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

REPLY BRIEF FOR THE PETITIONER

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Respondents labor to establish that they were convicted of crimes having something to do with employment. But no one disputes that. The question under this Court's Supremacy Clause jurisprudence is whether the "clear and manifest purpose of Congress" was to displace the State's "historic police powers" to prosecute these crimes. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). Respondents' sweeping and amorphous theory that Congress preempted all state prosecutions somehow related to the hiring process has no basis in statute and would produce untenable results. These prosecutions are not preempted.

I. Respondents were convicted of using stolen social security information on state and federal tax withholding forms, not fraud on the employment verification system.

Respondents mistakenly conflate IRCA's employment verification system with the broader hiring process between an employer and employee. *E.g.*, Resp. Br. 2, 33, 41-42, 49-51. That error underlies their rhetoric—accusing the State of "misrepresentation" or "extraordinary mischaracterization" that is "unequivocally wrong," Resp. Br. 2, 17, 21, 28 & nn.1, 14—which is incorrect at every turn. The State has consistently described Respondents' convictions as for identity theft and false information crimes on their tax withholding forms and not on their I-9 forms. *See, e.g.*, Pet. i-ii, 1-9. Those crimes, while related to employment, have nothing to do with the federal employment verification system.

1. IRCA does not insulate the overall hiring process from scrutiny under state law. Only what can be called "the I-9 verification system," *see*, *e.g.*, *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 640 (2011) (Sotomayor, J., dissenting), operates to "indicate [the employee's] work status." *Arizona v. United States*, 567 U.S. 387, 405 (2012). That system requires completion of the I-9 form, on which an employee must provide and attest to certain information, and an employer must attest that it has "verified that the individual is not an unauthorized alien by examining" either (i) a single document that establishes both employment authorization and identity or (ii) two documents, one of which evidences employment authorization and the other that establishes the identity of the individual. 8 U.S.C. § 1324a(b)(1)(A); *see also* https://www.uscis.gov/i-9. The I-9 form enumerates three "Lists of Acceptable Documents" that may be presented to satisfy that requirement.

Yet IRCA says nothing about *other* documents and information that *also* may be required of a job applicant or employee in the hiring process for *different* purposes as a condition or consequence of employment. For example, the employer may require a job application, resume, list of references, completed direct-deposit payroll forms, insurance and beneficiary notification forms, or even an agreement to arbitrate or not to compete. *See*, *e.g.*, JA 75-80 (describing the information Garcia provided his employer). Federal and state law also may require submission of forms and other information to the employer, including the tax withholding forms that underlie Respondents'

convictions. *See*, *e.g.*, *Hiring Employees*, *available at* https://www.irs.gov/businesses/ small-businesses-self-employed/hiring-employees (last visited September 3, 2019) (differentiating among the separate requirements of eligibility to work in the United States, use of name and social security number for wage reporting, and enforcement of tax withholding); *see also National Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134 (2011) (background check required for employment).

2. To whatever extent Congress has preempted matters involving the I-9 verification system, Resp. App. 4a-8a, tax withholding forms submitted during the hiring process are not part of that system. As the State has consistently explained, Respondents were convicted solely for using false or stolen information on state or federal tax withholding forms. *See*, *e.g.*, Pet. i-ii, 1-8.

In Garcia's trial, the State entered his W-4 and K-4 tax withholding forms into evidence but not his I-9 form. JA 109, 110. The jury found him guilty of one count of identity theft. JA 112. Garcia conceded "the State is not relying on the I-9 document as a basis of this prosecution," JA 32, and the Kansas Supreme Court agreed, Pet. App. 28.

Likewise, Ochoa-Lara was convicted of two counts of identity theft on facts that *stipulated* he used the stolen social security number on a W-4. JA 216-17. The stipulation makes no mention of the I-9 form or its contents.

Respondents now complain about the admission into evidence of Morales' I-9 form in his bench trial, Resp. Br. 37-38, but fail to mention that the district court made an explicit assurance that the I-9 charge was dismissed and that the court would "not … make any findings based upon [the I-9 form]." JA 150. Based on that, Morales's counsel dropped his objection to admission of the I-9 form.[1] JA 151 ("No objection to No. 1, Judge.").

IRCA says nothing about tax withholding forms. Nor are they mentioned in the "Lists of Acceptable Documents" on the I-9 form itself. *See* https://www.uscis.gov/i-9. That stands to reason because tax withholding forms do not demonstrate work authorization any more than an I-9 form directs tax withholdings. Rather, tax forms are submitted to the employer "to cause the withholding from wages of the approximate amount of taxes" an employee will owe. *Graske v. C.I.R.*, 20 T.C. 418, 420 (1953); *see also* https://www.irs.gov/pub/irs-pdf/fw4.pdf (stating W-4 purpose); https://www.ksrevenue.org/pdf/k-4.pdf (same for K-4). The divergent histories of the W-4 and I-9

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[1] Neither the I-9 Form submitted by any of the Respondents nor any information supposedly appended thereto appears in the record on appeal. Having not previously argued this admission was error in the Kansas appellate courts or in their Brief in Opposition, Respondents' argument should be deemed waived. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1491 n. 1 (2019); *Carcieri v. Salazar*, 555 U.S. 379, 395-96 (2009); S. Ct. R. 15.2. But even if the admission of Morales' I-9 was error, it was either harmless, *see*, *e.g.*, *Chapman v. California*, 386 U.S. 18, 24 (1967), since the Court made no findings based upon it or, at most, would entitle Morales—but not Garcia or Ochoa-Lara—to a re-trial.

confirm their "different and independent purposes." Pet. App. 40 (Biles, J, dissenting). Since at least 1950, *see Little v. Smith*, 267 S.W.2d 511, 512 (Ark. 1954), the W-4 form has been used by the Internal Revenue Service to implement the income tax withholding requirements imposed by Congress in 1942 and 1943. *See Rowan Companies, Inc. v. United States*, 452 U.S. 247, 255 (1981). By contrast, the I-9 form was created by the Attorney General and is distributed by the Department of Homeland Security for employers to verify employees' authorization to work in the United States as required in 1986 by IRCA. *Whiting*, 563 U.S. at 588-89; *see also generally Hines v. Davidowitz*, 312 U.S. 52, 81 (1941) (Stone, J., dissenting) ("revenue laws" do not "preclude or even interfere with compliance" with immigration laws).[2]

3. The State has correctly explained that Respondents were not convicted for "using fraudulent information to demonstrate authorization to work in the United States." *Contra* Resp. Br. 21-22. That Respondents submitted tax withholding forms to obtain

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[2] Respondents need not be "stunned" that the State argued successfully in the Kansas Court of Appeals that Garcia's specific identity theft conviction rests on unitary conduct and here that Respondents' "multiple fabrications" on the W-4, K-4 and I-9 are more generally "akin to" three "separate criminal offenses." Resp. Br. 18, 25, 27. Both are so. Morales, for example, was convicted of one count of identity theft for using a stolen social security number (using only the W-4 and K-4 as evidence) and also of two separate counts of making false information, one each for the separate W-4 and K-4 falsehoods. That the State charged Garcia with only one count of identity theft says nothing about *other* charges he or others *could* have faced.

the benefit of employment, Resp. Br. 22-25, does not transform tax forms into part of the I-9 verification system. If it did, then the *federal* government could not prosecute a job applicant for the crime of falsifying a W-4 submitted at hiring because that crime, *see* 26 U.S.C. § 7205(a), is not one of the exceptions to the use prohibition in 8 U.S.C. § 1324a(b)(5) (allowing use only to enforce "this chapter and sections 1001, 1028, 1546, and 1621 of title 18"). Respondents' erroneous reading, not the State's, would render nugatory a provision of federal law (Section 7205).[3]

The State's prosecution theory that Respondents committed identity theft to obtain the benefit of employment does not implicate the I-9 verification system. *See* Resp. Br. 22-29. Respondents were successfully prosecuted for identity theft on tax documents submitted as part of the hiring process more generally, not for identity theft on the I-9 verification system. What matters for preemption is what

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[3] Respondents now complain that Kansas may not prosecute fraud committed on the W-4, asserting state prosecutions for W-4 fraud "[m]ust be wrong" but point to no support for that in IRCA. Resp. Br. 56-57. This Court does not find preemption based on "supposition (or wish) that 'it must be in there somewhere.'" *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (opinion of Gorsuch, J.). Respondents' suggestion that the existence of a separate federal statute criminalizing W-4 fraud means "Kansas may not prosecute this crime," Resp. Br. 57, is wrong and disregards the nature of our federal system, *see Gamble v. United States*, 139 S. Ct. 1960 (2019). In any event, whether any federal statute other than IRCA might preempt state prosecutions for fraud on the W-4 was not argued previously, falls outside the questions presented, and should not now be considered. *Glover v. United States*, 531 U.S. 198, 205 (2001); S. Ct. Rule 14.1(a); 15.2.

Respondents were actually convicted of—false statements on the tax withholding forms—and whether the State impermissibly used the I-9 verification system to obtain those convictions. It did not.

IRCA only restricts the use of information employees submit "to indicate their work status," *Arizona v. United States*, 567 U.S. 387, 405 (2012), but neither 8 U.S.C. § 1324a(b)(5) nor IRCA more broadly prevents state prosecution for *other* fraud that may occur during the hiring process. *See*, *e.g.*, *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2017 WL 1133012, at *8 (D. Ariz. 2017) (recognizing some documents serve a "purpose independent of the federal employment verification system" even if they are "part of a typical employment application"). That is what occurred here. The Iowa Supreme Court's decision, which involved state prosecution based on information supplied as part of the I-9 verification process, is not to the contrary. *State v. Martinez*, 896 N.W.2d 737, 741 (Iowa 2017) (fictitious driver's license and social security card submitted "as I-9 paperwork"); *id.* at 766-67 (Mansfield, J., dissenting).

Nor has the federal government, despite Respondents' assertions, previously (or currently) advanced a contrary position. *Contra* Resp. Br. 2, 31, 40, 48, 51, 54, 55 (citing the Government's amicus brief in *Puente Arizona*, 821 F.3d 1098 (9th Cir. 2016)). Rather, the federal government has consistently distinguished between prosecution of fraud in the I-9 verification system, which is preempted, *see* Gov't C.A. Br. *Puente Arizona* 13, and fraud in other employment documents, which is not, *see id.* at 23. *Accord* Gov't

Merit Stage Amicus Br. 14-15; Gov't Pet. Stage Amicus Br. 10.

At bottom, Respondents' entire argument is that States are preempted from prosecuting fraud on any document submitted as part of the hiring process whether or not part of the I-9 verification system. That contention finds no support in Section 1324a(b) or elsewhere in IRCA.

II. Section 1324a(b)(5) does not expressly preempt the State's prosecutions of Respondents.

Respondents offer no defense of the "effective express preemption" holding below, Pet. App. 27, and wisely so since "a provision that 'effectively' preempts state law only impliedly preempts state law." Pet. App. 30 (Luckert, J., concurring). Instead, Respondents advance their own interpretation of § 1324a(b)(5) and two other statutory provisions. Resp. Br. 32-38. But these provisions do not expressly preempt Respondents' prosecutions.

1. Respondents fail to identify any text in Section 1324a(b)(5) that precludes using information obtained outside the I-9 verification system to prosecute identity theft. *See* Resp. Br. 32-33. Nor can they. The ordinary meaning of the text prohibits using the *form* and its contents and appended documents that together constitute the I-9 verification system—nothing more. *See* Pet'r. Br. 26; Amicus Br. of Indiana *et. al* 12-16 (describing the ordinary usage as prohibiting use of the I-9 as the sole source of the information); Amicus Br. of United States 14-16 (explaining that ordinary usage

undermines Respondents' argument). This limited preemptive scope of Section 1324a(b)(5) is the only one faithful to the text of the statute. *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011).

Contrary to Respondents' urging, the State's interpretation of Section 1324a(b)(5) ignores no word or phrase in the statute. Resp. Br. 36-37. That section preempts a state prosecution based upon the "form," and "any information contained in or appended to such form." Thus, States are expressly preempted from using the "I-9 form or its supporting documentation *themselves*," *Whiting*, 563 U.S. at 603 n.9, which necessarily precludes state prosecution of state-law crimes committed within the I-9 verification system. But that does not preclude prosecuting crimes involving *identical* fraud *outside* the system, including elsewhere in the hiring process, Pet'r Br. 26, "merely because they are also used to support the federal employment verification application." Pet. App. 43. Under the State's reading, each word and phrase does significant work, Pet'r Br. 27-29, and contrary to Respondents' suggestion, Resp. Br. 38-39, the preemption provisions significantly constrain state actions—but only within the I-9 verification system.

Two other provisions invoked by Respondents are not to the contrary. Resp. Br. 34-36. Read in its statutory context, 8 U.S.C. § 1324a(d)(2)(F) merely limits the authority of the President to "change" the employment verification system Congress established, and the restriction on "use[] for law enforcement purposes" is limited to the "employment verification system established under subjection (b)," 8 U.S.C.

§ 1324a(d)(B)— which is the I-9 system. And 18 U.S.C. § 1546, which by its express term does "not prohibit" any "investigative … activity of a law enforcement agency of … a State," when read in connection with 8 U.S.C. § 1324a(d)(2)(F) merely allows the federal government to use the I-9 verification system in the prosecution of certain frauds. Neither provision either says or implies anything about current authority of states to prosecute identity theft or false writings without using documents from the I-9 verification system.[4]

2. Respondents' suggestion that Congress must "authorize" or "permit" these prosecutions, Resp. Br. 35, reveals their misapprehension of preemption analysis. "[P]rotection against fraud" is among "the oldest [powers] within the ambit of the police power" of the States. *California v. Zook*, 336 U.S. 725, 734 (1949). Kansas needs no congressional permission to prosecute these cases.

3. Respondents argue the Kansas statutes under which they are convicted are preempted as applied to them. Pet. App. 8-9; Resp. Br. 30-32. But behind that "as applied" label, Respondents circle back to their same argument that these prosecutions invade "the federal employment verification system"—a phrase apparently derived from the title of Section 1324a(b),

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[4] Contrary to Respondents' arguments, *see* Resp. Br. 29-30, Kansas has not prosecuted Respondents for failing to pay taxes but for "using some else's Social Security number in completing his federal W-4 and K-4 tax forms," Pet. App. 38-39 (Biles, J, dissenting). Identity crime, not tax evasion, is the serious harm these prosecutions address. Pet. 33-36.

which Respondents acknowledge cannot "take the place … of the text." Resp. Br. 34 n.10. In fact, if Respondents were correct—and they are not—that "any information contained in or appended to such form" extends to documents outside the I-9 verification system, then nothing remains in the statute's text to limit preemption to the hiring process. Either the text allows states their traditional authority to prosecute crimes in the hiring process except within the I-9 verification system, *see* Gov't C.A. Br. *Puente Arizona* 9-10, 23; *see also* https://www.washingtonpost.com/nation/2019/08/21/florida-murder-job-application-fingerprints/ (fingerprints submitted with job application lead to murder conviction), or IRCA's express preemption is so sweeping it "wipe[s] numerous criminal laws off the books." Pet. App. 45 (Stegall, J, dissenting); Pet'r Br. 29-32. The federal government has consistently rejected Respondents' express preemption argument, conceding that § 1324a(b)(5) does "not preclude a State from relying on the same information taken from another source." Gov't C.A. Br. *Puente Arizona* 14. After all, "IRCA's document use limitation is only violated when [state] identity theft laws are applied *in ways that rely on the Form I-9 and attached documents*," *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1108 (9th Cir. 2016) (emphasis added).

Respondents' novel theory, embraced by the Kansas Supreme Court, seems to be that *any information* once placed in the I-9 verification system is somehow tainted and may *never again* be used by the State in relation to the hiring process even when taken from another source. *See* Resp. Br. 32-33; JA 30, 32 (seeking to suppress Garcia's W-4 because false information on I-9

is "also transferred" to W-4); Pet. App. 28 ("The fact that this information was included in the W-4 and K-4 did not alter the fact that it was also part of the I-9."); Pet. App. 39-40 (Biles, J, dissenting). But there is *no* indication Congress intended to immunize job applicants from liability for fraud committed *outside* the I-9 verification system, even as part of the hiring process, merely because of coexisting fraud *within* the system. Respondents' interpretation finds no basis in the statute's text and is contrary to how Congress typically uses the phrase "information contained in." Pet'r Br. 24-26. Although Respondents now disavow the absurd results that flow from their interpretation, Resp. Br. 39-40, including creating preferential treatment for unauthorized aliens, Gov't Merit Stage Amicus Br. 26, Morales previously *invited* the same results. JA 134 ("prosecutors may be precluded *in general* from charging undocumented workers" (emphasis added)). Respondents cannot escape the logical results of their "sweeping" interpretation, Pet. App. 39 (Biles, J, dissenting); Pet'r. Br. 29-32; Pet. App. 46 (Stegall, J, dissenting), and this Court should reject it. *See Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019) (rejecting interpretation leading to "absurd results that the provision cannot have been meant to produce").

III. Through IRCA, Congress has not occupied any field that impliedly preempts these prosecutions.

Field preemption analysis must start with defining the field because only then can it be determined whether a state's exercise of its police powers intrudes upon an area of exclusive federal control. *See generally Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015); *see also Hines v. Davidowitz*, 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting). A preempted field may extend only so far as is supported by the clear and manifest purpose of Congress given the text and context of the federal law. *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993). Respondents have struggled to articulate what field they think Congress has occupied, positing along the way at least five different proposed fields specifically involving "aliens," JA 132, 198, Br. in Opp. 21-23, which would have produced the absurd result of allowing states to prosecute citizens but preempted prosecutions of aliens for the same misconduct, Pet. Br. 49-50; Gov't Merit Stage Amicus Br. 21. Respondents now abandon those propositions in favor of preemption within a "field relating to the federal employment verification system," a formulation derived not from statutory text but from statements of *executive branch officials* during

congressional testimony. Resp. Br. 42-43. No such field exists.[5]

1. Respondents attempt to add the phrase "relating to" the employment verification system even though those words are conspicuously absent from the statute. Resp. Br. 42. That phrase—when present—connotes a broad field Congress is occupying. *See*, *e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (2004) (recognizing the broad sweep afforded the term "relating to"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987) (noting expansive and broad meaning of the phrase "relate to" when used in ERISA). This Court should reject Respondents' invitation to read into the statute a material phrase Congress omitted.

Instead, any occupied field is no "broader than the statute's express language," *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 547 (1992) (Scalia, J., concurring in

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[5] Because defining crimes and protecting against fraud are among the oldest police powers of a state, *see California v. Zook*, 336 U.S. 725, 734 (1949); *see generally United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995), this Court should analyze this case with a presumption against implied preemption. In "all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [this Court] start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal citations and quotations omitted). Respondents' contrary position (at 40 n. 13) lacks merit. *See Wyeth*, 555 U.S. at 565 & n.3; *see also Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016) (applying presumption because identity theft laws, despite effects related to immigration, "regulate in an area of historic state power").

part and dissenting in part), and, at most, only narrowly traces the textual contours of the I-9 verification system established by § 1324a(b)(1)-(3), and the use-preemption in § 1324a(b)(5). "Implicit 'field preemption' will not do." *Arizona v. United States*, 567 U.S. 387, 423 (2012) (Scalia, J., concurring in part and dissenting in part); *see generally* Pet'r Br. 40-41 (existence of express preemptive language suggests Congress did not intend to occupy a broad field). Under this textually supported view, states may be field preempted from using documents submitted to employers to satisfy I-9 requirements even if not physically "appended to" the I-9. *See* § 1324a(b)(5). But even so, states could use documents submitted to an employer for a "purpose independent of the federal employment verification system" even if "part of a typical employment application." *Puente Arizona v. Arpaio*, 2017 WL 1133012, at *6-8. For example, submitting a fraudulent state identification card for the I-9 verification system does not immunize that fraud from state prosecution when discovered elsewhere. *See State v. Reynua*, 807 N.W.2d 473, 480-481 (Minn. Ct. App. 2011). By contrast, Respondents' sweeping field would preclude Kansas from prosecuting fraud on its *own state tax form*, the K-4.

Express, field, and conflict analyses are not "rigidly distinct," *English v. General Elec. Co.*, 496 U.S. 72, 80 & n.5 (1990), because ultimately they "work in the same way." *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018). Section 1324a(b)(5)'s prohibition on "use" of the I-9 verification system, rather than terms with broader preemptive effect, *see CSX Transp., Inc.*, 507 U.S. at 664-65

(discussing preemptive effective of various statutory terms), reveals at most federal occupation of a narrow field closely surrounding the I-9 verification system itself. After all, the statute's plain wording "contains the best evidence of Congress' preemptive intent." *Whiting*, 563 U.S. at 594.

No case Respondents identify supports more than such a narrow field. Resp. Br. 43-46. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, which is not a Supremacy Clause case, did not address the preemptive scope of IRCA, *see* 535 U.S. 137, 151 (2002), and "this Court is bound by holdings, not language," *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). *Arizona* held that conflict preemption prevented enforcement of a state law that sought to penalize unauthorized aliens who seek employment, *see* 567 U.S. at 406, but the Kansas statutes in this case do "not make it illegal to attempt to secure employment as an unauthorized alien" and Respondents' "immigration status[es] [were] not relevant to whether this conduct was unlawful." Pet. App. 38-39 (Biles, J, dissenting). And *Hines*, decided more than three decades before IRCA, merely recognized that then-existing federal law established the exclusively federal scheme for alien registration. 312 U.S. at. 73-74. None of these cases suggests a preempted field in the employment context that extends beyond the I-9 verification system. *See also Whiting*, 563 U.S. 606 (referring to "the I-9 system"); *id.* at 603 n.9 (use restriction limited to "I-9 form or its supporting documents *themselves"* (emphasis added)); *id.* at 636 (Sotomayor, J., dissenting) (describing § 1324a(b)(5) as prohibiting use "of the I-9 form" for other purposes).

Kansas law does not regulate alien registration, and Respondents' attempt to bootstrap this case into the federally occupied field of alien registration is meritless. *See* Resp. Br. 44-47. Congress has "occupied the field of alien registration." *Arizona*, 567 U.S. at 401. But an alien registration system operates "to keep track of aliens within the Nation's borders," by imposing statutory duties on *aliens* to register, carry proof of registration, in some cases be fingerprinted, report changes of address, and imposing penalties on aliens for violating the law. *Arizona*, 567 U.S. at 400-01. By contrast, IRCA imposes duties on *employers* to verify that its employee is "not an unauthorized alien by examining" the I-9 "form . . . and any information contained in or appended to such form . . . ," 8 U.S.C. § 1324a(b)(5), and on *all individuals* who apply for a job, citizens and aliens alike, 8 U.S.C. § 1324a(b)(2). The two provisions do not operate "in just the same way." Resp. Br. 46. The former applies only to aliens whether or not seeking employment; the latter applies to employers and job applicants regardless of citizenship or immigration status.

2. Even accepting Respondents' broad field, these prosecutions do not fall within it. Pet'r. Br. 41-43; *cf. Cipollone*, 505 U.S. at 526-27 (opinion of Stevens, J.) (even broad field preempted by federal advertising law did not preempt state-law warranty claim based on representation in an advertisement). Respondents' convictions were for identity theft on W-4 and K-4 tax withholding forms, which are not "information employees submit to indicate their work status." *Arizona*, 567 U.S. 387 (2012) (citing 8 U.S.C. § 1324a(b)(5), (d)(2)(F)-(G)); *see also* Part I, *supra.*

These forms are not mentioned in Sections 1324a(a) or (b),[6] which IRCA's heading describes as the "employment verification system," nor in the "Lists of Acceptable Documents" the I-9 form requires as evidence of authorization to work in the United States.

It matters not that the State's theory of identity theft relied on the "benefit" of obtaining employment, Resp. Br. 22-25, an issue not present in Morales's false information convictions. No preempted field is "determinable by the nature of the 'benefit' that the State asserts." Resp. Br. 31. Placing stolen social security numbers on federal or state tax withholding forms, regardless of context or motive, is not a method to "indicate … work status," *Arizona*, 567 U.S. at 387, and thus does not implicate Respondents' proposed field "relating to the federal employment verification system." Respondents cannot escape that they were convicted for "conduct [that] was independent of the federal employment verification system." Pet. App. 39 (Biles, J, dissenting).

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[6] Congress prohibited use of the singular "*form* designated or established by the Attorney General under this subsection" not the plural "forms" to include *other* forms, like the W-4 or K-4, completed during the hiring process.

IV. These prosecutions do not conflict with federal law and pose no obstacle to any federal interest.

No "freewheeling judicial inquiry" into whether the Kansas laws here are in tension with federal objectives is appropriate. *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (opinion of Roberts, C.J.) (internal citations and quotation marks omitted). Rather, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Id*. That threshold was not met here.

Respondents do not argue that it is impossible to comply with both federal and state law. Pet'r. Br. 44. Thus, the only question is whether these prosecutions are an obstacle that frustrates a federal purpose. The United States confirms they are not, *see generally* Gov't Merit Stage Amicus Br., as does the federal-state cooperation in these cases. Pet'r. Br. 10-13, 32-35. The employment verification system in IRCA is "designed to deny employment to [certain] aliens." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002). By contrast, the purpose of the Kansas identity theft statute "is to criminalize theft of another person's personal identifying information," Pet. App. 55, while the false information statute combats "[]fraud, obstruct[ing] detection of a theft or felony offense or [falsely] induc[ing] official action," Kan. Stat. Ann. § 21-3711. The state statutes "apply to any person, regardless of immigration status, and they apply in any situation— not just the employment authorization verification process." Pet. App. 43 (Biles, J, dissenting). These prosecutions frustrate no federal purpose. In

interpreting IRCA, this Court has distinguished cases in which state actions "directly interfered with the operation of the federal program" and upheld state regulations so long as the federal "program operates unimpeded by the state law." *Whiting*, 563 U.S. at 604-05 (opinion of Roberts, C.J.). The latter occurred here.

1. Kansas is not attempting to enforce federal law or regulate immigration, nor is that the effect of these prosecutions. IRCA does not punish fraud on a W-4; Congress created a *separate* statute for that. *See* 26 U.S.C. § 7205. And IRCA certainly does not punish fraud on the state tax withholding form. Respondents' assertion that Kansas penalized the "same conduct" as IRCA is wrong. Resp. Br. 49.

Contrary to Respondents' suggestion, Resp. Br. 51 & n.17, the federal government has consistently recognized that state prosecutions like these do not interfere with any federal prerogative, *see* Gov't C.A. Br. *Puente Arizona* 13, 23, instead noting that state prosecutions for identity theft in the employment context "may address important issues properly within the reach of the State's police power." Gov't C.A. Br. *Puente Arizona* 23. Only when states intrude in areas "already addressed by federal immigration law" might concerns arise. *Id*. at 19-21. But IRCA does not address state or federal tax withholding.

For this reason, Respondents' concern about prosecutorial discretion, *see* Resp. Br. 49-50, is illusory.[7] Kansas is not claiming prosecutorial authority over the I-9 verification system. Respondents' invocation of *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341 (2001), and *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986), are inapposite because Kansas is punishing Respondents for "[a]cquiring someone's personal identifying information in an effort to impersonate them or commit various criminal acts in that person's name," *State v. Meza*, 165 P.3d 298, 393 (Kan. Ct. App. 2007) (quoting legislative testimony supporting state identity theft statute), not for defrauding the federal government. Federal discretion to prosecute I-9 fraud "operates unimpeded by state law." *Whiting*, 563 U.S. at 605 (opinion of Roberts, C.J.).

It is no answer to complain, though Respondents do, *see* Resp. Br. 16 & n.6, 50-52, that prosecution for unrelated state charges might make an individual less

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[7] Respondents complain that most identity theft prosecutions in Kansas originate in Johnson County. Resp. Br. 16 & n.6, 52. But that is unsurprising. Roughly one-fifth of the State's population is in Johnson County, the county is near federal agencies in the Kansas City area, and the local prosecutor's office in this wealthiest county in the State has a white-collar crime division, a rarity in Kansas. While it may be that those whose convictions create immigration concerns have a higher propensity to appeal, Resp. Br. 16, there is no evidence that prosecutorial decisions in Johnson County are based upon anything other than the criminal misuse of stolen personal identification information, *see* Pet. Reply 8-9; Pet. Br. 7. Indeed, that so few of the 1,200 prosecutions Respondents cite, Resp. Br. 16 n. 6, resulted in appeals suggests just the opposite.

likely to cooperate with federal investigations concerning the hiring of unauthorized aliens.[8] States may prosecute conduct the federal government does not and vice versa. *See Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019); *Heath v. Alabama*, 474 U.S. 82, 93 (1985). State prosecution of Respondents for their conduct outside the I-9 employment verification system impedes no federal interest.

2. As applied to these Respondents, Kansas's identity theft and making false information laws do not conflict with IRCA. The cooperative nature of state-federal identity theft investigations and prosecutions, Pet'r. Br. 36-38, belie Respondents' contention that state law is conflict preempted as applied in these cases, Resp. Br. 30-32. Respondents' convictions resulted from joint state-federal investigations, federal agents testified at trial, and the United States says these prosecutions are "plainly consistent with Congress's purposes and objectives." *See* Gov't Merit Stage Am. Brief 28-32. State prosecution of identity theft and false information crimes committed in the employment setting undermines no congressional objective in IRCA so long as the State does not base its prosecution on the I-9 verification system.

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[8] Respondents cite trial-court statements of Garcia's own counsel to claim Garcia cooperated with the federal government in its investigation of Garcia's prior employer. Resp. Br. 51 (referring to JA 50 and JA62). That is not probative. *See I.N.S. v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (recognizing that statements of counsel are not evidence). Even if it were, it appears that the State's prosecution of Garcia for identity theft did not impede whatever cooperation federal authorities may have sought because Garcia's other "case was dismissed." JA 62.

3. Respondents' citation to *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012), *see* Resp. Br. 55-56, bolsters the State's position. This Court recognized that every preemption case must consider what the state law in fact does, not how the litigant might choose to describe it. *See National Meat Ass'n*, 565 U.S. at 464. Unlike in *National Meat* or even *Arizona*, Kansas's identity theft and false writing statutes were not "legislate[d] with the purpose and effect of regulating a federally preempted field." *Virginia Uranium Inc. v. Warren*, 139 S. Ct. 1894, 1920 (2019) (Roberts, C.J., dissenting). They neither regulate upstream or downstream from areas of exclusive federal control such as alien registration nor regulate "the same thing" as IRCA. *National Meat Ass'n*, 565 U.S. at 467. These state statutes merely punish fraudulent use of personal identification information and apply, without regard to immigration status or authorization to work, to citizens and aliens alike. They were applied to Respondents' conduct without using the I-9 verification system. There is no federal preemption of this use of the State's historic police powers to prosecute these identity thefts and related frauds.

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted,

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