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To: Senator Deb Patterson

From: Christopher P. Allnatt, Senior Deputy Legislative Counsel

Subject: -2 amendments to Senate Bill 1570

I am writing to note that there are potential legal issues with the enclosed -2 amendments to Senate Bill 1570.

Intergovernmental immunity

The enclosed amendments may be challenged as violating the doctrine of intergovernmental immunity, which stems from the Supremacy Clause of the United States Constitution.[1] The doctrine recognizes the federal government's independence from state control and prohibits states from "interfering with or controlling the operations of the Federal Government."[2] States are prohibited from enacting laws either regulating the United States directly or discriminating against the federal government or federal contractors.[3] A state law discriminates against the federal government or federal contractors if it "'single[s them] out' for less favorable 'treatment,' . . . or if it regulates them unfavorably on some basis related to their governmental 'status.'"[4]

For example, in *United States v. California*, the district court granted in part the federal government's motion for a preliminary injunction to enjoin the enforcement of a state law that prohibited employers from providing voluntary consent to an immigration enforcement officer to enter nonpublic areas.[5] The court found that California's law "impos[ing] monetary penalties on an employer solely because that employer voluntarily consents to federal immigration enforcement's entry into nonpublic areas of their place of business or access to their employment records impermissibly discriminates against those who choose to deal with the Federal Government."[6] Here, the enclosed amendments prohibit certain health care facilities from voluntarily consenting to federal immigration authorities and thus, require that certain private actors discriminate against the federal government.

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[1] *See* Article VI, clause 2, United States Constitution (providing that federal law is "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").
[2] *United States v. Washington*, 596 U.S. 832, 838 (2022).
[3] *Id*.
[4] *Id.* at 839, *quoting Washington v. United States*, 460 U.S. 536, 546 (1983) and *North Dakota v. United States*, 495 U.S. 423, 438 (1990).
[5] *United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018), *aff'd in part, rev'd in part and rem'd,* 921 F.3d 865 (9th Cir. 2019).
[6] *Id.* at 1096.

Preemption

The enclosed amendments may be challenged on the basis of federal preemption, a doctrine also based on the Supremacy Clause. Under the Supremacy Clause of the United States Constitution, federal laws and regulations may preempt state law.[7] Congress may do so explicitly in the text of the statute[8] or Congress' intent to supersede a state law may be inferred through either "field" preemption or "conflict" preemption.[9] Field preemption occurs when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law."[10] Conflict preemption occurs when compliance with both federal and state law is a "physical impossibility"[11] or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[12]

With regard to immigration policy, Congress has broad constitutional powers and has exercised those powers to "occupy the field" by adopting an array of international treaties and agreements and federal laws. By occupying the field, federal law on immigration preempts state laws that seek to regulate matters of immigration, unless specifically allowed under federal law. Even when a state law is not in direct conflict with federal law, a state law may also not be an "obstacle" to the objectives or purpose of federal law.[13]

Court decisions make it clear that a state may not proactively regulate areas related to immigration and naturalization, unless specifically provided for under federal law.[14] For example, in *Arizona v. United States*, the United States Supreme Court found that Arizona's attempt to regulate noncitizens residing in this country unlawfully was preempted by federal law. Here, the enclosed amendments seek to regulate the conduct of private actors as related to immigration and immigration enforcement and may be challenged as preempted by federal law.

Encl.

[7] *See* Article VI, clause 2, United States Constitution (providing that federal law is "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").
[8] *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015).
[9] *Id.* at 376-377.
[10] *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).
[11] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).
[12] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).
[13] *Id*. at 62-67.
[14] *Arizona v. United States*, 567 U.S. 387 (2012); *see also DeCanas v. Bica*, 424 U.S. 351, 354-355 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power.") (superseded by statute).