No. 17-834

In the Supreme Court of the United States

STATE OF KANSAS,
Petitioner,

v.

RAMIRO GARCIA, DONALDO MORALES,
AND GUADALUPE OCHOA-LARA,
Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. § 1324a(b)(5), which prohibits the "use[]" of a federal employment-authorization form (the I-9) and "any information contained in or appended to" the I-9 "for purposes other than" specified federal law-enforcement actions, expressly preempts state prosecutions for providing false identity information on documents other than the I-9.

2. Whether the Immigration Reform and Control Act impliedly preempts Kansas's prosecution of Respondents.

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The Kansas Court of Appeals' unpublished decision affirming Garcia's conviction can be found at 364 P.3d 1221, 2016 WL 368054 (Kan. Ct. App. 2016), and is reproduced at Pet. App. 48-60. The Kansas Court of Appeals' unpublished decision affirming Morales's convictions can be found at 364 P.3d 305, 2016 WL 97848 (Kan. Ct. App. 2016), and is reproduced at Pet. App. 71-82. The Kansas Court of Appeals' decision affirming Ochoa-Lara's convictions is reported at 362 P.3d 606 (Kan. Ct. App. 2015), and is reproduced at Pet. App. 97-112.

JURISDICTION

The Supreme Court of Kansas issued its opinions on September 8, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions central to this case are listed below. All relevant constitutional and statutory provisions are reproduced in the Appendix of Constitutional and Statutory Provisions Involved.

1. 8 U.S.C. § 1324a(b)(5) states:

> **Limitation on use of attestation form**
>
> A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18.

2. The Kansas identity theft statute, Kan. Stat. Ann. § 21-6107 (2011 Supp.),[1] provides in relevant part:

> (a) Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging

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[1] Prior to July 1, 2011, when Kansas's criminal code was comprehensively recodified, this statute was codified at Kan. Stat. Ann. § 21-4018. Only Respondent Morales was convicted for conduct occurring before July 2011. Except for its statutory number, the statute was identical at all times relevant to Respondents' cases. The State's petition inadvertently misstated that a different version of the statute was in effect at the time of the conduct for which Morales was charged. *See* Pet. 5. The statute was amended in 2013, but the relevant provision has not materially changed. *See* Kan. Stat. Ann. § 21-6107(a)(1).

> to or issued to another person, with the intent to defraud that person, or anyone else, in order to receive any benefit.

3. The Kansas making a false information statute, Kan. Stat. Ann. § 21-3711 (2010 Supp.),[2] provides in relevant part:

> Making a false information is making, generating, distributing or drawing, or causing to be made, generated, distributed or drawn, any written instrument, electronic data or entry in a book of account with knowledge that such information falsely states or represents some material matter or is not what it purports to be, and with intent to defraud, obstruct the detection of a theft or felony offense or induce official action.

[2] As part of the comprehensive recodification effective July 1, 2011, this statute was moved—without change—from Kan. Stat. Ann. § 21-3711 to Kan. Stat. Ann. § 21-5824.

STATEMENT OF THE CASE

Identity theft is a serious and growing problem that often leaves victims helpless in its wake.[3] In 2017 alone, identity thieves stole $16.8 billion from 16.7 million victims,[4] despite cooperative state and federal efforts.[5]

This case involves three respondents. Following joint state and federal investigations, each was separately prosecuted and convicted of identity theft under Kansas law for using someone else's social security number on tax-withholding forms. Pet. App. 3, 5, 63-65, 91-92; JA 125. Respondent Donaldo Morales was also convicted of two counts of making a false information for the same thing.

A four-member majority of the Kansas Supreme Court reversed Respondents' convictions based on a novel rationale: that 8 U.S.C. § 1324a(b)(5) is an "effective express preemption provision" that bars these

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[3] Federal Trade Commission, *Guide for Assisting Identity Theft Victims* at 4-5 (Sept. 2013), https://www.consumer.ftc.gov/articles/pdf-0119-guide-assisting-id-theft-victims.pdf (describing the financial stress and emotional toll the crime of identity theft imposes on its victims).

[4] Insurance Information Institute, *Facts + Statistics: Identity theft and cybercrime*, https://www.iii.org/fact-statistic/facts-statistics-identity-theft-and-cybercrime.

[5] *See, e.g.*, Social Security, OIG Expand National Anti-Fraud Program, https://oig.ssa.gov/newsroom/news-releases/sep27-cdi-expansion (describing Social Security Administration efforts to partner with state and local law enforcement to combat Social Security disability fraud); *see also infra* §§ II.A.1, II.B.2.

prosecutions. Pet. App. 27. Section 1324a(b)(5) states that the federal I-9 work authorization verification form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of" select federal immigration and criminal laws. 8 U.S.C. § 1324a(b)(5). Despite the statute's plain language, the Kansas Supreme Court stretched § 1324a(b)(5) to prohibit enforcement of Kansas's identity theft and making false information laws even when the crimes are committed by providing false information on forms other than the I-9, such as state and federal tax forms. Pet. App. 27-28.

The Kansas laws at issue punish identity theft across the board, regardless of immigration status or work authorization. *See* Pet. App. 56-57. And there is no dispute that Respondents' convictions were not based on misrepresentations on I-9 forms, their immigration status, the lawfulness of their presence in the United States, or their work authorization. Pet. App. 55-56, 81-82, 105-06. Rather, each was convicted solely for using another person's social security number on *other* government forms. Pet. App. 4-5, 7, 63-64, 91-92.

The Kansas Supreme Court's decision is wrong. Respondents' prosecutions for violating Kansas's identity theft and false information statutes are not expressly preempted because their convictions were based on falsehoods they provided on tax-withholding forms—not the I-9. Nor are the prosecutions impliedly preempted because Congress has not occupied the field of identity theft, the prosecutions do not implicate any field Congress has occupied, and they do not conflict

with Congress's enforcement of the employment-authorization verification system it enacted in the Immigration Reform and Control Act (IRCA).

A. Statutory background

1. Kansas law "criminalize[s] theft of another person's personal identifying information." Pet. App. 55 (internal quotation marks omitted). That central prohibition is the focus of the statutes Respondents were convicted of violating.

The Kansas identity theft statute, first enacted in 1998, prohibits "obtaining, possessing, . . . [or] using" any "personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to defraud that person, or anyone else, in order to receive any benefit." Kan. Stat. Ann. § 21-6107(a) (2011 Supp.). "[P]ersonal identifying information" includes name, birth date, address, phone number, driver's license card or number, and social security card or number, among other things. *Id.* § 21-6107(e) (2011 Supp.).

Kansas also criminalizes making a false information. That crime is defined as "making, generating, distributing or drawing, or causing to be made, generated, distributed or drawn, any written instrument . . . with knowledge that such information falsely states or represents some material matter or is not what it purports to be, and with intent to defraud, obstruct the detection of a theft or felony offense or induce official action." Kan. Stat. Ann. § 21-5824. It has been on the books since 1969.

These laws do not "depend on . . . immigration status, the lawfulness of [a perpetrator's] presence in the United States, or his eligibility for employment." Pet. App. 110. They punish and aim to prevent identity theft and related fraud in any context where it arises. *See, e.g.*, *State v. Hardesty*, 213 P.3d 745, 749 (Kan. Ct. App. 2009) (affirming an identity theft conviction where the defendant used his deceased brother's driver's license to prevent officers from knowing his real identity when he was stopped for driving under the influence); *State v. Green*, 172 P.3d 1213, 1216 (Kan. Ct. App. 2007) (affirming identity theft convictions for defendant's use of another's identification information to open credit cards).

Just as the "possible illegal uses of another's Social Security number are myriad," so are the harms caused by identity theft. Pet. App. 110. It can cause a victim to lose disability or retirement benefits, affect eligibility for student loans, and expose victims to claims for back taxes on income the victim did not earn. JA 95-96; *State v. Meza*, 165 P.3d 298 (Kan. Ct. App. 2007) (involving a victim who was told she owed the Internal Revenue Service $3,000 in back taxes on income she did not earn). In more extreme cases, victims can be arrested and placed in jail for crimes committed by the identity thief.[6]

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[6] *See, e.g.*, Zack McDonald, The State Journal, *Family: Mentally disabled woman's arrest was a case of stolen identity*, https://www.state-journal.com/2019/04/30/family-mentally-disabled-womans-arrest-was-a-case-of-stolen-identity.

Kansas identity theft and related laws protect victims from the devastating consequences of the widespread problem of identity theft, no matter what form it takes, and regardless of the offender's immigration status or employment eligibility.

2. IRCA, on the other hand, is an immigration law that makes it "unlawful . . . to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A). An unauthorized alien is one who is not "lawfully admitted for permanent residence" or not otherwise authorized by the Attorney General to be employed in the United States. *Id.* § 1324a(h)(3); *see also Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 589 (2011).

To "facilitate compliance" with the prohibition on knowingly hiring unauthorized aliens, IRCA established an "[e]mployment verification system." 8 U.S.C. § 1324a(b); *see also id.* § 1324a(d). The centerpiece of that system is the I-9 form,[7] which Congress required the Attorney General to create according to Congress's specifications. *See id.* § 1324a(b)(5). Many of the documents Congress allows employees to use to establish their identity and employment authorization on the I-9 are state-issued, including a driver's license, state identity card, school identity card, voter registration card, and birth certificate. *See id.* § 1324a(b); 8 C.F.R. § 274a.2.

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[7] The I-9 form is available on the United States Citizenship and Immigration Services website: https://www.uscis.gov/system/files_force/files/form/I-9.pdf?download=1.

Employers are required to use the form to "verif[y]" that an employee "is not an unauthorized alien." 8 U.S.C. § 1324a(b)(1)(A). Upon reviewing the form and the documents submitted with it, the employer must "attest . . . that it has verified that the individual is not an unauthorized alien." *Id.* § 1324a(b)(1)(A). *Every* employee—citizen or alien—must complete the I-9 form, including attesting to work authorization, as a condition of employment. *See id.* § 1324a(b).

Congress also limited how the I-9 form could be used. Under the heading, "Limitation on use of attestation form," IRCA provides that the I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of" the Immigration and Nationality Act and specific criminal statutes addressing false statements (18 U.S.C. § 1001), identity theft (18 U.S.C. § 1028), immigration document fraud (18 U.S.C. § 1546), and perjury (18 U.S.C. § 1621). 8 U.S.C. § 1324a(b)(5).

IRCA also contains a separate express preemption provision, which Congress used to define the preemptive scope of the Act. *See Whiting*, 563 U.S. at 594. It provides that IRCA "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

B. The identity theft investigations and district court proceedings

Respondents were convicted under Kansas law of using someone else's social security number on state and federal tax-withholding forms. Each argued his prosecution was preempted by IRCA's "[l]imitation on use of attestation form" provision even though the conviction did not rely on the content of or any misrepresentations made on an I-9 form.

1. In August 2012, Respondent Ramiro Garcia was stopped for speeding. A routine records check showed he was previously contacted by a detective regarding possible identity theft. Pet. App. 3; JA 13-14, 41-42. So the officer called a financial crimes detective to the scene. Pet. App. 3. Through a joint investigation conducted by local law enforcement in partnership with the Social Security Administration's Office of the Inspector General, detectives obtained documents in Garcia's employment file from a local restaurant. Pet. App. 49; JA 89-90. Those documents showed that Garcia had used someone else's social security number on state and federal tax-withholding forms, the K-4 and W-4. Pet. App. 3, 51.

The State of Kansas charged Garcia with one count of identity theft in violation of Kan. Stat. Ann. § 21-6107 (2011 Supp.) for using a social security number issued to someone else. Pet. App. 3-4. Garcia moved to suppress the I-9 and a federal tax-withholding form he filled out with the false social security number. *See* Pet. App. 4; JA 11, 31-33. The State agreed not to use the I-9 form as the basis for the identity theft charge but maintained it could rely on Garcia's misrepresentations

on other forms. *See* Pet. App. 4; JA 33. The district court agreed with the State and denied Garcia's motion to suppress. JA 34.

At trial, Garcia's state and federal tax-withholding forms (the K-4 and W-4) were admitted. Pet. App. 4; JA 109-110. Special Agent Joseph Espinosa with the Social Security Administration's Office of the Inspector General testified that the social security number Garcia used on those forms belonged to a woman in Texas. Pet. App. 5; JA 96-97. And the jury convicted Garcia of identity theft. Pet. App. 4-5, 7.

2. Respondent Donaldo Morales came under investigation in 2012 when the Kansas Department of Labor Workers Compensation Division notified Special Agent Espinosa of an irregularity with a social security number being used by an employee at a local restaurant. Pet. App. 63, 73. Subsequent investigation by Espinosa and a local detective confirmed that Morales was using a social security number issued to someone else. Pet App. 73; JA 124-125. So "Espinosa arrested Morales." Pet. App. 73.

Following Morales's arrest, the State of Kansas charged Morales with one count of identity theft in violation of Kan. Stat. Ann. § 21-4018 (2010 Supp.) for using a social security number issued to someone else on K-4 and W-4 tax-withholding forms. He also was charged with two counts of making a false information in violation of Kan. Stat. Ann. § 21-3711 (2010 Supp.)—one each for writing a false social security number on the K-4 and W-4 forms. And he was charged with making a false information on the I-9 form. Pet. App. 63-64; JA 126-128.

Morales moved to dismiss the I-9 and W-4 counts, arguing they were preempted by IRCA. Pet. App. 63.[8] The State dismissed the I-9 count but defended the W-4 count. The district court agreed with the State and denied Morales's motion to dismiss the W-4 count. Pet. App. 63. At trial, Morales testified that he purchased the social security card at a park known for being a marketplace for false documents and used the number on K-4 and W-4 tax-withholding forms. Pet. App. 73; JA 176-177, 179. He was convicted on all three remaining counts. Pet. App. 63-64; JA 178-180.

3. Respondent Guadalupe Ochoa-Lara was tried and convicted on stipulated facts. Pet. App. 91-92; JA 216-217. In 2012, Ochoa-Lara came to the attention of a federal-state joint investigation comprised of officers from the Department of Homeland Security, Immigration and Customs Enforcement, and the Overland Park Police Department. While investigating another individual, the officers learned that Ochoa-Lara had used a social security number issued to someone else to lease an apartment. Officers contacted the person whose social security number was used and found that she did not know Ochoa-Lara had been using her social security number and that she had not consented to him using it. The victim later reported that she contacted the Internal Revenue Service and discovered that income had been reported under her

[8] Morales did not move to dismiss the false information charge based on the K-4, but the Kansas Supreme Court "look[ed] past" Morales's obvious failure to preserve the argument and reversed all of his convictions. Pet. App. 68-69.

social security number that she had not earned. Pet. App. 91-92; JA 216-217.

The officers then determined that Ochoa-Lara was employed at a local restaurant and confirmed that he had used the victim's social security number on a federal W-4 tax-withholding form and an I-9. Pet. App. 90-92. Ochoa-Lara was initially charged with two counts of identity theft in violation of Kan. Stat. Ann. § 21-6107 (2011 Supp.)—one for using someone else's social security number on a W-4 and the other for using someone else's resident alien card number—and one count of making a false information on his I-9. Pet. App. 90. Ochoa-Lara moved to dismiss the charges, and the State agreed to dismiss the counts based on the alien registration number and I-9. Pet. App. 90. The case proceeded to a bench trial on an amended complaint that split the identity theft count into two based on different offense dates. Pet. App. 90-91; JA 211-212. Both were related to Ochoa-Lara's use of someone else's social security number on a W-4. *See* Pet. App. 91-92, 107. He was convicted on both counts. Pet. App. 92.

C. The Kansas Court of Appeals' decisions

Respondents appealed their convictions to the Kansas Court of Appeals. Each separately argued that IRCA's "[l]imitation on [the] use of" the I-9 form prohibits the use of any information contained in or appended to an I-9 form—including name, address, date of birth, telephone number, e-mail address, or copy of a driver's license—even though the false information that formed the basis of their convictions was separately provided on other

documents, not the I-9. Pet. App. 51, 53, 86, 99-100, 107. Three separate panels of the Kansas Court of Appeals rejected Respondents' preemption arguments. The panels concluded that Respondents' convictions "did not depend on [their] immigration status, the lawfulness of [their] presence in the United States, or [their] eligibility for employment," and therefore were not preempted by IRCA. Pet. App. 55-56, 81-82, 105-06.

D. The Kansas Supreme Court's decisions

The Kansas Supreme Court granted review in all three cases and reversed Respondents' convictions because a majority of the Court, over two dissents, held that Respondents' prosecutions were expressly preempted by 8 U.S.C. § 1324a(b)(5). The Kansas Supreme Court's reasoning for its decisions in all three cases is set out in its decision in *Garcia*. Pet. App. 1-47. *Morales* and *Ochoa-Lara* were decided on the same grounds, with the majority adopting its rationale in *Garcia*, and the concurring and dissenting justices adopting theirs. Pet App. 61-70 (*Morales*), 88-96 (*Ochoa-Lara*).

1. In *Garcia*, a four-Justice majority of the Kansas Supreme Court held that 8 U.S.C. § 1324a(b)(5) *expressly* preempted Garcia's identity theft prosecution. The majority reasoned that even though "the State did not rely on the I-9," the "fact that [the false social security number Garcia used] was included in the W-4 and K-4 did not alter the fact that it was also part of the I-9." Pet. App. 28. The majority acknowledged the express preemption clause Congress included in 8 U.S.C. § 1324a(h)(2) was limited to *employers*, but concluded Congress adopted 8 U.S.C. § 1324a(b)(5) as

a separate "effective express preemption provision having to do with *employees* as well as employers." Pet. App. 19, 27.

The majority declined to rely on field or conflict preemption. Pet. App. 16, 28. Instead, it discovered a "much more direct route to a similar result," holding that the "plain and unambiguous" meaning of the words "'*information contained in*' the I-9" includes the false social security number Garcia used on state and federal tax-withholding forms. Pet. App. 27-28.

3. Justice Luckert concurred in the judgment. She rejected the majority's novel theory of "effective express preemption," and relied instead on implied preemption. Pet. App. 30, 33, 35-36. First she concluded that Congress has occupied the "the field and prohibited the use of false documents, including those using the identity of others, when an unauthorized alien seeks employment." Pet. App. 35-36. Alternatively she concluded, without much explanation, that any prosecution based on any document submitted as part of the employment application process would "frustrate[] congressional purpose and provide[] an obstacle to the implementation of federal immigration policy." Pet. App. 36 (internal quotation marks omitted). Justice Luckert acknowledged the State's prosecution did not rely on the I-9, Pet. App. 36, but concluded that IRCA preempted Garcia's prosecution anyway, Pet. App. 38.

4. Two Justices dissented. Justice Biles rejected the majority's express preemption decision, which he described as "effectively prevent[ing] *any* prosecution" of employment-related identity theft under Kansas law

"if it relies on information that also just happens to be on or attached to a Form I-9." Pet. App. 39-40. He explained that "the Form I-9 and the W-4 and K-4 forms were supplied for different and independent purposes"; "Garcia's immigration status was not relevant to whether [his] conduct was unlawful"; and "the Form I-9 was not admitted into evidence, so no information *necessarily* gleaned from it was 'used' in the State's prosecution." Pet. App. 39-40. Justice Biles concluded that "Garcia was not convicted for using someone else's identity on Form I-9 to deceive his employer as to his work authorization," but instead was "convicted for using another person's Social Security number on tax withholding forms." Pet. App. 40. As to implied preemption, Justice Biles concluded that the strong presumption against preemption tipped the balance in the State's favor. Pet. App. 45.

Justice Stegall joined Justice Biles's dissent but wrote separately to emphasize two points. First, that the "logic" of the majority's opinion "is wrong" as shown "irrefutabl[y]" by the breadth of the majority's decision, which "appears to wipe numerous criminal laws off the books in Kansas—starting with, but not necessarily ending with, laws prohibiting identity theft." Pet. App. 45. Thus, if the "majority's implicit holding that Congress has . . . the constitutional power to prohibit states from using any *information* found on a federal I-9 form" were correct, "the delicate federal-state balance achieved by our system of federalism would not merely be disturbed, it would be obliterated." Pet. App. 46. Second, Justice Stegall added that the conclusion that implied preemption does not apply is "not . . . a particularly close call." Pet. App. 47.

* * *

This Court agreed to review the Kansas Supreme Court's decision regarding express preemption and added a question asking whether IRCA impliedly preempted Respondents' prosecutions.

SUMMARY OF ARGUMENT

Respondents were convicted of identity theft and making a false information in violation of Kansas law for using stolen social security numbers on state and federal tax-withholding forms. Their prosecutions are not expressly or impliedly preempted by federal immigration law.

I. Respondents' prosecutions are not expressly preempted by 8 U.S.C. § 1324a(b)(5). That statute provides that the I-9 form and "any information contained in or appended to such form, may not be used for purposes other than enforcement" of the Immigration and Nationality Act and select criminal laws. The Kansas Supreme Court's determination that Respondents' prosecutions were expressly preempted by § 1324a(b)(5) has no support in the text or structure of the statute and would upend identity theft enforcement as we know it.

A. The text of § 1324a(b)(5) shows that Congress was focused on the "I-9 form or its supporting documentation *themselves*." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 603 n.9 (2011) (opinion of Roberts, C.J.). It was not attempting to regulate the *separate* "use" of information that appeared on an I-9, when the information being used was found in other places such as other forms or documents. Such an

interpretation would stretch the phrase "information contained in or appended to" beyond the ordinary meaning of those words. The misrepresentations Respondents made on state and federal tax forms—which are separate and distinct from the I-9, are filled out separately, and serve different purposes—were *not* "contained in or appended to" I-9 forms.

B. Congress underscored the point in two ways. It captioned § 1324a(b)(5), "Limitation on use of attestation form." And it consistently focused throughout § 1324a(b) on the completed form itself and the documents attached to it.

C. If § 1324a(b)(5) were stretched to prohibit the use of any information that happens to appear on an I-9 form, States would be precluded from prosecuting *any* fraud-related crimes that require use of a name, address, date of birth, telephone number, e-mail address, social security number, or a state document like a driver's license, that have been provided on or attached to an I-9. Such a sweeping and absurd result would upend the federal-state balance by divesting States of their traditional authority to enforce their criminal statutes and by undermining the federal government's concerted efforts to partner with States in combatting identity theft. To take that drastic step, the Court must be "certain" that is what Congress intended. *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Section 1324a(b)(5) provides no such certainty.

II. IRCA also does not impliedly preempt Respondents' prosecutions under either field or conflict

preemption. The starting point for assessing implied preemption is a strong presumption against preemption based on "the assumption that the historic police powers of the States' are not superseded" by federal law "unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

A. Respondents' prosecutions for using stolen social security numbers on state and federal tax forms are not field preempted. The only field they implicate is the field of identity theft, which Congress has not occupied. To the contrary, the field of identity theft is marked by substantial federal and state cooperation both at the national and local levels. In each of Respondents' cases, the investigations involved both federal and state law enforcement working together.

Respondents have identified three other fields they claim Congress has occupied—(1) the use of false documents by unauthorized aliens to show work authorization, (2) the employment verification process, and (3) the unauthorized employment of aliens. Opp. 21-22. But Congress has not occupied those fields. That is clear from this Court's decision in *Arizona v. United States*, 567 U.S. 387 (2012), in which the Court limited its field preemption analysis to "the field of alien registration," and addressed most of the provisions of the Arizona law in question under *conflict* preemption. *Id*. at 401.

Even if Congress has occupied those fields, the State's prosecution of Respondents had nothing to do with the use of false documents to show work

authorization, the employment verification process, or the employment of unauthorized aliens. Each Respondent was prosecuted for crimes committed on state and federal tax forms unrelated to work authorization or employment verification. At the very least Congress has not shown a clear and manifest intent to preempt such prosecutions.

B. Likewise, Respondents' prosecutions for using stolen social security numbers on state and federal tax forms are not conflict preempted. Respondents have not claimed it is impossible to comply with both IRCA and Kansas identity theft and making a false information laws. The only question is whether the state laws stand as an obstacle to IRCA's implementation. They do not.

The text of IRCA makes clear that Congress has not made a "deliberate choice" to preempt Respondents' prosecutions. *Arizona*, 567 U.S. at 405. Nor do Respondents' prosecutions or the state laws they were convicted of violating stand as an obstacle to IRCA's broader purpose of prohibiting the employment of unauthorized aliens. Respondents' convictions were unrelated to their immigration status, but were based on false statements they made on federal and state tax-withholding forms that play no role in IRCA's system of verifying work authorization. *See* 8 U.S.C. § 1324a(b).

As a practical matter, Respondents' convictions were the product of federal-state partnerships, and would not have been possible without the assistance of the Social Security Administration. *See* 20 C.F.R. § 401.155. Adding to the evidence of federal-state cooperation—not conflict—the United States has filed

a brief in support of the State, arguing that there is no conflict here.

Congress has shown no intent to preempt prosecutions like the Respondents', much less a clear intent to do so. Accordingly, the Kansas Supreme Court's decision should be reversed and Respondents' convictions should stand.

ARGUMENT

Respondents were convicted of violating Kansas law for using other people's social security numbers on tax-withholding forms. They were not convicted for providing false information on I-9 forms. Nor were they prosecuted for any immigration-related violations or misrepresentations related to the verification of employment authorization. Thus, IRCA does not preempt Respondents' prosecutions.

The Kansas Supreme Court's decision that the prosecutions are "effective[ly]" expressly preempted is wrong. Pet. App. 30. There is no language in IRCA that expressly preempts these state prosecutions. And the Kansas Supreme Court's tortured interpretation of § 1324a(b)(5) leads to absurd results that Congress could not possibly have intended. Nor are Respondents' prosecutions impliedly preempted under either field or conflict preemption. Congress clearly has not occupied the field of identity theft. And Respondents' prosecutions for state-law violations on tax-withholding forms—having nothing to do with immigration status or work authorization—do not conflict with IRCA's employment verification system.

I. IRCA Does Not Expressly Preempt Respondents' Prosecutions.

The plain text of 8 U.S.C. § 1324a(b)(5) does not preempt Respondents' prosecutions for using someone else's social security number on forms other than the I-9. The context of the provision and the overall structure of IRCA confirm that conclusion. The Kansas Supreme Court's sweeping preemption decision would prohibit state prosecutions based on false information provided on tax-withholding forms, credit card applications, drivers licenses, and the like, just because the same false information also happens to be found separately on the I-9. Congress could not have intended § 1324a(b)(5) to extend so broadly beyond the context of immigration or employment verification, which underscores the need to reverse the decision below.

A. IRCA's plain language limits only how the I-9 form itself and the information on or attached to it can be used.

The "focus" of any express preemption question is "on the plain wording" of the federal law because it "contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Section 1324a(b)(5) provides that the I-9 "form" and "any information contained in or appended to such form may not be used for purposes other than enforcement of" the Immigration and Nationality Act and certain federal crimes. Unable to overcome the undisputed fact that "the State did not rely on the I-9" to convict them, Pet. App. 28, Respondents seek an interpretation of

§ 1324a(b)(5) that shields identity thieves from the consequences of using others' personal identification information on state or federal tax forms when the thieves also provide the same false information on an I-9. The text of § 1324a(b)(5) does not support that result.

1. The focus of § 1324a(b)(5) is the I-9 "*form,*" including "any information contained in or appended to *such form*." (Emphasis added.) Thus, Congress was focused on restricting the use of the form and the information provided on the form "*itself*." *See Whiting*, 563 U.S. at 589 (emphasis added).

Congress underscored its focus on the information provided on an I-9 form itself by limiting the use restriction in § 1324a(b)(5) to information obtained from specific locations—either "contained in or appended to" the I-9. To "contain" means to "have within," "hold," "consist of," "comprise," or "include." Webster's Third New International Dictionary 490-91 (1971 ed.); *see also* American Heritage Dictionary 396 (5th ed. 2011) (defining "contain" as "[t]o have within"). "In" "indicate[s] location or position in space or in some materially bounded object." Webster's Third New International Dictionary 1139 (1971 ed.); *see also* American Heritage Dictionary 885 (5th ed. 2011) (defining "in" as "[w]ithin the limits, bounds, or area of"). And to "append" means to "attach." Webster's Third New International Dictionary 103 (1971 ed.); American Heritage Dictionary 86 (5th ed. 2011).

So the phrase, "information contained in or appended to" the I-9, is limited to restricting the use of information held within the four corners of the I-9 or

attached to it. *See Arreola-Arellano v. I.N.S.*, 223 F.3d 653, 656 (7th Cir. 2000) (equating use of "information contained in" an application with "use of information retrieved from an application"). The text does not support extending § 1324a(b)(5)'s limitation to information found anywhere outside an I-9.

2. The way Congress has used the phrase "information contained in" elsewhere confirms that the phrase refers to the use of specific information retrieved from a specific location, here the I-9 form itself. For example, 8 U.S.C. § 1365b establishes a plan for implementing a biometric entry and exit data system in response to the September 11, 2001, terrorist attacks. It provides in part that the President "shall establish a clearinghouse bureau in the Department of Homeland Security, to centralize and streamline the process through which members of the public can seek corrections to erroneous or inaccurate *information contained in* agency databases, which is related to immigration status." 8 U.S.C. § 1365b(f)(5) (emphasis added). Under Respondents' view of "information contained in," this would require the President's clearinghouse to correct any information related to immigration status no matter where else it happened to appear—whether in the federal databases or not. But that cannot be correct. The phrase "information contained in" is obviously limited to the information that actually is stored within the database itself.

Another example is 15 U.S.C. § 1141b. It provides that when an application for international registration of a trademark is filed, certain federal government officers shall "examine the international application for

the purpose of certifying that the *information contained in* the international application corresponds to the *information contained in* the basic application or basic registration." 15 U.S.C. § 1141b(a) (emphasis added). This provision only makes sense if the phrase "information contained in" is limited to the information that actually appears on the face of the applications.

Similarly, the phrase "information contained in or appended to" the I-9 form cannot be read to refer to information contained in *other* forms, such as the tax-withholding forms that were the basis for prosecuting Respondents. Though Respondents' tax-withholding forms contain some of the same information as the I-9 forms, the different forms are filled out separately and serve different purposes.

For example, the tax-withholding forms are published and processed by different agencies. The Department of Homeland Security's U.S. Citizenship and Immigration Services publishes the I-9, while the Internal Revenue Service publishes the W-4, and the Kansas Department of Revenue publishes the K-4. The forms are physically separate and filled out separately. The K-4 and W-4 are not used to assess an employee's work authorization or immigration status; rather, they serve the separate and distinct purpose of enabling employers to withhold the correct amount of state or federal income tax from employees' paychecks.

Respondents' multiple fabrications are akin to making the same false statement three separate times to three government entities, which would constitute three separate criminal offenses. Here, the State of Kansas prosecuted Respondents only for the falsehoods

they told on their state and federal tax forms, not for those on their I-9 forms.

3. The most natural reading of § 1324a(b)(5) is that it creates only an evidentiary limitation on the use of the "I-9 form or its supporting documentation *themselves*," except for purposes of certain federal prosecutions. *Whiting*, 563 U.S. at 603 n.9 (opinion of Roberts, C.J.); *see also Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1108 (9th Cir. 2016) (recognizing that "IRCA's document use limitation is only violated when the identity theft laws are applied in ways *that rely on the Form I-9 and attached documents*" (emphasis added)). The text does not limit the use of information that appears elsewhere simply because it also happens to appear on an I-9.

In other words, Congress only intended to prohibit the use of the I-9 itself and documents attached to it. States may, however, use documents submitted in the I-9 process if they were also submitted for a purpose independent of the federal employment verification system, such as to establish a person can lawfully drive or as part of a typical employment application. *See* Pet. App. 41 (Biles, J., dissenting). Here, Respondents were prosecuted for "submit[ing]" the stolen social security numbers "for a purpose independent of the federal employment verification system"—namely, to comply with state or federal tax laws. Pet. App. 41 (Biles, J., dissenting).

4. Respondents have argued that this reading "renders nugatory" the clause, "and any information contained in or appended to such form." Opp. 18. Not so. Under the State's reading, that clause serves as

Congress's recognition that a completed I-9 will contain information and may have documents appended to it that will be used in the I-9 employment verification process. So Congress clarified that the limitation on the use of the form applies to the contents of a completed form and its attachments, and not just to the form itself. Had Congress intended to micromanage the use of personal information beyond the contents of and attachments to the I-9, "it would have worded the statute much differently." *State v. Martinez*, 896 N.W.2d 737, 768 (Iowa 2017) (Mansfield, J., dissenting).

B. The context of § 1324a(b)(5) and the structure of IRCA confirm that Congress was focused on limiting the use of the I-9 form itself and the information on or attached to it.

The context of § 1324a(b)(5) and the structure of IRCA reinforce what is plain from the text of the statute: Congress did not intend to eliminate States' historic ability to combat identity theft and related crimes. Rather, Congress sought only to control how the newly created I-9 form itself and the information actually on it or attached to it could be used.

The I-9 form was created as part of the "comprehensive" federal "framework" for "combating the employment of illegal aliens" that Congress enacted in IRCA. *Arizona v. United States*, 567 U.S. 387, 404 (2012) (internal quotation marks omitted). To prevent the employment-verification form from being coopted for other purposes, Congress limited how the form could be used. Congress was not concerned, however,

with how information on *other* forms that play no role in verifying employment authorization, such as the K-4 or W-4 tax-withholding forms, are used. Its focus was squarely on the I-9 form. This aim is clear in section 1324a(b)(5), and is reinforced throughout IRCA.

For example, the caption of section 1324a(b)(5) reads, "Limitation on use of *attestation form*." (Emphasis added.) Captions like this "supply clues" as to Congress's intent and are useful for resolving any ambiguity in the statute. *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015). Because § 1324a(b)(5)'s caption focuses on the use of the I-9 form, the text of the provision should not be stretched to "create a congressional 'information-use preemption' rather than a 'Form I-9-use limitation.'" Pet. App. 40 (Biles, J., dissenting).

Indeed, all of § 1324a(b) focuses on the completed form itself and the documents attached to it. Section 1324a(b)(3) requires an employer to retain the "complet[ed]" form and make it "available for inspection." And § 1324a(b)(4) regulates copying documents presented with the form. Nothing in the text or structure indicates a separate concern for regulating commonly used, otherwise-acquired information no matter where it is found merely because it also happens to appear on the completed I-9 or attached forms. Had Congress intended to limit so broadly a State's use of all such information, it could have drafted § 1324a(b)(5) to do so. It did not. Rather, § 1324a(b)(5) is more akin to a rule of evidence that seeks to guard how the new I-9 form itself, once completed and submitted with proper documentation,

may be used—even to the point of disallowing its use in many *federal* prosecutions.

C. The Kansas Supreme Court's view of § 1324a(b)(5) would lead to absurd results, disrupt federal-state cooperation, and upend the federal-state balance.

Construing § 1324a(b)(5) as broadly as the Kansas Supreme Court did would preempt States from a wide range of traditional state prosecutions for crimes having nothing to do with IRCA's work authorization verification system. *Any employee* would have a "get-out-of-jail-free card" for a broad swath of criminal acts—even criminal activity *entirely unrelated to employment*—so long as the prosecution relies on information that was also separately included on an I-9 form at some point in time. The decision below also would disrupt or disband cooperative state and federal partnerships to combat these crimes and would upend the traditional role of States in prosecuting crimes affecting their residents. This cannot be what Congress intended.

1. Beyond the identity theft and false information statutes involved in these cases, under the Kansas Supreme Court's decision the State would be effectively precluded from prosecuting *any* fraud-related crimes—against citizens and non-citizens alike—if the State's case relies on information or misrepresentations a defendant also separately included on an I-9. Such crimes are numerous and typically require using information that also appears on an I-9, such as name, address, date of birth, telephone number, e-mail address, or state documents such as a driver's license.

For example, most domestic violence prosecutions in Kansas require the State to prove the defendant and the victim are over the age of 18. *See* Kan. Stat. Ann. § 21-5414(a), (b), (e)(2). Certain sex crimes and human trafficking crimes also require proving the ages of the victim and defendant. *See, e.g.*, Kan. Stat. Ann. § 21-5503(a)(3), (b)(1)(2); Kan. Stat. Ann. § 21-5426(b), (c)(3). Under the Kansas Supreme Court's rationale, the State would be precluded from introducing the defendant's or victim's date of birth if that information also happens to appear on an I-9.

Another example is state-law computer fraud prosecutions. *See* Kan. Stat. Ann. § 21-5839. Payroll-related computer fraud is so rampant that the IRS has partnered with state revenue departments to combat it.[9] Prosecuting computer fraud typically requires using information that would appear on an I-9, including a name and phone number or e-mail address, which are used to prove the defendant contacted the victim by phone or e-mail. So too with state-law prescription drug fraud prosecutions, *see* Kan. Stat. Ann. § 21-5708, which can also involve identity theft, identity fraud, and unlawfully obtaining medication by making, altering, or signing a prescription order.[10] Such

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[9] IRS, *Security Summit partners warn tax professionals of fake payroll direct deposit and wire transfer emails*, https://www.irs.gov/newsroom/irs-security-summit-partners-warn-tax-professionals-of-fake-payroll-direct-deposit-and-wire-transfer-emails.

[10] Jeff Lehr, Joplin Globe, *Kansas woman arrested on prescription fraud charges*, https://www.joplinglobe.com/news/crime_and_courts/kansas-woman-arrested-on-prescription-fraud-charges/article_bcefe523-a887-5e61-a06b-e96af0a2b64e.html.

prosecutions necessarily will rely on the victim's personal identifying information, at the very least the victim's name, and would be preempted if that information was ever provided on an I-9.

But the absurd consequences of the Kansas Supreme Court's view of § 1324a(b)(5) would not stop there. States also would be precluded from using any "information . . . appended to [the] form," 8 U.S.C. § 1324a(b)(5), including a state-issued "driver's license or similar document," *id.* § 1324a(b)(1)(D), which are used to prove everything from underage drinking (Kan. Stat. Ann. § 41-727), to consent to organ donation (Kan. Stat. Ann. § 65-3239), and, of course, to prove legal permission to drive, *see* Kan. Stat. Ann. § 8-260.

Under the Kansas Supreme Court's flawed logic, the statute quite literally would prohibit the use of *any* information on or attached to the I-9 form, including name, address, date of birth, telephone number, e-mail address, driver's license, state identification card, student identification card, or voter registration card for any purpose other than for enforcing select federal laws. If that were true, criminals could effectively immunize themselves from numerous state prosecutions based on the use of false information simply by writing that same false information on an I-9 form. It is absurd to suggest that Congress intended that result. The I-9 form was intended to assist with determining employees' work authorization, not to act as a "'Get Out of Jail Free' card for other" crimes. Pet. App. 107.

2. The Kansas Supreme Court attempted to limit the damage of its express preemption holding by emphasizing that Respondents raised an "as applied" challenge, and not a facial one. This creative characterization, however, does not change the holding below—that § 1324a(b)(5) "prohibit[s] state law enforcement use not only of the I-9 itself but also of the '*information contained in*' the I-9"—no matter where the information actually appears or what the basis for the prosecution might be. Pet. App. 27. Nor is there any textual basis for confining the Kansas Supreme Court's holding to the circumstances of Respondents' particular cases. If the phrase, "information contained in or appended to such form" includes information that appears on an I-9 even when that information is actually found on a different form or in a different place, there is nothing in the text of § 1324a(b)(5) that would limit the breadth of its limitation on the use of the information. The decision below therefore effectively immunizes from many state prosecutions any person who has ever completed an I-9 and thereby effectively "wipe[s] numerous criminal laws off the books." Pet. App. 45 (Stegall, J, dissenting). Labeling Respondents' challenges "as applied" does nothing to limit the damage.

3. Adopting the Kansas Supreme Court's sweeping view of the preemptive scope of § 1324a(b)(5) also would disrupt a longstanding tradition of federal-state cooperation in combatting identity theft. And it would invade traditional state police powers that the federal government has generally respected and even invited.

There can be no doubt that Kansas identity theft laws fall squarely within the State's "area of historic state power." *See Puente Arizona*, 821 F.3d at 1104 (observing that state identity theft laws "regulate for the health and safety of the people of" the State). State laws that "protect the health and safety of their citizens," like the laws Respondents violated, are "primarily, and historically, matters of local concern." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotation marks and alterations omitted).

And traditionally—including in these very cases—state and federal law enforcement cooperate in both investigating criminal activity and obtaining convictions. Each of the three Respondents here was investigated by local and federal authorities working together, which is consistent with the federal government's general approach to combatting the identity theft pandemic. Pet. App. 3, 5, 63-65, 91-92; JA 125.

The Kansas Supreme Court's view of § 1324a(b)(5) would end this federal-state cooperation and replace it with a system of exclusive federal domination without any indication that Congress intended that result or any evidence that the federal criminal justice system is up to the task on its own. In 2016, for example, "an estimated 26 million persons, or about 10% of all U.S. residents age 16 or older, reported that they had been victims of identity theft during the prior 12 months."[11]

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[11] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Victims of Identity Theft, 2016*, at 1 (Jan. 2019) *available at* https://www.bjs.gov/content/pub/pdf/vit16.pdf.

Yet only 1,831 people were sentenced for federal identity theft crimes.[12] Preventing States from participating with the federal government in prosecuting identity theft crimes will result in fewer identity theft prosecutions overall, which means more crime will go unpunished and more victims will be left without justice.

It is well established that courts must "'be *certain* of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond v. United States*, 572 U.S. 844, 858 (2014) (emphasis added) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). This principle applies equally in the preemption context even though the "Federal Government holds a decided advantage in this delicate balance" under the Supremacy Clause. *Gregory*, 501 U.S. at 460; *see also Bond*, 572 U.S. at 858 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Even when "addressing questions of express . . . pre-emption," the Court begins with the "assumption that the historic police powers of the States are not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). Because § 1324a(b)(5) does not provide any statement—much less a clear statement—that

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[12] United States Sentencing Commission, *Mandatory Minimum Penalties for Identity Theft Offenses in the Federal Criminal Justice System*, at 14 (Sept. 2018), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180924_ID-Theft-Mand-Min.pdf.

Congress intended to displace States' traditional police power to prosecute violations of state law based on information contained in forms other than the I-9, Respondents' convictions should stand.

II. IRCA Does Not Impliedly Preempt Respondents' Prosecutions.

IRCA also does not impliedly preempt Respondents' prosecutions for committing identity theft and making a false information. Congress does not occupy the field of identity theft, and prosecuting identity theft perpetrated with documents other than the I-9 creates no conflict with IRCA.

When assessing implied preemption, the Court starts with a strong presumption against preemption, which is rooted in "the assumption that the historic police powers of the States" are not superseded by federal law "unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic*, 518 U.S. at 485). So if there is any doubt about Congress's intent to preempt, the Court has a "duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). That duty is heightened where (as here) the area of law in question is one of traditional state regulation. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

Federal law impliedly preempts state law only where Congress creates a scheme of federal regulation so pervasive that it leaves no room for state regulation (field preemption), or where state law actually conflicts

with federal law (conflict preemption). *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (conflict); *Rice*, 331 U.S. at 230 (field). Evidence of preemption, whether express or implied, must be found "in the text and structure of the statute at issue." *CSX Transp.*, 507 U.S. at 664. There is no such evidence—much less clear and manifest evidence—that Congress intended to preempt Respondents' prosecutions for using stolen identification information.

A. Respondents' prosecutions are not field preempted.

This Court has been careful to limit its use of field preemption and to narrowly delimit the fields Congress does occupy. For example, in *Arizona v. United States*, 567 U.S. 387 (2012), the Court carefully limited its field preemption analysis to the "field of alien registration." *Id.* at 401; *see also id.* at 406 (applying *conflict* preemption to Arizona's criminal prohibition on unauthorized aliens applying for work); *Rice*, 331 U.S. at 237 (distinguishing between the field of warehouseman licensing and the field of regulations that "affect the ability of warehousemen to render adequate service at reasonable rates"). The State's prosecution of Respondents for violating Kansas identity theft and false writing statutes does not implicate any field that Congress has occupied.

1. Congress does not occupy the field of identity theft.

The field at issue in this case is the field of identity theft. No matter how much Respondents may wish to

make their immigration or work authorization status the central focus of this case, it is not. Respondents' convictions did not rely on misrepresentations on the I-9, nor were Respondents' convictions otherwise related to the verification of employment authorization. Rather, Respondents were convicted of identity theft for using someone else's social security number on tax-withholding forms.

Congress has not "so pervasive[ly]" regulated the field of identity theft that it has "left no room for the States" to act. *Arizona*, 567 U.S. at 399 (internal quotation marks omitted). Nor is the "federal interest . . . so dominant" in those areas that "the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* (internal quotation marks omitted)

Quite to the contrary. The field of identity theft is marked by state and federal cooperation. The federal government and all 50 States have criminal statutes punishing identity theft. *See* 18 U.S.C. § 1028; U.S. Amicus Br. 2, filed Dec. 4, 2018. Federal and state investigators routinely work together to root out identity theft. Respondents' prosecutions are examples of this. All three involved cooperative federal and state investigations resulting in state prosecutions. Pet. App. 3, 5, 63-65, 91-92; JA 124-125.

The cooperation that took place in Respondents' cases is the product of a broader effort by the federal government to partner with States and other stakeholders to combat identity theft. In 2012, the IRS launched a pilot program aimed at aiding local law enforcement in pursuing identity theft prosecutions by

allowing them to confidentially obtain tax return information of identity theft victims from the IRS. That program was expanded to all 50 States and the District of Columbia in 2013.[13] And in 2015 the IRS touted a "sweeping new collaborative effort to combat identity theft refund fraud and protect the nation's taxpayers."[14] Congress has also, for example, required States to establish and maintain Medicaid Fraud Control Units as a condition of participating in the Medicaid program. *See* 42 U.S.C. § 1396a(a)(61); *id.* § 1396b(q). Those Units investigate and prosecute Medicaid fraud, which includes medical identity theft.[15] This is hardly the portrait of total federal dominion that this Court's cases require before implying that Congress intended to preclude enforcement of state laws.

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[13] *See* Sally P. Schreiber, The Tax Adviser, *IRS Expands Identity Theft Law Enforcement Assistance Program*, https://www.thetaxadviser.com/issues/2013/jun/newsnotes-jun2013-story-03.html (June 1, 2013).

[14] 2015 IRS Security Summit: Internal Revenue Service, IRS, Industry, States Take New Steps Together to Fight Identity Theft, Protect Taxpayers, https://www.irs.gov/newsroom/irs-industry-states-take-new-steps-together-to-fight-identity-theft-protect-taxpayers.

[15] Centers for Medicare & Medicaid Services, *Partners in Integrity: Understanding and Preventing Provider Medical Identity Theft* at 3-4, 7 (June 2015), available at https://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/Medicaid-Integrity-Education/Provider-Education-Toolkits/Downloads/understand-prevent-provider-idtheft.pdf.

2. Congress has not occupied the fields Respondents have identified.

Respondents have argued that IRCA impliedly preempts their prosecutions because Congress has occupied the field of the use of false documents by unauthorized aliens to show work authorization. Opp. 21. They also have contended that Congress has "comprehensively regulated the employment verification process" and that "Congress has occupied the broader field of 'unauthorized employment of aliens.'" Opp. 22 (quoting *Arizona*, 567 U.S. at 406). But Congress has not chosen to fully occupy any of these fields.

To ascertain the boundaries of the field any given federal law occupies, this Court "look[s] to the federal statute itself" in light of its context. *DeCanas v. Bica*, 424 U.S. 351, 360 n.8 (1976) (internal quotation marks omitted). Regarding the IRCA framework, this Court has explained that "the Federal Government has occupied the field of alien registration." *Arizona*, 567 U.S. at 401; *see also Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) (holding that a Pennsylvania alien registration statute was preempted by the federal "comprehensive" and "complete system for alien registration"). That field is limited to "maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders," and punishing violations of the registration requirements. *Arizona*, 567 U.S. at 401-02. This Court has never held that Congress has occupied the broader fields of the employment verification process or employment of unauthorized aliens. To the contrary, in invalidating

Arizona's law punishing aliens for seeking or performing work they were not authorized to do under federal law, this Court applied *conflict*, not field, preemption. *Id.* at 403.

The plain language of § 1324a(b)(5) confirms that Congress has not occupied the fields of false documents used by unauthorized aliens to show work authorization, the employment verification process, or the unauthorized employment of aliens, as Respondents suggest. That provision only limits the use of the I-9 form itself, including information written on the form or attached to it. It does not purport to regulate the use of other documents, forms (such as the K-4 and W-4), or information that might also be used in the employment application, screening, and hiring process that are entirely separate from the I-9. *See generally* 8 U.S.C. § 1324a(b); *see also supra* § I.

Finally, "IRCA's express preemption provision, which in most instances bars States from imposing penalties on *employers* of unauthorized aliens, is silent about whether additional penalties may be imposed against the employees themselves." *Arizona*, 567 U.S. at 406 (emphasis added). Because "[f]ield preemption reflects a congressional decision to foreclose any state regulation in the area," *id.* at 401, Congress's choice to expressly preempt state regulation of only some aspects of the employment relationship indicates it did not intend to occupy the entire field. *See Wyeth*, 555 U.S. at, 574-75 (noting that Congress's enactment of an express preemption provision for medical devices but not for prescription drugs was "powerful evidence that Congress did not intend FDA oversight to be the

exclusive means of ensuring drug safety and effectiveness").

3. Even if Congress has occupied the fields Respondents suggest, the State's prosecution of Respondents does not fall within those fields.

Even if Congress has occupied the fields of false documents used by unauthorized aliens to show work authorization, the employment verification process, or the unauthorized employment of aliens, the State's prosecution of Respondents does not implicate those fields.

1. Respondents' prosecutions do not implicate the field of the use of false documents by unauthorized aliens to show work authorization. Under IRCA, work authorization is assessed using the I-9 form. *See* 8 U.S.C. § 1324a(b). Each respondent was convicted of using stolen information on tax forms that have no bearing on assessing work authorization under IRCA. Not one of the Respondents was convicted for any information included on an I-9 form or as part of the process of verifying authorization to work.

If this field encompasses the use of any document submitted as part of the employment application process, even those documents not directly used to establish work authorization, strange results would follow. Federal preemption would extend not only to tax-withholding forms but presumably also to prosecutions for fraud on direct deposit, health insurance, or other forms submitted as part of the employment application and hiring process. That

includes prospective employees who misrepresent themselves in order to dodge outstanding warrants or hide a criminal record that would appear on a background check. There is nothing "discernible in the statutory text" suggesting Congress intended such strange, atextual results. *See Whiting*, 563 U.S. at 599.

2. Even if Congress has occupied the field of employment verification, the verification of work authorization is accomplished exclusively through the I-9 form, including the information provided on it and the documents attached to it. But Respondents were not convicted for anything they put on or attached to the I-9 form; they were convicted only for using stolen social security numbers on state and federal tax forms.

The tax forms used to convict Respondents are not connected to or derivative of the I-9 form. Nor do the tax forms play a role in the field of employment verification. Kansas's identity theft and false writing statutes do not address employment verification and were not used to prosecute fraud in the employment verification process. The mere fact that the I-9 and the tax forms use a common identifier—a social security number—does not mean that all uses of that identifier are necessarily part of the field of employment verification. Social security numbers were not developed for verifying employment, but rather as a tool for tracking the earnings of employees and their status within the Social Security Act programs related to retirement, survivors, and disability. JA 87-88.

Finding Respondents' prosecutions field preempted because they implicate the field of employment verification would stretch the field beyond IRCA's employment verification framework to the point of precluding state prosecutions where a person uses someone else's social security number on tax-withholding forms in order to avoid paying taxes. Yet there is not even a hint in IRCA that Congress so intended. And requiring the preemption analysis to turn on the intent of the identity thief would be inconsistent with the very nature of field preemption.

3. Nor are Respondents' prosecutions implicated if Congress occupies the field of unauthorized employment of aliens. The Kansas statutes at issue do not address the unauthorized employment of aliens at all. And the laws apply the same regardless of whether the person submitting the false information is authorized to work.

4. At the very least, IRCA does not show a "clear and manifest purpose of Congress" to preempt prosecutions like Respondents' where the basis for the charge is an act of identity theft that has nothing to do with the employment authorization verification system IRCA created. *See Wyeth*, 555 U.S. at 565 (internal quotation marks omitted). Even if Respondents could offer a plausible basis for finding field preemption, the Court "nevertheless ha[s] a duty to accept the reading that disfavors pre-emption." *Bates*, 544 U.S. at 449.

B. Respondents' prosecutions are not conflict preempted.

Out of respect for the laws Congress has actually passed and the States' important role in our system of government, the implied conflict preemption analysis begins with a strong presumption against preemption. *Altria Grp.*, 555 U.S. at 77; *see also Wyeth*, 555 U.S. at 565. Thus, a "high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Whiting*, 563 U.S. at 607 (opinion of Roberts, C.J.) (internal quotation marks omitted). That "high" threshold is insurmountable for Respondents.

State laws can be conflict preempted in two ways: "where 'compliance with both federal and state regulations is a physical impossibility,'" and "where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 567 U.S. at 399-400 (quoting *Florida Lime & Avocado Growers*, 373 U.S. at 142-43 and *Hines*, 312 U.S. at 67). Respondents have not claimed it is impossible to comply with both IRCA and Kansas identity theft and false information statutes. Indeed compliance with both is readily accomplished by providing truthful information on both federal and state forms.

Respondents' prosecutions also create no obstacle to enforcing IRCA. Although conflict preemption is a form of "implied" preemption, this Court's implied preemption inquiry "begin[s] . . . with the relevant text" of the federal and state statutes. *Whiting*, 563 U.S. at 608. And the text must indicate that Congress made a "deliberate choice" to preempt Respondents'

prosecutions. *Arizona*, 567 U.S. at 405. Congress has made no such choice to preempt state identity theft prosecutions. If anything, it made the opposite choice.

1. Starting with the text, IRCA makes it "unlawful . . . to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324(a)(1)(A). And it established an employment verification system that enlisted employers to "verif[y]" that an employee "is not an unauthorized alien." *Id.* § 1324a(b)(1)(A). Congress accomplished this, in part, using the I-9 form.

Kansas's statutes do not conflict with the federal scheme. *See Whiting*, 563 U.S. at 608. They do not address the employment of unauthorized aliens or even prohibit unauthorized aliens from obtaining employment. And the State does not contend that its identity theft and false information laws can be applied to misrepresentations on the I-9 itself in light of 8 U.S.C. § 1324a(b)(5).

2. Turning to IRCA's purpose, Respondents argue that their prosecutions "frustrate[] congressional purpose and provide[] an obstacle to the implementation of federal immigration policy by usurping federal enforcement discretion in the field of unauthorized employment of aliens." Opp. 23 (quoting Pet. App. 36 (Luckert, J., concurring in judgment)). To the contrary, Respondents' prosecutions underscore why there is no conflict between IRCA and the Kansas laws they were convicted of violating.

Respondents' convictions were not based on misrepresentations Respondents made on the I-9 employment verification form and have no bearing on the enforcement of "immigration [law] or creating criminal penalties for illegal aliens working in the state." Pet. App. 56-57. The conduct that formed the basis for Respondents' convictions was using someone else's social security number on federal and state tax-withholding forms, not the I-9. Pet. App. 4-5, 7, 63-64, 91-92. The K-4 and W-4 tax forms are not used to verify employment authorization and have no bearing on the employment verification system. Thus, Respondents' "immigration status was not relevant to whether the[ir] conduct" violated Kansas law. *See* Pet. App. 38-39 (Biles, J., dissenting).

Moreover, the state prosecutions here were actively supported by the federal government and arose from cooperative federal-state investigations. The federal government established a partnership with local law enforcement to combat identity theft, assisted in the investigation of Respondents, and referred Respondents' cases to the local prosecutor to prosecute state law violations. Pet. App. 49, 62-63, 91. In two of the cases, *Garcia* and *Morales*, a federal special agent with the Social Security Administration Office of the Inspector General testified at trial against the Respondents. Pet. App. 3, 6, 73; JA 86-87, 168. And in the third, agents with the Department of Homeland Security Immigration and Customs Enforcement—the very agency whose decisions Respondents are concerned about interfering with—notified local law enforcement about Ochoa-Lara's use of another person's social security number. *See* Pet. App. 91-92. In

fact, the federal government's active cooperation is required in *every* case like Respondents' because only the federal government can certify that the social security numbers used belonged to someone else. JA 89-90, 168-170; *see also* 20 C.F.R. § 401.155.

The federal government also is not concerned about the supposed conflict Respondents posit. U.S. Amicus Br. 20-22, filed Dec. 4, 2018. Quite the opposite. While Respondents attempt to conjure hypothetical conflicts between state and federal enforcement efforts, the federal government actually sees important synergies. *See supra* § II.A.1 (discussing cooperative federal and state identity theft enforcement). Thus, the state prosecutions furthered, rather than frustrated, federal objectives.

3. Because Respondents' prosecutions do not attempt to punish conduct prohibited by IRCA, this Court's conflict preemption analysis in *Arizona* does not apply. Respondents have claimed that the Kansas identity theft laws give the State the "power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." Opp. 24 (quoting *Arizona*, 567 U.S. at 402). Not so.

Kansas's prohibition on identity theft applies without regard to one's status and punishes conduct unrelated to what IRCA exists to regulate. With the exception of statements on an I-9 itself, *see* 8 U.S.C. § 1324a(b)(5), anyone found "obtaining, possessing, . . . [or] using" the personal identifying information of

another, or a document containing the same, has committed identity theft under Kansas law if that person also acts with intent to defraud in order to receive a benefit. Kan. Stat. Ann. § 21-6107(a) (2011 Supp.). Kansas's false information law is similar. *See* Kan. Stat. Ann. § 21-5824.

By contrast, the statute this Court found conflict preempted in *Arizona* directly regulated aliens' unauthorized employment by making it a misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. 567 U.S. at 403. But Kansas's decision to punish the use of another's personal identifying information does not relate to "the same activity" as IRCA, namely employment authorization. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000).

4. When Congress did address preemption in IRCA it adopted an express preemption provision that deliberately limits IRCA's preemptive scope to "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who *employ*, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2) (emphasis added). While "the existence of an express preemption provision does not bar the ordinary working of conflict preemption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause," *Arizona*, 567 U.S. at 406 (internal quotation marks and brackets omitted), "it is still probative of congressional intent. And it is the intent of

Congress that is the ultimate touchstone," *id.* at 452 (Alito, J., dissenting).

When Congress wanted to expressly preempt state and local law, it knew how to do so. Because Congress chose not to expressly preempt all employment-related fraud claims involving aliens, this Court should decline to find implied preemption. After all, conflict preemption analysis "does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Whiting*, 563 U.S. at 607 (opinion of Roberts, C.J.) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (Kennedy, J., concurring in part and concurring in judgment); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907-08 (2000) (Stevens, J., dissenting) (discussing the importance of preventing "federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes").

5. The flaws in Respondents' conflict preemption claim are on full display in the irrational results it would produce. If this Court were to hold that the prosecution of unauthorized aliens for any crimes committed related to their employment conflicts with IRCA, it would immunize unauthorized aliens from prosecution under a host of state laws that have nothing to do with immigration policy or the employment of unauthorized aliens. Not only would Respondents' use of other people's social security

numbers on tax-withholding documents be preempted, but so too would state prosecutions for identity theft in setting up a bank account for direct deposits from an employer or using another person's social security number in signing up for health or life insurance, both of which could significantly harm the actual holder of the social security number. In addition, citizens and work-authorized aliens would still be subject to prosecutions for employment-related crimes, such as using another's identity to evade a background check. Yet unauthorized aliens would enjoy a favored status, with immunity from state prosecution for violating criminal statutes that apply to everyone else. "No such design can be attributed to a rational Congress." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 265 (2013).

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

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APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. 8 U.S.C. § 1324a provides in pertinent part:

Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity—

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or

refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

* * *

(b) Employment verification system

The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation

(A) In general

The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining—

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the

requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.

(B) Documents establishing both employment authorization and identity

A document described in this subparagraph is an individual's—

(i) United States passport;[1]

(ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document—

(I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection,

[1] So in original. Probably should be followed by "or".

(II) is evidence of authorization of employment in the United States, and

(III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

(C) Documents evidencing employment authorization

A document described in this subparagraph is an individual's—

(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or

(ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.

(D) Documents establishing identity of individual

A document described in this subparagraph is an individual's—

(i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or

(ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification.

(E) Authority to prohibit use of certain documents

If the Attorney General finds, by regulation, that any document described in subparagraph (B), (C), or (D) as establishing employment authorization or identity does not reliably establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Attorney General may prohibit or place conditions on its use for purposes of this subsection.

(2) Individual attestation of employment authorization

The individual must attest, under penalty of perjury on the form designated or established for purposes of paragraph (1), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment. Such attestation may be manifested by either a hand-written or an electronic signature.

(3) Retention of verification form

After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during a period beginning on the date of the hiring, recruiting, or referral of the individual and ending—

(A) in the case of the recruiting or referral for a fee (without hiring) of an individual, three years after the date of the recruiting or referral, and

(B) in the case of the hiring of an individual—

(i) three years after the date of such hiring, or

(ii) one year after the date the individual's employment is terminated,

whichever is later.

(4) Copying of documentation permitted

Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

(5) Limitation on use of attestation form

A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18.

(6) Good faith compliance

(A) In general

Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

(B) Exception if failure to correct after notice

Subparagraph (A) shall not apply if—

(i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,

(ii) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure, and

(iii) the person or entity has not corrected the failure voluntarily within such period.

(C) Exception for pattern or practice violators

Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section.

* * *

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement.

(2) Preemption

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.

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for

permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

3. The Kansas identity theft statute, Kan. Stat. Ann. § 21-6107 (2011 Supp.),[2] provides in relevant part:

(a) Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to defraud that person, or anyone else, in order to receive any benefit.

* * *

(d) It is not a defense that the person did not know that such personal identifying information belongs to another person, or that the person to whom such personal identifying information belongs or was issued is deceased.

(e) As used in this section "personal identifying information" includes, but is not limited to, the following:

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[2] Prior to July 1, 2011, when Kansas's criminal code was comprehensively recodified, this statute was codified at Kan. Stat. Ann. § 21-4018. Only Respondent Morales was convicted for conduct occurring before July 2011. Except for its statutory number, the statute was identical at all times relevant to Respondents' cases. The State's petition inadvertently misstated that a different version of the statute was in effect at the time of the conduct for which Morales was charged. *See* Pet. 5. The statute was amended in 2013, but the relevant provision has not materially changed.

(1) Name;

(2) birth date;

(3) address;

(4) telephone number;

(5) driver's license number or card or non-driver's identification number or card;

(6) social security number or card;

(7) place of employment;

(8) employee identification numbers or other personal identification numbers or cards;

(9) mother's maiden name;

(10) birth, death or marriage certificates;

(11) electronic identification numbers;

(12) electronic signatures;

(13) any financial number, or password that can be used to access a person's financial resources, including, but not limited to, checking or savings accounts, credit or debit card information, demand deposit or medical information.

4. The current Kansas identity theft statute, Kan. Stat. Ann. § 21-6107 (2018 Supp.), provides in relevant part:

(a) Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to:

(1) Defraud that person, or anyone else, in order to receive any benefit; or

(2) Misrepresent that person in order to subject that person to economic or bodily harm.

* * *

(d) It is not a defense that the person did not know that such personal identifying information belongs to another person, or that the person to whom such personal identifying information belongs or was issued is deceased.

(e) As used in this section:

(1) "Personal electronic content" means the electronically stored content of an individual including, but not limited to, pictures, videos, emails and other data files;

(2) "personal identifying information" includes, but is not limited to, the following:

(A) Name;

(B) birth date;

(C) address;

(D) telephone number;

(E) driver's license number or card or nondriver's identification number or card;

(F) social security number or card;

(G) place of employment;

(H) employee identification numbers or other personal identification numbers or cards;

(I) mother's maiden name;

(J) birth, death or marriage certificates;

(K) electronic identification numbers;

(L) electronic signatures;

(M) any financial number, or password that can be used to access a person's financial resources, including, but not limited to, checking or savings accounts, credit or debit card information, demand deposit or medical information; and

(N) passwords, usernames or other log-in information that can be used to access a person's personal electronic content, including, but not limited to, content stored on a social networking website . . . .

5. The Kansas making a false information statute, Kan. Stat. Ann. § 21-3711 (2010 Supp.),[3] provides in relevant part:

> Making a false information is making, generating, distributing or drawing, or causing to be made, generated, distributed or drawn, any written instrument, electronic data or entry in a book of account with knowledge that such information falsely states or represents some material matter or is not what it purports to be, and with intent to defraud, obstruct the detection of a theft or felony offense or induce official action.

[3] As part of the comprehensive recodification effective July 1, 2011, this statute was moved—without change—from Kan. Stat. Ann. § 21-3711 to Kan. Stat. Ann. § 21-5824.