "*Supremacy Clause*" [Art. VI, cl. 2] is the authority for Congress to enact 8 U.S.C. § 1324a . However, the "*Supremacy Clause*" does not grant Congress the authority to abrogate the state's sovereignty interests of self-government reserved to the States under the *Guarantee Clause* and the Tenth Amendment, it merely provides that the "Constitution, and **the Laws** of the United States **which shall be made in *Pursuance thereof*** ... shall be the supreme Law of the Land." [Art. VI, cl. 2] (emphasis added). The "***Pursuance thereof***" language requires appropriate Constitutional authority for any law Congress may enact in order for it to be the supreme law of the land. (See *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)(Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority). Therefore, 8 U.S.C. § 1324a(h)(2) cannot abrogate the State of Oklahoma's sovereignty interests of self-government [X Amend. U.S. Const.] in enacting 25 O.S. § 1313 and 68 O.S. § 2385.32, based upon the *Supremacy Clause*.

Likewise, the Constitution's *Naturalization Clause* does not restrict those two statutes in this case. That clause provides that "Congress shall have Power ... To establish an uniform

Rule of Naturalization ... throughout the United States." [Art. I, sec. 8, cl. 4]. Nothing in that clause grants Congress the power to abrogate a state's sovereignty interest of self-government [X Amend. U.S. Const.] or to tell a state who or how it may conduct business with contractors and sub-contractors; what statutory cause of actions it may enact to protect it's legal workers, or how it may tax businesses or individuals within the state. That clause merely provides that Congress shall have the power to determine who, and under what conditions, an alien may become a United States' citizen. *DeCanas v. Bica*, 424 U.S. 351 (1976). Besides, the Supreme Court has made it clear that **"**[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I [where the *Naturalization Clause* is found] cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction". *College Savings Bank*, supra, at 672; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627, 636 (1999); *Alden v. Maine*, 527 U. S. 706, 730-733 (1999). Without proper Constitutional authority to preempt state law this Court is left with no alternative but to analysis the two challenged state statutes under the "rational basis standard".

[c] Congress has overstepped its authority under 8 U.S.C. § 1324a(h)(2) and the State's statutes are reasonable

The State of Oklahoma has a sovereign interest in placing reasonable conditions on who it awards contracts to, as long as those conditions are rationally related to legitimate state concerns. The State also has a sovereign right to create any statutory cause of action that it believes protects its legal state workers from discrimination, and to tax state employers

who hire illegal aliens. The state of Oklahoma has enacted several statutes (two of which are challenged in this case) that attempt to implement federal law (8 U.S.C. § 1601(6)) by discouraging illegal aliens from seeking refuge in this state. One of the ways to discourage such illegal refuge is to eliminate the reasons the illegal aliens seek to come to this state. In this case, Oklahoma's statutes address those legitimate governmental goals by discouraging employers from hiring illegal aliens. Oklahoma's laws are rationally based and narrowly tailored to meet those legitimate State governmental goals. A pre-IRCA Supreme Court decision illustrates the State's sovereignty interest conditions in the employment of illegal aliens (and no-preemption) expressed in both 25 O.S. § 1313 and 68 O.S. § 2385.32.

In the case of *DeCanas v. Bica*, 424 U.S. 351 (1976), the Court was asked to determine the validity of a California statute that prevents California employers from hiring illegal aliens "if such employment would have an adverse effect on lawful resident workers." *Id*. at 352. In an opinion written by Justice Stevens, he held that the Court had " never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by ... constitutional power, whether latent or exercised." *Id*. at 355. "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id*. at 355. "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Id*. at 356. A State's power to prohibit

employment of illegal aliens "is certainly within the mainstream of such police power regulation." Id. at 356. "In attempting to protect [a State's] fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, [California's statute] focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils." Id. at 357.

Even though Justice Stevens seems to indicate that Congress could enact laws ousting state authority to regulate the employment relationship between employers and illegal aliens, "[o]nly a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was the clear and manifest purpose of Congress' would justify that conclusion." (Internal quotations omitted) Id. at 357. Justice Stevens did not address what constitutional authority Congress would need to enact such laws, nor did he address how far Congress could go under such federal ouster.

As further evidence of the constitutionality of Oklahoma's statutes, even the federal government has a policy (issued by President Clinton) of only awarding contracts to contractors who do not hire illegal aliens. See Executive Order 12989 of February 13, 1996, 61 Fed. Reg. 6091 (February 15, 1996). Therefore, Defendants would ask this Court to dismiss Plaintiffs' Complaint because the State of Oklahoma has the sovereign police power to enact the challenged state statutes and Congress' power to preempt those state laws cannot be premised on either the *Supremacy* or the *Naturalization Clauses*.

PROPOSITION IV

EVEN IF CONGRESS DID HAVE CONSTITUTIONAL AUTHORITY TO ABROGATE THE STATE'S SOVEREIGN POLICE POWERS ITS ABROGATION IS LIMITED

Even if this Court finds that Congress did have appropriate constitutional authority to regulate the employment of illegal aliens, the language of 8 U.S.C. § 1324a(h)(2) does not oust all of the States' police power in the area. In order for this Court to grant Plaintiffs the relief they request in this case, this Court must still decide the following issue: Do Oklahoma's challenged statutes create the kind of "civil or criminal sanctions" upon those who employ unauthorized aliens that Congress intended to prohibit?

Title 25 O.S. § 1313(B) prohibits the State of Oklahoma from contracting with any contractor who hires illegal aliens. That is a legitimate state goal based upon the State of Oklahoma's sovereign police powers. *DeCanas* at 356. The State attempts to assist potential contractors and sub-contractors who want to do business with them by allowing them to use a federal verification system designed to verify the legal status of potential employees in the United States. Oklahoma's statute is (in many respects) less restrictive then the federal requirements of 8 U.S.C. § 1324a, in that it does not require the specific "documentation" that the federal statute requires for employment verification. Oklahoma's statute only requires the use of a federal verification system in order to contract with the State. Such requirements cannot be interpreted to be a "civil or criminal sanction." Therefore, even though Plaintiffs have alleged total preemption of the State's sovereign police powers, their

allegation is not based on either appropriate constitutional authority or the specific federal law's preemptive language that they allege preempts 25 O.S. § 1313(B).

Title 25 O.S. § 1313(C) creates a statutory wrongful termination cause of action for the benefit of lawful Oklahoma employees who are terminated, but only if the employer retains an illegal alien "who is working in Oklahoma in a job category that requires equal skill, effort, and responsibility, and which is performed under similar working conditions, as defined by 29 U.S.C., Section 206(d)(1), as the job category held by the discharged employee", ***but only if*** the employer was not enrolled or used "a Status Verification System to verify the employment eligibility of its employees in Oklahoma hired after July 1, 2008." Irrespective of Plaintiffs' *standing* problems, 25 O.S. § 1313 (C) is not preempted by 8 U.S.C. § 1324a(h)(2) because the creation of a state cause of action for failing to verify an employee's legal status through a federal verification system is not a "civil or criminal sanction ... upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens" under federal law. A state has an inherently sovereign police power to protect its state's employees "[i]n attempt[] to protect [the State's] fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens..." *DeCanas* at 357. That statute "focuses directly upon [those] essentially local problems and is tailored to combat effectively the perceived evils" of illegal aliens taking legal resident's jobs. *DeCanas* at 357. Therefore, this Court should dismiss Plaintiffs'

Complaint because Oklahoma's statutes are not preempted by federal law and they are a valid exercise of the State's sovereign police powers reserved to it under the Tenth Amendment.

Title 68 O.S. § 2385.32 (the top marginal income tax rate statute) does not create the kind of "civil or criminal sanction" that Congress intended to preempt under 8 U.S.C. § 1324a(h)(2). That Oklahoma statute merely assesses a state tax withholding in order to protect the State's legal workers from the "deleterious effects on its economy resulting from the employment of illegal aliens." *DeCanas* at 357. The assessment of a state tax can hardly be considered a "civil or criminal sanction." Only an expressed statement by Congress that abrogated the states ability to tax its citizens and employers with appropriate constitutional authority could suffice to preempt that statute. No such appropriate express statement exits in the language of 8 U.S.C. § 1324a(h)(2). Therefore, this Court should dismiss Plaintiffs' Complaint because even the language of 8 U.S.C. § 1324a(h)(2) does not preempt Oklahoma's challenged state statutes.

CONCLUSION

This Court should dismiss Plaintiffs claims against Henry, Edmondson and the OHRC members challenging 68 O.S. § 2385.32 because none of those Defendants have any enforcement authority to tax any of Plaintiffs' member businesses. There is no "***case or controversy***" and Plaintiffs' use of ***Ex parte Young*** is inappropriate because there is no ***nexus*** between these Defendants and Plaintiff's alleged injuries. No Order by this Court against these Defendants would have any effect; it would only be advisory. While this Court

could issue a declaratory judgment holding that federal law preempts 68 O.S. § 2385.32, such order would be merely advisory against these Defendants since any Order issue against these Defendants would be futile. Finally (and probably most importantly) this Court should also hold that it lacks jurisdiction to decide the whether federal law preempts 68 O.S. § 2385.32 because any Order issued by this Court against these defendants would be counter to the Tax Injunction Act. 28 U.S.C. § 1341.

Plaintiffs claims against these Defendants pursuant to 25 O.S. § 1313(B) are also dubious. Plaintiffs claims are tenuously conditioned on whether or not a member business bids on a state contract, if they fail to verify the legal status of one of its employees, and if they are awarded that state contract by being the lowest bidder. Furthermore, while these Defendants may enter into contracts with contractors "for the physical performance of services within this state", these Defendants also possess a sovereign police power to condition those contracts on the legal status of the contractors' employees. Finally, the conditioning of a contract with the State on the verification of the legal status of the contractors' employees, is not a "civil or criminal sanction" pursuant to 8 U.S.C. § 1324a(h)(2). Therefore, this Court should dismiss Plaintiffs' claims challenging 25 O.S. § 1313(B) as preempted by federal law against these Defendants because Plaintiffs injuries are "***conjectural and hypothetical***"; these Defendants possess a sovereign police power to condition their state contracts on a contractor's verification of the legal status of its employees; and the conditioning of a state contract on the verification of the legal status of

a contractors' employees is not a "civil or criminal sanction" within the meaning of 8 U.S.C. § 1324a(h)(2).

This Court should also dismiss Plaintiffs claims pursuant to 25 O.S. § 1313(C) against these Defendants because neither the Governor nor the Attorney General have any enforcement power to investigate or hold liable an employer who terminates a legal worker while "knowingly" retaining an illegal alien. And, while the Oklahoma Human Rights Commission may have the power to investigate an employer who terminates a legal worker while "knowingly" retaining an illegal alien, they do not have the power to hold the employer liable under the statute; only a court could do that. Therefore, any Order by this Court pursuant to 25 O.S. § 1313(C) would merely be advisory and meaningless against these Defendants. (i.e., no case or controversy). See ***Ex parte Young's*** *nexus* requirements and *Hein v. Freedom From Religion Foundation, Inc.*, 127 S.Ct. 2553 (2007) (requiring both personal injury **traceable to these defendants *and*** the availability of **meaningful relief**)). Any challenge to 25 O.S. § 1313(C) would infringe on the lawmaking autonomy of the State of Oklahoma [10th Amendment] by striking "at the heart of political accountability that is so essential to our liberty and republican form of government"[*Alden*, 527 U. S. 706, 713 (1999); see also, the *Guarantee Clause*], with appropriate constitutional authority? [*Boerne*, 521 U.S. 507 (1997); *Kimel,*528 U.S. 62 (2000); *Garrett*, 531 U.S. 356 (2001)]. Therefore, this Court should dismiss Plaintiffs' claims challenging 25 O.S. § 1313(C) against these Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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