No. 17-834

IN THE

Supreme Court of the United States

KANSAS,
Petitioner,
v.

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

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF INDIANA AND ELEVEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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 *AMICI* STATES

The States of Indiana, Alabama, Alaska, Georgia, Maine, Mississippi, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia respectfully submit this brief as *amici curiae* in support of the petitioner.

The *Amici* States have a strong interest in enforcing state laws prohibiting identity theft and the intentional misuse of personal information—information necessary for all facets of modern life. All fifty States prohibit identity theft in some form. *See* Heather Morton, *Identity Theft*, Nat'l Conference of State Legislatures, http://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx. If the decision of the Supreme Court of Kansas were affirmed, States would be left unable to enforce these laws. The interpretation of federal law adopted by the decision below not only would prohibit innumerable essential—and commonplace—state prosecutions, but would also wreak havoc on a wide variety of state programs. The *Amici* States submit this brief to explain why this Court should reject the interpretation of the Supreme Court of Kansas.

SUMMARY OF ARGUMENT

This case arises from three run-of-the-mill identity theft prosecutions. Each of the three respondents, in the course of applying for and beginning new jobs, fraudulently filled out tax-withholding forms using someone else's Social Security number. Pet. App. 2–5, 62–63, 89–92. The State of Kansas prosecuted the respondents under its identity theft statute, Kan. Stat. Ann. § 21-6107—a prohibition it shares in common with every State, as well as Guam, Puerto Rico and the District of Columbia, *see* Heather Morton, *Identity Theft*, Nat'l Conference of State Legislatures, http://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx. The respondents do not appear to dispute that their conduct constitutes identity theft under Kansas law. The Supreme Court of Kansas held below, however, that the respondents have effectively immunized themselves from state prosecution—simply because they each used a single Social Security number to falsify *both* the tax forms *and* the federal employment eligibility verification form (*i.e.*, the Form I-9).

The Supreme Court of Kansas reached this surprising conclusion because it misread the federal Immigration Reform and Control Act of 1986 (IRCA). IRCA provides for the creation of the I-9 and "requires every employer to verify the employment authorization status of prospective employees." *Arizona v. United States*, 567 U.S. 387, 404 (2012). It imposes civil and criminal penalties on employers who fail to do so, and it imposes civil—but not criminal—penalties on aliens who seek or engage in unauthorized work, although federal law does "make[] it a crime for

unauthorized workers to obtain employment through fraudulent means." *Id.* at 405 (citing 18 U.S.C. § 1546(b)). While IRCA's single express preemption provision generally bars States from imposing penalties on *employers* of unauthorized aliens, 8 U.S.C. § 1324a(h)(2), in *Arizona* this Court held that IRCA *also* preempts state laws "contrary" to Congress's determination that "it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment." *Id.* at 406.

The Supreme Court of Kansas grounded its preemption decision neither on IRCA's express preemption provision nor on the conflict-preemption holding of *Arizona*. For good reason: These rules plainly are not implicated here, for the Kansas laws at issue prohibit identity theft generally without reference to immigration status or work authorization.

Instead, the decision below is premised on a separate provision of IRCA that provides that the I-9, "*and any information contained in or appended to*" the I-9, "*may not be used* for purposes other than for enforcement of [federal laws governing the employment verification system and prohibiting fraud and related conduct]." 8 U.S.C. § 1324a(b)(5)) (emphasis added). The Supreme Court of Kansas misread paragraph (b)(5) to prohibit a State from "using" any information that appears on the I-9, *even if the State has an independent source of the information*: While the Court acknowledged that these prosecutions turned on the tax-withholding forms and that the "State did not rely on the I-9," it held that the prosecutions were nevertheless barred because they were "based on the Social Security number contained in the I–9." Pet. App. 28.

1. The decision below thus misinterprets paragraph (b)(5) to preempt any "state law identity theft prosecution of an alien who uses another's Social Security information in an I–9," *id.*, where the identity theft involves—as it virtually always will—information that appears on the I-9. Indeed, it invites would-be identity thieves to evade state prosecution by including any information they steal (such as a Social Security number) in an I-9 form. To say the least, granting identity thieves such power to immunize themselves from prosecution would seriously impede States' efforts to fight identity theft, an increasingly serious issue with widespread consequences. Citizens and organizations across all strata of society use Social Security numbers, identifying documents, and other personal information included on I-9s on a daily basis. Identity theft is an extremely pervasive and costly crime, and the decision below would render States unable to combat the problem.

2. The reasoning of the decision below also goes far beyond identity theft and threatens to undermine a wide variety of federal, state, and nongovernmental programs. The Kansas Supreme Court's decision holds that an entity "use[s]" "information contained in" an I-9 *whenever* it employs any information that happens to appear on an I-9—even when the entity learns of the information from unrelated documents. Under this extremely broad reading, if information has been entered into an I-9 form, *the information may not be used for any purpose*. The Kansas Supreme Court's misinterpretation of paragraph (b)(5) would prohibit an enormous variety of ordinary—and crucial—public and private conduct, including: levying of

state taxes, verifying one's identity or age, and applying for public benefits. Virtually every employee in America has completed an I-9 form, providing a name, address, Social Security number, and other personal identification information. IRCA cannot be interpreted to bar the countless ways this information is used—whether by States, nongovernmental entities, or the federal government itself.

3. Rather than adopt such an absurdly broad interpretation of paragraph (b)(5), the Court should follow the plain meaning of the statutory text: When a company or government agency has learned of an individual's Social Security number from a tax form and has later used that information, ordinary English speakers would *not* say it "used" information "contained in" an I-9—even if the individual's Social Security number also happened to appear on an I-9. Rather, an entity uses information contained in an I-9 *only* when it employs information for which an I-9 is its *sole* source. This interpretation accords with ordinary usage and with the rest of IRCA's provisions. The system IRCA created to verify employment eligibility collects a considerable amount of information, and provisions of IRCA outside of paragraph (b)(5) bar anyone—including the federal government—from using the information collected by that system for unrelated purposes. Reading paragraph (b)(5) this away aptly aligns with these other provisions.

ARGUMENT

I. The Decision Below Misinterprets Federal Law to Prevent States from Fighting Identity Theft, a Matter of Serious and Increasing Concern

Identity theft is a rapidly growing problem. Each year from 2006 to 2008, approximately five percent of U.S. residents ages sixteen and older were victims of identity theft. Lynn Langton & Michael Planty, *Victims of Identity Theft, 2008*, Bureau of Just. Stat., 1 (2010), https://www.bjs.gov/content/pub/pdf/vit08.pdf. That figure rose to seven percent by 2012. Erika Harrell & Lynn Langton, *Victims of Identity Theft, 2012*, Bureau of Just. Stat., 1 (2013), https://www.bjs.gov/content/pub/pdf/vit12.pdf. And by 2016, *ten percent* of Americans sixteen and older had been victims of identity theft in the past year. Erika Harrell, *Victims of Identity Theft, 2016*, Bureau of Just. Stat., 1 (2019), https://www.bjs.gov/content/pub/pdf/vit16.pdf. Overall, approximately one out of every five Americans ages sixteen and over has experienced at least one incident of identity theft. *Id.* at 16.

The harm imposed by identity-theft crime is enormous. For example, in 2012—the last year it directly compared the costs of identity theft and property crimes—the Bureau of Justice Statistics noted that the national cost of identity theft exceeded twenty-four billion dollars, while all property crime *combined* amounted to less than fourteen billion dollars. Harrell & Langton, *supra* at 6.

Yet, under the interpretation of paragraph (b)(5) adopted below, many state laws prohibiting identity

theft would become unenforceable: The decision below maintains that "States are prohibited from using the I-9 *and any information contained within the I-9* as the bases for a state law identity theft prosecution of an alien who uses another's Social Security information in an I-9." Pet. App. at 28 (emphasis in original). And it held that this rule applies even when the State does "not rely on the I-9." *Id.* At the very least, this rule would make identity theft laws prohibiting the misuse of personal information useless when the perpetrator had also applied for employment using the false information. The decision below thus threatens disastrous consequences: It would cripple States' ability to combat the misuse of personal information (a subset of identity theft, and one of the crimes of conviction below), a crime that affects between two and three million victims each year nationwide. Harrell, *supra* at 4.

Indeed, this interpretation would frustrate even everyday identity-theft prosecutions that have nothing to do with I-9s. Such prosecutions generally begin with a complaint from a victim who has discovered—often due to attempts to collect debts she never incurred—that an identity thief has stolen her identity (invariably her Social Security number) to purchase goods and incur debts in her name. Investigators then contact the businesses where the fraudulent purchases were made to collect information (such as video footage, email addresses, or phone numbers) that might identify the thief. Officials use this information, together with the victim's testimony, to prosecute the crime. An I-9 often will never appear anywhere in this process. But, under the interpretation of paragraph (b)(5) adopted in the decision below, if

the victim's Social Security number happens to appear on an I-9, IRCA prohibits the identity-theft prosecution. There is no reason to interpret IRCA to require such a bizarre outcome.

Interpreting IRCA in this manner not only would exacerbate identity theft injuries in the well-known context of credit cards and bank accounts, but would prevent States from addressing identity theft harms in the employment context in which this case arose. Many States, for example, have laws restricting the jobs that convicted felons, including sex offenders, may hold. *See* Brenda V. Smith, *Fifty State Survey of Adult Sex Offender Registration Laws* (Aug. 1, 2009), https://ssrn.com/abstract=1517369. States also often require a clean licensure record to work within a particular profession, such as medicine. The decision below would render many of these laws effectively unenforceable, for States would be unable to prosecute offenders who use false identities in applying for work—the information critical for such a prosecution would be "contained within" the I-9 the offender submits to the employer.

Similarly, many employers require a submission of a criminal record with any job application. One purpose of state identity theft laws is to protect those employers and to ensure that they receive accurate information. And restricting or eliminating State enforcement of these laws could have pernicious results. It could allow, for example, a discredited doctor to practice despite numerous past violations of professional standards, or an accountant to convince an employer to hire him in spite of an embezzlement conviction.

Unprosecuted identity theft also increases the likelihood that victims will shoulder greater tax burdens: An identity thief who, as here, uses someone else's Social Security number to fraudulently obtain employment can cause the number's true owner to be assessed higher taxes. This is a problem the federal government has itself recognized: "Employment identity theft can cause a significant burden to innocent taxpayers, including the incorrect computation of taxes based on income that does not belong to them." *Most Employment Identity Theft Victims Have Not Been Notified That Their Identities Are Being Used by Others for Employment*, Treasury Inspector General for Tax Administration 1 (2018) https://www.treasury.gov/tigta/auditreports/2018reports/201840016fr.pdf.

In sum, the decision below, even if limited to the narrow context in which it arose, seriously frustrates States' compelling interest in protecting their citizens from identity theft. In enacting IRCA, Congress plainly did not intend to suddenly stop States' longstanding, ongoing, and increasingly important identity-theft enforcement efforts.

II. The Reasoning of the Decision Below Leads to Absurd Results, Such As Forbidding the Widespread Use of Commonly Accepted Personal Identification Information

Although this case arose in the employment context, the broad interpretation of paragraph (b)(5) reached by the Supreme Court of Kansas is not limited to that circumstance. Its decision interprets the use of information contained in an I-9 to include using

any information that appears on an I-9 *even if* the entity using the information is "*not rely[ing] on the I-9*." Pet. App. 28 (emphasis added). That interpretation necessarily implies that IRCA precludes all governmental agencies and all private-sector entities from using the personal information of virtually every employee in the country. The Court should refuse to entertain an interpretation that ineluctably leads to this absurd result.

Crucially, this case turns on what it means to "use[]" "information contained in" an I-9. 8 U.S.C. § 1324a(b)(5). And the Supreme Court of Kansas concluded that an entity "use[s]" information contained in an I-9 *not only* when it acts on the basis of information it found in an I-9 (such as by using an I-9 to find the address at which an individual could be found and arrested) *but also* when it acts on the basis of information it found elsewhere but *that also happens to be on an I-9* (as the identity-theft prosecutions did here). That interpretation extends paragraph (b)(5)'s prohibition far beyond I-9s—and even beyond the employment context in general—to *any* use of personal identification information that happens to appear on an I-9.

It is difficult to overstate the breadth of this reading of IRCA. The I-9 has been completed by the vast majority of adult Americans: IRCA, after all, *requires* any "person or other entity hiring, recruiting, or referring an individual for employment in the United States" to "attest, under penalty of perjury and on [the I-9 form] that it has verified that the individual is not

an unauthorized alien." 8 U.S.C. § 1324a(b). Employers thus ensure that virtually all workers in America have at some point filled out an I-9.

The information included in the I-9 is also extensive: It includes, but is not limited to, the individual's full name, address, date of birth, and social security number. *See I-9, Employment Eligibility Verification*, U.S. Citizenship and Immigration Services, (last reviewed July 7, 2017), https://www.uscis.gov/i-9. And the documents appended to the I-9 may include such common documents as U.S. passports, Social Security cards, and state driver's licenses. *Id.*

The universe of information that the decision below says cannot be used is thus enormous. It covers the vast majority of adult Americans and includes widely used documents and personal identification information that States use to administer countless programs every moment of every day all across the country.

Indeed, because paragraph (b)(5) limits the "use[]" of information contained in I-9s in general and does not (unlike IRCA's express preemption provision, 8 U.S.C. § 1324a(h)(2)) refer to States specifically, the prohibition on using this information would apply to *any* entity that might handle I-9s—States, as well as the federal government and private-sector entities. The decision below interprets paragraph (b)(5) to prohibit the federal government, for example, from tracking the identity and address of suspected terrorists—at least if those terrorists had at one time completed an I-9. And in the private sector, financial institutions would be prohibited from using their customers' birthdays for identity-authentication purposes.

Take, for example, the Social Security numbers used to complete countless I-9s. Following the adoption of the REAL ID Act, most States require a Social Security number or equivalent before issuing a driver's license. *See* Pub. L. 109–13, Div. B, Title II, § 202(c)(1)(C), 119 Stat. 313 (codified at 49 U.S.C. § 30301 note). Social security numbers are also used to apply for most forms of credit, including consumer and student lending, and are required to apply for Medicare, Medicaid, or—of course—Social Security benefits. None of these purposes are "among the purposes allowed in IRCA." Pet. App. at 27–28.

There is simply no possibility that in passing a statute directed toward curbing evasion of federal immigration laws Congress intended to wipe out the use of whole categories of personal identification information. IRCA does not render an individual's identification information unusable the moment the person applies for a job. As one dissenting judge below aptly remarked: "Today's decision appears to wipe numerous criminal laws off the books in Kansas—starting with, but not necessarily ending with, laws prohibiting identity theft. For this reason, I doubt the logic of today's decision will be extended beyond the narrow facts before us. But rather take solace in this hope, I find in it the irrefutable fact that today's logic wrong." Pet. App. at 45 (Stegall, J., dissenting).

III. The Court Should Hold That Federal Law Prohibits Only the Use of Information for Which an I-9 Is the Sole Source

The Court should refuse to embark upon an interpretive path that ends with prohibiting an enormous

swathe of widely accepted and unquestionably essential public and private sector activity. Instead, it should apply IRCA as written: Federal, state, and private-sector entities may "use[]" I-9 forms—as well as any information they obtain *only* from such forms—only to implement IRCA's employment eligibility verification system. 8 U.S.C. § 1324a(b)(5).

This reading of paragraph (b)(5) corresponds most fittingly with ordinary usage. As explained above, nearly every worker in America has filled out an I-9 that identifies the worker's name, address, and Social Security number; at the same time, companies and government agencies use individuals' names, addresses, and Social Security numbers for countless purposes. Ordinary English speakers would not say that these companies and government agencies are "using" information "contained in" an I-9. Indeed, they may not even be *aware* of the I-9; it simply does not matter that the information they are using happens to be duplicated elsewhere.

To take another example, imagine the diary—off limits to her parents, of course—of a student who has just learned that she will successfully, albeit narrowly, graduate high school. When she celebrates her graduation in her diary, one might say the fact of her upcoming graduation is information "contained in" the diary. But when—after a school letter informs the diarist's parents that their daughter will indeed graduate—her parents hold a graduation party, no one would say the parents *used information contained in the diary*. The parents did not "use" information contained in the diary because the school's letter, not the diary, was the source of their knowledge of their

daughter's graduation; that the diary *also* happened to "contain" this information is irrelevant.

Similarly, the attorney-client privilege would protect a client's confidential letter to his lawyer mentioning a disadvantageous internal report. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). But the privilege would *not* prevent the opposing counsel from taking advantage of the internal report if his own investigation reveals the report's existence. *See id.* Again, whether or not the fact of the report is information "contained in" the client's letter, one would not ordinarily say that the opposing counsel is "using" information contained in the letter; he has discovered the information from an independent source and may not even be aware the letter exists.

Here, the State of Kansas charged the respondents with identity theft for using other individuals' Social Security numbers on their tax-withholding forms. These tax forms by themselves sufficed to show the specific Social Security numbers the respondents used, and testimony from a Social Security Administration official sufficed to show that these numbers were not assigned to the respondents. *See* Pet. App. 6. For these reasons, the State of Kansas obtained these convictions using *just the tax forms*—not the I-9. *See* Pet. App. 4–5, 63–66, 90–92. That these Social Security numbers *also* appeared on the I-9 is, like the information appearing in the diary or the client's letter above, irrelevant.

This reading of paragraph (b)(5) also accords with IRCA's other provisions, which address a particular concern with the potential for abuse of the employment verification system. For example, in *Arizona*,

this Court recognized that IRCA provides "that any information employees submit to indicate their work status 'may not be used' for purposes other than prosecution under specified federal criminal statutes for fraud, perjury, and related conduct." *Arizona v. United States*, 567 U.S. 387, 405 (2012). In support of this proposition, the Court cited paragraph (b)(5) (the provision at issue in this case) *and* subparagraphs (d)(2)(F) and (d)(2)(G). *Id.*

The Court thus recognized that *all* of these provisions work together to limit the scope of the employment verification system. They all limit the purposes for which various things may be used: Paragraph (b)(5) is captioned "Limitation on use of attestation form" while subparagraph (d)(2)(F) is captioned "Limited use for law enforcement purposes" and subparagraph (d)(2)(G) is captioned "Restriction on use of new documents." *Cf. Almendarez–Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (internal quotation marks and citation omitted). And these limitations set an identical scope—namely, "enforcement of [chapter 12 of title 8] or sections 1001, 1028, 1546, and 1621 of title 18." 8 U.S.C. § 1324a(d)(2)(F); *see also* 8 U.S.C. § 1324a(d)(2)(G).

It is therefore notable that subparagraphs (d)(2)(F) and (d)(2)(G) both directly refer to the use of the employment verification system specifically, *not* the use of any information that happens to be duplicated on I-9s. *See* 8 U.S.C. §§ 1324a(d)(2)(F) (providing that "[t]he system" may be used only for limited law enforcement purposes), (d)(2)(G) (providing that

"[i]f the system requires individuals to present a new card . . . [the card] may not be required to be presented for any purpose other than other than under [chapter 12 of title 8] (or enforcement of sections 1001, 1028, 1546, and 1621 of title 18)"). Similarly, a separate provision, subparagraph (d)(2)(C) (entitled "Limited use of system"), provides that "[a]ny personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien." 8 U.S.C. § 1324a(d)(2)(C).

Read in the context of these other provisions, it is clear that paragraph (b)(5) ensures that I-9s—whether the forms themselves or information that individuals and organizations learn from the forms—are subject to the same limitations as the employment verification system itself. It plainly does *not* limit what States—or the federal government or nongovernmental entities—do with information they obtain from *other* sources. Because these prosecutions did not depend on information "contained in" an I-9, IRCA does not foreclose them.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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