No. 17-834

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

RAMIRO GARCIA, DONALDO MORALES, AND GUADALUPE OCHOA-LARA

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR *AMICI CURIAE* OF IMMIGRATION, LABOR AND EMPLOYMENT LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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August 13, 2019

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INTEREST OF *AMICI CURIAE*

Amici curiae are 34 scholars of immigration, labor and/or employment law who have an interest and specialization in the proper construction of federal immigration law and its interaction with potentially conflicting state law.[1] *Amici* respectfully submit this brief to address conflicts between federal and state enforcement efforts relating to unauthorized employment.

SUMMARY OF ARGUMENT

It is settled law that Congress has made a considered judgment to enforce the Nation's immigration restrictions by regulating and penalizing *employers* that employ unauthorized workers, rather than imposing criminal penalties on *individuals* seeking unauthorized work. Moreover, Congress intended the work-authorization scheme—including penalties for the use of fraudulent social security numbers in connection with that scheme—to be exclusively federal, and to carefully balance a number of competing interests. State laws attempting to impose criminal penalties on individuals who seek work based on fraudulent social security numbers are thus invalid

[1] A full list of *amici* is provided in Appendix A. Pursuant to Rule 37.6, the *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties were timely notified that *amici* intended to file this brief and have consented to its filing.

because they present "an obstacle to the regulatory system Congress chose." *Arizona v. United States*, 567 U.S. 387, 406 (2012). Accordingly, it is beyond dispute that state laws establishing criminal penalties for an unauthorized alien to knowingly apply for or perform work are preempted. *See id.* at 404-06.

Nevertheless, the State of Kansas has imposed felony criminal penalties on three immigrants solely because they sought and obtained unauthorized employment through the use of a false social security card. The State attempts to evade the result foretold by *Arizona* principally by arguing that the criminal penalties were imposed for identity theft based on use of a social security number on the W-4 and K-4 forms, not for engaging in unauthorized work. *See* Pet. Br. 19-20, 41-42; Brief for the United States as *Amici Curiae* (hereinafter "Gov't Amicus Br.") 27.

That distinction does not hold water. The State's use of its general identity theft statute in this context poses an obstacle to the statutory scheme of the Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3445, no less than Arizona's specific statutory provision. Allowing the State to use its identity theft statute as it has here would amount to an end-run around this Court's holding in *Arizona*.

The same is true of the other distinction the State puts forward: that because it relied on the K-4 and W-4 forms, rather than the I-9, its prosecutions do not conflict with IRCA. That ignores, however, the evidence here that all of those documents were submitted as one "package" to the employer, with the same purpose of obtaining employment. Once again, to adopt

the State's ephemeral distinction would as a practical matter vitiate the Court's holding in *Arizona*.

While other cases hypothesized by the State may raise difficult conflict preemption questions, this is not such a case. The evidence demonstrating that the W-4 and K-4 were submitted as part of a single package is undisputed. Also undisputed is the practical reality that such forms are routinely filled out as a mandatory prerequisite for a prospective employee to be hired. And the State's initial reliance on the I-9 form demonstrates the conflict with federal law.

Accordingly, a finding of conflict preemption here would not unleash the parade of horribles trumpeted by the State. States could still prosecute individuals for violation of tax laws, domestic violence, computer fraud, and the various other crimes described by the State. All that would be preempted is the State's reliance on a social security number or other information submitted on forms like the W-4 and K-4, that are closely associated with the I-9 form. Even then, preemption would only apply insofar as those forms associated with employment were the basis of the State's prosecution. For example, the State would not be preempted from using its identity theft law to prosecute an individual who used a false social security number on a loan application, as such an application—unlike the W-4 and K-4 form—has nothing to do with the employment onboarding process.

At bottom, "Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment." *Arizona*, 567 U.S. at 406. That is precisely what the State

sought to do here, and so these prosecutions are preempted under the Court's conflict preemption doctrine.[2]

ARGUMENT

The State's Applications of its Identity Theft Statutes Are Preempted on these Facts Because They Conflict with a Congressionally-Established Federal Enforcement Scheme

I. The State's Prosecutions Impose Criminal Penalties for the Use of Fraudulent Documents to Obtain Employment, in Conflict With a Comprehensive Congressional Scheme.

A. The State's Prosecutions Are Subject to Conflict Preemption under this Court's Holding in *Arizona*

A straightforward application of this Court's decision in *Arizona* makes clear that the State's prosecutions are preempted. The State has prosecuted petitioners for the crime of identity theft, based on the underlying conduct of using others' social security numbers to seek and engage in unauthorized employment. *See* Pet. Br. 10-13; Gov't Amicus Br. 7. But this Court has already explained that "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." *Arizona*, 567 U.S. at 405. "[A] state law

[2] Amici agree with and endorse Respondents' express and field preemption arguments but focus on the conflict preemption argument in this brief.

to the contrary is an obstacle to the regulatory system Congress chose," and is thus preempted. *Id.* at 406.

"Congress enacted IRCA as a comprehensive framework for 'combating the employment of illegal aliens.'" *Arizona*, 567 U.S. at 404 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)). Following years of research into the issue, Congress determined that prioritizing interior enforcement on identifying and deporting illegal workers was ineffective. *See* S. Rep. No. 132, 99th Cong., 1st Sess. 8 (1985). Congress chose instead to target the primary motivation for illegal immigration: the availability of employment in the United States. Congress did so by establishing a statutory scheme that focused on sanctioning *employers* who knowingly employ unauthorized workers.

The cornerstone of IRCA is the employment verification system, which contemplates use of the social security number to establish work authorization. Congress was aware that IRCA's employer sanction system would only be effective if there was a "reliable means of verifying employment eligibility." S. Rep. No. 132, 99th Cong., 1st Sess. 23. Congress thus directed the President to take a number of steps to establish a robust system of verifying eligibility. *See* 8 U.S.C. 1324a(d)(1)(A), (d)(1)(B), (d)(2)(B). That system contemplates use of the social security number. *See id.* 1324a(b)(1)(C)(i) (authorizing the use of the social security card to demonstrate employment authorization), (d)(3) (requiring two years advance notice to Congress before requiring changes to social security cards); IRCA § 101(e), (f) (directing various

agencies to study improvements to make the social security card more secure).

To ensure that this system would function, Congress had to require that employers use it and address the possibility that employees would submit false materials. As this Court has noted,

> "[u]nder the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations." *Hoffman Plastic*, 535 U.S. at 148.

Congress addressed both possibilities, choosing to impose (1) criminal and civil penalties on employers, and (2) certain civil penalties on aliens who seek or engage in unauthorized employment. *Arizona*, 567 U.S. at 404, 406. It deliberately chose not to impose federal criminal sanctions on employees. *Id.* In making this considered judgment, Congress determined that imposing criminal penalties on unauthorized workers "would be 'unnecessary and unworkable'" and "inconsistent with federal policy and objectives." *Id.* at 405 (*quoting* U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners 65-66 (1981)).

While Congress authorized the imposition of criminal penalties on employees who use fraudulent documents, it granted discretion to the Executive Branch to seek penalties that are modest in comparison to what the State would impose here. A prosecution might result only in a fine without any sentence of imprisonment. *See* IRCA § 103(a) (amending 18 U.S.C. 1546). And it strictly limited the use that could be made of information "contained in or appended to" the I-9 outside of specific statutes. *See* 8 U.S.C. 1324a(b)(5) (cross-referencing statutes, including 18 U.S.C. 1546). Thus "Congress has made clear. . . 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*, 567 U.S. at 405; *see also*, S. Rep. No. 132, 99th Cong., 1st Sess. 33 (specifying that the "new verification system may not be used for law enforcement, other than as related to enforcement of the INA" or other federal provisions relating to "false or fraudulent statements or documents.").

Nor did Congress intend for these federal criminal provisions to act as the primary mechanism to combat the use of fraudulent documents to obtain employment. Rather, Congress anticipated focusing enforcement "on employer education and assistance" and "building a record with both the employers and aliens as to [the] continued use" of fraudulent documentation. *Summary of Hearings held by the Senate Judiciary Subcommittee on Immigration and Refugee Policy, July 1981-April 1982*, Committee Print No. 40, 98th Cong., 1st Sess., 63-64 (1983) (hereinafter *Summary of Hearings*) (testimony of Doris Meissner,

Acting Commissioner, Immigration and Naturalization Services). And where individual undocumented workers were identified, Congress anticipated pursuing immigration penalties, such that the INS would "be more likely to deport an alien than prosecute him for the use of fraudulent documents, except for aggravated use." *Id.*

This choice by Congress reflects its concerns about imposing criminal penalties on unauthorized workers as a class of "aliens who already face the possibility of employer exploitation because of their removable status." *Arizona*, 567 U.S. at 405; *see also* Kati L. Griffith, *ICE Was Not Meant to be Cold: The Case for Civil Rights Monitoring of Immigration Enforcement at the Workplace*, 53 Arizona L. Rev. 1137, 1146 (2011) (noting concerns over the "negative civil rights consequences of a new workplace-immigration enforcement scheme"). In particular, Congress was concerned that information provided by individuals to obtain employment would "create a 'paper trail'" that could be used "for the purposes of apprehending undocumented aliens," H.R. Rep. No. 682, 99th Cong., 2d. Sess. Pt. 1, 45 (1986), and civil rights organizations consequently called for "strict legislative limits on access to and use of the underlying data" provided by individuals to obtain employment. *Summary of Hearings*, at 69 (testimony of Paul McLeary on behalf of the Citizens Committee for Immigration Reform). IRCA's structure thus focuses on "disincentivizing the employer preference for undocumented workers rather than placing the blame on workers who are drawn into the migration stream." Leticia Saucedo, *The Making of the "Wrongfully" Documented Worker*, 93 N.C. L. Rev.

1505, 1507-08 (2015); *see* Kati L. Griffith, *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*, 17 NYU J. Legis. & Pub. Pol'y 881, 906-07 (2014). As a result of these concerns, Congress narrowly circumscribed the criminal penalties that could be imposed on employees using false documents.

The State's prosecutions upset this balance. The State has used its laws to impose criminal penalties on individuals who submitted fraudulent documentation to seek and engage in unauthorized work. *See* Pet. Br. 10-13; Gov't Amicus Br. 7. This upsets "the careful balance struck by Congress with respect to unauthorized employment of aliens." *Arizona*, 567 U.S. at 406. Indeed, as the United States has previously explained, "IRCA leaves no room for the imposition of state criminal liability on individual aliens" on the basis that they "obtain[ed] employment *through fraudulent means*." Ariz. Amicus Br. at 36, *Arizona v. United States*, 567 U.S. 387 (2012) No. 11-182 (emphasis in original). The State's prosecutions are thus preempted under *Arizona*.

B. The State's Prosecutions Contravene Congress's Decision to Retain Federal Oversight and Discretion in Counteracting the Use of Fraudulent Documentation to Obtain Employment

The State's prosecutions are also preempted because they conflict with the design of the federal enforcement scheme, which is designed to retain *federal* control and discretion. Recognizing the

complexity of the enforcement scheme devised by IRCA, Congress made clear that retaining "Congressional oversight of the implementation process . . . is crucial." *The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3445, A Summary and Explanation submitted to the Committee on the Judiciary House of Representatives*, 99th Cong., 2d Sess. 3-4 (1986).

As an initial matter, IRCA vests the federal government with exclusive control and oversight over the types of documentation an individual can use to legally obtain employment.

First, IRCA vests the federal government with control over the documentation that may be used to demonstrate authorization to work in the United States. The statute specifies by name certain documentation, including that at issue here: the Social Security card. *See* 8 U.S.C. 1324a(b)(1). The Congressionally-prescribed list of documentation can only be expanded by the U.S. Attorney General through regulation. *See id.* Where IRCA allows an individual to use state-issued documentation to verify his or her identity, such documentation must meet the *federal* standards established by the Attorney General. *See id.* 1324a(b)(1)(D).

Second, Congress vests authority with the President and federal agencies, not state governments, to monitor and revise federal documentation standards to counteract the use of fraudulent documents, and to study and bolster the security of the Social Security card. *See* p. 5, *supra*; 8 U.S.C. 1324a(d); IRCA § 101(e), (f). Even here, *Congress* retained ultimate

oversight, by requiring that the President and other federal agencies submit to Congress a written report on proposed changes two years before any such changes would be implemented, and to obtain Congressional approval for such changes. *See* 8 U.S.C. 1324a(d)(3).

Third, to prevent abuse of the employer verification system and to address privacy and civil rights concerns, Congress strictly limited the use of any information that individuals submit as a part of this employment process, including the use of the Social Security card. IRCA not only prohibits the use of "any information contained in or appended to" the I-9 form for all purposes except for enforcement of *federal* identity theft and document fraud statutes, 8 U.S.C. 1324a(b)(5), but also generally prohibits the use of the employer verification system "for law enforcement purposes, other than for enforcement of this [Act]" or specified federal identity theft and fraud statutes. 8 U.S.C. 1324a(d)(2)(F).

IRCA is also carefully structured to ensure that only the federal government may prosecute individuals for submitting false documentation to circumvent these requirements. *See* pp. 6-8, *supra*.

Federal prosecutorial discretion has been critical to effectuating Congress's intent in IRCA. *See Arizona*, 567 U.S. at 396 (explaining why discretion exercised by immigration officials is a "principal feature" of immigration law). Most importantly, the Executive retains the discretion to refrain from pursuing criminal sanctions for the use of false documentation when, in its considered assessment,

the facts point in another direction. For example, federal officials routinely rely on unauthorized aliens for assistance in federal investigations, particularly in cases involving drugs, human trafficking or labor violations. *See* Gov't Ca. Amicus Br. at 18-19, *Puente Ariz. v. Arpaio*, No. 15-15211, 2016 WL 1181917, (9th Cir. Mar. 25, 2016) ("Federal law enforcement officials routinely rely on foreign nationals, including unauthorized aliens, to build criminal cases, particularly cases against human traffickers, and employers who violate IRCA.").

Federal prosecutorial discretion is necessary to maintain leverage so as to encourage cooperation in such investigations. *See* Gov't Ca. Amicus Br. at 19 (explaining that the "ability to rely on unauthorized aliens as witnesses in high-priority criminal proceedings . . . would be thwarted by parallel state prosecutions of the same individuals for offenses already regulated by federal law."); *State v. Martinez*, 896 N.W.2d 737, 756-57 (Iowa 2017) ("[T]he full purposes and objectives of Congress in the employment of unlawful immigrants include the establishment of a comprehensive federal system of control with a unified discretionary enforcement regime. . . . If . . . local exercise of prosecutorial discretion were permitted, the harmonious system of federal immigration law related to unauthorized employment would literally be destroyed."); *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377 (2000) (explaining that a state law imposing additional sanctions against the Burmese political regime interfered with the President's discretion because it left the President with "less to offer and less economic and diplomatic leverage as a consequence").

Federal discretion is also critical to ensure that prosecution of unauthorized workers for the use of fraudulent documentation does not interfere with other types of investigations that the Executive Branch chooses to prioritize, including investigations into labor violations involving exploitation of the very same unauthorized workers. For this reason, ICE has entered into a formal Memorandum of Understanding with the Department of Labor by which it agrees to refrain from immigration enforcement activities at worksites subject to investigations for labor violations. *See Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites*, Dep't of Labor (Dec. 7, 2011).[3] This is consistent with Congress's intent to focus on targeting employers, rather than the exploited and vulnerable class of unauthorized workers. *See* pp. 5-8, *supra*.

Indeed, one of the respondents, Mr. Ramiro Garcia, assisted the federal government in an investigation of his employer at the time the state proceedings in this case began. *See* J.A. at 50. That case involved an investigation into the employer's pattern of directing employees to change social security numbers. *See id.* In contrast with the State, the federal government did not bring charges against Mr. Garcia for using false documentation in seeking employment.

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[3] Department of Labor, *Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites*, https://www.dol.gov/asp/media/reports /dhs-dol-mou.pdf (Dec. 7, 2011).

The State's prosecutions thus conflict with Congress's intent for the federal government to retain control and oversight over the use of fraudulent documentation to obtain unauthorized employment, and frustrate "the careful balance struck by Congress with respect to unauthorized employment of aliens." *Arizona*, 567 U.S. at 406. By allowing State prosecutions for identity fraud in the unauthorized employment context, the State is able to impose its own penalties and sanctions, even if doing so undercuts the federal government's own exercise of discretion. Such activity "'diminish[es] the [Federal Government]'s control over enforcement' and 'detract[s] from the integrated scheme of regulation created by Congress.'" *Id.* at 402 (quoting *Wis. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 288–289 (1986)).

In our federal system, state prosecutors are under no obligation to pursue cases in a manner consistent with federal objectives. Indeed, the State prosecutors in these cases had "no flexibility" pursuant to "certain policies" adopted by the State to reduce the charges brought under the identity theft statutes from a felony to a misdemeanor—i.e., to anything less than a deportable offense. *See* J.A. at 52, 57. Any exercise of discretion by the federal government in such circumstances would be a nullity. Allowing the State to impose additional and different penalties—including those with immigration consequences—is thus in conflict with the federal enforcement scheme. *See Arizona*, 567 U.S. at 401-02 (noting that if every state could prosecute federal registration violations, such laws would diminish the Federal government's control over enforcement and detract from Congress's integrated scheme of regulation); *Wis. Dep't of Indus.,* 475

U.S. at 286 ("[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity.") (internal quotations and citation omitted); *cf. Crosby*, 530 U.S. at 378-79.

Moreover, States may not "complement[ ] the federal law, or enforc[e] additional or auxiliary regulations," *Arizona*, 567 U.S. at 403 (internal quotations and citation omitted), particularly where, as here, state laws operate as a separate scheme of punishment, *Wis. Dep't of Indus.*, 475 U.S. at 286. "Even where federal authorities believe prosecution is appropriate, there is an inconsistency between [state law] and federal law with respect to penalties." *Arizona*, 567 U.S. at 402-03.

The federal identity theft statutes include specific limitations that are not found in the State's laws. Federal statutes require both that the individuals have knowledge that the documentation he or she presented belonged to another person, and an "intent . . . to defraud the United States." 18 U.S.C. 1028(a)(4). Neither of these limits are included in the State's identity theft statutes. *See* Kan. Stat. Ann. § 21-6107(d) ("It is not a defense that the person did not know that such identifying information belongs to another person."). Similarly, Congress chose to limit criminal penalties for the use of fraudulent documentation in the employment context to either a fine or imprisonment, *see* 18 U.S.C. 1546, whereas the Kansas statute only authorizes imprisonment if convicted, *see* Kan. Stat. Ann. § 21-6107(c)(1); Kan. Stat. Ann. § 21-5824(b).

"[P]ermitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted." *Arizona*, 567 U.S. at 402; *see also Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 350-51 (2001) (noting that state enforcement of its anti-fraud statute was preempted because it could deter off-label use in conflict with the Administration's express intent not to interfere with the practice of medicine).

II. The State's Attempts to Distinguish *Arizona* Are Unavailing

If Kansas had enacted a statute expressly imposing a criminal penalty on immigrants who sought unauthorized work using a false social security number, that statute clearly would be preempted. *See Arizona*, 567 U.S. at 403-07. That is precisely how Kansas has applied its broad identity theft statute here.

The State advances three principal distinctions to argue that its prosecutions here are not preempted: (1) the prosecutions are based on the W-4 and K-4 forms, which are not part of the IRCA employment-authorization scheme, (2) the prosecutions are under general identity-theft statutes, and (3) Executive Branch officials have endorsed the prosecutions. *See* Pet. Br. 46-47; Gov't Amicus Br. 26, 29-30. None of these differences alters the conclusion that the State's actions are preempted as an obstacle to the comprehensive scheme Congress established under IRCA.

A. The W-4 and K-4 Were a Necessary Component of the Same Hiring Process as the I-9 Form.

These three cases all began as prosecutions based on social security numbers provided by respondents on their I-9 forms. Understanding that Congress has preempted the use of fraudulent documentation for unauthorized work, and attempting to circumvent that result, the State dropped its prosecutions based on the I-9 and prosecuted petitioners solely based on two other employment-related forms: the W-4 and the K-4. *See* Pet. Br. 10-13; Gov't Amicus Br. 8. But this maneuver cannot save the State from its fate: the W-4 and K-4, like the I-9, are essential for obtaining employment in Kansas, and the fraudulent information submitted on all three forms was exactly the same: a false Social Security number.

Employers routinely require that the W-4 and K-4 be submitted by prospective employees to obtain employment, which, along with the I-9, are part of the onboarding process for most new employees. Indeed, the IRS instructs employers to require employees to fill out a W-4 along with an I-9 upon hiring, *see* Internal Revenue Service, *Hiring Employees*,[4] and states that employers "must" have an employee complete the W-4, Internal Revenue Service, *Topic No. 753 Form W-4 — Employee's Withholding*

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[4] Internal Revenue Service, *Hiring Employees*, https://www.irs.gov/businesses/small-businesses-self-employed/hiring-employees (last updated Mar. 22, 2019).

Allowance Certificate.[5] Similarly, employees in Kansas are "required" to submit a K-4 form "on or before the date of employment." *See* Kansas Division of Revenue, *Kansas Withholding Form K-4*.[6]

As a practical matter, the forms are invariably required by employers as part of the same employment onboarding process. *See, e.g.*, *United States v. Ramirez*, 635 F.3d 249, 254 (6th Cir. 2011) ("Paperwork for new employees included an application, a new hire form, a W–4, and an I–9 form."); *Tri-State Emp. Servs., Inc. v. Mountbatten Sur. Co., Inc.*, 295 F.3d 256, 263-64 (2d Cir. 2002) ("These workers complete and submit I–9 and W–4 forms to Tri–State, and the forms are then matched up with the client company's list. The I–9 and W–4 forms are, according to Tri–State, 'the only hiring paperwork.'"); *Syzmanski v. Rite-Way Lawn Maint. Co., Inc.*, 231 F.3d 360, 362 (7th Cir. 2000) ("Rite–Way . . . requires all employees, prior to commencing their employment, to complete a variety of forms, including an employment application Form W–4 and Form I–9."); *Robison Fruit Ranch, Inc. v. United States*, 147 F.3d 798, 802 (9th Cir. 1998) ("Robison simply requested documents the aliens were already using to complete the top portion of Form I–9 as well as the accompanying Treasury Form W–4, which requires a social security number."); *United States v. Manning*,

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[5] Internal Revenue Service, *Topic No. 753 Form W-4-Employee's Withholding Allowance Certificate*, https://www.irs.gov/tax topics /tc753 (last updated Aug. 6, 2019).

[6] Kansas Department of Revenue, *Kansas Withholding Form K-4* https://www.ksrevenue.org /k4info.html (last visited Aug. 9, 2019).

955 F.2d 770, 771 (1st Cir. 1992) ("Among the forms Manning completed for the job were an INS form I-9 and an IRS form W-4.").

In fact, in each of Respondents' cases, the evidence showed that the W-4 and K-4 were completed as a part of a "hiring packet" and that the petitioners were *required* to complete the W-4 and K-4 to obtain employment. *See* J.A. at 76 (describing the I-9 and W-4 in Mr. Ramiro Garcia's case as part of a "welcoming packet"); *id.* at 155 (describing the I-9, W-4 and K-4 in Mr. Donaldo Morales' case as part of a "hiring packet" given to each employee); *id.* at 82 (employer testified that Mr. Garcia would not have been hired if he hadn't signed the W-4 form); *id.* at 157 (Mr. Morales's employer testified that "[i]n order for the employee to be hired . . . they must fill out the [K-4 and W-4] documents"); *id* at 217 (affidavit noting that Mr. Ochoa-Lara's employer "confirmed [that a] social security number is required in order for individuals to be hired by their company and also for both federal and state tax withholding purposes."). Respondents would not have been hired by their employers had they not completed the forms, which like the I-9, called for disclosure of a social security number.

And the State prosecutors themselves characterized the W-4 and K-4 as inextricably intertwined with petitioners' ability to secure employment. In order to satisfy the requirements of identity theft under the Kansas statute, the State prosecutor was required to show that petitioners received a "benefit" from the use of a false Social Security card on the W-4 and the K-4. Kan. Stat. Ann. § 21-4018 (requiring that an identity theft charge establish an "intent to defraud for any

benefit"). That "benefit," according to the State prosecutors was the petitioners' ability to secure unauthorized employment through use of the false social security numbers on the forms. J.A. at 107 (describing the benefits Mr. Ramiro Garcia received as "benefit[s] of his employment"); *id.* at 176 (arguing that defendant Mr. Morales knew that social security numbers were necessary to get a job and get paid).

Because of this inextricable linkage between the W-4 and K-4 and the hiring process, the preemption of respondents' prosecutions under their as-applied challenges would dictate preemption of the State's identity theft laws in only a narrow set of circumstances: where those forms are submitted as part of the employment application process, closely associated with the I-9 form. Accordingly, the State would not, as it posits, be prohibited by IRCA from using the W-4 or K-4 to prosecute other types of offenses, such as tax evasion. Nor would the State be prohibited from using its identity theft statute to prosecute individuals for domestic violence crimes, state-law computer fraud, drug fraud, or other crimes that are unrelated to seeking unauthorized employment. *See* Pet. Br. 29-31; Gov't Amicus Br. 19-20. Similarly, IRCA would not preempt prosecutions of individuals who use a false Social Security card to evade child support payments or wage garnishment. *See* Gov't Amicus Br. 31. Instead, preemption would only apply to use of the State identity theft statute to prosecute individuals for falsifying documentation necessary to obtain employment.

It is the *State*'s interpretation instead that would lead to absurd results, as it would allow all 50 states

to target illegal immigrants and impose their own penalties on employees seeking or engaging in unlawful employment—conduct that Congress already carefully considered and placed the responsibility to address in the hands of the federal government. Under the State's view, it would be a simple matter of bringing prosecutions based on the social security number included on the W-4 (or state equivalents) rather than the I-9.[7] Given the practical reality that the W-4 and the I-9 are both submitted by individuals to obtain employment, and both contain social security numbers, the State's approach would effectively vitiate the Court's holding in *Arizona* and the balance struck by IRCA, resulting in an unworkable 50-state immigration enforcement patchwork. *See Arizona*, 567 U.S. at 395 (noting that the federal government must be able to act on foreign policy as one nation, without interference from "50 separate States"); *Buckman*, 531 U.S. at 350 (noting that the operation of the FDA's regulatory scheme "in the shadow of 50 States' tort regimes" would "dramatically increase the burden facing potential applicants" in conflict with Congress' intent); *Wis. Dep't of Indus.*, 475 U.S. at 288-89 (finding that "[e]ach additional statute incrementally diminishe[d]" control over the enforcement of NLRA

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[7] In response to the Kansas Supreme Court's ruling prohibiting the use of the State's identity theft statutes to prosecute individuals seeking unauthorized work, Kansas Secretary of State Kris Kobach commented that the decision was "yet another respect in which Kansas is becoming the sanctuary state of the Midwest." Allison Kite, *Kansas A.G. Derek Schmidt Appeals State Court Decisions on Prosecution of Undocumented Immigrants*, Topeka Capital J. (Sept. 14, 2017), https://www.cjonline.com/news/state-government/local/2017-09-14/kansas-ag-derek-schmidt-appeals-state-court-decisions.

in conflict with Congressional intent). IRCA, as interpreted by this Court's decision in *Arizona*, requires the rejection of such a back-door attempt to penalize aliens who seek or engage in unlawful employment.

B. The General Applicability of the State's Identity Theft Statute Is Irrelevant to Petitioners' As-Applied Challenge

The State argues that it has prosecuted petitioners under broad identity theft statutes, which apply regardless of an individual's immigration status, and therefore cannot conflict with IRCA's scheme. *See* Pet. Br. 47-48; Gov't Amicus Br. 26. But this Court's precedent contradicts such logic. A state law of general applicability may be preempted in certain applications by federal statute. *See, e.g.*, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) (holding that ERISA preempted a Vermont state law "as applied" to ERISA plans); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518-19 (1992) (invalidating state law tort claims *only* as applied to cigarette warnings and labeling, after finding that Congress intended to occupy the field of cigarette labeling and warning); *U.S. Airways Inc. v. O'Donnell*, 627 F.3d 1318, 1325 (10th Cir. 2010) (invalidating New Mexico's Liquor Control Act only as applied to the airline industry, because Congress had occupied the field of aviation safety); *Adrian & Blissfield R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008) (recognizing that state and local actions "may be preempted *as applied*"); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008) (recognizing that

"state or local actions that are not facially preempted," may still be preempted "as applied").

The State's related point that its identity theft laws apply regardless of immigration status is irrelevant for another reason: IRCA's scheme is not limited only to *illegal immigrants* who provide fraudulent documentation; rather IRCA's employer verification system was purposefully designed to cover *all* U.S. employees regardless of their immigration status. *See, e.g.*, S. Rep. No. 132, 99th Cong., 1st Sess. 23 ("[t]o be nondiscriminatory. . . any employee eligibility system must apply equally to each member of the U.S. workforce – whether that individual be an alien authorized to work in this country or a U.S. citizen); *Summary of Hearings*, 69 (testimony from the ACLU calling for a "universal identification system" applying to "all workers" to protect against discrimination against minorities). Citizens, authorized aliens, and unauthorized aliens alike must *all* fill out I-9 forms, and all are subject to the same federal penalties for submitting false information in connection with that process. The State thus offers no compelling reason why Respondents' as-applied challenge should not be given narrow preemptive effect to preclude their prosecutions under the State's identity theft law.

C. Federal Involvement in a State Prosecution Does Not "Cure" Conflict Preemption

The State and the United States argue that the State's application of the identity theft laws does not pose an obstacle to federal immigration policy because the federal government provided some assistance in,

and therefore tacitly approved of, the State's prosecution of respondents. *See* Pet. Br. 46–47; Gov't Amicus Br. 29. But the conflict preemption analysis turns on *Congress's* intent that the Executive Branch should have exclusive control over the enforcement of criminal penalties for employees seeking or engaging in unauthorized employment. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (holding that "the purpose of Congress is the ultimate touchstone in every pre-emption case"). The Executive Branch cannot give away that control as a general matter, even if it does indeed endorse the State's handling of a particular case. Here, Congress intended for the Executive Branch to retain federal control and discretion, and did not authorize the Executive Branch to deputize state officials to pursue prosecutions. *See Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 979 (9th Cir. 2017) (Berzon, J. concurring) ("[I]t is the *authority* specifically conferred on the Attorney General by the Immigration and Nationality Act . . . that is the body of federal law that preempts Arizona's policy, not any particular exercise of executive authority.").

Indeed, despite the fact that "federal law-enforcement officials worked alongside Kansas authorities in investigating and prosecuting respondents," Gov't Am. Br. at 29, federal prosecutors *refrained* from bringing any criminal charges against petitioners for their use of false documentation to obtain work authorization. And, as noted, in Mr. Ramiro Garcia's case, he was providing assistance to an ongoing federal investigation of his employer's use of false social security numbers, and the federal prosecutors apparently refrained from bringing any criminal charges against him as well.

Nor was the assistance provided by the federal government tantamount to Executive Branch "approval" of the State's application of its identity theft statutes. Federal involvement was largely limited to a single investigator from the Social Security Administration, who assisted the State by confirming that the Social Security card was fraudulent, and testifying to that fact in state court. *See* J.A. at 8, 25. Such confirmation can indeed *only* be provided by a federal agent because access to the Social Security database is strictly limited, a direct consequence of Congressional intent to require federal oversight over the use of the Social Security card. *See e.g.,* J.A. at 90 (testimony by a Social Security investigator that he checked petitioner's SSN in a "closed network – government network database that I only have access to and others in the Social Security Administration"). There is no contemporaneous evidence in the record that reflects approval by the requisite Executive Branch decision makers of the criminal penalties sought by the State.

At any rate, the Executive Branch's participation in the lower court proceedings cannot sanction state-level prosecution where Congress intended the federal government to retain control over such prosecutions. *See Arizona*, 567 U.S. at 445 (Alito, J., concurring) (explaining that "a federal agency's current enforcement priorities . . . . are not law."). Indeed, under the State's interpretation, state law that is not preempted under the "[f]ederal [g]overnment's current priorities" could become preempted "at some time in the future if the agency's priorities changed." *Id.* This is precisely why preemption is based on the views and intent of Congress, rather than the statement or actions of

Executive Branch officials—a point reinforced by the history of Executive Branch statements on the preemption issue raised in this case. *Puente Arizona*, 821 F.3d at 1104 ("In both field and conflict preemption cases, the touchstone of our inquiry is congressional intent.").

Even in the foreign policy context, where the Executive's constitutional authority is at its apex, the Executive Branch's views cannot contravene a clear Congressional scheme, particularly when those views are submitted only through briefing. *See Crosby*, 530 U.S. at 385 (recognizing that courts do not "unquestioningly defer" to the Executive Branch when determining a federal act's preemptive nature); *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60, 75, 81 (1993) (holding that the United States' position in its *amicus* brief is by "no means dispositive" on the issue of preemption, and that "only Congress" could make the decision to determine when state interests should be subordinated to national interests (internal quotations and citation omitted)); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329-30 (1994) (holding that the Executive Branch's press releases, letters, and *amicus* briefs were merely "precatory" and could not contravene Congressional intent). *Cf. United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (Executive Branch receives *Chevron* deference only where "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority").

CONCLUSION

For the reasons discussed above, the Court should affirm the ruling of the Kansas Supreme Court.

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August 13, 2019

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