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 *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 700-1A
WASHINGTON, DC 20036
(202) 202-355-9452
lj@larryjoseph.com

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether the Immigration Reform and Control Act ("IRCA") expressly preempts the States from using any *information* entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications.

2. Whether IRCA impliedly preempts Kansas's prosecution of Respondents.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding in 1981, EFELDF has defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. That federalist structure enables State and local government to protect their communities and to maintain order, without regard to whether the

[1] *Amicus* files this brief with the parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

federal government can or will aid them. In addition, EFELDF has consistently opposed unlawful behavior, including illegal entry into and residence in the United States, and supported enforcing immigration laws. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Three illegal aliens convicted in state court of identity theft and false statements challenge those convictions on the theory that the Immigration Reform & Control Act, PUB. L. NO. 99-603, 100 Stat. 3359 (1986) ("IRCA") preempts the use of identity-related information on or appended to the "I-9" form, 8 U.S.C. §1324a(b)(5), without regard to whether the information came *from* the I-9 form. The Kansas Supreme Court found Kansas's facially neutral identity-related crimes to be expressly preempted as applied to these illegal aliens, and Kansas appealed.

Constitutional Background

Under the Constitution's Supremacy Clause, federal law preempts State law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three ways in which federal laws can preempt State laws: express or implied preemption, with implied preemption further subdivided into "field" and "conflict" pre-emption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992); *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000).

Preemption analysis begins with the federal statute's plain wording, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). Under *Santa Fe Elevator* and its progeny,

courts in implied-preemption cases use a presumption against preemption for federal legislation in fields traditionally occupied by the States. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). In express-preemption cases, by contrast, this Court recently rejected the presumption against preemption. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S.Ct. 1938, 1946 (2016).

Statutory Background

The relevant Kansas criminal statutes prohibit false statements and identity theft, without regard to a defendant's immigration status. *See* KAN. STAT. ANN. §§21-3711, 21-4018 (2011); KAN. STAT. ANN. §§21-5918, 21-6107.

In a subsection captioned "Limitation on use of attestation form," IRCA provides that "[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 enforcement of this chapter and [18 U.S.C. §§1001, 1028, 1546, and 1621]." 8 U.S.C. §1324a(b)(5). Another subsection captioned "Preemption" provides that "[t]he 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." *Id.* §1324a(h)(2).

Factual Background

Amicus EFELDF adopts the facts as stated by the petitioner. *See* Kansas Br. at 10-17. EFELDF notes that the lower courts in Kansas convicted respondents without using the I-9 form or its attachments, but did

rely on some of the same information that the I-9 form contains (*e.g.*, names, Social Security numbers) as submitted on *other forms* (*e.g.*, state and federal tax forms). EFELDF also notes that the Kansas Supreme Court held that §1324a(b)(5) preempts prosecution of only aliens in respondents' position:

> [Mr. Garcia] does not seek to prevent all prosecutions under the state law. His challenge can fairly be characterized as "facial" in the traditional sense only insofar that its holding will *apply to other aliens in his position*, *i.e.*, those who use the Social Security card or other document listed in federal law of another for purposes of establishing employment eligibility.

Pet. App. 20 (first emphasis added).

SUMMARY OF ARGUMENT

Although the Court decided against reviewing the question that the petition posed on the constitutional issue, the unconstitutionality of the Kansas Supreme Court's interpretation of §1324a(b)(5) remains at issue through the canon of constitutional avoidance. *See* Section I. If Congress indeed intended to block the prosecution of facially neutral non-immigration crimes as applied to illegal aliens, Congress violated the equal-protection component of the Fifth Amendment. *See* Section I.A. The alternate interpretation that Congress intended to block these facially neutral non-immigration crimes as applied to everyone raises serious questions under the Tenth Amendment. *See* Section I.B.

On the questions presented under both express and implied preemption, *Chamber of Commerce of*

U.S. v. Whiting, 563 U.S. 582 (2011) (2011), already found that §1324a(b)(5) applies only to the I-9 documents themselves, but not to the same information obtained from other sources. *Whiting*, 563 U.S. at 603 n.9. *See* Section II.B.1. There is no reason to reverse *Whiting* on this issue.

With respect to express preemption, this Court should clarify that the clear-statement rule survives the rejection of the presumption against preemption in *Franklin Cal. Tax-Free Tr*. *See* Section II.A. The plain language of §1324a(b)(5) bars only the use of the I-9 forms themselves, not the same information from independent sources; moreover, the canon against repeals by implication reinforces that narrow reading. *See* Section II.B.2. Of course, the clear-statement rule makes that plain-language argument even stronger. *See* Section II.B.3.

With respect to implied preemption, neither field preemption nor conflict preemption can survive the presumption against preemption, which continues to apply for implied-preemption cases. *See* Section III.A. For both field preemption and conflict preemption, IRCA can readily and most plausibly be read to bar use of the I-9 form and its attachments *themselves*, without barring the use of the same information from independent sources. *See* Sections III.B-III.C. Finally, the jumble of lower-court decisions – ranging from express preemption to field preemption to conflict preemption to no preemption – demonstrate the need for this Court to clarify its preemption analysis for immigration cases. Particularly, this Court should resolve the apparent disconnect between the rejection of conflict preemption in *Whiting* and the finding of

conflict preemption for employee-based sanctions in *Arizona v. U.S.,* 567 U.S. 387 (2012). The Court should resolve this tension by limiting *Arizona* conflict preemption to State laws that restrict "unauthorized employment" based on a person's immigration status, while excluding facially neutral, generally applicable, non-immigration laws like the general prohibitions against identity theft or false statements at issue here. *See* Section III.D.

ARGUMENT

I. THIS CANON OF CONSTITUTIONAL AVOIDANCE APPLIES HERE.

Although the Court did not grant *certiorari* for the second question that Kansas posed – on the power of Congress to enact §1324a(b)(5) as the Kansas Supreme Court interpreted that section – this Court still must consider that constitutional issue to avoid interpreting §1324a(b)(5) in an unconstitutional way. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013). As explained in this section, the preemptive statute that the Kansas Supreme Court imagined, and that respondents press here, violates either – if not both – the Equal Protection component of the Fifth Amendment or the Tenth Amendment.

While the constitutional questions easily resolve against the respondents, this Court may prefer to avoid those questions by interpreting §1324a(b)(5) narrowly to avoid the constitutional issues.

A. Exempting illegal aliens from facially neutral general laws would violate the Equal Protection component of the Fifth Amendment.

In providing illegal aliens an as-applied exemption from facially neutral, generally applicable state-law crimes *because* they are illegal aliens, the Kansas Supreme Court begs the question: can Congress do that? Although it seems ludicrous to suggest that Congress intended to exempt illegal aliens from prosecution for facially neutral, generally applicable crimes within the States' historic police powers, the Kansas Supreme Court has put that question to this Court, as least for purposes of the canon of constitutional avoidance. If Congress intended that result, Congress violated the Equal Protection component of the Fifth Amendment.[2]

As the Kansas Supreme Court understands it, Congress *intended* §1324a(b)(5) to authorize illegal aliens – but not citizens – to use identity theft to hide criminal records from employers, to evade wage garnishment, and to escape compliance with generally applicable tax laws. If Congress intended to benefit illegal aliens *because* they are illegal aliens, that intent would violate Equal Protection unless Congress had at least a rational basis for that preference. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979). Indeed, in order to discriminate against citizens, Congress needs

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[2] By its terms, the Fourteenth Amendment's Equal Protection Clause applies only to States, U.S. CONST. amend. XIV, §1, cl. 4, but this Court has found an equivalent protection *vis-à-vis* federal action in the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe,* 347 U.S. 497, 499-500 (1954).

to meet heightened scrutiny. *U.S. Dept. of Agric. v. Moreno,* 413 U.S. 528 (1973). There is, of course, no reason for Congress to shield only illegal aliens from prosecution for facially neutral crimes.

If this Court rejects the Kansas Supreme Court's alien-shielding view of §1324a(b)(5) under equal-protection principles, the Court has two options:

> [W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) (citations and footnotes omitted, emphasis in original). In other words, §1324a(b)(5) either prohibits using I-9 information to prosecute *anyone* – citizen or alien – or it does not prohibit using I-9 information to prosecute anyone.

Neither option would aid respondents in evading culpability for their crimes. The first option (preempting the use of I-9 information for everyone) is covered in Section I.B, *infra*, whereas the second option (allowing the use of I-9 information) is Kansas's position.

B. Congress may lack the authority to preempt the States' enforcement of immigration-neutral criminal laws.

The rival reading – that §1324a(b)(5) preempts *all* non-excluded civil and criminal actions based on such general information as name, age, and Social Security number for *everyone* – runs afoul of both logic and the Tenth Amendment. As to the former, "Congress…

does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not … hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). Moreover, the expansive reading of IRCA also would violate the canon against repeals by implication. *See* Section II.B.2, *infra*. But this fanciful alternative also raises constitutional concerns under the Tenth Amendment:

> Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.

Bond v. U.S., 572 U.S. 844, 848 (2014). Under these circumstances, "it is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Id.* at 855 (interior quotations omitted). This "well-established" canon of constitutional avoidance counsels for interpreting §1324a(b)(5) narrowly.

II. IRCA DOES NOT EXPRESSLY PREEMPT THESE PROSECUTIONS.

Before addressing the lack of express preemption here, *amicus* EFELDF discusses federalism-based tools of statutory construction that survive the Court's rejection of the presumption against preemption in express-preemption cases.

A. As a threshold issue, rejection of a presumption against preemption in express-preemption cases requires this Court to clarify whether other, related statutory construction tools continue to apply.

Although this Court has recently rejected the presumption against preemption for express-preemption statutes, the Court should nonetheless interpret IRCA deferentially to State authority because Congress itself would have done so. As the Court recently recognized, "a fair reading of statutory text" requires "recognizing that Congress legislates against the backdrop of certain unexpressed presumptions." *Bond*, 572 U.S. at 857 (interior quotations omitted). One of the presumptions inherent in this Court's analysis of congressional enactments has been that "Congress does not cavalierly pre-empt [State law]," *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted), but there have been two canons for evaluating the proper deference to State authority: (1) the presumption against preemption, and (2) the clear-statement rule. Rejecting the former gives no guidance on the fate of the latter.

Although the presumption against preemption appears to have grown out of the clear-statement rule,[3] they are no longer the same thing. *Gonzales v.*

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[3] In announcing the presumption against preemption, *Santa Fe Elevator,* 331 U.S. at 230, relied on cases that merely required that Congress act clearly. *Napier v. Atlantic Coast Line,* 272 U.S. 605, 611 (1926) ("intention of Congress to exclude States from exerting their police power must be clearly manifested"); *Allen-*

Oregon, 546 U.S. 243, 274-75 (2006) (distinguishing between the two). Instead, the presumption against preemption could upend other canons of construction: "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotations omitted). By contrast, the Court's "clear statement rules … are merely rules of statutory interpretation, to be relied upon only when the terms of a statute allow," as "rules for determining intent when legislation leaves intent subject to question." *U.S. v. Lopez*, 514 U.S. 549, 610-11 (1995). As such, unlike the presumption against preemption, the clear-statement rule does not come into potential conflict with a statute's plain text, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp.*, 507 U.S. at 664. In rejecting the presumption against preemption, this Court did not also reject the clear-statement rule.

Under the circumstances, the lower courts must continue to apply the clear-statement rule as a non-dispositive tool of statutory construction:

> "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Bradley v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749 (1942) (same).

Agostini v. Felton, 521 U.S. 203, 237 (1997) (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989), alteration in *Agostini*). Accordingly, barring further clarification from this Court, the clear-statement rule applies here.

B. Based on traditional tools of statutory construction, IRCA does not expressly preempt Kansas law.

With that background, IRCA does not expressly preempt these state-law prosecutions under facially neutral State laws based on information from sources other than the I-9 form.

1. The Kansas Supreme Court's holding is inconsistent with this Court's *Whiting* decision.

The first – and likely terminal – hurdle for the Kansas Supreme Court's reading of IRCA is that *Whiting* already rejected that reading.

While EFELDF respectfully submits the Kansas Supreme Court's resolution here would be improper if that court were writing on a blank slate, the court was not writing on a blank slate. In *Whiting*, the Legal Arizona Workers Act – which compels employers to use the federally non-mandatory E-Verify system as a matter of state law – was held neither impliedly nor expressly preempted. Specifically, although a "request to the E-Verify system" is "based on information that the employee provides similar to that used in the I-9 process," 563 U.S. at 590, this Court limited preemption under §1324a(b)(5) to "the I-9 form or its supporting documents themselves." *Whiting*, 563 U.S. at 603 n.9. In other words, so long as an entity – *e.g.*, an employer or governmental prosecutor – uses the I-

9 information without using the form or its attachments themselves, there is no preemption.

The provision at issue in *Whiting* fell within the "donut hole" of §1324a(h)(2)'s preemption of *employer*-based sanctions.[4] 8 U.S.C. §1324a(h)(2). In that regard, the Arizona statute in *Whiting* was identically situated *vis-à-vis* IRCA to the Kansas statutes here: there was no preemption under §1324a(h)(2), so §1324a(b)(5) did not preempt using information on the I-9 form if the information was obtained from other sources. As *Whiting* has already held, the correct meaning of §1324a(b)(5) is the one Kansas presses here.

2. <u>The plain language of §1324a(b)(5) does not preempt these prosecutions.</u>

IRCA's express bar against using I-9 information outside of the purposes listed in §1324a(b)(5) does not preclude relying on the same information – *e.g.*, name, age, Social Security number – obtained from other sources. *See* Kansas Br. at 22-27. As this Court noted shortly before IRCA's passage, "evidence … is not to be excluded, for example, if police had an 'independent source' for discovery of the evidence," *Segura v. U.S.*, 468 U.S. 796, 805 (1984):

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall

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[4] Although the provision was an "employer sanction" covered by §1324a(h)(2)'s primary language, it was not preempted because it fell within the exception for "licensing and similar laws." *See* 8 U.S.C. §1324a(h)(2).

> not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. *If knowledge of them is gained from an independent source they may be proved like any others*."

Id. (*quoting Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392 (1920)) (emphasis in *Segura*). The exclusion of evidence does not apply when the prosecution has a non-excluded basis for the same evidence. *Id.* Taking the opposite view is inconsistent with this Court's precedents and would not have occurred to Congress as a possible or plausible meaning of IRCA's text.

Another problem with reading §1324a(b)(5) to bar these prosecutions is that the same prohibition against Kansas's using I-9 information to enforce its generally applicable laws would apply equally to the federal government. If §1324a(b)(5) bars enforcement outside IRCA and the few criminal provisions listed in §1324a(b)(5) (namely, 18 U.S.C. §§1001, 1028, 1546, and 1621), *see* 8 U.S.C. §1324a(b)(5), the Internal Revenue Service could not seek to pursue tax-evasion remedies generally, *see*, *e.g.*, 26 U.S.C. §7201, to say nothing of *civil* remedies.

Specifically, because 26 U.S.C. §7201 is not enumerated in §1324a(b)(5) and tax enforcement is not "enforcement of this chapter" under §1324a(b)(5), the Kansas Supreme Court's broad interpretation of §1324a(b)(5) would prevent federal enforcement of 26 U.S.C. §7201 for the same reason Kansas purportedly cannot enforce its identity-theft and false-statement laws.

Congress is unlikely to have intended to give a pass to anyone – whatever his or her immigration status – for generally applicable tax laws. Even with no presumption against preempting *State* law, §1324a(b)(5) would remain subject to the canon against repeals by implication, which requires "clear and manifest" evidence of the intent to repeal. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (alteration in original, interior quotations and citations omitted). Moreover, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975). In short, the Kansas Supreme Court's reading of §1324a(b)(5) is untenable.

3. <u>If the clear-statement rule applies, it precludes interpreting §1324a(b)(5) to preempt State – or federal – laws based on I-9 information obtained from other sources.</u>

Assuming *arguendo* that the Court does not reject the clear-statement rule for construing statutes in express-preemption cases, *see* Section II.A, *supra*, this federalism-based canon bolsters Kansas's reading of IRCA. First, "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *accord Bond*, 572 U.S. at 862-63. Second,

and relatedly, "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *U.S. v. Bass*, 404 U.S. 336, 349 (1971); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (same). Although Kansas does not *need* this canon to prove its view of IRCA generally or §1324a(b)(5) specifically, the canon nonetheless bolsters Kansas's position.

III. IRCA DOES NOT IMPLIEDLY PREEMPT THESE PROSECUTIONS.

Before addressing the lack of implied preemption here, *amicus* EFELDF first discusses the presumption against preemption, which remains in effect for implied-preemption cases, notwithstanding this Court's recent rejection of that presumption for express-preemption cases.

A. The presumption against preemption continues in implied-preemption cases.

Although the Kansas Supreme Court avoided the presumption against preemption by analyzing this as an express-preemption case, Pet. App. 16, this Court added an implied-preemption question. Importantly, the presumption against preemption applies not only to determining the *existence* of preemption, but also to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Applying that presumption to the scope of preemption here is fatal to the preemption claims.

Specifically, for implied-preemption claims, the presumption against preemption makes §1324a(b)(5) amenable to a reading that prohibits using only the I-9 form and its attachments themselves, without precluding States from enforcing facially neutral non-

immigration laws based on the same common data – such as names and Social Security numbers – that the State acquires by other means (*e.g.*, tax forms, license applications). *See State v. Reynua*, 807 N.W.2d 473, 481 (Minn. Ct. App. 2011) (applying presumption against preemption to §1324a(b)(5)). Consistent with this Court's decisions, the *Segura*-style reading of §1324a(b)(5) easily qualifies as a *permissible* reading, which is all that the presumption requires. *See Altria Group,* 555 U.S. at 77 (quoted *supra*). An implied-preemption claim cannot survive the presumption against preemption.

B. IRCA does not field preempt these prosecutions.

As shown in Section III.A, *supra*, an implied-preemption claim cannot survive the presumption against preemption and a *Segura*-style reading of §1324a(b)(5). Moreover, this Court already has adopted that reading of §1324a(b)(5), *Whiting*, 563 U.S. at 603 n.9, and relied on conflict preemption – not field preemption – to review §1324a(h)(2). *Arizona*, 567 U.S. at 406-07. To the extent that more is needed, Kansas thoroughly addresses field preemption, *see* Kansas Br. at 36-43, which EFELDF adopts without adding more to it. *See* S.Ct. Rule 37.1. Respondents do not have a viable field-preemption claim.

C. IRCA does not conflict preempt these prosecutions.

Like field preemption, conflict preemption cannot survive the presumption against preemption and a *Segura*-style reading of §1324a(b)(5). *See* Sections III.A-III.B, *supra*. And, once again, *Whiting* already adopted that reading of §1324a(b)(5). As explained in

Section III.D, *infra*, moreover, the *Arizona* conflict-preemption analysis does not apply here. To the extent that more is needed, Kansas thoroughly addresses conflict preemption, *see* Kansas Br. at 44-50, which EFELDF adopts without adding more to it. *See* S.Ct. Rule 37.1. Respondents do not have a viable conflict-preemption claim.

D. This Court should resolve the tension between *Whiting* and *Arizona* by confining *Arizona* to sanctions directly related to unauthorized employment.

Amicus EFELDF respectfully submits that the lower-court decisions in this case and in related cases are a veritable Rorschach test of jurisprudence and that the scattered results derive from the tension between this Court's recent immigration decisions in *Whiting* and *Arizona*.[5] In resolving this case, the Court should try to resolve that tension.

By way of background, the pertinent part of *Whiting* was a conflict-preemption challenge to

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[5] In this case, four judges voted for the express-preemption holding, with one judge concurring in the judgment by finding field and conflict preemption and two judges dissenting. Pet. App. 17-28, 29-38, 38-47. By contrast, the Iowa Supreme Court decided a similar case with four judges rejecting express preemption but finding field and conflict preemption – with two of those four judges specially concurring on additional issues of field preemption and the exclusively federal discretion for prosecuting immigration-related matters – and three judges dissenting. *State v. Martinez*, 896 N.W.2d 737 (Iowa 2017). The Ninth Circuit rejected a facial challenge by treating the issue here as one of field and conflict preemption, including the presumption against preemption. *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1105 (9th Cir. 2016).

Arizona's requiring – under state law – employers to use the E-Verify system that IRCA made voluntary under federal law. *See Whiting*, 563 U.S. at 603-04. As this Court explained, "[i]mplied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," which – if allowed – "would undercut the principle that it is Congress rather than the courts that preempts state law." *Whiting*, 563 U.S. at 607 (internal quotations and citations omitted). *Amicus* EFELDF respectfully submits that any finding of conflict preemption based on perceived federal objectives and contrary to viable no-preemption interpretations undermines separation of powers and the federalist structure of our Constitution.

By contrast, the pertinent part of *Arizona* was a conflict-preemption challenge to Arizona's making a state-law crime of working without authorization when IRCA preempted only certain *employer*-based sanctions. *See Arizona*, 567 U.S. at 403-07. Although IRCA's plain language did not address *employee*-based sanctions and was susceptible – under the presumption against preemption – to a reading that IRCA simply failed to address employee-based sanctions, a majority of this Court cobbled together a congressional "instruction … from the text, structure, and history of IRCA" to find employee-based sanctions preempted:

> The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who

> seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.

Arizona, 567 U.S. at 406.[6] Like three justices of this Court,[7] *amicus* EFELDF did not interpret IRCA as the *Arizona* majority interpreted it, but the question now before the Court is different.

Respondents ask this Court to extend IRCA's focus on unauthorized employment to reach non-employment actions that violate facially neutral, generally applicable laws such as tax evasion and identity theft. Respondents are not alone: Advocates for illegal aliens cite *Arizona* to argue that any State action that interferes with illegal aliens is conflict preempted by IRCA's comprehensive federal enforcement scheme, *see*, *e.g.*, *City of El Cenizo v. Texas*, 890 F.3d 164, 178-80 (5th Cir. 2018); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 549 (5th Cir. 2013) (*en banc*) (Dennis, J., specially concurring), but *Arizona* was not that broad.

Indeed, the *Whiting-Arizona* conflict may be quite narrow. The *Arizona* holding about exempting

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[6] Section 5(C) of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act prohibited "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." ARIZ. REV. STAT. ANN. §13-2928(C). Unlike the Kansas laws here, the Arizona law was not facially neutral with respect to immigration status.

[7] *See Arizona*, 567 U.S. at 432-33 (Scalia, J., concurring in part and dissenting in part); *id.* at 439 (Thomas, J., concurring in part and dissenting in part); *id.* at 450-53 (Alito, J., concurring in part and dissenting in part).

employee-based sanctions – as opposed to *employer*-based sanctions – from IRCA enforcement focuses exclusively on "unauthorized employment," as distinct from other unlawful acts indirectly related to employment (*e.g.*, identify theft) or flowing from that employment (*e.g.*, tax evasion). Although *Arizona* could be read broadly to preempt any State action that directly *or indirectly* affects illegal aliens working here, that is not what *Arizona* held: the law challenged there applied directly to the act of seeking or holding work without the proper immigration authorization. By contrast, the laws challenged here are facially neutral as to the defendant's immigration status and fall well within a State's traditional police power. Because immigration law has not touched on these types of State laws, they should remain within a State's authority under *Whiting*.

Arizona interpreted IRCA to preempt sanctioning employees for unauthorized employment, but – even accepting that *arguendo* – it would not follow that IRCA preempts sanctioning the same employees for crimes *indirectly* related to employment (*e.g.*, identity theft and false statements) any more than it preempts charging them for driving a company car under the influence of intoxicants or any resulting vehicular homicides. This Court should make clear that *Arizona* merely expanded IRCA's preempted employment-sanction silo from the §1324a(h)(2) that Congress enacted (*i.e.*, employer-based sanctions) to include both *employer*-based and *employee*-based sanctions for "employ[ment], or recruit[ment] or refer[ral] for a fee for employment, [of] unauthorized aliens." 8 U.S.C. §1324a(h)(2). While that expansion is dubious under

§1324a(h)(2)'s plain language and the presumption against preemption, nothing in *Arizona* requires expanding IRCA preemption further to include taxes, identity theft, and facially neutral, non-employment aspects of the States' criminal and civil laws.

CONCLUSION

The decisions of the Kansas Supreme Court should be reversed.

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Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for *Amicus Curiae*