No. 17-834

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

–v–

RAMIRO GARCIA, DONALDO MORALES, and GUADALUPE OCHOA-LARA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF OF AMICUS CURIAE LAW OFFICE OF DAVID J. GRUMMON, P.A. IN SUPPORT OF RESPONDENTS

DAVID J. GRUMMON
LAW OFFICE OF
DAVID J. GRUMMON, P.A.
3111 STRONG AVENUE
KANSAS CITY, KS 66106
(913) 942-2470

BRIAN LEININGER
COUNSEL OF RECORD
LEININGER LAW OFFICES
8826 SANTA FE DRIVE
SUITE 214
OVERLAND PARK, KS 66212
(913) 648-7070
BRIAN@LEININGER-LAW.COM

AUGUST 13, 2019 *COUNSEL FOR AMICUS CURIAE*

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS – Continued

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

INTEREST OF AMICUS CURIAE

Amicus curiae Law Office of David J. Grummon, P.A.[1] is a for-profit corporation located in Kansas City, Kansas which focuses on the legal representation of mostly Spanish-speaking clients in criminal defense cases. In this capacity, *amicus* represents and advises numerous immigrant clients of various statuses in several Kansas jurisdictions, including Johnson County District Court, from which the prosecution of the named Respondents originated. Most of the individuals represented by *amicus* live in mixed-status families, with both citizen and noncitizen members, as well as members with potential paths to adjustment of status, such as deportation relief through application for U-Visas or cancellation of removal. To appropriately and safely represent these families, *amicus* must be cognizant and aware of how actions easily taken by citizen clients, such as accepting certain plea offers or cooperating with law enforcement, may or may not adversely impact the lives, safety and future of everyone in a mixed-status household. The issues raised in this litigation, and the decision of this Court, will greatly impact how *amicus* and other similarly situated law practices advise and represent noncitizen clients, as well as the rights and opportunities of many of those clients and the affected communities in which

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

they live. For all these reasons, *amicus* has direct and vital interests in the issues before this Court.

SUMMARY OF ARGUMENT

The State of Kansas is not wrong to state that the central prohibition of Kan. Stat. Ann. § 21-6107 (2011 Supp.) for identity theft and Kan. Stat. Ann. § 21-3711 (2010 Supp.) for false information "criminal-ize[s] theft of another person's personal identifying information" Pet'r Br. 6. However, the use of these state statutes to prosecute attempts to secure employment for unauthorized aliens, specifically as done within the Johnson County District Court, is not central to either statute. To be clear, the conduct for which the three named Respondents were convicted is indeed illegal. The use of another's identification document, a false identification document, or a false attestation for purposes of demonstrating work authorization under federal law is already criminalized under 18 U.S.C. § 1546(b), and the knowing hiring of an unauthorized alien is criminalized under 8 U.S.C. § 1324a(a)(1)(A). Congress has designed a comprehensive scheme—an interconnected series of criminal, civil, and immigration-related consequences—for individuals who commit fraud on the federal employment verification system, and of this there is no dispute between the parties. Rather, the State disputes the finding in the case below that these convictions "intrude[ ] into an area occupied wholly by federal law and conflicts with the policy established by Congress through IRCA, INA, and specifically the employment verification system."

State v. Garcia, 306 Kan. 1113, 1137, 401 P.3d 588, 603 (Kan. 2017) (Pet.App.38) (Luckert, J., concurring).

Whether by applying an express analysis, as was done by the Kansas Supreme Court, or by finding an implied field preemption, as was done by the Iowa Supreme Court, the result reached is the same and is correct. Thus, the use of these state statutes, as applied to the named Respondents, is preempted by federal law.

ARGUMENT

I. THE KANSAS SUPREME COURT'S DECISION WAS NARROWLY FOCUSED ON THE USE OF THE I-9 AND INFORMATION CONTAINED WITHIN THE I-9 AS THE BASES FOR A STATE LAW IDENTITY THEFT PROSECUTION OF AN ALIEN WHO USES ANOTHER PERSON'S SOCIAL SECURITY INFORMATION FOR EMPLOYMENT AUTHORIZATION.

Petitioner can, and does, expound on the very real problem and many potential harms of identity theft at large, but the Kansas Supreme Court's decision below is clearly more narrowly focused on the use of these state statutes to prosecute the conduct of the three named Respondents, specifically, their attempts to secure employment despite being unauthorized aliens. *State v. Garcia*, 306 Kan. 1113 at 1130-1131, 401 P.3d 588 at 599) (Pet.App.27). The holding by the Kansas Supreme Court clearly implicates use of these state statutes for prosecution for use of another's Social Security number contained in the I-9 to establish one's employment eligibility. Moreover, as is well

documented by Respondent's brief, the crux of the trials and litigation in the cases below centered around employment authorization, not the other concerns raised by the Petitioner regarding identity theft.

The Kansas Supreme Court's decision below found that the use of 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 number to establish employment eligibility was expressly preempted by 8 U.S.C. § 1324a(b)(5). The Iowa Supreme Court, examining a similar state statute with similar facts reached the same result with a different rationale: Because of its comprehensive statutory scheme to regulate employment authorization and to criminalize violations of that scheme, Congress has "occupied the field" and prohibited the use of false documents when an unauthorized alien seeks employment. Because of this field preemption, the State of Iowa is barred from using state identity theft statutes to prosecute an unauthorized alien for identity theft related to false documentation supplied to an employer. *State v. Martinez*, 896 N.W.2d 737, 755–56 (Iowa 2017) Either way, both analyses reach the correct result.

II. THE PETITIONER'S USE OF STATE IDENTITY THEFT STATUTES TO PROSECUTE THE USE OF FALSE DOCUMENTS BY UNAUTHORIZED ALIENS SEEKING EMPLOYMENT LEADS TO ABSURD RESULTS, DISRUPTS NORMAL COOPERATION WITH LOCAL LAW ENFORCEMENT, AND RESULTS IN DISPARATE AND DISPROPORTIONATE PUNISHMENT.

The Petitioner seems to complain that the holding from the case below will create sweeping and "absurd"

results, listing hypothetical prohibitions against prosecutions for criminal activity unrelated to employment, such domestic violence prosecutions, sex crimes and human trafficking, computer fraud, prescription drug fraud, underage drinking, consent to organ donation, and driving without a license. Pet'r Br. 30-31. Petitioner provides no evidence that this will be the case, and *amicus* is aware of no lack of new prosecutions by the State for these crimes since *Garcia* was decided in 2017.

A. Petitioner's Use of State Identity Theft Statutes to Prosecute the Use of False Documents by Unauthorized Aliens Seeking Employment Leads to Absurd Results.

Respondents properly document some of the ways how the Petitioner's policies using state identity theft statutes to prosecute false documentation supplied to an employer created actual, non-hypothetical absurd results for the three Respondents. Despite the trial court observing that the prosecution of Garcia seemed unfair and was "destroying families," the assistant district attorney claimed no prosecutorial discretion to amend the charges to lesser, non-deportable offenses, or to offer diversion even after Garcia had obtained legal status and proper authorization for employment. Br. in Opp. 8-9. The trial court in the bench trial for Morales expressed concern that despite having contributed money to social security for twenty-four years that he would never draw out, and despite having three children born here and despite now having a legal social security number, the court couldn't find the Respondent not guilty. Br. in Opp. 12-13. In lieu of trial, Respondent Ochoa-Lara executed a stipulation

of facts, stating that he used another's social security number to gain employment, similarly resulting in his conviction. Br. in Opp. 13. These convictions of state statutes for identity theft and making a false writing carry with them harsh consequences for these noncitizen Respondents.

B. Petitioner's Use of State Identity Theft Statutes to Prosecute the Use of False Documents by Unauthorized Aliens Seeking Employment Results in Disparate and Disproportionate Punishment.

Amicus is aware of the almost inevitable immigration consequences that result, and have repeatedly resulted, for the many noncitizen defendants who have been charged and convicted in Johnson County District Court under the state statutes for identity theft and making a false information: Such a conviction may result in an expedited administrative removal without right to a hearing or judicial review. 8 U.S.C. § 1228(b). A conviction for the similarly worded statute for identity theft under Iowa law was held to qualify as an aggravated felony for immigration purposes in *United States v. Mejia-Barba*, 327 F.3d 678, 681-682 (8th Cir. 2003). Consequently, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Further, status as an "aggravated felon" renders an individual ineligible for several forms of immigration relief, including cancellation of removal and asylum. *See*, *id.* §§ 1158(b)(2)(A)(ii), 1158(b)(2)(B), 1229b(b)(1)(C). Additionally, any alien who is convicted of a "crime involving moral turpitude," for which the Kansas statutes for identity theft and making a false writing

likely qualify, can render an immigrant inadmissible under 8 U.S.C. § 1182(a)(2).

By themselves, Kan. Stat. Ann. § 21-6107 (2011 Supp.) for identity theft and Kan. Stat. Ann. § 21-3711 (2010 Supp.) for false information are considered lower-level felonies. Under the Kansas Sentencing Guidelines Act Kan. Stat. Ann. § 21-6801 *et. seq.* (2012 Supp.) such crimes usually result in presumptive probation sentences for most defendants unless they were already on probation or already have a very bad criminal history—that is, unless the defendant is a noncitizen, in which case the immigration consequences listed above result in hugely disparate and disproportionate punishment for the same behavior. For noncitizens like the Respondents, even without any criminal history, they will most likely face mandatory detention and removal, and never have a chance to complete probation. That disparity and disproportionality of punishment seems to be of little concern to the Petitioner, at least within the jurisdiction of Johnson County District Court, from which these convictions originated. Under Petitioner's policies, the lack of any actual demonstrable harm caused by the offense does not matter. In the case of Respondent Garcia, the investigating law enforcement officer never spoke to the victim, much less ascertained harm or monetary damages. *State v. Garcia*, 306 Kan. 1113, at 1116, 401 P. 3d 588 at 591 (Pet.App.6). Under Petitioner's policies, it does not matter whether noncitizens like Respondents might have a path to becoming authorized. In the case of Respondents Garcia and Morales, both had found a way to obtain work authorization and a valid social security number before trial. Br. in Opp. 8, 13. Under the federal immigration statutes

referenced above, that authorization will likely be lost. Under Petitioner's policies, it matters not how many citizen household members rely on noncitizens like Respondents, nor their involvement in the community, nor their lack of risk to public safety. Noncitizens convicted of these state statutes are almost certain to be deported, and in the process will become separated from their families, their property and all they have worked for, sometimes for decades. Indeed, this Court has already recognized that "as a matter of federal law, deportation is an integral part, indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla v. Kentucky* 130 S.Ct. 1473, 1480, 559 U.S. 356, 364 (2010)

Regrettably, not all criminal defense attorneys are aware of, and not all of them have advised their noncitizen clients of, the devastating immigration consequences that will almost certainly result from convictions under these state statutes, despite this Court's clear ruling to do so. *See Padilla* 130 S.Ct. at 1484, 559 U.S. at 369. More importantly, however, Petitioner within the jurisdiction of the Johnson County District Court is abundantly aware how fatal these convictions usually are for the immigration future of noncitizen clients, despite the Petitioner's insistence that its prosecutions under state statutes are completely unrelated to their immigration statuses. Knowing full well the consequences to noncitizen defendants charged with these statutes, Petitioner could offer resolutions that could lessen the disparate and disproportionate punishment described above. Instead, the State continues to list identity theft as

an offense for which no diversion is available[2] and, even when the facts in support of mitigation and discretion are compelling and heartbreaking, merely shrugs and states "I just do not have any flexibility." Br. in Opp. 8.

C. Petitioner's Use of State Identity Theft Statutes to Prosecute the Use of False Documents by Unauthorized Aliens Seeking Employment Disrupts Normal Cooperation with Law Enforcement.

Unlike the many hypothetical absurd results proffered by Petitioner to possibly happen if the Kansas Supreme Court's opinion below stands, the very real and non-hypothetical results of Petitioner's policies are widespread and systemic. One very realistic result of these policies is the dilemma presented to criminal defense counsel, such as *amicus*, when representing or advising noncitizen clients who are victims of crimes or have information about crimes which they could share with local law enforcement. On the one hand, noncitizen victims of some crimes can open a path to a visa through their cooperation. Similarly, potential defendants contacted during an unrelated investigation may obtain some form of consideration in charging decisions or may receive some leniency in sentencing by taking the risk and sharing with local law enforcement what he or she knows about other crimes. However, because Petitioner can and does use state statutes against identity theft and making a false writing to prosecute the attempt to secure employ-

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[2] *See* Johnson County District Attorney Diversion Policy, available at https://da.jocogov.org/adult-diversion-program.

ment by an unauthorized alien, defense counsel must be wary of the inherent risks of clients revealing their workplace should clients choose to speak with local law enforcement, even about completely unrelated matters. Under Petitioner's policies, any local law enforcement officer has the ability and the discretion to almost guarantee that individual's eventual deportation, once he has obtained enough information from a suspected unauthorized alien to ascertain their place of employment. The officer could be stopping the individual for a speeding ticket (as was the case with Respondent Garcia, Br. in Opp. 7), the officer could be interviewing the individual as a witness, the officer could be responding to a report of a crime in which the individual was the victim. Now, simply armed with the workplace of the suspected unauthorized alien, that officer can at any time and for any reason respond to that business, ask for work records, contact the Social Security Administration (or some other agency with the means of checking a social security number) and then forward the results to the District Attorney of Johnson County. The Petitioner will then prosecute that individual under state statutes of identity theft or making a false writing without giving any quarter, without consideration of any mitigating factors, and without any flexibility on resolving the case without trial. Even if actual federal law enforcement officials (whose authority to prosecute the same conduct under 8 U.S.C. §§ 1182(a)(6)(F), 1227(a)(3)(B)(iii), (C) is beyond dispute) choose not to file federal charges out of humanitarian considerations or out of their desire to maintain continued cooperation from a cooperating witness, the state-level prosecution by Petitioner could, and likely would, go forward. Thus,

the power this gives local law enforcement officers, and the potential for the abuse of such discretion, is immense.

Unlike many of the speculative dangers posited by Petitioners, the dangers resulting from Petitioner's policies are not hypothetical at all. In the case below, Respondent Garcia was already working with federal agents in their appropriate investigation when a zealous local law enforcement officer took a passing comment to expand his stop for a speeding citation into an identity theft prosecution. Br. in Opp. 6. The trial judge in the case of Respondent Garcia recognized the usual pattern of these cases, their unfairness, and their potential to destroy families. Br. in Opp. 8-9. Even Justice Biles in his dissent in the decision below recognized the possibility that duel state and federal enforcement tracks could rob the federal government of its discretion. "Spotty statewide enforcement would seem to manifest the evil." *State v. Garcia*, 306 Kan. 1113 at 1142, 401 P. 3d 588 at 606 (Pet.App.44) (Biles, J., dissenting). The concerns of Justice Biles are well placed.

Due to these practical considerations, the Petitioner's policies surrounding its use of state statutes to prosecute violations of the federal work authorization enforcement scheme leaves criminal defense attorneys like *amicus* with impossible dilemmas on how to advise noncitizen clients, or even citizen clients living in mixed-status households, particularly when considering how and whether to interact and cooperate with local law enforcement. Is it safe for undocumented client with a misdemeanor traffic conviction to submit to fingerprints when a booking officer may

ask for their place of employment? Is it safe for young citizen clients to tell local law enforcement where their undocumented parents work? Is it safe for an undocumented domestic violence victim to write her place of employment on her *ex parte* petition for protection from abuse?

Criminal defense attorneys like *amicus* cannot answer such questions, at least not within the jurisdiction of Johnson County District Court. The way in which the Petitioner prosecutes violations of the federal work authorization enforcement scheme using state statutes leaves criminal defense attorneys and their clients with complete and total uncertainty. In turn, this uncertainty leaves the affected community—already feeling fearful and targeted—even more unsure of whether they can and should trust local police. Of all the reasons listed above, this is the reason that compelled *amicus* to file a brief asking this Court to uphold the Kansas Supreme Court's decision below and find that the Kansas statutes are preempted.

CONCLUSION

For these reasons and the reasons stated in Respondent's brief, the Court should affirm the judgment below.

Respectfully submitted,

BRIAN LEININGER
COUNSEL OF RECORD
LEININGER LAW OFFICES
8826 SANTA FE DRIVE
SUITE 214
OVERLAND PARK, KS 66212
(913) 648-7070
BRIAN@LEININGER-LAW.COM

DAVID J. GRUMMON
LAW OFFICE OF
DAVID J. GRUMMON, P.A.
3111 STRONG AVE.
KANSAS CITY, KS 66106
(913) 942-2470

COUNSEL FOR AMICUS CURIAE

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