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

PADRES UNIDOS DE TULSA, *et al.*,

Plaintiffs,

v.

GENTNER DRUMMOND, *et al.*,

Defendants.

Case No: CIV-24-511-J

DEFENDANTS' RESPONSE OPPOSING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

BACKGROUND 2

STANDARDS 4

ARGUMENTS 6

I. **Plaintiffs lack a cause of action to pursue relief here.** 6

II. **Plaintiffs cannot rely on their illegal activity for standing to pursue a preliminary injunction.** 14

III. **Plaintiffs' likelihood of success on the merits has decreased substantially.** 18

IV. **Congress did not intend for lawbreaking to be shielded via pseudonym.** 23

V. **This Court should not provisionally certify classes of federal lawbreakers.** 30

VI. **The remaining factors and equities do not favor Plaintiffs here.** 34

VII. **This Court should require Plaintiffs to post a substantial bond.** 34

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

A.D. v. Park City Sch. Dist.,
No. 2:23-cv-665, 2024 WL 1178578 (D. Utah Mar. 19, 2024) 24

Abraham v. WPX Prod. Prods., LLC,
184 F. Supp. 3d 1150 (D.N.M. 2016) 30

Alexander v. Sandoval,
532 U.S. 275 (2001) 6

Aliah K. ex rel. Loretta M. v. Haw., Dep't of Educ.,
788 F. Supp. 2d 1176 (D. Haw. 2011) 2

Arizona v. United States,
567 U.S. 387 (2012) 4, 19, 23

Armstrong v. Exceptional Child Ctr., Inc.,
575 U.S. 320 (2015) 7, 8, 9, 10, 11, 12

Bradshaw v. Am. Airlines, Inc.,
123 F.4th 1168 (10th Cir. 2024) 6

Canal Auth. of Fla. v. Callaway,
489 F.2d 567 (5th Cir. 1974) 4

Chamber of Commerce of United States v. Edmondson,
594 F.3d 742 (10th Cir. 2010) 7

Coe v. U.S. Dist. Ct. for Dist. of Colo.,
676 F.2d 411 (10th Cir. 1982) 25

Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media,
589 U.S. 327 (2020) 6

Coquina Oil Corp. v. Transwestern Pipeline Co.,
825 F.2d 1461 (10th Cir. 1987) 35

Davis v. Passman,
442 U.S. 228 (1979) 6

DeCanas v. Bica,
424 U.S. 351 (1976) 20

Doe v. City of Albuquerque,
667 F.3d 1111 (10th Cir. 2012) 6

Doe v. MIT,
46 F.4th 61 (1st Cir. 2022) 24

Ellis v. Liberty Life Assurance Co. of Boston,
958 F.3d 1271 (10th Cir. 2020) 16

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 4

Ex parte Young,
209 U.S. 123 (1908) 10

FDA v. All. for Hippocratic Med.,
602 U.S. 367 (2024) 16

Femedeer v. Haun,
227 F.3d 1244 (10th Cir. 2000) 24, 25, 26, 27

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 9, 10, 14

GTE Corp. v. Williams,
731 F.2d 676 (10th Cir. 1984) 4

Health & Hosp. Corp. of Marion Cnty. v. Talevski,
599 U.S. 166 (2023) 14

Initiative & Referendum Inst. v. Walker,
450 F.3d 1082 (10th Cir. 2006) 14, 15

Kansas v. Garcia,
589 U.S. 191 (2020) 12, 19, 20, 21, 22

Kerr v. Polis,
20 F.4th 686 (10th Cir. 2021) 15

Kerr v. Polis,
930 F.3d 1190 (10th Cir. 2019) 15

L.M. ex rel. A.M. v. City of Gardner,
No. 19-2425-DDC, 2019 WL 4168805 (D. Kan. Sept. 3, 2019) 25

Liddell v. Heavner,
180 P.3d 1191 (Okla. 2008) 6

M.D. Mark, Inc. v. Kerr-McGee Corp.,
565 F.3d 753 (10th Cir. 2009) 7

M.G. ex rel. Garcia v. Armijo,
117 F.4th 1230 (10th Cir. 2024) 13

Martin v. Mukasey,
517 F.3d 1201 (10th Cir. 2008) 28

Moody v. NetChoice,
603 U.S. 707 (2024) 5

N.Y. State Dep't of Soc. Servs. v. Dublino,
413 U.S. 405 (1973) 21

Nat'l Commodity & Barter Ass'n v. Gibbs,
886 F.2d 1240 (10th Cir. 1989) 29

Original Invs., LLC v. Okla.,
542 F. Supp. 3d 1230 (W.D. Okla. 2021) 1, 8, 13, 34

P.J.E.S. ex rel. Escobar Francisco v. Wolf,
502 F. Supp. 3d 492 (D.D.C. 2020) 31

Plyler v. Doe,
457 U.S. 202 (1982) 19

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) 24

Safe Streets Alliance v. Hickenlooper,
859 F.3d 865 (10th Cir. 2017) 9, 10, 11, 12, 14

Schrier v. Univ. of Colo.,
427 F.3d 1253 (10th Cir. 2005) 4

Speech First, Inc. v. Shrum,
92 F.4th 947 (10th Cir. 2024) 24

United States v. Hansen,
599 U.S. 762 (2023) 5

United States v. Oklahoma,
739 F. Supp. 3d 985 (W.D. Okla. 2024) 3, 4, 7, 8, 12, 21

United States v. Supreme Ct. of N.M.,
839 F.3d 888 (10th Cir. 2016) 8

Vallario v. Vandehey,
554 F.3d 1259 (10th Cir. 2009) 30

W.N.J. v. Yocom,
257 F.3d 1171 (10th Cir. 2001) 25

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 31, 33

Ward v. Utah,
398 F.3d 1239 (10th Cir. 2005) 4, 5

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008) 5

White v. Ziriax,
No. CIV-24-631-J, 2025 WL 1178594 (W.D. Okla. Jan. 29, 2025) 7

Whole Woman's Health v. Jackson,
595 U.S. 30 (2021) 12

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 4

Wyeth v. Levine,
555 U.S. 555 (2009) 6

Younger v. Harris,
401 U.S. 37 (1971) 27

Statutes

8 U.S.C § 1158 13

8 U.S.C. § 1182 13

8 U.S.C. § 1231 13

8 U.S.C. § 1325 20

8 U.S.C. § 1326 ..... 9, 10, 20

42 U.S.C. § 1983 7

OKLA. STAT. tit. 74, § 18 34

Constitutional Provisions

U.S. CONST. art. VI, cl. 2 22

Other Authorities

Fed. R. Civ. P. 23 ..... 31, 33

Geraldine Szott Moohr, *The Federal Interest in Criminal Law*,
47 SYRACUSE L. REV. 1127 (1997) 5

Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*,
70 S. CAL. L. REV. 643 (1997) 5

Less than two weeks ago, Defendants ("the State" or "Oklahoma") responded at length to Plaintiffs' combined motion for a temporary restraining order ("TRO") or a preliminary injunction. Given the shortened time frame for the present filing, the State stands on and incorporates that response here. *See* Doc. 76. In sum, this Court should deny Plaintiffs a preliminary injunction of House Bill 4156 ("H.B. 4156") because: (1) federal lawbreaking cannot bestow standing to challenge a state law on the same topic as the federal law; (2) Congress did not preempt state laws that mirror federal entry and reentry laws at the state level; (3) Plaintiffs ignore critical developments, such as the United States' declaration of an invasion at the southern border; (4) Plaintiffs have not made a case for provisional certification of an enormous class of federal lawbreakers, and those lawbreakers should not be given pseudonymous status to avoid federal law enforcement; and (5) the equities do not permit injunctive relief here, as Plaintiffs have not acted with urgency and "[i]t is well-settled … that 'a court won't use its equitable power to facilitate illegal conduct.'" *Original Invs., LLC v. Oklahoma*, 542 F. Supp. 3d 1230, 1233 (W.D. Okla. 2021) (citation omitted).

For purposes of this response, then, the State will focus primarily on raising and preserving additional arguments, such as Plaintiffs' lack of a cause of action, and interacting with this Court's recent order granting a TRO.[1] *See* Doc. 80. In the end, the State's position is unchanged: To grant equitable relief, pseudonym status, and provisional class certification to Plaintiffs plainly subverts federal criminal law in the name of upholding it. This Court should therefore deny a preliminary injunction, and the TRO should be allowed to expire.

[1] Because the State's submission of a comprehensive response under significant time constraints has also required rebuttal of the arguments contained in Plaintiffs' pseudonym and class-certification motions, this Response exceeds 25 pages.

BACKGROUND

This is the third time the State has responded to preliminary injunction motions on this same topic in this Court. Last year, before the United States dismissed its lawsuit, Oklahoma filed a combined response to the injunction motions submitted by the United States and Plaintiffs. Oklahoma incorporates that response by reference, as well. *See* Doc. 21; *see also, e.g.*, *Aliah K. ex rel. Loretta M. v. Haw., Dep't of Educ.*, 788 F. Supp. 2d 1176, 1183 (D. Haw. 2011) (permitting defendant to "incorporate[] by reference its memorandum in opposition to the August 2010 TRO Motion" in opposing a later preliminary injunction/TRO motion). Moreover, out of an abundance of caution, Oklahoma attaches two of the exhibits from that filing here: (1) Attorney General Gentner Drummond's 2024 testimony to the U.S. House Homeland Security Committee, and (2) the declaration of Donnie Anderson, the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control. *See* Exhibits 1 & 2. Those affidavits, in addition to H.B. 4156 itself, explain in detail the "border crisis [that] has swamped Oklahoma with an unprecedented onslaught of criminal activity." Doc. 21 at 2. Plaintiffs have provided nothing to undermine this material.

The remaining two declarations from last year come from affiants who have since accepted positions in the United States government: Rodney Scott has been nominated to lead U.S. Customs and Border Protection (CBP), and Christopher Landau is serving as the 23rd Deputy Secretary of State. Oklahoma will not attach Mr. Scott or Mr. Landau's declarations here, both because the affiants are moving into public service, and because they were both asked to rebut affidavits submitted by the United States. *See, e.g.*, Doc. 21-4, at ¶ 3 (Landau: "I submit this Declaration in response to the Declaration of Eric Jacobstein ….").

States affidavits are now gone from this case, and Plaintiffs have offered nothing similar in their place. This should matter, because this Court expressly grounded part of its original ruling on that withdrawn testimony. Specifically, this Court relied on the "declarations provided by the United States regarding Oklahoma's interference with its comprehensive foreign-policy framework as well as Mexico's expression of its concern over the signing of H.B. 4156" to find that the "United States' arguments are well-taken." *United States v. Oklahoma*, 739 F. Supp. 3d 985, 1006 (W.D. Okla. 2024). Among the arguments this Court found "well-taken" (based on the now-absent affidavits) were that H.B. 4156 "would harm the United States' relationship with foreign nations" and "will displace the federal exercise of discretion in enforcing immigration laws, as well as interfere with federal immigration proceedings." *Id.* No such findings are possible here, and no rebuttals needed, because Plaintiffs have not even tried to replace this evidentiary material. Nor could they, since the United States no longer opposes H.B. 4156's enforcement.

This leads to Director Anderson's affidavit, which deserves closer inspection. He testified that enforcement of H.B. 4156 "would necessarily be limited by the resources available to the [State Bureau] and the willingness of the federal government to assist." Exhibit 2 at ¶ 8. "Put differently," he wrote, "[H.B.] 4156 does not appear to me to be designed to operate in opposition to the federal government, but in some form of collaboration with it." *Id.* And now the United States is willing to collaborate. Yet, with this Court's TRO, a state law mirroring federal law is being stymied despite both sides to that equation being willing to collaborate on enforcement. This is improper. With the United States having dismissed its

case, there is no basis to find that H.B. 4156 will "displace federal exercise of discretion" or "interfere with federal immigration proceedings." *Oklahoma*, 739 F. Supp. 3d at 1006.

STANDARDS

Again, a preliminary injunction is supposed to be "an *extraordinary* remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (emphasis added); *see also Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). To obtain this extraordinary remedy, a plaintiff—not a defendant—has the burden to show that (1) "he is likely to succeed on the merits," (2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in his favor," and (4) "an injunction is in the public interest." *Winter*, 555 U.S. at 20; *see also Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974) ("The burden of persuasion on all of the four requirements for a preliminary injunction is at all times upon the plaintiff."). Because of this heavy burden, preliminary injunctions are the "exception rather than the rule." *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984). Stated differently, "the right to relief must be clear and unequivocal." *Schrier*, 427 F.3d at 1258 (quotation omitted). Such is not the case here, where substantial questions about standing, a cause of action, the appropriateness of equitable relief, and the merits abound. *See, e.g.*, *Oklahoma*, 739 F. Supp. 3d at 998 (admitting, "to Oklahoma's credit," that *Arizona v. United States*, 567 U.S. 387 (2012) is not directly on point and must be extended to reach H.B. 4156).

Moreover, when a plaintiff seeks facial relief, "it is necessary to proceed with caution and restraint." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). This is "[b]ecause facial challenges push the judiciary towards the edge of its traditional purview and expertise." *Ward v. Utah*, 398 F.3d 1239, 1247 (10th Cir. 2005). As a result, the Supreme Court has "made facial

challenges *hard to win*" because they "'threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways." *Moody v. NetChoice*, 603 U.S. 707, 723 (2024) (emphasis added) (citation omitted). Thus, facial challenges to laws are "disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Plaintiffs bringing a facial challenge "normally 'must establish that no set of circumstances exists under which the [statute] would be valid.'" *United States v. Hansen*, 599 U.S. 762, 769 (2023) (citation omitted). Therefore, "courts must be vigilant in applying a most exacting analysis to such claims." *Ward*, 398 F.3d at 1247.

This case involves a pre-enforcement facial challenge to a state criminal law, yet the TRO made no mention of the higher standard for facial challenges—challenges that the Supreme Court has expressly made "hard to win." *NetChoice*, 603 U.S. at 723. This standard should be particularly onerous for plaintiffs challenging a state criminal law that echoes an uncontested federal law—a situation utterly commonplace throughout criminal law. *See, e.g.*, Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 654–55 (1997) (collecting numerous examples of "duplicative" state and federal criminal laws); Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1128 (1997) ("Congress has, over the past decade, enacted numerous federal criminal laws[,] many of which punish conduct already criminalized by state penal codes."). Showing a likelihood of success on the merits of a claim that is undeniably "hard to win," when *both* sovereigns in our country's federalist structure disagree, should demand far more than the paltry effort Plaintiffs have put forward. That a law *might* infringe upon the federal domain does not mean that it always will, which means that facial relief is inappropriate. Here, for example, surely there are

persons unlawfully present—murderers, rapists, etc.—whom Congress did not intend to shield from a state's unlawful presence law. What sense does it make, after all, to say that a state can prosecute an illegal alien for murder or rape but not for being here unlawfully?

Also important, in terms of legal standards, is that courts (federal and state) are required to presume that Oklahoma's laws are constitutional. *See, e.g.*, *Doe v. City of Albuquerque*, 667 F.3d 1111, 1120 (10th Cir. 2012) ("[W]e give all statutes a presumption of constitutionality ...."); *Liddell v. Heavner*, 180 P.3d 1191, 1200 (Okla. 2008) (a "statute will be presumed to conform to the state and federal Constitutions and will be upheld unless it is clearly, palpably and plainly inconsistent with the Constitution"). Narrowing in further, "[i]n all pre-emption cases," courts are required to "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citations omitted). The Tenth Circuit recognized this "presumption" against preemption as recently as five months ago, citing *Arizona*, 567 U.S. at 399. *Bradshaw v. Am. Airlines, Inc.*, 123 F.4th 1168, 1173 (10th Cir. 2024). This presumption, combined with the difficulties of a facial challenge, should make Plaintiffs' effort to secure equitable relief nearly impossible.

ARGUMENTS

I. Plaintiffs lack a cause of action to pursue relief here.

A private plaintiff must show he has a private right or cause of action before he can demonstrate a likelihood of success. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media,* 589 U.S. 327, 334 (2020) ("private rights of action to enforce federal law must be created by Congress") (quoting *Alexander v. Sandoval,* 532 U.S. 275, 286–287 (2001)); *Davis v. Passman*, 442

U.S. 228, 239 n.18 (1979) (explaining how a "cause of action" differs from other related concepts). But in their injunction motion, Plaintiffs omitted any discussion of a private right or cause of action. *See* Doc. 60. This by itself should quash their effort to obtain an "extraordinary" injunction, given that they alone bear the burden to prove that they are likely to succeed in this "hard to win" posture. *See NetChoice*, 603 U.S. at 723. Plaintiffs attempted to rectify this omission in their TRO reply, but as the State has recently been reminded by this Court, "a party waives issues and arguments raised for the first time in a reply brief." *White v. Ziriax*, No. CIV-24-631-J, 2025 WL 1178594, at *3 n.6 (W.D. Okla. Jan. 29, 2025) (quoting *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 768 n.7 (10th Cir. 2009)). In any event, no such private right of action exists here. At a minimum, whether illegal immigrants have a legal "right" to bring a pre-enforcement facial challenge to a state illegal presence law is *highly* debatable, which is not the stuff of which extraordinary injunctions are made.

In their Second Amended Complaint, Plaintiffs do not assert that Congress has created a cause of action for them on the Supremacy Clause claim; indeed, they do not even cite 42 U.S.C. § 1983 for that claim. Rather, they merely cite the Supremacy Clause and "equity" as the basis for the suit. Doc. 64 at 15. This is not enough. As this Court has correctly recognized, "the Supremacy Clause does not create a cause of action" and is "not the source of any federal rights." *Oklahoma*, 739 F. Supp. 3d at 996 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015)). This alone refutes Plaintiffs' reliance (in their TRO reply) on *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010). *See* Doc. 78 at 5. In *Edmondson*, the Tenth Circuit found that the "Chambers have a valid right of action under the Supremacy Clause," 594 F.3d at 756, a holding that has been abrogated by *Armstrong*.

To be sure, this Court previously held that the United States could win an injunction anyway based solely on the Court's equitable authority. *Oklahoma*, 739 F. Supp. 3d at 996–97. But most of the authorities this Court relied on specifically discussed the ability of the federal government to obtain relief in equity. *See, e.g.*, *United States v. Supreme Ct. of N.M.*, 839 F.3d 888, 906 n.9 (10th Cir. 2016) ("To the extent that *Armstrong*'s Supremacy Clause holding is motivated by the desire to preserve the federal government's 'ability to guide the implementation of federal law,' this counsels in favor of—not against—permitting the United States to invoke preemption." (internal citation omitted)). That point is moot now. And there is a *chasm* between finding that "the federal government may bring an action in equity to enforce federal supremacy," *Oklahoma*, 739 F. Supp. 3d at 996, and a finding that individuals who are here illegally may use equity in a similar manner, *see, e.g.*, *Original Invs.*, 542 F. Supp. 3d at 1233 (W.D. Okla. 2021) ("It is well-settled … that 'a court won't use its equitable power to facilitate illegal conduct.'"). The latter does not necessarily follow from the former—at all. Thus, while it is undeniable that "in a proper case, relief may be given in a court of equity to prevent an injurious act by a public officer," *Oklahoma*, 739 F. Supp. 3d at 996 (quoting *Armstrong*, 575 U.S. at 327), this is not a "proper case" for the deployment of equitable relief. Equity may at times allow someone to "sue to enjoin unconstitutional actions by state and federal officers," *id.* (quoting *Armstrong*, 575 U.S. at 327), but not here.

Nevertheless, this Court previously indicated that, while Oklahoma was "correct that the Court is limited in its jurisdiction," "for Oklahoma to prevail on its argument that equitable relief is unavailable, it must identify some law that has displaced the Court's equitable powers." *Id.* at 997. Respectfully, putting the burden on Oklahoma to identify a law disavowing equitable

relief—rather than on Plaintiffs to identify a cause of action—conflicts with the most relevant Tenth Circuit precedent interpreting *Armstrong*: *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017). In *Hickenlooper*, the Tenth Circuit firmly rejected an attempt by private individuals and organizations to obtain equitable relief against Colorado for injuries resulting from that state's contravention of the federal Controlled Substances Act ("CSA"). Like here, the plaintiffs there argued that a state law (legalizing marijuana) was preempted. But rather than permit equitable relief, the Tenth Circuit concluded that the plaintiffs had no "federal substantive rights that have been injured by Colorado." *Id.* at 877. Even in the context of preemption and equity, that is, the Tenth Circuit put the burden *on the plaintiffs* to show that the CSA gave them a "substantive private right" to sue. *Id.* at 914 (Hartz, J., concurring).

In doing so, the Tenth Circuit reviewed *Armstrong* and "over thirty Supreme Court cases" and explained that "where the text and structure" of a law provides "no indication that Congress intend[ed] to create new individual rights, there is *no basis* for a private suit." *Id.* at 901 n.13 (emphasis in original) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002)). It is "critical[]," the Tenth Circuit held, that unless Congress has given a private plaintiff "a federal right of her or his own to vindicate in the CSA, the plaintiff cannot maintain a cause of action—in law *or in equity*—against any defendant for violating the CSA." *Id.* at 902 (emphasis added). And the "same threshold inquiry applies when we ask 'whether a statutory violation may be enforced through § 1983.'" *Id.*[2] In the end, the Tenth Circuit "will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Id.* "'*Congress*

[2] Plaintiffs' Commerce Clause claim cites both equity and Section 1983. Doc. 64 at 15–16.

must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity' for injunctive relief to issue." *Id.* at 902–03 (emphasis added) (citation omitted).

The Tenth Circuit further explained that "[f]or a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'" *Id.* at 903 (quoting *Gonzaga Univ.*, 536 U.S. at 283). Obviously, nothing in the Immigration and Nationality Act ("INA") prohibitions on illegal entry and reentry is phrased in a way that suggest *benefits* for the persons breaking those laws. Punishments, not benefits, are the express instructions. *See, e.g.*, 8 U.S.C. § 1326(a) ("alien … shall be fined … or imprisoned not more than 2 years, or both"). Regardless, like in *Hickenlooper*, "no discerning inquiry is necessary because [Plaintiffs] have *never* alleged that they have any substantive rights" in the INA or anywhere else "by which they can enforce the [INA's] preemptive effects." *Id.* at 903. Plaintiffs are "required to plausibly allege that they are vindicating a federal substantive *right* to be able to maintain a cause of action in equity of the type they assert here. But they failed to do so." *Id.* at 903–04 (emphasis added). Again, Plaintiffs' complaint does not list the INA as an anchor for their claim. "Perhaps in antiquity a private citizen could enter a judicial forum and demand equitable relief in the absence of any injury to a protected substantive right. But such incantations almost certainly ceased to hold any power in 1788." *Id.* at 904.

Ignoring all this binding instruction, Plaintiffs make a mere passing reference to *Hickenlooper*, relying solely on Footnote 19. *See* Doc. 78 at 5. In that footnote, the Tenth Circuit echoed *Armstrong* (and *Ex parte Young*, 209 U.S. 123 (1908)), in stating that "if an individual claims federal law immunizes him from state *regulation*, the court may issue an injunction upon finding the state *regulatory actions* preempted." *Hickenlooper*, 859 F.3d at 906 n.19 (emphasis in

original) (quoting *Armstrong*, 575 U.S. at 326). But later in that same footnote, the Tenth Circuit indicated that "immunizes" means that the person has federal "rights" that he cannot be forced to give up through a threat of state prosecution. *See id.* ("It is the official 'coercion' at issue (e.g., 'putting the challenger to the choice between abandoning his *rights* or risking *prosecution*') that gives rise to such preemption-based *defenses*." (citation omitted)). The idea that the INA grants violators of its criminal strictures any sort of immunity or substantive "rights" is illogical and cannot be what Congress intended when it enacted the INA. It simply cannot be the case that law-abiding Colorado citizens lack a right of action to obtain equitable relief for injuries caused by Colorado's contravention of federal law (*Hickenlooper*), while law-breaking non-citizens in Oklahoma are permitted to obtain prospective equitable relief to allow them to thwart federal law (here). This dichotomy would turn the rule of law on its head.

Oklahoma recognizes, of course, that this argument veers closer to the merits. And it is true that if Oklahoma is correct on the merits, then Plaintiffs would also *ipso facto* lack a cause of action to bring their claim. But the flipside of this is not necessarily true. Even if Congress intended to preempt states from mirroring federal entry and reentry prohibitions, as this Court has previously found, that does not necessarily mean that Congress intended to provide persons breaking those federal laws with a "right" or "immunity" that could be exercised prospectively in equity. Rather, it is more plausible that Congress intended *at most* for the United States to be the exclusive wielder of injunctive authority, and for persons violating the law to bring preemption arguments in a defensive posture, when facing a state prosecution. Indeed, both *Armstrong* and *Hickenlooper* (in the very footnote cited by Plaintiffs) contemplated this scenario, observing that a state "court may not convict a criminal defendant

of violating a state law that federal law prohibits." *Hickenlooper*, 859 F.3d at 906 n.19 (quoting *Armstrong*, 525 U.S. at 326). This explanation would be unnecessary to include if all such individuals could just bring anonymous pre-enforcement challenges in federal court.

There is nothing improper with a defensive avenue being the only one available to Plaintiffs. Just four years ago, the Supreme Court observed—in rejecting the argument that equitable relief just *had* to be available to a group of plaintiffs—that "those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 49 (2021). Put succinctly, there is no "unqualified right to pre-enforcement review of constitutional claims in federal court." *Id.* "To this day," the Supreme Court explained, "*many* federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, *not* in federal pre-enforcement cases." *Id.* (emphases added). That's how the Supreme Court's decision in *Kansas v. Garcia* came about; the aliens were convicted in state court, had their convictions overturned by the Kansas Supreme Court (on preemption grounds), and then had the convictions reinstated by the U.S. Supreme Court. *See* 589 U.S. 191 (2020). Oklahoma's position here is not esoteric or unfair, according to the Supreme Court itself. Plaintiffs lack a cause of action, and they are not entitled to equitable pre-enforcement relief.

Even under this Court's prior formulation, Oklahoma should still prevail. This Court, that is, seems to believe that instead of the burden being on Plaintiffs to show a created right of action, Oklahoma must cite to a "constitutional or statutory provision that expressly or impliedly displaces an action arising in equity." *Oklahoma*, 739 F. Supp. 3d at 997. This is easy here. By criminalizing the underlying behavior in the INA, Congress impliedly displaced the

ability of courts to rely on equity to grant individuals engaging in that behavior prospective relief from state action targeting the same illegal conduct. Since it "[i]t is well-settled … that 'a court won't use its equitable power to facilitate illegal conduct," *Original Invs.*, 542 F. Supp. 3d at 1233, the creation of a statute making the conduct in question here illegal as a federal matter takes federal court equity off the table, even if an individual may later attempt to protest about preemption in a defensive manner in state court.

Indeed, "several characteristics of the federal statute before [the Court], when taken together, make clear that Congress intended to foreclose respondents from bringing this particular action for injunctive relief." *M.G. ex rel. Garcia v. Armijo*, 117 F.4th 1230, 1252 (10th Cir. 2024). Here, the INA repeatedly explains that the targets of its provisions do not have a right to sue. *See, e.g.*, 8 U.S.C. § 1231(a)(4)(D) ("No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien."); *id.* § 1158(d)(7) ("No private right of action. … Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person."). Further, Congress directed immigration officers to "order ... removed from the United States without further hearing or review" an alien who lacks a "valid entry document." *Id.* § 1182(a)(7)(A)(i)(I). To be sure, there is no express language disavowing a right to sue for the specific entry and reentry crimes here—but why would it be needed? Surely, the sheer fact of criminalization is enough to show Congress's intent not to create a simultaneous right to sue for the relevant lawbreakers.

Finally, again, Plaintiffs' invocation of Section 1983 for the Commerce Clause claim does not help their lack of a cause of action. As *Hickenlooper* explained, the "same threshold inquiry applies when we ask 'whether a statutory violation may be enforced through § 1983.'" 859 F.3d at 902. It is a "plaintiff's burden under § 1983" to show that a statute '*unambiguously* confer[s] individual federal rights.'" *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 230 (2023) (Alito, J., dissenting) (agreeing with and quoting the majority's explanation of Section 1983). "[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms." *Gonzaga Univ.*, 536 U.S. at 290. Congress has not done so here. And any private right of action claim predicated on Section 1983 and Congress's "dormant" Foreign Commerce Clause power must fail because a dormant power necessarily implies the lack of a positive exercise of congressional authority in creating a cause of action.

II. Plaintiffs cannot rely on their illegal activity for standing to pursue a preliminary injunction.

The State has already explained why Plaintiffs lack standing. *E.g.*, Doc. 76 at 6–12. Again, Oklahoma incorporates those arguments here. In short, Plaintiffs are open about their intent and actions violating federal law, Doc. 62 at 6 & Doc. 60 at 4, and "a person complaining that government action will make his criminal activity more difficult lacks standing because his interest is not 'legally protected.'" *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) (en banc). Plaintiffs' interest in remaining in Oklahoma without being charged under H.B. 4156, per the express mandate of Congress enshrined in federal statutes, is "not 'legally protected.'" *Id.* And if they lack individualized standing, it is difficult to see how the Plaintiff organizations could somehow avoid the same fate.

According to this Court, "Defendants' reliance on *Walker* is misplaced." Doc. 80 at 8. As an initial matter, this Court found that the "Tenth Circuit's brief reference to criminal activity was nothing more than an illustrative example—one of several types of conduct generally deemed insufficient to meet the threshold for standing." *Id.* The State agrees—and is confused as to how this favors Plaintiffs here. *Walker* stated a rule: the term "legally protected interest" in the standing analysis "has independent force and meaning." 450 F.3d at 1093. It then gave three examples of this rule's application, one of which was broadly phrased: "a person complaining that government action will make his criminal activity more difficult lacks standing because his interest is not 'legally protected.'" *Id.* That example *is* "illustrative," and it applies here: Plaintiffs are present in the United States illegally, by their admission, and they are suing because their continued violation of federal law will be more difficult if the State prosecutes them for illegal presence. Nothing in *Kerr v. Polis*, 930 F.3d 1190 (10th Cir. 2019), (to the extent that decision is still valid[3]) contradicts this reading of *Walker*. To the contrary, the *Kerr* panel *reaffirmed* that *Walker* provided an "illustrative list of situations … in which an asserted 'legally protected interest' is not recognized." *Id.* at 1198.

Nevertheless, without citation, this Court found that *Walker*'s statement "was not a sweeping declaration that any unlawful status (like unauthorized presence) categorically precludes standing." Doc. 80 at 8. Perhaps not, although *Walker*'s statement was broadly phrased, and broadly phrased statements are just as mandatory for this Court and the State as narrowly phrased statements. Regardless, the State is not herein arguing that Plaintiffs'

[3] This Court cites the panel decision in *Kerr*, but the Tenth Circuit issued a subsequent *en banc* decision that did not fully agree with the panel and did not discuss *Walker* at all. *See Kerr v. Polis*, 20 F.4th 686 (10th Cir. 2021) (en banc).

unlawful presence precludes them from judicial relief entirely; they may raise preemption in state court defenses. Nor is the State arguing that Plaintiffs are categorically excluded from federal courts on other claims unrelated to illegal presence. The State is simply arguing, based on binding precedent, that to show standing for an equitable pre-enforcement facial challenge Plaintiffs cannot have a "legally protected interest" in being present in Oklahoma without punishment when the federal government has criminalized that very presence.

Next, this Court found that "Defendants' position would broadly eviscerate standing in preemption challenges of parallel state laws." Doc. 80 at 8. Even if true, this is irrelevant. No one is guaranteed standing for anything: if Plaintiffs lack standing, they lack standing. The Supreme Court's *FDA* case just last term repeatedly made this clear. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024) ("the standing requirement means that the federal courts may never need to decide some contested legal questions"); *id.* at 396 ("this Court has long rejected that kind of 'if not us, who?' argument as a basis for standing"); *id.* ("The 'assumption' that if these plaintiffs lack 'standing to sue, no one would have standing, is not a reason to find standing.'" (citation omitted)). In any event, it is not obvious that the universe of people needing standing to challenge as preempted state laws that merely parallel uncontested federal laws is very broad; in our federalist structure, nearly all parallel state laws will surely be constitutional. *See, e.g.*, *Ellis v. Liberty Life Assurance Co. of Boston*, 958 F.3d 1271, 1278 (10th Cir. 2020) (deeming field preemption "rare").

At a bare minimum, this Court cited little authority indicating that a ruling in Oklahoma's favor would have a broad impact in this context or any other context. Rather, the Court relied on a brand-new district court decision issued less than a month ago, and the Court

added as a "*cf.*" a Ninth Circuit case from a decade ago again involving illegal immigration and a Third Circuit case that was vacated on other grounds. Doc. 80 at 9. Although those citations are favorable to the Court's position, the State sees little grounding in this non-binding material for the claim that standing will be "broadly eviscerate[d]" here if the State prevails.

Respectfully, this Court is also incorrect that "someone facing criminal prosecution under a state law mirroring federal law would be precluded from asserting preemption." Doc. 80 at 8–9. As explained above, these individuals could raise preemption as a defense to state court prosecutions. Thus, states would not be able "to insulate even the most severe criminal sanctions from judicial scrutiny simply by mirroring federal prohibitions." *Id.* at 9.

This Court's alternative holding that Plaintiffs "have made a clear showing of likely injury-in-fact," Doc. 80 at 11, is difficult to square with the completely anonymous nature of the proceedings thus far (and seemingly into the future given this Court's pseudonymity ruling). Plaintiffs certainly purport to be here unlawfully, which, as explained above, should end the matter in terms of standing. *See id.* (acknowledging that one Plaintiff has been removed *twice*). But how anything here can be "clear" when Plaintiffs hide behind pseudonyms and detail-deficient allegations is a mystery to Oklahoma. This is especially the case when these pseudonymous Plaintiffs didn't even appear in this year-long case until several weeks ago and no explanation has been given for why prior named Plaintiffs have been dropped in favor of cloaked lawbreakers. Plaintiffs bear the burden here of making a rigorous showing of standing, and they have not done so. Instead, Plaintiffs devoted a mere page of their motion to standing.

Oklahoma also disputes that the rest of the standing prongs have been met. Redressability, for example, seems particularly problematic when Plaintiffs' illegality and

exposure to prosecution remains under federal law even if H.B. 4156 is enjoined. The injunction, that is, does nothing to remove Plaintiffs' illegal status and exposure to punishment. Finally, the associational standing arguments largely depend on the standing (or lack thereof) of the individual Plaintiffs. Because the individual Plaintiffs lack standing, so do the organizational Plaintiffs. The organizations also fail the second prong of associational standing because, yet again, the "interests" they seek to protect are the continued illegal behavior and actions of their members—which cannot confer standing. Much as an organization devoted to perpetuating bank robberies nationwide could not claim standing based on that joint and illicit interest, the organizations cannot base their standing here on a joint interest to have their members escape the rule of law in this country. And to the extent certain members are law-abiding, they may very well have standing to pursue unrelated claims elsewhere, but they lack standing to challenge a law that simply mirrors federal law and affects federal lawbreakers only.

III. Plaintiffs' likelihood of success on the merits has decreased substantially.

Despite a tectonic "shift[]" in "the case's posture," the Court continues to conclude that H.B. 4156 is "likely both field and conflict preempted." Doc. 80 at 15. But the United States' abandonment of its support of Plaintiffs' legal position only underscores the point that Oklahoma has consistently maintained throughout the course of this litigation: Congress did not intend to preempt the enactment of state laws that merely mirror federal entry and reentry laws at the state level. H.B. 4156 is derived from—and complements—federal law. As such, it exemplifies a *cooperative* relationship between federal and state sovereigns. It neither displaces nor interferes with the overarching framework of federal immigration law. And when both

sovereigns in question are comfortable with the law's legality, that has significance. It may not be controlling, per se, but it speaks volumes as to the relative strengths of the arguments about congressional intent here when this country's dual sovereigns are unified in their position. To hold otherwise is to in essence find that the United States and Oklahoma have teamed up to defy congressional intent, which is a theory that should not be embraced unless the evidence in support is crystal-clear and unequivocal. Nothing of the sort exists here; Plaintiffs certainly have not put forward that substantial a case.

"From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today." *Kansas*, 589 U.S. at 212. This principle holds no less true in the immigration context: "the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." *Arizona*, 567 U.S. at 400 (cleaned up). Accordingly, states are not deprived of "power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns." *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982). When "the Federal Government … prescribe[s] what it believes to be appropriate standards for the treatment of [aliens], the States may, of course, follow the federal direction." *Id.* at 219 n.19.

Oklahoma has done no more than that in enacting H.B. 4156, which mirrors federal criminal law. Indeed, it is undeniable that H.B. 4156 is more limited than federal criminal law because it does not regulate the removal of anyone from the United States itself. In its Order, this Court emphasized that "Congress's intent … controls the preemption inquiry." Doc. 80 at 16. Rightly so. But this Court should not so readily endorse Plaintiffs' maximalist view of field preemption and conflict preemption in the arena of federal immigration law. Plaintiffs

have come nowhere close to meeting the exacting burden of showing that H.B. 4156 is likely preempted on its face and in every single possible application. Indeed, their effort is so flimsy that it is clear they are still relying implicitly on the previous work of the previous administration in this case—which is yet another reason why it matters here that the United States has abandoned its prior position. Plaintiffs should not be permitted to meet their incredibly onerous burden by effectively piggybacking on the effort of a separate sovereign litigant who has decided not to participate anymore. The abandoned views of the prior administration cannot be elevated over the intentional decisions of the present one.

To recap, field preemption occurs only in the "rare case[]" where state law "fall[s] into a field that is implicitly reserved exclusively for federal regulation." *Kansas*, 589 U.S. at 208. In order to demonstrate that a field has been preempted, Plaintiffs must show that the "clear and manifest purpose of Congress" was a "complete ouster of state power" in that area. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976). This "can be inferred from a framework of regulation so pervasive ... that Congress left no room for the States to supplement it" or a "federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona*, 567 U.S. at 399 (quotations omitted). But while "[f]ederal governance of immigration and alien status is extensive and complex," *Arizona* itself makes plain that the federal government has occupied only "the field of alien registration," not all immigration regulation. *Id.* at 395, 401.

Aliens who surreptitiously enter or reenter the United States "shall" face federal criminal prosecution. 8 U.S.C. §§ 1325, 1326. Notably, the federal entry and reentry crimes under the INA are far less detailed than those for alien registration, which extensively prescribe

when, where, how, and with whom aliens are to register. *Compare* 8 U.S.C. §§ 1325, 1326, *with* 8 U.S.C. §§ 1301–1306. In any event, preemption may not be "inferred merely from the comprehensive character" of federal law. *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973). The fact that Congress has criminalized certain categories of conduct is a far cry from showing it has simultaneously foreclosed *all* state laws on the subject. *See Kansas*, 589 U.S. at 212 ("Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap[.]"). By the same token, H.B. 4156 neither conflicts with nor stands as an obstacle to federal objectives in immigration enforcement. Rather, H.B. 4156 echoes and amplifies those objectives—which is evidenced here by the fact that the current administration does not oppose it. In other words, Oklahoma is not acting unilaterally "to achieve its own immigration policy" by ignoring federal immigration law or acting at variance with its directives. *Arizona*, 567 U.S. at 408. As discussed, the very enforcement of H.B. 4156 will often depend on federal cooperation. *See* Exhibit 2.

This Court acknowledges its "heavy application of *Arizona* to H.B. 4156." Doc. 80 at 17. But the Court's application takes the form of an extension that the Supreme Court has consistently declined to impose. *See Kansas*, 589 U.S. at 210. In short, a parallel state-law crime based on unique harms to Oklahomans does not create conflict with federal law.

Nearly a year ago, the Court contrasted the federal government's "full[] support[]" of the state law in *Kansas*, 589 U.S. at 212, with this case, "where federal pushback is the genesis of litigation and H.B. 4156 touches so deliberately on matters of immigration regulation," *Oklahoma*, 739 F. Supp. 3d at 1001. Today, Oklahoma and the United States are operating in unison. Thus, based on this Court's own words, the ground has shifted in a way that is legally

significant. Rather than embrace that point, however, this Court came close to recanting its previous words, admitting that it cited "the federal government's then-opposition to H.B. 4156 as additional support for preemption," but deeming a "change" in that opposition as an irrelevant "matter of policy" now. Doc. 80 at 17. A year ago, *Kansas* was distinguishable because the United States supported Kansas. Now, the United States' support is deemed unimportant to preemption. What's good for the goose should be good for the gander. Yet somehow, Oklahoma's sovereign interests in protecting those lawfully present within its borders get undermined each go-round. This should not be.

Unlike most everything else in this case—including the United States' position and the make-up of the Plaintiffs—Oklahoma's position has never once changed. To be sure, the Court is correct that "the enforcement priorities of a given administration" do not govern preemption analysis. Doc. 80 at 17. Preemption arises from "'the Laws of the United States,'" not federal officers' "criminal law enforcement priorities." *Kansas*, 589 U.S. at 212 (quoting U.S. CONST. art. VI, cl. 2). But the Supreme Court has made clear—in a case where the United States and a state were unified—that nothing about an "overlap" in federal and state criminal law demands preemption. *Kansas*, 589 U.S. at 212. Further, "the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption." *Id.* In this case, federal enforcement priorities have not been upset—they are being strengthened and supported by Oklahoma's complementary state-law analogue to the federal crimes of illegal entry and reentry. That is to say, H.B. 4156 does not deviate from federal law—it derives from it, and federal law does not preempt it.

In the meantime, Plaintiffs have completely ignored the United States' own declaration of an invasion at the southern border. So far, this Court has not credited these significant developments. Nevertheless, the fact remains that the federal government itself now speaks of the emergency at the border as an actual invasion. The United States' own considered views on the crisis are more than enough to prevent a sovereign state's invasion argument from being brushed aside as a fanciful or fringe notion. Moreover, this Court's insistence solely on black-letter *judicial* authority recognizing a state's ability to invoke the prospect of invasion also diminishes the *executive* branch's coequal authority to determine when an invasion is in fact occurring. In sum, Oklahoma "has moved to protect its sovereignty—not in contradiction of federal law, but in complete compliance with it." *Arizona*, 567 U.S. at 437 (Scalia, J., concurring in part and dissenting in part). "If securing its territory in this fashion is not within the power of [Oklahoma], we should cease referring to it as a sovereign State." *Id.* And if the United States' agreement with Oklahoma means nothing, then its own sovereignty is diminished, as well. Rather than undermine the sovereignty of two governments by holding that they are both opposed to the United States Constitution, this Court should place the lawless label where it belongs here—on Plaintiffs, who are undeniably violating federal law and attempting to use this Court to further that lawbreaking.

IV. Congress did not intend for lawbreaking to be shielded via pseudonym.

In issuing a TRO, this Court emphasized that "[w]hen determining whether a state law like H.B. 4156 is preempted, ***the Supreme Court instructs courts like this one to look to the intent of Congress, not the enforcement priorities of any particular administration.***" Doc. 80 at 30 (emphasis in original). But this concern for the intent of

Congress and the supremacy of federal law is largely absent from the analysis of Plaintiffs' request to proceed pseudonymously. Pseudonym permission, after all, is *not* found in the Rules of Civil Procedure or any relevant congressional enactment. *See* Doc. 80 at 5 ("There is no 'specific statute or rule supporting the practice,' and 'the Federal Rules of Civil Procedure mandate that all pleadings contain the name of the parties.'" (citation omitted)). And Congress has straightforwardly outlawed the behavior in question here. Thus, if congressional intent is truly our lodestar, then there can be no pseudonym status for Plaintiffs.

"Judicial hostility to a party's use of a pseudonym springs from our Nation's tradition of doing justice out in the open, neither 'in a corner nor in any covert manner.'" *Doe v. MIT*, 46 F.4th 61, 68 (1st Cir. 2022) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567 (1980) (plurality opinion)). Accordingly, "an order granting pseudonymity should be periodically reevaluated if and when circumstances change." *Id.* at 73. Where there are "questions about whether anonymity is being improperly exploited, … the court may require the plaintiff to proceed under his or her legal name." *Speech First, Inc. v. Shrum*, 92 F.4th 947, 950 (10th Cir. 2024). Even when courts permit parties to proceed pseudonymously, "it is often with the requirement that the real names of the plaintiffs be disclosed to the defense and the court but kept under seal thereafter." *A.D. v. Park City Sch. Dist.*, No. 2:23-cv-665, 2024 WL 1178578 (D. Utah Mar. 19, 2024).

This Court previously found that under *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000), "this case presents 'exceptional' circumstances permitting the use of pseudonyms" because requiring Plaintiffs to proceed under their true names would "expos[e] them[] to federal authorities." Doc. 80 at 5–6. With respect, again, this seems quite contrary to other

portions of the order, where this Court emphasized that the intent of Congress is sacrosanct. *See, e.g.*, Doc. 80 at 16 ("*Congress's intent … controls the preemption inquiry.*" (emphasis in original)).

There is simply no evidence that Congress intended to protect the identities of litigants who are unlawfully present in the United States from "federal authorities." The fact of criminalization itself counsels strongly otherwise. Moreover, the Court's finding in this regard did not identify which of the *Femedeer* categories makes this case exceptional, it did not discuss the prejudice to the State if Plaintiffs are allowed to proceed anonymously, and it did not require Plaintiffs to submit their true names under seal. Each of these issues indicates that the Court should revisit its order permitting the Plaintiffs to proceed pseudonymously.

Under *Femedeer*, there are three categories of "exceptional cases" in which a party should be permitted to proceed pseudonymously: (1) matters of a highly sensitive and personal nature; (2) a real danger of physical harm; and (3) where the injury litigated against would be incurred as a result of the disclosure of plaintiff's identity. *Femedeer*, 227 F.3d at 1246. The first *Femedeer* category is inapplicable here. "Matters of a highly sensitive and personal nature" typically include "challenges to laws involving birth control, abortion, and homosexuality" or other acts that could cause public embarrassment if litigants were forced to proceed under their true names. *See W.N.J. v. Yocom*, 257 F.3d 1171, 1172 (10th Cir. 2001) (citing *Coe v. U.S. Dist. Ct. for Dist. of Colo.*, 676 F.2d 411, 416 (10th Cir. 1982)). Other examples involve sexual assault of minors and similar cases where disclosure of a plaintiff's identity "might lead to further severe emotional distress" or "the real potential of additional psychological harm." *L.M. ex rel. A.M. v. City of Gardner*, No. 19-2425-DDC, 2019 WL 4168805, at *2 (D. Kan. Sept. 3, 2019). Here, Plaintiffs' unlawful immigration status does not involve personal intimate

details of a potentially embarrassing nature such that they should be shielded from the public or federal authorities. It seems doubtful that federal lawbreaking of any sort could *ever* be deemed personal or intimate enough to deserve the protection of a federal court. Plaintiffs are not entitled to proceed anonymously under this category.

The third category is also inapplicable. The "injury litigated against" in this case is arrest and prosecution under H.B. 4156. Plaintiffs are under no threat of suffering that injury because the Court has already enjoined enforcement of that law. (The State disagrees with this, obviously, but the current reality is what it is.) To the extent that Plaintiffs are at risk of enforcement of *federal* law, that cannot possibly be a trigger for pseudonym status in a case where the federal law in question is unchallenged. It is entirely inappropriate for a federal court to protect federal lawbreakers from the federal consequences of their actions.

The second category is inapplicable for essentially the same reason. Importantly, while "real danger of physical harm" may warrant the use of pseudonyms, such harm must be "coterminous to the harm [Plaintiffs are] seeking to avoid by filing [their] claim." *Femedeer*, 227 F.3d at 1246. And again, the harm Plaintiffs are seeking to avoid is arrest and deportation under Oklahoma's immigration law, not federal immigration law. Even if this Court believes that federal law enforcement would vindictively target Plaintiffs—although surely this Court is required to assume the federal government will act in good faith—federal immigration law is not the subject of these proceedings. As such, the risk of harm of deportation by federal authorities in not "coterminous to the harm" Plaintiffs are seeking to avoid in their lawsuit, and the second *Femedeer* factor is not implicated.

Because this case does not fall under any of the categories enumerated in *Femedeer*, Defendants request that the Court revisit its ruling and require Plaintiffs to proceed under their true names.

Given the discretionary nature of the decision to allow Plaintiffs to proceed pseudonymously, Defendants ask the Court to consider the prejudice to the State. If Plaintiffs proceed pseudonymously, there is no way Oklahoma will know whether any of the Plaintiffs are actually subject to arrest and deportation under H.B. 4156.[4] The prejudice to Defendants is thus twofold: (1) Oklahoma must defend an action in which it is required to blindly trust pseudonymous affidavits to establish standing, and (2) the State will be unable to raise affirmative defenses, such as the Fugitive Disentitlement Doctrine, which as a practical matter requires knowledge of the Plaintiffs' true identities.

If Plaintiffs are allowed to proceed pseudonymously, the State and the Court are left to blindly trust the affidavits of anonymous individuals to establish standing in this case. While Courts have allowed anonymous standing in other contexts, it is particularly inappropriate here because, as this Court recognized, Plaintiffs remain subject to deportation under federal law. Doc. 80 at 5. If Plaintiffs are found and deported by federal law enforcement, their

[4] Plaintiffs point out that a district attorney's office has filed charges under H.B. 4156 against a criminal defendant in Rogers County, Oklahoma. *See* Doc. 60 at 2 (describing *State v. Falcon–Romo*, No. CM-2025-264 (Rogers Cnty. Dist. Ct.)). Oklahoma has no way of knowing, for example, whether a pseudonymous plaintiff in this case might also currently be the subject of an ongoing state-court prosecution. At the very least, this evasiveness would raise serious concerns under the abstention doctrine articulated in *Younger v. Harris*, 401 U.S. 37, 54 (1971) (holding that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it," especially in the absence of "any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief").

challenge to Oklahoma's immigration law becomes moot. Moreover, if Plaintiffs simply leave Oklahoma while this matter is pending, their claims are moot. But under pseudonyms, neither the State nor the Court is in a position to discover potential mootness.

Furthermore, under the Fugitive Disentitlement Doctrine, actions brought by "fugitive immigrants" are subject to dismissal. *See Martin v. Mukasey*, 517 F.3d 1201, 1204 (10th Cir. 2008). Importantly, an alien does not need to be arrested or charged with a crime in order to be a "fugitive." *Id.* at 1203–04. Rather, an alien's failure to appear before DHS and provide it with a current address is sufficient to render the alien a "fugitive" for the purposes of the Fugitive Disentitlement Doctrine. *Id.* But again, Defendants have no way of knowing whether any of the Plaintiffs are "fugitive aliens" if Plaintiffs are allowed to proceed pseudonymously. Thus, Defendants respectfully assert that this Court's order is prejudicial to Defendants in that it frustrates, indeed largely vitiates, the Fugitive Disentitlement Doctrine as an affirmative defense in this case.

Because Defendants will suffer prejudice if Plaintiffs are allowed to proceed pseudonymously, the Court should require Plaintiffs to proceed under their true names. If that leads them to drop out of the case, then that is their choice. Much like Plaintiffs are not guaranteed standing or a pre-enforcement cause of action in equity, they are also not guaranteed pseudonym status. Plaintiffs do not have a right, that is, to enter federal court, announce their violation of federal law in order to attack a nearly identical state law, and receive protection from the federal consequences of that announcement.

It is also worth considering just how drastic this Court's pseudonym ruling is, when combined with the Court's provisional class certification. Essentially, this Court is holding that

it can shield hundreds (if not thousands) of individuals who are violating federal law from the consequences of those violations, should they choose to come to this Court and announce their lawbreaking. Based on the Court's ruling, any one of the class members could presumably show up to litigate in person and they would have to be granted anonymity, just like the current Plaintiffs. This broad undermining of federal law and federal law enforcement is not and should not be the business of the federal courts. Put differently, if Oklahoma cannot prosecute under H.B. 4156, it is only because the federal government can. But if this Court hides Plaintiffs' identity from the federal government, then it is shielding lawbreakers from the only sovereign that can prosecute them. That should not be.

Finally, as a longstanding matter of standard practice in the Tenth Circuit, courts require pseudonymous parties to provide their true names to opposing parties and the Court. *W.N.J.*, 257 F.3d at 1172 (citing *Nat'l Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989)). Requiring such disclosure alleviates some of the jurisdictional concerns surrounding anonymous pleadings. *Id.* As set forth in detail above, there are substantial jurisdictional concerns in this case that may arise if Plaintiffs continue to proceed pseudonymously. While Oklahoma maintains that such concerns dictate Plaintiffs should be required to proceed under their true names, the State understands that this Court is disinclined to enforce such a requirement. If Plaintiffs are permitted to continue under pseudonyms, the Court can alleviate some of the issues surrounding pseudonymous proceedings by requiring the individual Plaintiffs to provide the Court and Defendants' counsel with their true identities. Of course, this leads to difficulties as well, given that any such filing under seal would likely prohibit the State from sharing the names of federal lawbreakers with federal authorities. This

would be a bizarre outcome in the name of federal supremacy. In its TRO, this Court claimed that it was not interfering with "the federal government's ability, with *lawful assistance from its state partners*, to enforce that [immigration] framework as Congress intended." Doc. 80 at 30 (emphasis added). Respectfully, this Court's pseudonymity ruling threatens to do just that, in spades, and it should be reconsidered.

V. This Court should not provisionally certify classes of federal lawbreakers.

The State previously contended that Plaintiffs failed to satisfy Rule 23. Doc. 76 at 24–27. The State incorporates these certification arguments here. To summarize, Plaintiffs lack standing and should not be permitted to certify a class. Moreover, Plaintiffs cannot satisfy Rule 23's numerosity, typicality, commonality, and adequacy requirements. Nor can they show Oklahoma has "acted on grounds that apply generally to the class, so that final injunctive relief ... is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Provisional or not, "any 'analysis of class certification must begin with the issue of standing.'" *Vallario v. Vandehey*, 554 F.3d 1259, 1268 n.7 (10th Cir. 2009) (citation omitted). Named plaintiffs "must have individual standing to bring claims on behalf of the absent class members ... [and] may not rely on potential class members' injuries to establish their standing." *Abraham v. WPX Prod. Prods., LLC*, 184 F. Supp. 3d 1150, 1176 (D.N.M. 2016). As explained above, Plaintiffs lack standing and thus should not be certified as a class. Most significantly, like the individual Plaintiffs, the proposed classes are—according to this Court—classes of federal lawbreakers who are not challenging the federal law they are breaking. *See, e.g.*, Doc. 80 at 27 ("Here, members of both proposed classes face arrest, prosecution, and punishment under H.B. 4156."). This is something that should not be certified under Rule 23, any more

than a court should certify a class of mafia members who are complaining that a state is making their federally outlawed organized crime activities more difficult.

But even if Plaintiffs can establish standing, provisional certification is improper if Rule 23(a) and (b) are not satisfied. A party seeking provisional class certification still must demonstrate numerosity, typicality, commonality, and adequacy. Fed. R. Civ. P. 23(a)(1)–(4); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011); *see also P.J.E.S. ex rel. Escobar Francisco v. Wolf*, 502 F. Supp. 3d 492, 520 (D.D.C. 2020) ("[A] plaintiff requesting provisional certification must still demonstrate that Rule 23's requirements are met ….").

On numerosity, this Court gave credit to what is very nearly sheer speculation from Plaintiffs about the size of the classes. Plaintiffs cited one random non-governmental source for the total amount of "estimated … undocumented immigrants," Doc. 61 at 6–7, and this Court was forced to then guesstimate downward as to the actual number, *see* Doc. 80 at 26 ("it stands to reason that the number falling within each proposed class would easily reach into the hundreds"). Respectfully, the State fails to see how Plaintiffs have "established" anything on numerosity with this meager approach. In addition, Plaintiffs are noticeably cagey and ambiguous in describing the proposed classes. For example, they claim the "Entry Class includes [but is not limited to?] noncitizens who live in or travel to Oklahoma and who may [just may?] be subject to prosecution for entering the state without federal authorization." Doc. 61 at 6–7. This intentionally squirrely approach cannot possibly lead to firm numbers for purposes of numerosity. While there is no set formula for determining the class, there must be some definitive characteristic among the group so as to ascertain the number in the first place—and the State sees nothing definite in Plaintiffs' language.

On commonality, the Court concluded that "[t]he preemption question presents a common issue of fact that, if resolved in Plaintiffs' favor, would apply uniformly across the classes." Doc. 80 at 26. But this cannot be true of Plaintiffs' purported classes, given the tepid and undefined language Plaintiffs use to describe the classes. In other words, how can a court determine that commonality is met when the class itself is so amorphously described? In any event, H.B. 4156 does not treat all "noncitizens" the same, thus a resolution of the preemption question will not provide uniformity when each "noncitizen" has not suffered the same injury. Because Plaintiffs have alleged only that the prospective class members are potentially subject to the challenged provisions based on their future, hypothetical, individualized, and unlawful conduct, they cannot satisfy commonality. Plaintiffs similarly cannot satisfy the typicality requirement. The Court correctly noted that typicality "requires only that the claims of the class representative and class members are based on the same legal or remedial theory." Doc. 80 at 27. But the representatives' claims do not "arise from a uniform statutory scheme." *Id.* As noted above, Oklahoma's scheme builds in affirmative defenses which treat "noncitizens" distinctly (and, in other words, non-uniformly) based on (1) "federal grant[s] of lawful presence or asylum"; or (2) "approval under the federal Deferred Action for Childhood Arrivals program." H.B. 4156(F)(1)–(2). The representatives here could hypothetically qualify for either of these defenses in Oklahoma's law and would not be treated similarly to any non-qualifying members of the class. *See* Doc. 61 at 1–2. As a result, Plaintiffs cannot establish typicality.

Finally, the proposed class representatives cannot protect the interests of the class. Even if this Court is correct that "[a]ll Plaintiffs [including their representatives] share a common interest in halting enforcement of H.B. 4156," Doc. 80 at 28, this ignores the State's

contention that merely seeking and administering the class would risk garnering unwanted and harmful attention from law enforcement to members of the class who are actively violating federal law. Class administration itself clearly risks potential harm for the prospective class members here, as it risks drawing federal attention and law enforcement to the scene. Certification, as a result, has the potential to do anything but protect class members' interests.

Next, Plaintiffs' claims do not fall within any of Rule 23(b)'s catchall "types" of class actions. In addition to Rule 23(a)'s requirements, "the proposed class must satisfy at least one of the three requirements listed in 23(b)." *Dukes*, 564 U.S. at 345. Here, Plaintiffs put forward Rule 23(b)(2), which authorizes certification "where the party opposing the class has acted on grounds that apply generally to the class, so that final injunctive relief is ... appropriate respecting the class as a whole." But any relief rendered to the class will be distributed to the class non-uniformly, in violation of the principle cited by this Court that the challenged provision must be "enjoined or declared unlawful only as to all of the class members or to none of them." Doc. 80 at 29 (citing *Dukes*, 564 U.S. at 360). With respect to H.B. 4156's affirmative defenses (as discussed above), the unique positioning of each individual "noncitizen" composing the class renders any kind of injunctive relief fragmentary and inconsistent because every noncitizen falls distinctly within or outside of H.B. 4156's safe harbors. As a result, Plaintiffs cannot show that Oklahoma has acted on grounds that "apply generally to the ["noncitizen"] class" here. Fed. R. Civ. P. 23(b)(2). Class certification, as a result, is improper here.

VI. The remaining factors and equities do not favor Plaintiffs here.

Oklahoma incorporates its prior equities arguments here. Doc. 76 at 27–28. Again, Plaintiffs are individuals who are here in violation of United States law or organizations supporting such individuals. *See, e.g.*, Doc. 80 at 5 (admitting that Plaintiffs "may very well face removal or prosecution under the comprehensive federal immigration regime that Congress established"). Equity cannot, therefore, be in their favor. *See, e.g.*, *Original Invs.*, 542 F. Supp. 3d at 1233 (W.D. Okla. 2021) (granting the State's motion to dismiss because "[i]t is well-settled … that 'a court won't use its equitable power to facilitate illegal conduct'" (citation omitted)). Nor can the views of a private association about the law's effects, Doc. 60 at 11, somehow trump the statutorily enshrined views of the Oklahoma Legislature and the perspective of the "chief law officer of the state." OKLA. STAT. tit. 74, § 18. The equities here are straightforward and simple: equity cannot be in favor of private individuals who seek to shield and enable their breaking of valid and unchallenged federal laws. In the end, Oklahoma will be harmed by an injunction of a duly enacted law, whereas Plaintiffs' harms are not cognizable because they stem from admitted violations of federal law.

Moreover, Plaintiffs have never attempted to justify their seven-week-long delay in filing their amended complaint, they have not explained their last-minute withdrawal of named Plaintiffs, and they have not given any reason whatsoever for why equity should favor these new Plaintiffs when they apparently waited an entire year to join the lawsuit.

VII. This Court should require Plaintiffs to post a substantial bond.

Rule 65(c) premises the issuance of a preliminary injunction or TRO on "the movant giv[ing] security in an amount that the court considers proper to pay the costs and damages

sustained by any party found to have been wrongfully enjoined or restrained." The idea that Plaintiffs should be subject to no bond at all is mistaken and should be revisited. Again, "the trial judge's consideration of the imposition of bond is a necessary ingredient of an enforceable order for injunctive relief. The plain language of the rule permits no other analysis." *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987).

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs a preliminary injunction.

Respectfully submitted,

s/ *Zach West*

GARRY M. GASKINS, II
Solicitor General
ZACH WEST
Director of Special Litigation
CULLEN D. SWEENEY
Assistant Solicitor General

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
Garry.Gaskins@oag.ok.gov
Zach.West@oag.ok.gov
Cullen.Sweeney@oag.ok.gov

Counsel for Defendants