No. 17-834

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

RAMIRO GARCIA, ET AL.

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF PUENTE ARIZONA AND OTHERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are immigrants' rights organizations and law school clinics that were involved in litigating two of the cases that the parties discuss repeatedly in their briefs in the case at bar—*Puente Ariz. v. Arpaio* and *State v. Martinez*. In both cases, preemption served as an important check to ensure that local officials did not continue to prosecute undocumented immigrants for using a false identity to work. *Amici* can attest to the harm that arises when local officials see fit to appropriate criminal justice resources to further their own immigration agenda. *Amici* have an interest in ensuring that the Court's decision in this case does not foreclose the types of legal challenges that were brought in Arizona and Iowa in the future.[1]

Puente Arizona is a grassroots migrant justice organization based in Phoenix, Arizona, whose mission is to develop, educate, and empower the migrant community and enhance their quality of life through English classes, know-your-rights workshops, health and wellness education, programs for children and cultural events. It was one of the first organizations to respond to workplace raids that the Maricopa County Sheriff's Office (MCSO) began carrying out with the Maricopa County Attorney's Office (MCAO) in 2008 as part of crackdown on immigration that eventually received national attention. The state laws on which the raids were

[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

based punished the use of a false identity to work. At the behest of its members, Puente Arizona decided to bring litigation against county officials. It served as the lead plaintiff in the case *Puente Ariz. v. Arpaio.*

The **National Day Laborer Organizing Network** is a non-profit organization that works to improve the lives of day laborers in the United States. NDLON has over 40 member organizations throughout the country, many of which run day labor centers. NDLON seeks to unify and strengthen its member organizations to be more strategic and effective in their efforts to develop leadership, mobilize, and organize day laborers in order to protect and expand their civil, labor and human rights. NDLON works for safer, more humane environments for day laborers, both men and women, to earn a living, contribute to society, and integrate into the community. NDLON, along with others, represented the plaintiffs in *Puente Ariz. v. Arpaio*.

The **University of California, Irvine School of Law Immigrant Rights Clinic** is a law school clinic in which clinic students, working under close faculty supervision, provide direct representation to immigrants on matters ranging from detention and deportation defense to the protection of civil and constitutional rights of immigrants. The clinic also provides support to grassroots organizations working on critical issues that affect low-income immigrants and partners with community and legal advocacy organizations on policy and litigation projects to advance immigrants' rights and immigrant workers' rights. The clinic served as lead counsel for plaintiffs in *Puente Ariz. v. Arpaio*.

The **University of Iowa College of Law Clinical Law Program's Immigration Law Practice** is one of two free immigration law service providers in the state of Iowa. The clinic provides representation of individuals in a range of immigration matters, consults with immigration policy advocacy organizations and works on systemic projects and impact litigation related to immigrants' rights. Law students working on under the supervision of full-time faculty members represent clients at all stages of proceedings. The clinic has worked in a variety of settings to advance the rights recipients of the federal Deferred Action for Childhood Arrivals (DACA) program—among others—to participate fully in their communities. It represented the ACLU of Iowa as *amicus curiae* in the *State v. Martinez* case in briefing and at oral argument before the Iowa Supreme Court.

SUMMARY OF ARGUMENT

At issue in this case is the question of whether states have the power to punish undocumented immigrants for fraud they engage in solely to overcome their unauthorized status in the workplace. For many immigrants living in the United States, using a false identity is the only way they can earn wages to support themselves and their families. Federal law regulates such conduct directly and extensively through a comprehensive scheme that balances a range of different considerations. The Petitioner ("the State"), however, asks this Court to hold that states may also independently impose their own sanctions on such conduct, indifferent to federal considerations and outside the control of the federal government.

Amici's experiences in Arizona and Iowa demonstrate that when states are permitted to prosecute immigrants for using a false identity to work, officials can use that authority to interfere with the system Congress created. In Maricopa County, Arizona, for example, local officials relied on state felony identity theft and forgery statutes to carry out a campaign of workplace raids against immigrant workers, arresting and prosecuting hundreds of workers without regard to whether such actions would make it harder for federal officials to pursue investigations against unscrupulous employers or render immigrant workers even more vulnerable to exploitation. In Iowa, local officials arrested, detained and prosecuted a mother of three to whom federal officials had already granted a reprieve from

deportation and a work permit, based on conduct she engaged in *prior* to receiving the work permit.

When Congress enacted the employment verification requirement in the Immigration Reform and Control Act of 1986 ("IRCA"), it left the prosecution of fraud in response to the employment verification system to the province of a single sovereign—the federal government—so that officials could calibrate enforcement to meet the "purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399-400 (2012). A closer look at the text, purpose, and structure of IRCA confirms that Congress did not intend for states to be able to second-guess federal officials' enforcement decisions by pursuing their own sanctions against immigrants. Such activity by states would both intrude upon an area already fully and exclusively occupied by Congress and conflict with the carefully drawn federal scheme.

This is no less the case when a state proposes to rely on documents other than the I-9 form to sanction workers. Respondents in this case were prosecuted for using a false Social Security number to work. The State argues that its prosecutions were lawful because prosecutors were eventually able to secure convictions based only on documents other than the I-9 form, such as the federal tax withholding W-4 form and the state tax withholding form K-4. However, the W-4 and K-4 forms are employment-related forms that Respondents were asked to complete at the same time as the I-9 form, as a prerequisite to commencing employment. From their perspective, they filled out all of three of these documents using a single false

identity—a single Social Security number—to bypass the employment verification requirement. If, as explained below, Congress has in fact excluded states from prosecuting workers for fraud in the employment verification process, states may not achieve the same result simply by relying on other inextricably interrelated documents employees must also submit in order to work. The fraud that is being punished is the same, and prosecutions for such fraud do as much damage to Congress's "purposes and objectives," *id.* at 399-400, as prosecutions using the I-9 form.

State authorities remain free, of course, to exercise their traditional police powers to combat fraud, theft and other crimes without regard to the immigration status or nationality of a defendant. *Amici*'s experience shows that, contrary to what the State claims, a finding of preemption would not unduly impede its ability to investigate those offenses. Indeed, preemption may help to ensure the integrity of state identity theft laws and prevent state and local law enforcement resources from being diverted for immigration-related ends.

ARGUMENT

I. LOCAL OFFICIALS HAVE USED PROSECUTIONS OF IMMIGRANT WORKERS TO CARRY OUT THEIR OWN STATE-LEVEL IMMIGRATION POLICY

The experience of *amici* suggests that when states are permitted to prosecute undocumented immigrants for using a false identity to work, local officials are

prone to use this authority to enact their own state-level immigration policy.

The *Puente* litigation, for example, was filed in 2014 by Puente Arizona and others as a response to a then six-year campaign of worksite raids conducted by Maricopa County Sheriff Joe Arpaio together with the MCAO following Arizona's passage of two state laws that criminalized the use of false identifying information to work. In 2007, Arizona passed House Bill 2779, also known as the Legal Arizona Workers Act (LAWA), which amended the state's aggravated identity theft statute to create a new ground for the use of the information of another person—real *or fictitious*—with the intent to obtain employment. The next year, House Bill 2745 was enacted as a supplement to LAWA, expanding Arizona's non-aggravated identity theft statute to target the use of identifying information for employment. Both laws were conceived as part of Arizona legislators' "attrition through enforcement" strategy, which sought to make life so difficult for immigrants in the state that they would "deport themselves."[2]

During deliberations about the new state law provisions, lawmakers made clear their intention to take immigration policy into their own hands. A prominent senator argued, for instance, that the terms

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[2] Arizona's SB 1070 immigration law was enacted several years later as part of this same "attrition through enforcement" strategy. *See United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011), *rev'd on other grounds*, 567 U.S. 387 (Noonan J., concurring). This Court subsequently struck down three of SB 1070's provisions in *Arizona v. United States*. *See Arizona*, 567 U.S. at 416.

needed to be harsh enough to guarantee that workers would "stay in jail" and "never be allowed to be citizens of the United States again." Plaintiffs' Statement of Facts in Support of Motion for Partial Summary Judgment ("*Puente* Pls.' SOF"), *Puente Ariz. v. Arpaio*, No. CV-14-01356-PHX-DGC, Doc. 520, ¶ 22 (D. Ariz. filed July 1, 2017). Another senator, a co-sponsor of H.B. 2779, discouraged his colleagues from considering a reduction of the penalty for the newly defined state offense because doing so "would be viewed as a weakening of our . . . opposition to illegal immigration." *Id.* ¶ 21. The architect of both laws, then Senator Russell Pearce, also went on the record saying that he believed state action was necessary to quell a "national epidemic" of unlawful immigration. *Id.* ¶ 24.

While most counties in the state ignored the two new laws, one county—Maricopa County—welcomed their passage. During this time, the Maricopa County Sheriff's Office (MCSO) created a dedicated team within the agency's "Human Smuggling Unit" to investigate complaints of the employment of undocumented immigrants and the use of false identification for employment. *Id.* ¶¶ 94-98. MCAO, for its part, housed its prosecutions of workers for violations of the new laws in its "Special Crimes Bureau," which focused at the time on "criminal activity that violates immigration law." *Id.* ¶¶ 99-108.[3] Together these specialized units carried out over

[3] For many years, the MCAO website boasted that the Special Crimes Unit prosecuted "Illegal Immigrant Crimes," which included "the use of a Social Security account or other

80 worksite investigations, resulting in the arrest and prosecution of approximately 806 workers under the state identity theft and forgery statutes. *Id.* ¶ 59.[4] Sheriff Arpaio surmised that "99.9%" of those arrested were "here illegally," *id.* ¶¶ 77, 125, and the actual figure was not that far off. *See id.* ¶ 90.

The record in *Puente* confirms that county officials viewed their effort to enforce the new state laws as one that was closely linked to immigration. Arpaio, who took a keen interest in the worksite operations, regularly asked for statistics on the number of undocumented immigrants who were arrested. *Id.* ¶¶ 121-24. MCAO also tracked the immigration status of defendants. *Id.* ¶ 127. Additionally, the two offices sometimes issued press releases together, declaring that their worksite operations were helping to prevent the "undercut[ing] [of] wages of hard working citizens and legal residents" and "opening up job opportunities for . . . citizens." *Id.* ¶¶ 89-90.

Not incidentally, the raids themselves often involved a significant show of force, with sheriff's

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identification to get a job in the United States (Employment Identity Theft)." *Id.* ¶ 78; *see also id.* ¶ 72.

[4] The worksite raids were part of the same overall "crackdown" on immigration that thrust Arpaio into the national spotlight and led to (1) a court ruling that his agency had engaged in systematic racial profiling and violations of the Fourth Amendment rights of Latinos in Maricopa County; and (2) a finding of criminal contempt after Arpaio refused to stop. *See* Tina Vasquez, "Will Trump Pardon 'America's Best-Known Racial Profiler'?" REWIRE NEWS (Aug. 22, 2017), https://rewire.news/article/2017/08/22/will-trump-pardon-americas-best-known-racial-profiler/; *Puente* Pls.' SOF ¶¶ 136-37.

deputies from multiple units (including SWAT and K-9) participating. *Id.* ¶ 131. Up to hundreds of workers were detained at a time. *See, e.g.*, *id.* ¶ 62. Those arrested for state law violations were confined to the county jail for months without the possibility of bail and charged with multiple felony counts—one count per document—with potential exposures of multiple years in prison per count. *See id.* ¶ 143.

As expected, the raids generated panic and fear in the immigrant community. Some retreated from public life and, critically, others became unwilling to complain about labor violations in the workplace. *Id.* ¶¶ 143, 185. This was the very scenario Congress had sought to avoid when enacting IRCA, *see infra*, and yet here it was playing out in Maricopa County. Fortunately, workers with Puente Arizona were willing to file suit, and as a result, Arpaio eventually dismantled the MCSO unit that had led the raids.[5]

In Iowa as well, the *Martinez* litigation helped clarify limits on local officials' ability to prosecute immigrant workers for fraud related to their unauthorized status. Martha Aracely Martinez was a long-time resident of Iowa who had lived in the United States since she was eleven years old. *State v. Martinez*, 896 N.W.2d 737, 741 (Iowa 2017). She was a mother of three U.S. citizen children with another on the way. *Id.* She attended public school in the state and had held several jobs there. *Id.*

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[5] *See, e.g.*, "Arizona Sheriff Joe Arpaio Ends Controversial Workplace Raids," NBC News (Dec. 19, 2014), https://www.nbcnews.com/news/latino/arizona-sheriff-joe-arpaio-ends-controversial-workplace-raids-n271506.

In 2013, the federal government granted Ms. Martinez a *reprieve* from deportation and a work permit through the federal government's Deferred Action for Childhood Arrivals (DACA) program. *Id.* at 741. County officials, however, arrested, detained, and prosecuted her for having *previously* used the documents of a fictitious person to get a job. *Id.* at 741, 760. There was no indication that Ms. Martinez's use of the fictitious documents had caused anyone harm. *Id.* at 760.

The Iowa Supreme Court found that state authorities could not prosecute noncitizens for submitting false documents to obtain employment without running afoul of federal law. Justice Wiggins, specially concurring in the *Martinez* case explained that federal officials would have likely "blanch[ed]" at prosecuting someone like Ms. Martinez who had "in good faith responded to their invitation to come out of the shadows for deferred action." *Id.* at 757. And yet, Iowa went ahead.

The *Puente* and *Martinez* cases illustrate the type of state level activity the Court would be inviting if it were to adopt the State's position in the instant case. If the Court were to find for the State, then the types of challenges that were brought in Arizona and Iowa would not be possible in the future. Local policymakers would have free reign to adopt a patchwork of schemes, each with their own "calibration of force," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000),across the 50 states.

II. THE ARIZONA AND IOWA EXPERIENCES SHOW WHY THE COURT SHOULD FIND STATE PROSECUTIONS OF IMMIGRANTS FOR USING A FALSE IDENTITY TO WORK PREEMPTED BY FEDERAL LAW

In staking out its position, the State fixates on a single provision of federal law—8 U.S.C. § 1324a(b)(5)—ignoring the broader preemptive scheme it is a part of.[6] But IRCA's text, purpose and structure all point toward a unitary, comprehensive scheme for regulating fraud on the employment verification system. A faithful application of the Court's settled preemption precedents instructs that Congress has fully occupied the field of regulating fraud to establish federal eligibility to work.

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[6] Notably, even the State's interpretation of 8 U.S.C. § 1324a(b)(5) is unreasonably narrow. The State suggests that the only documents subject to the use prohibition are the I-9 form and its attachments. But as the district court concluded on remand in *Puente Ariz. v. Arpaio*, it must also preclude the use of other documents employees submit in the employment verification process, such as driver's licenses and Social Security cards, whether they are attached to the I-9 or not. No. CV-14-01356-PHX-DGC, 2017 WL 1133012, at *7-*8 (D. Ariz. Mar. 27, 2017). Moreover, the term "use" means more than just the affirmative introduction of a document in a criminal prosecution; it means *any* use, including the use of a document as an investigative lead. *See id.* at *8 (noting that "the ordinary meaning of the term 'use' is 'to employ or to derive service from'") (internal citation omitted). The State focuses exclusively on the Ninth Circuit Court of Appeals decision in *Puente*, *see* Pet. Br. at 26, ignoring the subsequent history in the case.

Furthermore, the experiences in Arizona and Iowa confirm that that state efforts to punish a noncitizen for false statements inextricably tied to establishing such employment eligibility "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 567 U.S. at 399-400 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The State's prosecution of Respondents is conflict preempted.

A. The State's Prosecutions Impermissibly Trench on a Field Already Fully Occupied by Congress

Over thirty years ago, Congress made "combating the employment of [undocumented immigrants] . . . central to the policy of immigration law." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (internal quotation omitted). It enacted IRCA, a "comprehensive" and "balanced" framework to regulate the employment of noncitizens. *See Arizona*, 567 U.S. at 404, 406.

"IRCA is a carefully crafted political compromise" that represents the result of considered deliberations about how to reconcile the sometimes competing objectives of discouraging unlawful employment with the protection of workers who may be adversely affected. *Nat'l Ctr. for Immigrants' Rights*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183; *see also* Statement of President Reagan Upon Signing S. 1200, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1, 5856-1; 8 U.S.C. § 1324b

(prohibiting unfair immigration-related employment practices). Key to IRCA's structure was a view that undocumented workers should not be treated as severely as the employers that hire them. For example, Congress chose to establish both civil and criminal penalties for employers who knowingly employ authorized noncitizen workers. *See Arizona*, 567 U.S. at 404 (citing 8 U.S.C. § 1324a(e)(4), (f); 8 C.F.R. § 174a.10). However, "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." *Id.* IRCA "reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives." *Id.* at 405.

In establishing the scheme for verification of prospective employees' work status, Congress did not leave law enforcement authorities without tools to address fraud that it anticipated individuals might engage in. *See* 132 Cong. Rec. S16,879–01 (1986) (statement of Sen. Simpson, bill co-sponsor) (legislators "paid close attention to" the issue of document fraud and "provide[d] for this reality"). The tools that Congress provided officials were flexible, detailed and diverse. Over time, they have come to include a range of civil, criminal, and immigration-related penalties. *See* 8 U.S.C. §§ 1324c(a)(1)-(4), 1324c(d) (allowing an administrative law judge to impose civil penalties, including a fine, for fraud in the employment verification process); 18 U.S.C. §§ 1546b, 1324a(b)(5) (identifying other federal criminal statutes that can be applied to the same); 8 U.S.C.

§§ 1182(a)(6)(C)(i), 1227(a)(3)(B)(iii), (C) (establishing immigration consequences for similar conduct).

Critically, though, Congress placed these tools in the hands of a single sovereign—the federal government. *See supra*. The system Congress created was designed to be a "single[,] integrated and all-embracing" one, intended to work more broadly with IRCA as a "harmonious whole." *Arizona*, 567 U.S. at 400-01 (quoting *Hines*, 312 U.S. at 72, 74).

Furthermore, it was clear Congress was concerned that the new system might be appropriated and used against workers in ways beyond those intended by IRCA. *See, e.g.*, H.R. Rep. 99-682(I) (1986) at 8-9 (discussing desire to avoid a situation where "verification information could create a 'paper trail'" used to "apprehend[] undocumented aliens"). Congress enacted provisions to ensure, as this Court has noted, "*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*, 567 U.S. at 405 (emphasis added) (citing 8 U.S.C. § 1324a(b)(5), (d)(2)(F)-(G)).[7]

Thus, while Congress provided federal officials with a robust range of tools to accomplish the objectives embodied in IRCA, it also set limits on how the system should otherwise be used. All of these are

[7] *See also* 8 U.S.C. §§ 1324a(b)(4) (restricting the copying and retention of documents), 1324a(d)(2)(C) (restricting access to personal information utilized by the employment verification system).

indications that Congress created "a framework of regulation so pervasive . . . that it left no room for states to supplement it." *Id.* at 399 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

These are the preemption principles that drove the Iowa Supreme Court to find the state's prosecution of Ms. Martinez impermissibly trenched on a field already fully occupied by Congress. The court agreed that Congress had occupied the field of regulating fraud in relation to the "unauthorized employment of aliens." *Martinez*, 896 N.W.2d at 753, 755-56 (comparing the case to other instances of states attempting to regulate immigration-related identity fraud, citing to *United States v. South Carolina,* 720 F.3d 518 (4th Cir. 2013) and *Arizona*, 567 U.S. at 400-01).[8] In such an instance, the court explained, "even complementary state regulation is impermissible." *Id.* at 756 (quoting *Arizona*, 567 U.S. at 401). It then proceeded to strike down a state forgery statute on its face, *id.* at 754, and find Iowa's use of its identity theft

[8] The State makes much of the fact that this Court previously applied a conflict (rather than field) preemption analysis to invalidate Arizona's law making it a crime for noncitizens to seek or perform work without authorization. *See, e.g.*, Pet. Br. at 39-40 (discussing *Arizona*, 567 U.S. at 403). But that is hardly remarkable. Congress specifically *declined* to impose criminal penalties on undocumented immigrants for unauthorized work. *See Arizona*, 567 U.S. at 403. It makes sense to apply a conflict preemption analysis where a state decides to impose a sanction where "no counterpart exists" in federal law. *Id.* (The Court's analysis otherwise resembled that of field preemption.) Where, however, as here, Congress has regulated affirmatively and extensively in a specific area, field preemption is more apt to apply. *See Arizona*, 567 U.S. at 400-02 (discussing preemptive effect of federal alien registration scheme).

law preempted as applied[9] to a noncitizen who used a false identity to engage in unauthorized work, *id.* at 755-56.

B. State Efforts to Punish Immigrants for Using a False Identity to Work Conflict with the Federal Scheme

State action can be also conflict preempted if it "'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 *Hines*, 312 U.S. at 67). There are several reasons why state prosecutions of undocumented workers for the type of fraud Respondents engaged in here interfere with federal law.

First, as this Court recognized in *Arizona*, where the federal government has reserved an area for itself, a state's ability to "bring criminal charges against individuals for violating federal law even in circumstances where federal officials in charge of the comprehensive scheme [do not]" detracts from, and creates a conflict with, federal law. 567 U.S. at 402-03; *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1027 (9th Cir. 2013); *South Carolina,* 720 F.3d at 531-32 (noting danger of "improperly placing in the hands of state officials the nation's immigration policy, and strip[ping] federal officials of the authority and discretion necessary" to carry out that policy).

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[9] A state statute may be preempted in some, but not all, of its applications. *See Hillman v. Maretta*, 569 U.S. 483, 485, 494 (2013) (holding that Virginia's rules for regulating the distribution of death benefits preempted on an as-applied basis).

Federal discretion and federal control make it possible for federal officials to pursue a "delicate balance of statutory objectives." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348-49 (2001) (finding preemption to be necessary to allow the FDA to "pursue[] difficult (and often competing)" goals). As discussed *supra*, Congress was centrally concerned with striking a balance in IRCA between discouraging unlawful employment and protecting workers from further exploitation.

State prosecutions thwart the delicate balance struck by IRCA. They permit local officials to impose their own, supplemental sanction for conduct already regulated by federal law, and to pursue charges against individuals for uniquely federal conduct that federal authorities would not bring. For example, when Congress created the system for employment verification in IRCA, it also provided for the legalization of millions of immigrants who had been residing in the United States. Muzaffar Chishti, Doris Meissner & Claire Bergeron, *At Its 25th Anniversary, IRCA's Legacy Lives On*, Migration Policy Institute (Nov. 16, 2011), https://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives.
Beneficiaries of legalization would have work authorization going forward, but many had likely used a false Social Security number to work in the past. Similarly, Ms. Martinez was granted a work permit through the DACA program in 2013, but she had used fictitious documents in the past. It would make no sense to criminally prosecute immigrants that the federal government is actively trying to welcome into American society, and indeed, Congress

did not contemplate that result. *See, e.g.*, 42 U.S.C. 408(e). But that is what Kansas is proposing it ought to be able to do.

The United States recognized the potential for these such clashes when it submitted an amicus brief to the Ninth Circuit Court of Appeals in the *Puente* case explaining that "[a] critical feature of the comprehensive federal scheme [for regulating fraud to demonstrate work authorization] is the discretion that it affords federal officials." Amicus Brief of the United States ("U.S. *Puente* Br."), *Puente Ariz. v. Arpaio*, No. 15-15211, 2016 WL 1181917, at *18 (9th Cir. filed Mar. 25, 2016). It noted the variety of federal interests that would be compromised if states were free to conduct their own "parallel . . . prosecutions" of workers, from guarding against unfair labor practices to the conduct of foreign affairs. *Id.* at *19-*20; *see also Arizona*, 567 U.S at 395; *Martinez*, 896 N.W.2d at 756-757 (detailing interests). The government also explained that federal officials may "rely on foreign nationals, including [undocumented workers], to build criminal cases[.]" *Id.* at *18-*19. Preemption, it argued, was necessary to avoid the possibility of state actions that might be directly at odds with the exercise of federal "prosecutorial power[] and . . . discretion." *Valle del Sol*, 732 F.3d at 1027.

Additionally, state prosecutions subject workers to a different (and harsher) sanctions regime than that which exists under federal law. This "inconsistency [in] sanctions" between state and federal law, the Court has explained, undermines the "congressional calibration of force" and is another basis for finding

conflict preemption. *Crosby*, 530 U.S. at 380; *see also Arizona*, 567 U.S. at 403, 406.

As discussed *supra*, federal officials can, if they choose to take any type of enforcement action against a worker at all, select from among a range of sanctions, including civil, criminal and administrative sanctions. State prosecutors, on the other hand, can *only* pursue criminal charges. The "variety of enforcement options" and "flexibility" built into the federal "statutory and regulatory framework" are essential to carrying out Congress's intent. *See Buckman*, 531 U.S. at 348-49 (finding that these features were what allowed the FDA to "make a measured response to suspected fraud upon the Administration"). Specifically, federal officials' ability to pursue non-criminal sanctions is one important way by which the government is able to carry forth IRCA's commitment to treat workers less severely than the employers that hire them. *See* Andorra Bruno, Cong. Research Serv., RL 40002, Immigration-Related Worksite Enforcement: Performance Measures 2, 5-6 (2015), https://fas.org/sgp/crs/homesec/R40002.pdf (comparing administrative charges brought over time by federal officials versus criminal charges brought, and noting that ICE has prioritized the prosecution of employers who engage in egregious violations and worker exploitation).

If states were permitted to bring their own prosecutions against immigrant workers, there would be no requirement that officials prioritize the investigation of employers and no ability for them to

apply administrative sanctions in lieu of criminal ones on workers.

In Maricopa County, for example, prosecutors only brought four actions against employers, in contrast to the many hundreds they brought against workers. *Id.* ¶ 58. Furthermore, while county officials understood their activities to be directed at immigration, they also openly refused to take into account the types of circumstances that might animate immigration policy decisions at the federal level. *See id.* ¶ 150 (MCAO never checked whether an undocumented worker had been subjected to labor violations before deciding whether or not to proceed with a prosecution). Arpaio specifically asserted that he had state-authority to go forward with enforcement actions even under circumstances where federal immigration authorities would not. *See, e.g.*, *id.* ¶¶ 91 (describing a 2009 raid that MCSO conducted in defiance of then-DHS Secretary Janet Napolitano's renewed effort to focus on employers instead of "employees who are in the country illegally"), 137 (describing instance in which Sheriff refused to allow two immigrants encountered during a worksite raid "[back] into the streets" after ICE had declined to take them).

Amici have serious concerns that a ruling for the State in this case would open the door to the arrest and prosecution of particularly vulnerable workers that the federal government has expressed should not be subject to deportation, let alone criminal prosecution for document fraud. *See Arizona*, 567 U.S. at 408 (invalidating provision of Arizona law that would have resulted in the unnecessary harassment of immigrants who federal officials determine should

not be removed). These include trafficking survivors, which Congress has suggested should "not be inappropriately incarcerated, fined or otherwise penalized" for acts committed as a result of being trafficked, "such as using false documents," Pub. L. 106-386 § 102(b)(19) (codified at 22 U.S.C. § 7101(b)(19)), and survivors of other crimes, such as domestic violence and workplace-related crimes, who are otherwise eligible for special visas designed to encourage their cooperation with law enforcement, *see generally* 8 U.S.C. §§ 1101(a)(15)(T), 1101(a)(15)(U); 8 C.F.R. § 214.14.

None of the federal policy judgments about the protection of vulnerable workers would bind local authorities in their decisions about who to prosecute under state law for employment-related fraud. Indeed, for many years, the U.S. Department of Labor has for many years had a Memorandum of Understanding (MOU) with the Department of Homeland Security (DHS) to help ensure that enforcement action is not taken against workers who may be victims of ongoing labor violations. *See* Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011), https://www.dol.gov/asp/media/reports/dhs-dol-mou.pdf. In the *Puente* litigation, plaintiffs learned that despite having known about possible labor violations taking place at a business, officials still went ahead with a raid. *Puente* Pls.' SOF ¶¶ 153-55. Workers reported physical and verbal abuse, racial discrimination and wage and overtime violations. *Id.* ¶ 154. One Puente member, Valentin Villanueva Fernandez, recalled the manager

threatening to call the sheriff to come arrest them if workers didn't do as they were told. *Id.*

The conflict with federal law arises even if state prosecutions do not undermine federal policy in every case and even if there is no intentional design to target immigrants. As this Court has made clear, "[s]tate-law-fraud-on-the-FDA claims *inevitably conflict*" with the federal scheme because of the *possibility* that state prosecutions could be unaligned with federal priorities. *Buckman*, 531 U.S. at 350 (emphasis added). So too with state-law-fraud-on-the-employment-verification-system claims. It matters not that federal immigration officials were involved in the investigation of one Respondent in this case, *see* Pet. Br. at 12, because nothing would prevent local officials from next prosecuting someone that federal authorities have determined should not be punished, or punished in the same way.

Finally, the State argues that it may prosecute Respondents in this case without affecting federal interests because prosecutors relied on documents other than the I-9 form. *See, e.g.*, *id.* at 47-48. But the reality is that there will almost always be other routine employment-related forms that workers complete using the same identity information—for example, the same Social Security number—that they use to complete the I-9 form. A rule that preempts only the use of the I-9 form but not other forms workers complete in the same transaction would allow local officials to be able to nullify federal decisions in nearly every case. *See United States v. Alabama*, 691 F.3d 1269, 1296 (11th Cir. 2012) (noting that this Court has "instructed that a preemption analysis must

contemplate the practical result of [a] state law, not just the means that a state utilizes to accomplish the goal"). From the perspective of the workers, they are being prosecuted for the same fraud, whether it is on the I-9 or W-4 or K-4 form.[10] Even the United States previously called this "the very same fraud." U.S. *Puente* Br., 2016 WL 1181917, at *15. State prosecutions for such fraud do just as much damage to federal interests as prosecutions using the I-9 form. *Id.* at *14-*15, *21.

Indeed, in carrying out their campaign of worksite raids, Maricopa County officials routinely seized I-9 forms and regularly used them as the basis for charges against workers. *See, e.g.*, Puente Pls.' SOF ¶¶ 80, 82. This makes sense, since state lawmakers' aim had been to penalize precisely immigrants' use of a false identity or Social Security number to get a job in Arizona. Eventually, after local criminal defense attorneys began to point out that use of the I-9 form was prohibited under federal law, prosecutors removed any mention of the I-9 from charging documents and stopped relying on it to establish the

[10] There is no indication in any of these cases that workers used a consistent identity on the W-4 or K-4 for any reason other than to overcome their unauthorized status. For example, there is no evidence they were trying to gain a tax benefit. The State also mischaracterizes the Kansas Supreme Court decision as granting noncitizens "favored status" due to their "immunity from state prosecution". Pet. Br. at 50. Undocumented workers, by virtue of their status, must use a false identity if they are to engage in any type of formal employment. *See* Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. L. REV. 879, 903-04 (2015). In that respect, they are not similarly situated to other workers. The fraud they are engaging in is a unique byproduct of federal law.

elements of a crime. *Id.* ¶ 83. But in all other respects, the operations (and investigations) remained unchanged.

The United States has submitted an amicus brief in this case arguing that the Kansas prosecutions are not preempted. Its position in this case is opposite to the view it previously expressed in 2016. Rather than undermine *amici*'s argument, however, the United States' views in this case simply suggest that this administration has different priorities, not that the federal government shouldn't have the power to *determine* priorities when it comes to worksite enforcement. After all, the power to determine priorities a prerequisite for carrying out enforcement in a manner that fulfills the "'full purposes and objectives of Congress.'" *Arizona*, 567 U.S. at 399-400 (quoting *Hines*, 312 U.S. at 67).[11]

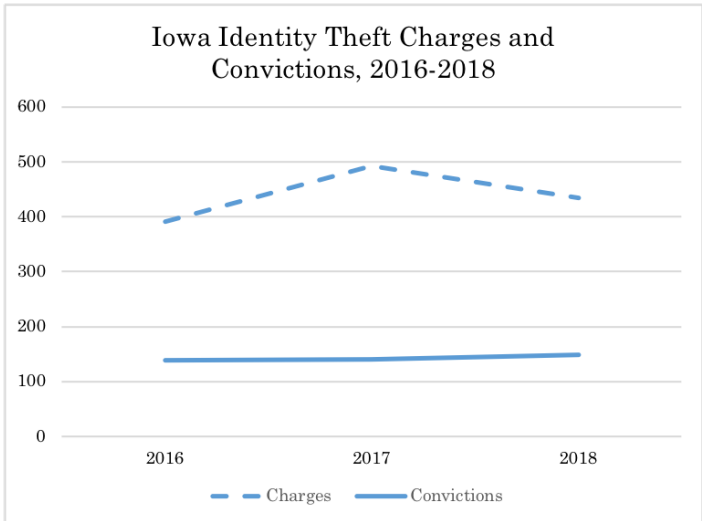
III. A RULING FOR RESPONDENTS WOULD NOT UNDULY IMPEDE STATES' ABILITY TO PURSUE IDENTITY THEFT INVESTIGATIONS AND PROSECUTIONS

The State hyperbolically claims that an affirmance would thwart its ability to prosecute other fraud-related offenses, as well as numerous other offenses. Pet. Br. at 29-31. *Amici*'s experiences in Iowa and

[11] The State relies on *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011) in various places, but that case is inapposite. *Whiting* dealt with express savings clause for *employer* sanctions in 8 U.S.C. § 1324a. There is no savings clause allowing states to impose their own penalties on workers for fraud related to unauthorized work.

Arizona, however, prove this is not the case. Indeed, preemption of state action in this area may help to ensure that state identity theft laws are not diluted—and that state and local law enforcement resources are not diverted—for immigration purposes.

In Iowa, data provided by the Iowa Division of Criminal & Juvenile Justice Planning in response to an ACLU of Iowa information request shows that charges and convictions under Iowa's identity theft statute, Iowa Code § 715A.8, actually *increased* slightly in the year following the *Martinez* decision (*i.e.*, 2018) compared to the year prior to the decision (*i.e.*, 2016):



Source: E-mail with attached data file from Sara Fineran, Iowa Division of Criminal & Juvenile Justice Planning to Phil Brown, ACLU of Iowa dated June 25, 2019.

Iowa officials remain free to exercise their traditional police powers to prosecute fraud, theft and other crimes without regard to the immigration status

or nationality of a defendant. They can also prosecute a defendant for fraudulently providing a false name, Social Security number, or other identifying information in a credit card or housing application, for example. *See Martinez*, 896 N.W.2d at 755 (explaining that the State was not preempted from prosecuting "identity theft to defraud a bank," even by a noncitizen). The only thing they cannot do is bring prosecutions against noncitizens for fraud to engage in unauthorized work.

Rather of impeding efforts to investigate and prosecute fraud-related offenses, excluding states from the business of immigration-related prosecutions may allow local officials to better focus their efforts on the more classic forms of identity theft. In the *Puente* litigation, expert analysis completed by Professor Jennifer Earl of the University of Arizona showed that as Maricopa County began prosecuting more employment-related identity theft and forgery cases against undocumented immigrants in the years after the passage of LAWA, its prosecution of other forgery and identity theft cases ***fell.*** *Puente* Pls.' SOF ¶ 76; *see also* Initial Expert Report of Jennifer Earl, *Puente Ariz. v. Arpaio*, No. CV-14-01356-PHX-DGC, Doc. 520-21, at 42-44 ((D. Ariz. filed July 1, 2017) (reporting that cases brought under Ariz. Rev. Stat. §§ 13-2002, 13-2008 and 13-2009 against documented defendants, as well as documented defendants together with defendants for which immigration status was unknown, fell in absolute numbers between 2007 and 2010). A bright line between local law enforcement and immigration may also encourage some immigrant victims of crime to come forward and report their experiences to law enforcement. *See generally* Nik

Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (University of Illinois at Chicago, 2013), https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

In short, the State's claims of law enforcement catastrophe are unfounded.

CONCLUSION

Preemption has and continues to serve as an important check on local law enforcement in the immigration arena. For all the reasons above, *amici* urge this Court to find the State's prosecutions of the Respondents in this case preempted.

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Respectfully submitted,

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