APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 112,502

[Filed September 8, 2017]

STATE OF KANSAS, *Appellee,*	)
v.	)
RAMIRO GARCIA, *Appellant.*	)

SYLLABUS BY THE COURT

Defendant's prosecution for identity theft for using another person's Social Security number to obtain employment is expressly preempted by the federal Immigration Reform and Control Act of 1986.

Review of the judgment of the Court of Appeals in an unpublished opinion filed January 29, 2016. Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed September 8, 2017. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, argued the cause, and *Evan Freeman*,

legal intern, of the same office, was with him on the brief for appellant.

Jacob M. Gontesky, assistant district attorney, argued the cause, and *Steven J. Obermeier*, senior deputy district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

BEIER, J.: This companion case to *State v. Morales*, 306 Kan. __, __ P.3d __ (No. 111,904, this day decided), and *State v. Ochoa-Lara*, 306 Kan. __, __ P.3d __ (No. 112,322, this day decided), involves defendant Ramiro Garcia's conviction on one count of identity theft.

The State's basis for the charge was Garcia's use of the Social Security number of Felisha Munguia to obtain restaurant employment. A Court of Appeals panel affirmed Garcia's conviction in an unpublished opinion. See *State v. Garcia*, No. 112,502, 2016 WL 368054 (Kan. App. 2016).

We granted Garcia's petition for review on three issues: (1) whether there was sufficient evidence that Garcia acted with an "intent to defraud," an element of identity theft; (2) whether the federal Immigration Reform and Control Act of 1986 (IRCA) preempted the prosecution; and (3) whether it was clearly erroneous for the district court judge not to give a unanimity instruction. Because we decide that Garcia's conviction must be reversed because the State's prosecution based on the Social Security number was expressly preempted, we do not reach Garcia's two other issues.

FACTUAL AND PROCEDURAL HISTORY

On August 26, 2012, Officer Mike Gibson pulled Garcia over for speeding. Gibson asked Garcia where he was going in such a hurry. Garcia replied that he was on his way to work at Bonefish Grill. Based on the results of a routine records check on Garcia, Gibson contacted Detective Justin Russell, who worked in the financial crimes department of the Overland Park Police Department. Russell was in the neighborhood and came to the scene to speak with Garcia.

The day after speaking with Garcia, Russell contacted Bonefish Grill and obtained Garcia's "[e]mployment application documents, possibly the W-2, the I-9 documents." Russell then spoke with Special Agent Joseph Espinosa of the Social Security Office of the Inspector General. Espinosa told Russell that the Social Security number Garcia had used on the forms belonged to Felisha Munguia of Edinburg, Texas.

As a result of the investigation, Garcia was charged with one count of identity theft. The complaint alleged:

> "That on or about the 25th day of May, 2012, in the City of Overland Park, County of Johnson, and State of Kansas, RAMIRO ENRIQUEZ GARCIA did then and there unlawfully, willfully, and feloniously obtain, possess, transfer, use, sell or purchase any personal identifying information, or document containing the same, to wit: [S]ocial [S]ecurity number belonging to or issued to another person, to wit: Felisha Munguia, with the intent to defraud that person, or anyone else, in order to receive any benefit, a severity level 8, nonperson felony, in

violation of K.S.A. 21-6107, K.S.A. 21-6804 and K.S.A. 21-6807. (identity theft)"

Before trial, Garcia filed a motion to suppress the I-9 form he had filled out during the hiring process, relying on an express preemption provision in IRCA. At the hearing on the motion, Garcia noted, and the State agreed, that the State did not intend to rely on the I-9 as a basis of prosecution. Garcia then argued that, because the information contained on the I-9 was transferred to a W-4 form, the W-4 should be suppressed as well. The district judge refused to suppress the W-4.

At trial, Khalil Booshehri, a manager at Bonefish Grill, testified that Garcia had been a line cook for the restaurant and had been a good employee. Booshehri testified that Garcia was paid for his work as a line cook, was allowed to eat while on duty, and was eligible for overtime pay.

Jason Gajan, a managing partner at Bonefish Grill, testified about the restaurant's hiring process. The process typically begins with a short, informal interview when a person comes in looking for an application. If the manager determines that the person meets the restaurant's basic requirements, he or she is given a card with instructions explaining how to fill out an online application.

With respect to Garcia's hiring specifically, the State introduced his employment application into evidence. The application contained basic information about Garcia's work history and education. The application did not disclose a Social Security number, although it contained a statement by Garcia that, if

hired, he could verify his identity and legal right to work in the United States.

After receiving Garcia's application, Bonefish Grill decided to hire Garcia.

Once a hiring decision has been made, the restaurant sends an e-mail to the new hire with a packet of information, including documents to fill out. Gajan believed that in addition to the information packet, new hires also received W-4 and I-9 forms.

Garcia filled out electronic W-4 and K-4 tax forms, both of which were admitted into evidence. Each of the forms contained a Social Security number and was digitally signed by Garcia. Gajan testified that, in addition to the employee filling out the forms, Gajan would have had to see a paper Social Security card and then manually input the number from the card into an electronic document. After verifying the documents, Gajan would also have digitally signed the document himself. According to Gajan, he could not have proceeded with the hiring process if Garcia had not filled out the required forms.

Gajan also testified about the benefits Bonefish Grill offered to employees and the benefits Garcia received. According to Gajan, Garcia was paid for the hours he worked at Bonefish Grill, including overtime pay on occasion. During his shifts, Garcia was allowed to eat at the restaurant. In addition, Bonefish Grill offered employees health and dental insurance, as well as paid vacation; but Gajan conceded that Garcia had not worked at Bonefish Grill long enough to receive these benefits. Gajan believed that Garcia would have

received workers compensation benefits had he been injured on the job.

The State's final witness was Espinosa. He testified that he had searched the "Social Security Master File Database" and determined that the Social Security number Garcia had used was not assigned to Garcia. The number was assigned to Felisha Mari Munguia, who was born in 1996. The database showed that Munguia had been issued a second Social Security card in 2000. Espinosa also provided examples of hypothetical consequences that might be caused by a person using someone else's Social Security number. In a "case specifically like this," if a person were to

> "come and work under your [S]ocial [S]ecurity number, it would report back wages for you[,] presumably making you insured into federal government programs that you may have not otherwise been entitled to.
>
> "Conversely to that, let's say that you were receiving some disability or retirement benefits from one of these government programs. These earnings could adversely affect you, because it would indicate that you are working when in fact you might not be working, and you could be terminated from those benefits."

During cross-examination, Espinosa testified that he had never spoken to Munguia.

In closing argument, the prosecutor acknowledged that Garcia was "a hard worker" and "did well at his job." He conceded that "Mr. Booshehri did everything but tell you he was a very valuable employee. Mr. Gajan had nothing bad to say about him. He worked

hard for Bonefish." But, according to the State, those facts did not matter because "in the State of Kansas, you cannot work under someone else's [S]ocial [S]ecurity number." The prosecutor also noted that Gajan "would not have hired [Garcia] if he did not have a [S]ocial [S]ecurity number."

After deliberations, the jury found Garcia guilty of identity theft. The district judge later sentenced Garcia to 7 months in prison but granted 18 months' probation.

This appeal followed.

DISCUSSION

Garcia challenges his conviction because, in his view, this identity theft prosecution against him was preempted by IRCA.

All preemption arguments, including the as-applied one advanced by Garcia in this case, are based upon the Supremacy Clause of the United States Constitution. The Supremacy Clause gives Congress the power to preempt state law. *Arizona v. United States*, 567 U.S. 387, 398-99, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012). When evaluating whether a state law is preempted, "'[t]he purpose of Congress is the ultimate touchstone.' *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 223, 11 L. Ed. 2d 179 (1963)." *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S. Ct. 1185, 55 L. Ed. 2d 443 (1978).

Before focusing on the use of the Kansas identity theft statute challenged here, it is helpful to review the general law of preemption under the precedents of the United States Supreme Court and this court.

When all types, categories, and subcategories of preemption claims are considered, we discern eight possible ways a party may challenge an application of state law, alleging it is preempted by federal law.

First, there are traditionally two basic types of such challenges: facial and as-applied. When a party raises a facial challenge to application of state law, he or she claims that the law is preempted in all or virtually all cases. See *California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572, 588-89, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987) (explaining concept of facial preemption).

In contrast, when a party raises an as-applied preemption challenge, he or she argues that state law may be constitutional when applied in some cases but not in the particular circumstances of his or her case. See *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 907 (10th Cir. 2016), *petition for cert. filed* June 5, 2017. In an as-applied challenge, the law under scrutiny can itself be "textually neutral," meaning "one [cannot] tell that the" law undermines federal policy "by looking at the text [alone]. Only when studying certain applications of the laws" do conflicts arise. *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1105 (9th Cir. 2016) (defining contours of as-applied challenge); see also 16 C.J.S., Constitutional Law § 243 ("An 'as applied' challenge is a claim that the operation of a statute is unconstitutional in a particular case while a facial challenge indicates that the statute may rarely or never be constitutionally applied.").

All of this said, "facial" and "as-applied" labels "parties attach to claims are not determinative" of the analysis a court will ultimately employ in a preemption case. See *Supreme Court of New Mexico*, 839 F.3d at

914. And the boundary between the two types of challenges is not impenetrable. Still, as with other types of cases alleging that a law is unconstitutional, "[t]he distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 331, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (considering regulation of corporate political speech). Garcia challenges the use of law of general application to himself alone, *i.e.*, advances an as-applied claim. The State does not challenge his characterization. The relief provided in this case will flow solely to Garcia. The fact that the holding in his favor may have wider application, *Morales*, 306 Kan. __, and *Ochoa-Lara*, 306 Kan. __, does not mean his preemption argument should be labeled "facial."

Regardless of whether a particular challenge qualifies as facial or as-applied, any preemption claim also fits one of two other categories: express and implied.

Express preemption depends upon the words used by Congress, which may explicitly limit a state's ability to legislate or apply its own constitutional or common law. "There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Arizona*, 567 U.S. at 399; see also *Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.*, 569 U.S. __, 133 S. Ct. 2096, 186 L. Ed. 2d 177 (2013) (facial, express challenge: certain provisions of concession agreements in clean air action plan expressly preempted by Federal Aviation Administration Authorization Act, which

preempts a state "law, regulation, or other provision having the force and effect of law"); *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. __, 136 S. Ct. 936, 194 L. Ed. 2d 20 (2016) (as-applied, express challenge: Employee Retirement Income Security Act [ERISA] preempts Vermont statute establishing health care database for use in Vermont, by Vermont residents); *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 295, 255 P.3d 1186 (2011) (facial, express challenge: explicit statutory language from Congress compared to Kansas Recreational Trails Act).

Implied preemption arises when a federal statute's "structure and purpose" demonstrate that state law can have no application. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008).

Implied preemption is further analytically divided into two subcategories: field and conflict.

A field preemption claim involves circumstances in which Congress has legislated so comprehensively on a subject that it has foreclosed any state regulation in that area. *Arizona*, 567 U.S. at 401. "Where Congress occupies an entire field, . . . even complementary state regulation is impermissible." *Arizona*, 567 U.S. at 401 (facial, field challenge: IRCA fully occupies field of alien registration, thus preempting Arizona law requiring alien registration); *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. __, 135 S. Ct. 1591, 191 L. Ed. 2d 511 (2015) (as-applied, field challenge: Natural Gas Act does not preempt state antitrust law as applied to federally regulated wholesale natural-gas prices).

Conflict preemption involves just that—conflict between federal law and state law. A conflict preemption claim can arise in one of two situations, which have been labeled "impossibility" and "obstacle."

Conflict-impossibility preemption arises in circumstances in which compliance with both federal and state law is, practically speaking, impossible. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. __, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013) (as-applied, conflict-impossibility challenge: federal Food, Drug, and Cosmetic Act preempted state-law design-defect claim turning on adequacy of generic drug's warning; federal law precludes generic drug manufacturer from altering required warning).

Conflict-obstacle preemption involves circumstances in which application of state law erects an obstacle to achievement of Congress' objectives. *California v. ARC America Corp.*, 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989) (facial, conflict-obstacle challenge: Alabama, Arizona, California, Minnesota antitrust laws compared to federal provisions); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (facial, conflict-obstacle challenge: Massachusetts law barring companies from doing business with Burma presents obstacle to federal Foreign Commerce Clause); *Supreme Court of New Mexico*, 839 F.3d at 928 (conflict-obstacle challenge with facial and as-applied features: New Mexico rule governing professional conduct of federal prosecutors conflicts with federal law on grand jury subpoena practices; rule imposes "far more onerous conditions" than federal law).

As we turn to evaluating the applicability of these preemption concepts in this case, we first address two preliminary matters: preservation of the preemption issue and the potential applicability of a presumption against preemption.

Preservation of Preemption Issue

As stated above, a party's label on his or her preemption challenge does not inevitably control the analysis a court can employ. See *Supreme Court of New Mexico*, 839 F.3d at 914-15 ("labels the parties attach to claims are not determinative"). Simply put, a court's analysis of a preemption challenge is not bound to color within any party's lines. See *Hillman v. Maretta*, 569 U.S. __, 133 S. Ct. 1943, 1954, 186 L. Ed. 2d 43 (2013) (presence of express preemption clause does not necessarily end court's preemption inquiry); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000) (express preemption provision does not bar ordinary working of conflict preemption principles); *Supreme Court of New Mexico*, 839 F.3d at 912, 914-915 (facial, as-applied preemption claims legal in nature; judicial estoppel doctrine does not apply to limit party to label first attached to challenge); see also *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. __, 136 S. Ct. 1288, 1301, 194 L. Ed. 2d 414 (2016) (Thomas, J., concurring in part and concurring in the judgment) (state law could have been preempted "based on the statute alone"; majority unnecessarily relies on principles of implied preemption). Compare *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (O'Connor, J., plurality) (state law impliedly preempted by Occupational Safety and

Health Act), with *Gade*, 505 U.S. at 109-14 (Kennedy, J., concurring in part and concurring in the judgment) (would have found state law expressly preempted). This approach to preemption challenge analysis is consistent with the more widely applicable practice of allowing a party who properly preserves a federal claim to make any appellate argument in support of that claim. See *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (considering federal takings case).

Here, Garcia's preemption issue was preserved in the district court through defense IRCA arguments in favor of suppression and a subsequent evidentiary objection. In his brief to the Court of Appeals, Garcia advanced express, field, and conflict-obstacle preemption challenges—all as-applied to Garcia only. The State responded in kind in its brief. In Garcia's petition for review to this court, he repeated his three-pronged approach to preemption. It was not until oral argument that his counsel, when pressed, concentrated his argument on as-applied, field preemption. Again, even after this limitation, we are free to consider any type, category, or subcategory of preemption supported by the appellate record and applicable law.

Potential Application of Presumption Against Preemption

The United States Supreme Court has sometimes recited that it presumes no preemption. See *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 627, 131 S. Ct. 2567, 180 L. Ed. 2d 580 (2011) (Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, JJ.) ("In the context of express [preemption], we read federal statutes whenever possible not to [preempt] state law."); *Altria*

Grp., Inc. v. Good, 555 U.S. 70, 77, 129 S. Ct. 538, 558, 172 L. Ed. 2d 398 (2008) (Stevens, J.) (when text of preemption clause susceptible to more than one plausible reading, courts ordinarily accept reading disfavoring preemption). And we have recited and applied such a presumption in some but not all of this court's earlier preemption cases. See *Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. at 301 (applying presumption to implied preemption analysis); *Continental Slip Form Builders, Inc. v. Local Union*, 195 Kan. 572, 573, 408 P.2d 620 (1965) (not applying presumption).

But the reality is that under United States Supreme Court precedent, the necessity of indulging such a presumption in an express preemption case is far from clear.

Three members of the current Court—Chief Justice John G. Roberts and Justices Clarence Thomas and Samuel A. Alito—and the now departed Justice Antonin G. Scalia have recognized that the Court has not consistently applied the presumption to express preemption cases and have said it should not be so applied. *Altria Grp., Inc.*, 555 U.S. at 102-03 (Thomas, J., dissenting, joined by Roberts, C.J., and Scalia and Alito, JJ.) (since 1992 decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 112, S. Ct. 2608, 120 L. Ed. 2d 407 [1992], presumption applied only intermittently in express preemption cases; Court should employ only ordinary rules of statutory construction in such cases). And the wording of opinions authored by Justice Anthony M. Kennedy betray at least some ambivalence about the merit of applying a presumption of Congressional intent when

Congress has already included express preemption language in a statute. See *CTS Corp. v. Waldburger*, 573 U.S. __, 134 S. Ct. 2175, 2189, 189 L. Ed. 2d 62 (2014) (Kennedy, J., writing for plurality including himself, Sotomayor and Kagan, JJ.) (application of presumption in analysis of express preemption clause to determine narrow interpretation "where plausible" proper); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. ___, 133 S. Ct. 2247, 2261, 186 L. Ed. 2d 239 (2013) (Kennedy, J., concurring in part and concurring in judgment) ("presumption" label avoided in favor of "principle"; "cautionary" principle ensures preemption "does not go beyond the strict requirements of the statutory command").

Indeed, careful review of a single case exposes the range of positions on application of the presumption in an express preemption case held by Court members. In that case, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 322, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008), the Court considered whether federal law preempted state-law claims of negligence, strict liability, and implied warranty in a case regarding the manufacture of a balloon catheter. Justice Scalia, writing for a majority including Chief Justice Roberts and Justices Kennedy, Souter, Thomas, Breyer, and Alito, interpreted an express preemption clause without applying the presumption and held that state law was preempted. See 552 U.S. at 322-30. Justice Stevens concurred in part and in the judgment; he would not have applied the presumption and agreed that the state law was preempted. See 552 U.S. at 330-32 (Stevens, J., concurring). Finally, Justice Ginsburg dissented. She would have applied the presumption and would have

held that the state law was not preempted. See 552 U.S. at 333-35 (Ginsburg, J., dissenting).

Lacking contrary clarity from the United States Supreme Court, we hold that it is unnecessary to apply a presumption against preemption when a court evaluates the merit of an express preemption claim, as long as the language of the congressional enactment at issue is clear. This makes logical and legal sense. There is simply no need to presume congressional intent when Congress has stated its intent explicitly. See *Kanza Rail-Trails Conservancy*, 292 Kan. at 296 ("'[*I*]*n the absence of express preemption in a federal law*, there is a strong presumption that Congress did not intend to displace state law.'" [Emphasis added.] [Quoting *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 975, 218 P.3d 400 (2009).]). We agree that

> "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' *Malone v. White Motor Corp.*, 435 U.S., at 505, 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.)." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (Stevens, J.).

This approach also has the considerable virtue of consistency with our modern rubric for statutory interpretation and construction in all other contexts. "The fundamental rule of statutory interpretation is that the intent of the legislature is dispositive if it is possible to ascertain that intent. *State v. Looney*, 299 Kan. 903, 906, 327 P.3d 425 (2014)." *Merryfield v. Sullivan*, 301 Kan. 397, 399, 343 P.3d 515 (2015) (considering provisions of Kansas Sexually Violent Predator Treatment Program). Our "primary consideration in ascertaining the intent of the legislature" is the language of a statute; we think "the best and only safe rule for determining the intent of the creators of a written law is to abide by the language that they have chosen to use." 301 Kan. at 399. This court does not move from interpretation of plain statutory language to the endeavor of statutory construction, including its reliance on extra-textual legislative history and canons of construction and other background considerations, unless the plain language of the legislature or Congress is ambiguous. See *City of Dodge City v. Webb*, 305 Kan. 351, 356, 381 P.3d 464 (2016) (state statute under consideration); *Sierra Club v. Moser*, 298 Kan. 22, 53-54, 310 P.3d 360 (2013) (federal statute under consideration).

Express Preemption

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 567 U.S. at 394. In line with that power, Congress enacted the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, which "established a 'comprehensive federal statutory scheme for regulation of immigration and

naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 587, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 353, 359, 96 S. Ct. 933, 47 L. Ed. 2d 43 [1976]).

In 1986, Congress supplemented the INA by enacting IRCA, which comprehensively regulates employment of aliens. See Pub. L. No. 99-603; *Arizona*, 567 U.S. at 404. According to a 1986 House Report, Congress sought "to close the back door on illegal immigration so that the front door on legal immigration may remain open," and it attempted to achieve this goal predominantly through employer sanctions. H.R. REP. 99-682, 46, 1986 U.S.C.C.A.N. 5649, 5650.

Section 101 of IRCA became 8 U.S.C. § 1324a. It provides in pertinent part that the employment of unauthorized aliens is unlawful. 8 U.S.C. § 1324a(a) (2012). It also establishes an employment verification system that requires employers to attest to their employee's immigration status. 8 U.S.C. § 1324a(b). Failure to comply with the requirements can result in civil penalties, and a pattern or practice of violations can result in both civil and criminal penalties against an employer. 8 U.S.C. § 1324a(e), (f).

In turn, 8 C.F.R. § 274a.2 was promulgated in 1987 by the Immigration and Naturalization Service, which was then part of the Department of Justice, to implement 8 U.S.C. § 1324a. The regulation provides for an employment verification system, and its § 274a.2 identifies Form I-9 as the form to be used by an employer when verifying such eligibility. The employer

must ensure that a potential employee completes the I-9, must examine the potential employee's identification and work authorization documents, must complete the employer portion of the I-9, and must sign an attestation. See also Pub. L. No. 99-603, § 101(a)(1). A Social Security card is one of the documents an employer may examine to establish employment eligibility. 8 C.F.R. § 274a.2(b)(1)(v)(C)(1) (2016).

Congress included an express preemption clause having to do with employers in IRCA. 8 U.S.C. § 1324a(h)(2). It also included the following language:

> "A form designated or established by the Attorney General under this subsection *and any information contained in* or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18." (Emphasis added.) 8 U.S.C. § 1324a(b)(5).

Title 18 of the United States Code (2012) deals with Crimes and Criminal Procedure. Section 1001 deals with fraud and false statements generally; § 1028 deals with fraud and related activity in connection with identification documents, authentication features, and information; § 1546 deals with fraud and misuse of visas, permits, and other documents; and § 1621 deals with perjury generally. Despite references in the legislative history to Congress emphasizing penalties for employers rather employees, IRCA specifically amended § 1546 to include criminal sanctions against an alien who commits fraud in the employment eligibility verification process. See Pub L. No. 99-603, § 103.

Of course, the case before us does not arise under 18 U.S.C. § 1546(b). Rather, it is a State prosecution under a generally applicable statute prohibiting identity theft. The State seeks to punish an alien who used the personal identifying information of another to establish the alien's work authorization. Again, this means that Garcia's preemption challenge, no matter which category, is an as-applied type. He does not seek to prevent all prosecutions under the state law. His challenge can fairly be characterized as "facial" in the traditional sense only insofar that its holding will apply to other aliens in his position, *i.e.*, those who use the Social Security card or other document listed in federal law of another for purposes of establishing employment eligibility. See *Supreme Court of New Mexico*, 839 F.3d at 907.

Garcia has relied heavily on *Arizona*, 567 U.S. 387, to support what his counsel termed his field preemption argument. But *Arizona* actually has limited influence on that particular argument.

In *Arizona*, the Supreme Court determined that Congress has fully occupied the field of alien *registration*. On the other hand, the only provision considered in that case that is somewhat analogous to the prosecution's use of the identity theft statute in this case was section 5(C), which made it a misdemeanor for an alien to seek or engage in work. Section 5(C) was not field preempted. Rather, it was preempted under conflict-obstacle theory because it "involve[d] a conflict in the method of enforcement." *Arizona*, 567 U.S. at 406 (section 5[C]'s criminal penalty stands as obstacle to IRCA, which does not impose criminal penalties on unauthorized employees).

Garcia has also directed our attention to the *Puente Arizona v. Arpaio* series of federal decisions.

The first time *Puente Arizona* came before a district judge, the judge was considering whether two Arizona state statutes were constitutional. 76 F. Supp. 3d 833 (D. Ariz. 2015), *reconsideration denied* No. CV-14-01356-PHX-DGC, 2015 WL 1432674 (D. Ariz. 2015) (unpublished opinion), *and rev'd in part, vacated in part* 821 F.3d 1098 (9th Cir. 2016). The plaintiffs were a civil rights organization and separate individuals, including at least one who had been convicted under the challenged laws, which criminalized "the act of identity theft done with the intent to obtain or continue employment" and forgery generally. 76 F. Supp. 3d at 842. Plaintiffs sought a preliminary injunction, asking the district judge to enjoin enforcement of the laws. The plaintiffs invoked IRCA to claim that the laws were facially preempted and as applied, under both field and conflict principles. The district judge ruled that the plaintiffs had demonstrated a likelihood of success for facial field and facial conflict preemption and granted a temporary injunction. 76 F. Supp. 3d at 858, 861.

On appeal the Ninth Circuit reversed, holding that the neutral application of the laws to all defendants was fatal to the facial challenge. *Puente Arizona*, 821 F.3d at 1105. The circuit panel remanded to the same district judge for consideration of the plaintiffs' as-applied challenges. 821 F.3d at 1110.

On remand, the district judge considered the plaintiffs' conflict and field preemption arguments. *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 WL 6873294, at *6 (D. Ariz. 2016). He treated the

language in 8 U.S.C. § 1324a(b)(5) as a "use limitation" and ruled that Congress intended "to preempt a relatively narrow field: state prosecution of fraud in the I-9 process." 2016 WL 6873294, at *12. "[U]se limitation certainly is relevant in assessing Congress's intent for preemption purposes, but the focus of the provision is quite narrow. *It applies only to Form I-9 and documents appended to the form*." 2016 WL 6873294, at *8. (Emphasis added.) On field preemption, the judge ruled that he could not conclude that Congress had "expressed a clear and manifest intent to occupy the field of unauthorized alien fraud in seeking employment. The focus of the criminal statute, 18 U.S.C. § 1546, is the I-9 process." 2016 WL 6873294, at *11. The district judge also determined prosecution of aliens under the state statutes was not preempted because of conflict either because of the impossibility of enforcing both state and federal law or because enforcement of state law erected a barrier or obstacle to full realization of federal policy goals. "The Court sees no strong showing of conflict between the application of the identity theft and forgery statutes outside the I-9 process and federal statutes that are limited to that process." 2016 WL 6873294, at *15.

In a still later decision in the series, the district judge addressed the plaintiffs' argument that its November 2016 preemption decision in favor of the plaintiffs was narrower than it should be, and he "clarified" his preemption holding. *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2017 WL 1133012, at *5-8 (D. Ariz. 2017). Specifically, the judge recognized that the federal I-9 verification system, which requires a prospective employee to present certain documents demonstrating employment

eligibility to the prospective employer and permits the employer to retain copies of those documents, potentially including among them a Social Security card,

> "suggests that Congress intended to protect more than the I-9 and documents physically attached to it. The Court sees no logical reason why Congress would prohibit state law-enforcement officers from using the Form I-9 and documents physically attached to it, and yet permit them to use [designated employment eligibility documents including Social Security cards] submitted with [the] I-9 simply because they were never stapled to the I-9 or were stored by the employer in a folder separate from the I-9. This is particularly true when one considers other statutory sections.
>
> "Section 1324a(d) provides guidance for future variations of the federal employment verification system. It makes clear that even if the Form I-9 is replaced or new documentation requirements are created, the use limitation will continue to prohibit use of the employment verification system for non-enumerated purposes. The statute sates that '[t]he system may not be used for law enforcement purposes, other than for enforcement of this chapter or sections 1001, 1028, 1546, and 1621 of Title 18.' 8 U.S.C. § 1324(d)(2)(F); *see also* 8 U.S.C. § 1324(d)(2)(G) (prohibiting the use for non-enumerated purposes of any new document or card designed for the federal employment verification system). This suggests that

Congress intended to bar the use of the verification process itself, not just the I-9 and physically attached documents, in state law enforcement. Additionally, § 1324(d)(2)(C) provides that '[a]ny personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien.' This limitation is not restricted to information contained in or appended to any specific document, but applies generally to the federal employment verification system.

"Statutes imposing criminal, civil, and immigration penalties for fraud committed in the employment verification process also reflect a congressional intent to regulate more than the Form I-9 and physically attached documents. . . .

. . . .

". . . The Court continues to hold the view that Congress did not intend to preempt state regulation of fraud outside the federal employment verification process, as stated in its summary judgment ruling . . . . But the Court concludes from the provisions reviewed above that Congress's preemptive intent was not limited to the Form I-9 and physically attached documents. Congress also regulated—and intended to preempt state use of—other documents used to show employment authorization under the federal system. As the Ninth Circuit has noted, 'field preemption can be

inferred . . . where there is a regulatory framework so pervasive . . . that Congress left no room for the States to supplement it.' *Valle del Sol* [*v.Whiting*], 732 F.3d [1006,] 1023 [(2013)] (internal quotation and brackets omitted); Laurence H. Tribe, *American Constitutional Law*, § 6-31, at 1206-07 (same).

"This conclusion is supported by the legislative history of the Immigration Reform and Control Act, which reflects Congress's '[c]oncern . . . that verification information could create a "paper trail" resulting in the utilization of this information for the purpose of apprehending undocumented aliens. 'H.R. Rep. 99-682(III) (1986) at 8-9. If documents presented solely to comply with the federal employment verification system could be used for state law enforcement purposes so long as they were not physically attached to a Form I-9, this congressional intent easily would be undermined.

"The Court's conclusion is also supported by recent decisions from other courts. Reviewing the use limitation and several other provisions of § 1324a, the Supreme Court found that 'Congress has made clear . . . that *any information employees submit to indicate their work status* "may not be used" for purposes other than prosecution under specific federal criminal statues for fraud, perjury, and related conduct.' *Arizona v. United States*, 567 U.S. 387 (2012) (citing 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)-(G)) (emphasis added). The Ninth Circuit reached a

> similar conclusion. *United States v. Arizona*, 641 F.3d 339, 359 (9th Cir. 2011), *aff'd in part, rev'd in part and remanded* (reviewing 8 U.S.C. § 1324a and finding that the federal employment verification system and any personal information it contains cannot be used for any non-enumerated purpose, including investigating and prosecuting violations of Arizona law).
>
> "In summary, the Court concludes that Congress clearly and manifestly intended to prohibit the use of the Form I-9, documents attached to the Form I-9, and documents submitted as part of the I-9 employment verification process, whether attached to the form or not, for state law enforcement purposes . . . . Defendants are preempted from (a) employing or relying on (b) any documents or information (c) submitted to an employer solely as part of the federal employment verification process (d) for any investigative or prosecutorial purpose under the Arizona identi[t]y theft and forgery statutes. As Plaintiffs concede, Defendants may use [designated employment eligibility documents including Social Security cards] submitted in the I-9 process if they were also submitted for a purpose independent of the federal employment verification system, such as to demonstrate the ability to drive or as part of a typical employment application." *Puente Arizona*, 2017 WL 1133012, at *6-8.

Although we might be inclined to agree with the ultimate *Puente Arizona* decision from the district

judge, it nevertheless has limited influence today because we dispose of this case under the plain and unambiguous language of 8 U.S.C. § 1324a(b)(5), an effective express preemption provision having to do with *employees* as well as employers. When the *Puente Arizona* district judge was considering the plaintiffs' as-applied challenges, he was focused only on field and conflict preemption analysis. No party was urging express preemption, which provides a much more direct route to a similar result. The language in 8 U.S.C. § 1324a(b)(5) explicitly prohibited state law enforcement use not only of the I-9 itself but also of the "*information contained in*" the I-9 for purposes other than those enumerated. 8 U.S.C. § 1324a(b)(5). In short, in March of this year, the *Puente Arizona* district judge admirably recognized that he had unduly narrowed his interpretation of the "use limitation" in the statute. It had simply been incorrect to say that only use of the I-9 and attached documents was covered. But his focus on whether other documents need or need not be attached to the I-9 at some point still ignored the "information contained in" plain language of the statute.

We do not ignore this language. It is Congress' plain and clear expression of its intent to preempt the use of the I-9 form *and any information contained* in the I-9 for purposes other than those listed in §1324a(b)(5). See *Whiting*, 563 U.S. at 594 ("[W]e 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.' *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732, 123 L. Ed. 2d 387 [1993]."). Prosecution of Garcia—an alien who committed identity theft for the purpose of establishing work eligibility—is not among

the purposes allowed in IRCA. Although the State did not rely on the I-9, it does not follow that the State's use of the Social Security card information was allowed by Congress. "A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 638, 133 S. Ct. 1391, 185 L. Ed. 2d 471 (2013).

The "key question" when evaluating whether a state law is preempted is congressional intent. That intent is spelled out for us in 8 U.S.C. § 1324a(b)(5): States are prohibited from using the I-9 *and any information contained within the I-9* as the bases for a state law identity theft prosecution of an alien who uses another's Social Security information in an I-9. 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.

Because we can dispose of Garcia's preemption claim based on the express preemption language in 8 U.S.C. § 1324a(b)(5), we need not decide the merits of any other possible or actual preemption argument.

CONCLUSION

We reverse Garcia's conviction because the State's identity theft prosecution of him based on the Social Security number contained in the I-9 used to establish his employment eligibility was expressly preempted.

JOHNSON, J., not participating.

MICHAEL J. MALONE, Senior Judge, assigned.[1]

* * *

LUCKERT, J., concurring: I concur in the majority's holding that 8 U.S.C. § 1324a(b)(5) (2012) preempts the prosecution of Ramiro Garcia for identity theft under the circumstances of this case. But I reach this holding through a different analytical path than the one used by the majority. I respectfully disagree with the majority's conclusion that express preemption applies, although I would nevertheless hold that Kansas' identity theft statute intrudes into a field wholly occupied by federal law. I would further hold that a conflict exists between the immigration policy established by Congress and Kansas' identity theft statute when it is applied in a case, as here, that is dependent upon the use of information derived from the employment verification process established by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, and the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq. (2012). In other words, I would apply the doctrines of field and conflict preemption, rather than express preemption.

Although Congress included an express preemption provision in 8 U.S.C. § 1324a(h)(2) (2012), it applies only to certain laws relating to *employers*. Specifically, it states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon

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[1] **REPORTER'S NOTE:** Senior Judge Malone was appointed to hear case No. 112,502 vice Justice Johnson under the authority vested in the Supreme Court by K.S.A. 20-2616.

those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). As the United States Supreme Court has indicated, notably missing from this provision is any language expressly preempting State or local laws imposing civil or criminal sanctions on prospective or actual *employees*. *Arizona v. United States*, 567 U.S. 387, 406, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012) ("IRCA's express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens, is silent about whether additional penalties may be imposed against the employees themselves.").

In the face of this conclusion by the United States Supreme Court, the majority relies on "an effective express preemption provision," 8 U.S.C. § 1325a(b)(5). Slip op. at 21. In my view, describing a statutory provision as "an effective express preemption provision" regarding employees miscasts implied preemption as express preemption. Stated another way, a provision that "effectively" preempts state law only impliedly preempts state law. Generally, when the United States Supreme Court has labelled statutory language as "an express preemption provision" it has been worded more like 8 U.S.C. § 1324a(h)(2) ("this section preempt[s] any State or local law") than § 1324a(b)(5) ("A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter . . . .").

Granted, the United States Supreme Court has never required "magic words" before labeling statutory language as express preemption provisions. See *Gade*

v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 112, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (Kennedy, J., concurring). But, as a practical matter, the Court has only applied the express preemption label when the statutory language or title has included terms like "supersede," "preempt," or "preemption," or when the statutory language has explicitly prohibited a state or local entity from enacting or enforcing a specified type of law. See, *e.g.*, *Coventry Health Care of Missouri, Inc. v. Nevils*, 581 U.S. ___, 137 S. Ct. 1190, 1192, 197 L. Ed. 2d 572 (2017); *Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. ___, 136 S. Ct. 1938, 1945, 195 L. Ed. 2d 298 (2016); *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. ___, 136 S. Ct. 936, 943, 194 L. Ed. 2d 20 (2016); *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. ___, 134 S. Ct. 2228, 2235, 189 L. Ed. 2d 141 (2014); *Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.*, 569 U.S. ___, 133 S. Ct. 2096, 2102, 186 L. Ed. 2d 177 (2013); *Hillman v. Maretta*, 569 U.S. __, 133 S. Ct. 1943, 1948, 186 L. Ed. 2d 43 (2013); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 78, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002); see also *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89, 79 S. Ct. 818, 3 L. Ed. 2d 893 (1959) (under federal law, titles of statutes indicate congressional intent). Here, Congress did not enact similar explicit language preempting state civil or criminal proceedings against *employees*. Accordingly, I would not apply an express preemption analysis.

Of course, "the existence of an 'express preemption provisio[n] does not bar the ordinary working of conflict preemption principles' or impose a 'special burden' that would make it more difficult to establish the

preemption of laws falling outside the clause." *Arizona*, 567 U.S. at 406 (quoting *Geier v. American Honda Motor Co.,* 529 U.S. 861, 869-72, 120 S. Ct. 1913, 146 L. Ed. 2d 914 [2000]). In my view, both field and conflict preemption apply to prevent the State's prosecution of Garcia.

These preemptions do not arise *facially*. In other words, IRCA does not preempt the Kansas identity theft statute in all cases, but it does preempt the prosecution of the defendant in this case. The crime of identity theft, as applicable to this case, requires proof of "obtaining, possessing, transferring, using, selling or purchasing any personal identifying information" of another with the intent "to receive any benefit." K.S.A. 2012 Supp. 21-6107. Here, the State alleges Garcia, an unauthorized alien, possessed a false Social Security number for the purpose of receiving taxable income from employment—*i.e.*, with the intent to receive a benefit. Under those circumstances, preemption arises because of a conflict with federal immigration laws and regulations, specifically those relating to the employment verification system. But the potential application of 21-6107 is much broader. An unauthorized alien could use someone else's personal identifying information to receive loans, credit cards, banking privileges, or a variety of other benefits without implicating federal provisions relating to the employment of unauthorized aliens. And individuals who are not unauthorized aliens could use stolen personal identifying information to obtain employment without violating federal law regarding immigration or the employment of unauthorized aliens. Thus, facially, the provisions do not precisely overlap.

The identity theft statute can still be preempted, however, *as applied* to receiving the benefit of employment. See *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1062-63 (9th Cir. 2014) ("In considering whether a state law is conflict-preempted, 'we "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written."'"). And a statute "is not saved from pre-emption simply because the State can demonstrate some additional effect outside of the [preempted area]." *Gade*, 505 U.S. at 107; see *Hillman*, 133 S. Ct. at 1953 (holding a state statute was preempted only as applied to federal employees).

When considering Kansas' identity theft statute as applied to the employment of unauthorized aliens, several aspects of the "structure and purpose" of IRCA and INA demonstrate that implied preemption arises and that Kansas' identity theft statute can have no application in the context of the employment of unauthorized aliens. See *Altria Grp.*, 555 U.S. at 76 (discussing implied preemption generally and the role of structure and purpose). As the United States Supreme Court has observed, IRCA "forcefully" made combating the employment of illegal aliens central to "[t]his policy of immigration law." *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, and n.8, 112 S. Ct. 551, 116 L. Ed. 2d 546 (1991). And in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147-49, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002), the Court observed that IRCA's "extensive" employment verification system "is critical to the IRCA regime." 535 U.S. at 147-48.

This process includes an extensive system that regulates employers and provides for potential criminal and civil penalties if employers fail to comply. The *Hoffman* Court discussed those various provisions. It then turned to provisions covering *employees* and noted:

> "IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. [8 U.S.C.] § 1324c(a). It thus prohibits aliens from using or attempting to use 'any forged, counterfeit, altered, or falsely made document' or 'any document lawfully issued to or with respect to a person other than the possessor' for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b)." 535 U.S. at 148.

Considering these statutes, the *Hoffman* Court concluded an unauthorized alien who had used the birth certificate of a friend born in Texas in order to obtain employment "violated these provisions." 535 U.S. at 148. Based on its survey of the comprehensive array of regulatory, civil, and criminal provisions surrounding the employment verification system, the Court concluded:

> "Under 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." 535 U.S. at 148.

As part of this comprehensive IRCA system, Congress enacted a provision limiting the use of information contained on or appended to the I-9 form: "A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18." 8 U.S.C. § 1324a(b)(5). The majority focuses on this provision and notes that a Social Security card is one of the documents an employer may examine to establish employment eligibility. 8 C.F.R. § 274a.2(b)(1)(v)(C)(1). Another provision, 8 U.S.C. § 1324a(d)(2)(C), states that "[a]ny personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien." These provisions effectively prevent the investigation or prosecution of identity theft when the crime is based on documents supplied or completed during the employment verification process. See *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2017 WL 1133012, at *5-8 (D. Ariz. 2017); *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 WL 6873294, at *6 (D. Ariz. 2016).

Through this comprehensive statutory scheme, Congress has occupied the field and prohibited the use of false documents, including those using the identity of others, when an unauthorized alien seeks

employment. Accordingly, under the doctrine of field preemption, the State cannot prosecute Garcia, an unauthorized alien, for identity theft related to false documentation supplied to his employer. See *State v. Martinez*, 896 N.W.2d 737, 755-56 (Iowa 2017).

The State in this case attempts to dodge field preemption by noting the district court did not admit the I-9 form completed as part of Garcia's employment process; instead, the district court allowed the admission, over Garcia's objection, of Garcia's tax withholding (W-4 and K-4) forms, which also included the stolen Social Security number. But the State does not explain what benefit Garcia received from these forms other than his employment and the taxable salary derived therefrom, which circles back to the I-9 that had to be completed in order for Garcia to gain employment. But even assuming the State could establish this element, it cannot avoid the reality that the W-4 and K-4 were completed with information—*i.e.*, the unauthorized Social Security number and false name—from the I-9 and accompanying documents. The State cannot avoid the doctrine of conflict preemption.

Conflict preemption bars the use of Kansas' identity theft statute under the circumstances of this case because it "frustrates congressional purpose and provides an obstacle to the implementation of federal immigration policy by usurping federal enforcement discretion in the field of unauthorized employment of aliens." *Martinez*, 896 N.W.2d at 756. As the Iowa Supreme Court explained:

> "[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. As noted in [*United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013)], it is the prerogative of federal officials to police work authorization fraud by aliens. 720 F.3d at 533. Federal discretion in the enforcement of immigration law is essential to its implementation as a harmonious whole. The reasons for exercise of federal discretion are varied. . . .
>
> "Local enforcement of laws regulating employment of unauthorized aliens would result in a patchwork of inconsistent enforcement that would undermine the harmonious whole of national immigration law." *Martinez*, 896 N.W.2d at 756.

In *Martinez*, "[f]ederal authorities . . . appear[ed] to be willing to defer any potential federal immigration action on equitable and humanitarian grounds." 896 F.2d at 756. In contrast, the *Martinez* state prosecutor "seem[ed] to have a different philosophy" that exposed Martha Araceley Martinez to significant prison terms and deportation. "If such local exercise of prosecutorial discretion were permitted, the harmonious system of federal immigration law related to unauthorized employment would literally be destroyed." 896 N.W.2d at 757. As the Chief Justice of the Iowa Supreme Court more broadly stated in a concurring opinion: "As applied to unauthorized aliens who use identification information in seeking employment, the law interferes with the efforts of Congress to regulate matters governing unauthorized alien employees every bit as it interfered in *Arizona*[, 567 U.S. 387]." 896 N.W.2d at

759 (Cady, C.J., concurring). Consistent with the majority and various concurring opinions of the Iowa Supreme Court, I would hold that conflict preemption prevents the State from prosecuting Garcia.

Prosecuting Garcia for identity theft under the facts of this case intrudes 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. As a result, in this case prosecution of Garcia under K.S.A. 2012 Supp. 21-6107 is preempted by Article VI, Clause 2 of the United States Constitution.

* * *

BILES, J., dissenting: I disagree that 8 U.S.C. § 1324a(b)(5) (2012) creates an as-applied, express federal preemption barring Ramiro Garcia's state law prosecution for identity theft when he used someone else's Social Security number to complete tax forms while being hired as a restaurant worker. The majority's rationale sets up a sweeping prohibition against identity theft prosecutions for such crimes generally occurring in the employment process. I also cannot conclude any other federal preemption theory carries the day under these facts, so I dissent.

Garcia was convicted under our state's identity theft law, K.S.A. 2012 Supp. 21-6107, for using someone else's Social Security number to receive a benefit, *i.e.*, employment. The statute does not make it illegal to attempt to secure employment as an unauthorized alien. The specific conduct for which Garcia was convicted was using someone else's Social Security number in completing his federal W-4 and state K-4 tax

forms. Garcia's immigration status was not relevant to whether this conduct was unlawful, and the conduct was independent of the federal employment verification system. The tax forms are used solely to calculate federal and state income tax withholdings—not to verify a person's authority to work in the United States.

Under these circumstances, the question put to us is whether Garcia's use of someone else's identifying information within the employment setting sufficiently implicates the narrow area controlled by Congress through the federal Immigration Reform and Control Act of 1986 (IRCA). In answering that question, the majority holds states cannot use the Form I-9 or any information contained in it, and the fact that one uses the information elsewhere–the W-4, K-4, and employment application–does not save the case from the preemption explicitly intended by Congress when it passed IRCA. The majority concludes this is an as-applied, express preemption, citing 8 U.S.C. § 1324a(b)(5), which states: "A form designated or established by the Attorney General under this subsection *and any information contained in* or appended to such form, may not be used for purposes other than for the enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18." (Emphasis added.)

This rationale is sweeping because 8 U.S.C. § 1324a(b) requires an employer to verify that an "*individual*" is not an unauthorized alien, which means employers must verify *all* job applicants irrespective of their immigrant or nonimmigrant status. Under the majority's view, federal law effectively prevents *any*

prosecution under the Kansas identity theft crime occurring in the employment context if it relies on information that also just happens to be on or attached to a Form I-9. This cannot reflect congressional intent.

The crux of the express preemption question is whether the phrase "any information contained in" the form applies literally to all information on the Form I-9, wherever else it might be found; or more narrowly to the contents of the completed Form I-9. While the majority takes the former view, I take the latter because the Form I-9 and the W-4 and K-4 forms were supplied for different and independent purposes. In Garcia's case, the Form I-9 was not admitted into evidence, so no information *necessarily* gleaned from it was "used" in the State's prosecution. Garcia was not convicted for using someone else's identity on Form I-9 to deceive his employer as to his work authorization. Instead, Garcia was convicted for using another person's Social Security number on tax withholding forms.

The majority reaches its decision through a unique and overly literal interpretation of 8 U.S.C. § 1324a(b)(5). The majority reads the provision to create a congressional "information-use preemption" rather than a "Form I-9-use limitation." In doing so, the majority stretches statutory interpretation past the breaking point and dismisses contrary caselaw.

In *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 WL 6873294 (D. Ariz. 2016), a federal district court looked at this same statutory language and ruled Congress preempted "a relatively narrow field: state prosecution of fraud in the I-9 process." 2016 WL 6873294, at *12. That same court in a follow-

up opinion most recently explained the scope of this preemption by stating:

> "In summary, the Court concludes that Congress clearly and manifestly intended to prohibit the use of the Form I-9, documents attached to the Form I-9, and documents submitted as part of the I-9 employment verification process, whether attached to the form or not, for state law enforcement purposes. Further, as the Supreme Court found in *Smith v. United States*, 508 U.S. 223, 228 (1993), the ordinary meaning of the term 'use' is '"to employ" or "to derive service from."' *Id.* at 229 (quoting *Astor v. Merritt,* 111 U.S. 202, 213 [1884]); see also Black's Law Dictionary 1681 (9th ed. 2009) (defining 'use' as the 'application or employment of something'). The Court will adopt this ordinary meaning of the word 'use.' Thus, the Court holds that Defendants are preempted from (a) employing or relying on (b) any documents or information (c) submitted to an employer solely *as part of the federal employment verification process* (d) for any investigative or prosecutorial purpose under the Arizona identify theft and forgery statutes. *As Plaintiffs concede, Defendants may use List A, B, or C documents submitted in the I-9 process if they were also submitted for a purpose independent of the federal employment verification system, such as to demonstrate ability to drive or as part of a typical employment application.*" (Emphasis added.) *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2017 WL 1133012, at * 8 (D. Ariz. 2017).

The *Garcia* majority attempts to minimize the *Puente Arizona* court's analysis by asserting "no party was urging express preemption." 306 Kan. at __, slip op. at 18. But a careful review of both the 2016 and 2017 district court decisions demonstrate that the court did not "overlook" the language in 8 U.S.C. § 1324a(b)(5). The *Puente Arizona* court was familiar with the statutory language and the arguments arising from it—including express preemption. The court simply interpreted the law differently than the majority does.

Indeed, no other court has interpreted 8 U.S.C. § 1324a(b)(5) as the majority has. There are several decisions, including those from our own state, that have come to opposite or unsupportive conclusions. For instance, in *Arizona v. United States*, 567 U.S. 387, 406, 132 S. Ct. 2492, 2504, 183 L. Ed. 2d 351 (2012), the United States Supreme Court noted, "IRCA's express preemption provision, which in most instances bars [s]tates from imposing penalties on employers of unauthorized aliens, is *silent about whether additional penalties may be imposed against the employees*." (Emphasis added.) The *Arizona* Court recognized IRCA's express preemption provision on the employer side but not on the employee side of the equation.

The Iowa Supreme Court recently held that state's identity theft law is not facially preempted by IRCA. *State v. Martinez*, 896 N.W.2d 737, 755 (Iowa 2017). Instead, a bare majority of the *Martinez* court held *implied* preemption theories applicable to that state's identity theft law, which is largely similar to ours. Compare K.S.A. 2012 Supp. 21-6107(a) ("Identity theft is obtaining, possessing, transferring, using, selling or

purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to . . . receive any benefit."), with Iowa Code § 715A.8(2) (2013) ("A person commits the offense of identity theft if the person fraudulently uses or attempts to fraudulently use identification information of another person, with the intent to obtain . . . benefit."). Both Kansas' and Iowa's statutes are alike in that they apply to any person, regardless of immigration status, and they apply in any situation–not just the employment authorization verification process.

Another example is *State v. Reynua*, 807 N.W.2d 473, 479-81 (Minn. App. 2011). In that case, the *Reynua* court stated, "[W]e cannot read [8 U.S.C. § 1324a(b)(5)] so broadly as to preempt a state from enforcing its laws relating to its own identification documents." 807 N.W.2d at 480-81. The court reasoned, "It would be a significant limitation on state powers to preempt prosecution of state laws prohibiting falsification of state-issued identification cards, let alone to prohibit all use of such cards *merely because they are also used to support the federal employment-verification application*." (Emphasis added.) 807 N.W.2d at 481. The *Reynua* court's rationale fully protects federal interests, while the *Garcia* majority's broad reading of 8 U.S.C. § 1324a(b)(5) constitutes a "significant limitation" on our state's police power to protect its citizens from identity theft.

The *Garcia* majority's rationale also runs counter to a unanimous string of Kansas Court of Appeals decisions that have expressly considered this question. See *State v. Ochoa-Lara*, 52 Kan. App. 2d 86, 91, 362

P.3d 606 (2015) ("There is nothing in the [federal] preemption language that prohibits the State from proving identity theft by using information from sources other than the I-9 form, even though that information may also be contained on the I-9 form and the documents appended thereto."); see, *e.g.*, *State v. Jasso-Mendoza*, No. 113,237, 2017 WL 2001347 (Kan. App. 2017) (unpublished opinion); *State v. Hernandez-Manrique*, No. 110,950, 2016 WL 5853078 (Kan. App. 2016) (unpublished opinion); *State v. Morales*, No. 111,904, 2016 WL 97848 (Kan. App. 2016) (unpublished opinion).

Despite my conclusion that as-applied express preemption is not applicable, I admit to being attracted to the notion that the Kansas statute is preempted as applied in this case under implied theories of either field or conflict preemption, as the Iowa Supreme Court majority recently held. See *Martinez*, 896 N.W. 2d at 755. The possibility of dual enforcement tracks—state and federal—is concerning because of the prosecutorial discretion contemplated in the federal IRCA statutory scheme and the discretion our state affords to its prosecutors. See *In re Holste*, 302 Kan. 880, 889-90, 358 P.3d 850 (2015) ("We have long acknowledged that prosecuting attorneys have broad discretion in deciding whether to charge someone with a crime."). Spotty statewide enforcement would seem to manifest the evil—robing the federal government of its discretion—foreseen by Iowa's Chief Justice Cady in his separate *Martinez* concurring opinion. *Martinez*, 896 N.W. 2d at 758-59.

This apprehension is particularly noteworthy because the identity theft cases reaching our Kansas

appellate courts involving unauthorized immigrants seem to be arising from just one prosecuting jurisdiction, which suggests other Kansas prosecutors may be exercising their discretion differently. I would view an as-applied conflict preemption challenge raised under the proper facts to be a close call. But in the end, the balance is tipped by our state's longstanding caselaw recognizing that "'"[i]n the absence of express preemption in a federal law, there is a strong presumption that Congress did not intend to displace state law." [Citation omitted.]'" *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 296, 255 P.3d 1186 (2011) (quoting *Zimmerman v. Board of Wabaunsee County Comm'rs,* 289 Kan. 926, 975, 218 P.3d 400 [2009]).

This strong presumption, combined with the caselaw recited above and my concern about the sweeping potential impact of the majority's rationale, cause me to dissent.

* * *

STEGALL, J., dissenting: I join Justice Biles' dissent fully with respect to express preemption. Today's decision appears to wipe numerous criminal laws off the books in Kansas—starting with, but not necessarily ending with, laws prohibiting identity theft. For this reason, I doubt the logic of today's decision will be extended beyond the narrow facts before us. But rather than take solace in this hope, I find in it the irrefutable fact that today's logic is wrong.

"It is well established that within Constitutional limits Congress may pre-empt state authority by so stating in express terms." *Pacific Gas & Elec. v. Energy*

Resources Com'n, 461 U.S. 190, 203, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983). Thus, as a first principle, Congress cannot preempt state law in matters that lie outside Congress' limited, prescribed powers. Moreover, additional limits on federal preemption have been crafted to guard the prerogatives of states in order not to "disturb" the "federal-state balance." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977).

Even if the majority's interpretation of 8 U.S.C. § 1324a(b)(5) (2012) is correct, and Congress intended to expressly preempt state use of all information contained in a person's I-9 form, it is doubtful Congress has such sweeping powers to interfere with the legitimate government of the states. Can it really be true that the state of Kansas is or could be expressly preempted from using—for any purpose—the name of any citizen who has completed an I-9 form? A name is "information" after all. To ask the question is to answer it.

Therefore, even if I were convinced by the majority's statutory analysis—I am not—I would question the majority's implicit holding that Congress has, in the first place, the constitutional power to prohibit states from using any *information* found on a federal I-9 form. If such a power *did* exist, the delicate federal-state balance achieved by our system of federalism would not merely be disturbed, it would be obliterated.

Finally, I likewise join my colleague in dissent with respect to implied preemption. Unlike Justice Biles, however, I do not find the question a particularly close call.

For these reasons, I respectfully dissent.

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

No. 112,502

[Filed January 29, 2016]

STATE OF KANSAS,	)
Appellee,	)
	)
v.	)
	)
RAMIRO GARCIA,	)
Appellant.	)
	)

MEMORANDUM OPINION

Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed January 29, 2016. Affirmed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GARDNER, P.J., HILL and POWELL, JJ.

Per Curiam: Ramiro Garcia appeals his conviction of identity theft for having used someone else's social security number to obtain employment in Kansas. He contends that insufficient evidence shows his intent to defraud, that the Immigration Reform and Control Act of 1986 (IRCA) preempts the Kansas identity theft statute, and that the district court should have given a unanimity instruction. Finding no reversible error, we affirm.

Procedural Background

In August of 2012, an Overland Park police officer stopped Garcia for speeding. Garcia told the officer he was on his way to a Leawood restaurant where he worked. After checking Garcia's records, the officer contacted a financial crimes detective who interviewed Garcia briefly before letting him go.

The next day, the detective contacted the restaurant where Garcia worked and requested and received Garcia's employment documents. Some of those documents listed a social security number, so the detective contacted a Social Security Administration special agent to verify that the number listed belonged to Garcia. It did not.

After a jury found Garcia guilty of one count of identity theft, the district court sentenced him to 18 months' probation. He timely appeals.

Does sufficient evidence show Garcia's intent to defraud?

Garcia first argues that the State failed to prove that he acted with intent to defraud. According to Garcia, he did not receive "any benefit" from his use of

another's social security number; rather, he earned his paycheck by working at the restaurant.

Standard of Review

In a criminal case, when the evidence's sufficiency is challenged, this court's standard of review is "'whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.'" *State v. Kesserling*, 279 Kan. 671, 679, 112 P.3d 175 (2005) (quoting *State v. Beach*, 275 Kan. 603, Syl. ¶ 2, 67 P.3d 121 [2003]). To the extent statutory interpretation is required, our review is unlimited. See *State v. Storey*, 286 Kan. 7, 9-10, 179 P.3d 1137 (2008).

Discussion

K.S.A. 2012 Supp. 21-6107(a) defined identity theft as:

> "[O]btaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to defraud that person, or any one else, in order to receive any benefit."

"Intent to defraud" is defined as "an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property." K.S.A. 2012 Supp. 21-5111(o).

Here, according to the statute's plain language, Garcia committed identity theft. He used a social security number belonging to another person on his W-4 and K-4. He used the number with the intent to make his potential employer think the number belonged to Garcia, so he had the intent to defraud required by the statute. Further, Garcia did so in order to receive employment from that employer, which the jury found to be a benefit.

But is the receipt of employment a "benefit" within the meaning of this statute? Garcia contends he did a day's work for the day's pay, which he earned, so his wages were not a benefit. We answered this question affirmatively in *State v. Meza*, 38 Kan. App. 2d 245, 165 P.3d 298 (2007), *rev. denied* 285 Kan. 1176 (2007), concluding the receipt of employment is a benefit. We specifically found that the defendant, who had used someone else's social security number to get a job, acted with the intent to defraud because she induced her employer to believe that she was eligible to be employed when she was not. 38 Kan. App. 2d at 248-49. We further noted that the employer invested in the defendant certain property rights that were attached to the job, such as "access to any available employee benefits, rights under federal laws such as ERISA, together with her entitlement to the protection of the laws of Kansas relating to employment, wage and hour regulations, workers compensation and unemployment benefits." 38 Kan. App. 2d at 249.

Like the defendant in *Meza*, Garcia induced his potential employer to believe he was eligible to be employed by using a stolen social security number on his W-4 and K-4. Had Garcia not used a false social

security number, he would not have obtained the job and would not have been entitled to receive the wages and insurance benefits that flowed directly from his employment. Although Garcia did not actually steal money or services from his employer, he did obtain employment, compensation, and insurance benefits by misrepresenting himself as someone else. The statute does not require him to defraud his employer by stealing money or by being compensated for services not actually rendered in order to be guilty of identity theft. Here, the fraudulent behavior consisted of defendant's knowing use of the victim's identifying information to obtain employment, wages, and benefits to which he would not otherwise have been entitled. See *Meza*, 38 Kan. App. 2d at 249-50. No more is required.

Garcia argues this court should apply *City of Liberal v. Vargas*, 28 Kan. App. 2d 867, 24 P.3d 155, *rev. denied* 271 Kan. 1035 (2001). In *Vargas*, we stated that the defendant did not act with intent to defraud because he used a false identity only to get a job. 28 Kan. App. 2d at 870. We also noted our uncertainty how the defendant received an economic benefit because he was paid for the time he worked. 28 Kan. App. 2d at 870. But in *Meza*, this court reviewed the *Vargas* decision and noted that the language about not receiving an economic benefit was dicta. *Meza*, 38 Kan. App. 2d at 248. We agree. The decision was based on the defendant's use of the identity of a "totally fictitious person," but the statute was intended to protect only real persons so the statute did not apply. 38 Kan. App. 2d at 248; see *State v. Oswald*, 36 Kan. App. 2d 144, 148-49, 137 P.3d 1066, *rev. denied* 282 Kan. 795 (2006)

(finding *Vargas* language about not receiving an economic benefit to be dicta).

Finally, Garcia mentions that the benefits discussed in *Meza* are "second-order benefits, not directly connected to the use of a social security number," because those benefits were conferred for his time worked, not for his use of the stolen number. As mentioned, however, Garcia would not have been hired and thus would not have received either a paycheck or fringe benefits of the job had he not used the social security number.

We find the State presented sufficient evidence to show that Garcia acted with intent to defraud his potential employer in order to receive a benefit.

Does the Immigration Reform and Control Act preempt Kansas' identity theft statute?

Garcia next argues that the Immigration Reform and Control Act of 1986 (IRCA) preempts the Kansas identity theft statute. He claims that because federal law preempts K.S.A. 2012 Supp. 21-6107, the State could not prosecute him for identity theft. Garcia has properly preserved this issue for our review.

Standard of Review

Preemption is a question of law. *State ex rel. Kline v. Transmasters Towing*, 38 Kan. App. 2d 537, Syl. ¶ 2, 168 P.3d 60, *rev. denied* 285 Kan. 1175 (2007). We have unlimited review over issues of federal preemption. *Transmasters Towing*, 38 Kan. App. 2d 537, Syl. ¶ 2. As noted, issues of statutory interpretation are also subject to unlimited review. See *Storey*, 286 Kan. at 9-10.

Discussion

The United States Constitution provides: "[T]he Laws of the United States . . . shall be the Supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. State laws that conflict with federal law cannot be enforced. *Wichita Terminal Ass'n v. F.Y.G. Investments, Inc.*, 48 Kan. App. 2d 1071, 1078, 305 P.3d 13 (2013). To determine whether a Kansas law is preempted, we must consider the federal statute's language and its framework. 48 Kan. App. 2d at 1078 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S. Ct. 2240, 135 L. Ed. 2d 700 [1996]). We should also assume that "'the historic police powers of the State's are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona v. United States*, 567 U.S.___, 132 S. Ct. 2492, 2501, 185 L. Ed. 2d 351 (2012). [Citation omitted.]

The relevant IRCA provision provides: "A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18." 8 U.S.C. § 1324a(b)(5) (2012). In *Arizona v. United States*, the United States Supreme Court found that the IRCA preempted an Arizona law which made it illegal for an unauthorized alien to seek employment or work in Arizona. 132 S. Ct. at 2503-05. The Court held that the Arizona law was preempted because "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." 132 S. Ct. at 2504.

But Garcia was convicted of identity theft under K.S.A. 2012 Supp. 21-6107(a). That statute, unlike Arizona's, does not penalize aliens for working or attempting to work in Kansas. The purpose of our statute "is to criminalize theft of another person's personal identifying information." *State v. Saldana*, No. 111,429, 2015 WL 4486779, at *3 (Kan. App. 2015) (unpublished opinion), *petition for rev. filed* August 5, 2015; see *Meza*, 38 Kan. App. 2d at 250-51. So the Kansas identity theft statute "has nothing to do with immigration or creating criminal penalties for illegal aliens working in the state." *Saldana*, 2015 WL 4486779, at *3.

This court has repeatedly rejected similar preemption arguments, most recently in *State v. Ochoa-Lara*, 52 Kan. App. 2d __, 362 P.3d 606, 612 (Kan. App. 2015):

> "The State's prosecution of Ochoa-Lara for the illegal use of another's Social Security number did not depend on his immigration status, the lawfulness of his presence in the United States, or his eligibility for employment. The other panels of our court noted in those decisions, as we do here, that the possible illegal uses of another's Social Security number are myriad. There is nothing in the IRCA that suggests that Congress intended the comprehensive preemption of the police powers of the State to prosecute all such instances of identity theft. The State's prosecution of Ochoa-Lara for violations of Kansas identity theft statutes was not preempted by the IRCA."

We agree with the court's analysis and conclusion in *Ochoa-Lara* and adopt it here. See also *Saldana*, 2015 4486779, at *2-4; *State v. Dorantes*, No. 111,224, 2015 WL 4366452, at *2-4 (Kan. App. 2015) (unpublished opinion), *petition for rev. filed*, July 23, 2015; *State v. Lopez-Navarrete*, No. 111,190, 2014 WL 7566851, at *2-4 (Kan. App. 2014) (unpublished opinion); *State v. Flores-Sanchez*, No. 110,457, 2014 WL 7565673, at *3-4 (Kan. App. 2014) (unpublished opinion), *rev. denied* 302 Kan. ___ (August, 20, 2015).

Further, we find the federal district court case on which Garcia relies to be distinguishable. In *Puente Arizona v. Arpaio*, 76 F. Supp. 3d 833, 842, 854-56 (D. Ariz. 2015), the court, in granting a temporary injunction, determined that it could consider whether the IRCA preempted Arizona's facially neutral identity theft laws because according to legislative history, the purpose and intent of that statute was to impose criminal penalties on unauthorized aliens seeking employment in Arizona. It then found that "Congress has occupied the field of unauthorized-alien fraud in obtaining employment" and that Arizona's identity theft laws are likely preempted because they have the purpose and effect of regulating that field. 76 F. Supp. 3d at 857. The court concluded that because the identity theft laws and the IRCA share the same purpose but have overlapping penalties, the laws likely conflict. 76 F. Supp. 3d at 858.

But the legislative history of K.S.A. 2012 Supp. 21-6107 does not indicate that its purpose is to impose criminal penalties on unauthorized aliens seeking work in Kansas. See *Meza*, 38 Kan. App. 2d at 250-51 (summarizing the testimony presented to the House

Committee on Federal and State Affairs before K.S.A. 2012 Supp. 21-6107 [then 21-4018] was enacted in 1998). Instead, as mentioned, K.S.A. 2012 Supp. 21-6107's purpose "is to criminalize theft of another person's personal identifying information." *Saldana*, 2015 WL 4486779, at *3.

Nor do we find *United States v. South Carolina*, 906 F. Supp. 2d 463 (D. S.C. 2012) to be persuasive. There, the United States District Court found the South Carolina immigration statute's "self harboring" provisions, which criminalized a person's unlawful presence in the United States, was preempted by federal law in accordance with *Arizona*. 906 F. Supp. 2d at 468-69. But K.S.A. 2012 Supp. 21-6107 is not an immigration statute; it neither contains any "self harboring" provisions, nor does it impose criminal penalties on unauthorized aliens.

Accordingly, we find the Kansas identity theft statute is not preempted by federal law and the State was not prevented from prosecuting Garcia under K.S.A. 2012 Supp. 21-6107.

Should a unanimity instruction have been given?

Lastly, Garcia argues that a unanimity instruction should have been given. He claims that some jurors may have found him guilty of identity theft because he used someone else's social security number on a K-4 form, while other jurors may have based his guilt on his use of that same number on a W-4 form. Garcia did not request a unanimity instruction.

Standard of Review

Our review of this issue is governed by a three-part framework. *State v. Castleberry*, 301 Kan. 170, 185, 339 P.3d 795 (2014). We first determine whether the case involved multiple acts by considering the central question of "whether jurors heard evidence of multiple acts, each of which could have supported conviction on a charged crime." 301 Kan. at 185. This consideration is a question of law subject to unlimited review. 301 Kan. at 185. If the case did involve multiple acts, we then consider whether error occurred. 301 Kan. at 185. The State must have told the jury which act to rely on, or the district court must have instructed the jury that it was to agree on a specific act. 301 Kan. at 185. Failure to do either is error. If error occurred, we then determine whether it was reversible error. 301 Kan. at 186. When, as here, the defendant did not request a unanimity instruction, we apply the clearly erroneous standard of K.S.A. 2012 Supp. 22-3414(3). 301 Kan. at 186. Under that standard, an error is clearly erroneous if the court is "firmly convinced that under the facts the jury would have returned a different verdict if the unanimity instruction had been given." *State v. Santos-Vega*, 299 Kan. 11, 18, 321 P.3d 1 (2014).

Discussion

"Multiple acts" means "legally and factually separate incidents that independently satisfy the elements of the charged offense." *State v. De La Torre*, 300 Kan. 591, 598, 331 P.3d 815 (2014). When criminal behavior occurred at different times or different locations, or when a fresh impulse motivates a new criminal act, the incidents are factually separate and thus not unitary. 300 Kan. at 598. The factors we

consider when determining whether conduct was unitary are: (1) whether the acts occurred at or near the same time; (2) whether the acts occurred at the same location; (3) whether there was a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there was a fresh impulse motivating some of the conduct. *State v. Schoonover*, 281 Kan. 453, 497, 133 P.3d 48 (2006).

Here, the restaurants' managing partner never specifically indicated when or where Garcia filled out, or when and where a prospective employee usually fills out, the W-4 and K-4 forms. But the managing partner did testify that a W-4 and a K-4 had to be signed before an applicant could move forward in the process, and that an applicant cannot be hired without providing a social security number. And both forms required an applicant to provide a social security number. Because the purpose of filling out the forms was the same, Garcia apparently filled out his W-4 and K-4 at or near the same time and place. A causal relationship is also shown because Garcia filled out both forms for the specific purpose of securing a job at the restaurant. The record does not indicate, and Garcia does not point to, any intervening event. Finally, and perhaps most importantly, Garcia's decision to use someone else's social security number on his W-4 and K-4 was not motivated by a fresh impulse because he filled out both forms with the intent of getting a job at only one restaurant. To complete that deception, Garcia had to sign two forms, both of which required him to provide a social security number.

Garcia fails to insightfully address how using the stolen social security number on his W-4 and K-4

constituted multiple acts. Our review of caselaw refutes that proposition. In *State v. Staggs*, 27 Kan. App. 2d 865, 9 P.3d 601, *rev. denied* 270 Kan. 903 (2000), the defendant, who was convicted of aggravated battery, claimed that a unanimity instruction should have been given because some jurors could have found that he kicked the victim and others could have found that he punched the victim. This court concluded that the defendant could not have been charged with two counts of aggravated battery because the charges would have been multiplicitous since the incident was continuous and not factually separated. 27 Kan. App. 2d at 867-68. In contrast, in *State v. Green*, 38 Kan. App. 2d 781, 172 P.3d 1213 (2007), *rev. denied* 286 Kan. 1182 (2008), the defendant had used a stolen identity at three different retailers over a 2-day period. We found that each store gave the defendant a fresh impulse to use the stolen identity, thus the defendant's multiple convictions for identity theft were proper. 38 Kan. App. 2d at 784-87.

We find this case to be more like *Staggs* than *Green*. Because Garcia's conduct was unitary, his acts of using the stolen social security number on both his W-4 and K-4 were not factually separate and distinct incidents. And since Garcia's conduct did not constitute multiple acts, a unanimity instruction was not required. We find it unnecessary to address the next two steps in the analysis. See *Castleberry*, 301 Kan. at 187; *State v. Ultreras*, 296 Kan. 828, 856-57, 295 P.3d 1020 (2013) (finding the defendant did not meet the first step of the multiple acts analysis and holding that the district court did not err by not giving a unanimity instruction).

Affirmed.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 111,904

[Filed September 8, 2017]

STATE OF KANSAS,
Appellee,

v.

DONALDO MORALES,
Appellant.

SYLLABUS BY THE COURT

Defendant's prosecution for identity theft and making false information for using another person's Social Security number to obtain employment was expressly preempted by the federal Immigration Reform and Control Act of 1986.

Review of the judgment of the Court of Appeals in an unpublished opinion filed January 8, 2016. Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed September 8, 2017. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, was on the brief for appellant.

Steven J. Obermeier, senior deputy district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

BEIER, J.: This companion case to *State v. Garcia*, 306 Kan. __, __ P.3d __ (No. 112,502, this day decided), and *State v. Ochoa-Lara*, 306 Kan. __, __ P.3d __ (No. 112,322, this day decided), involves defendant Donaldo Morales' convictions on one count of identity theft and two counts of making a false information.

The State's basis for the charges was Morales' use of another person's Social Security number to obtain restaurant employment. Morales was convicted after a bench trial. A panel of the Court of Appeals affirmed Morales' convictions in an unpublished opinion. See *State v. Morales*, No. 111,904, 2016 WL 97848 (2016).

Morales successfully petitioned this court for review of two of the three issues he raised in the Court of Appeals: (1) whether the evidence of his intent to defraud was sufficient, and (2) whether the Immigration Reform and Control Act of 1986 (IRCA) preempted the prosecution. Because we decide that Morales' convictions must be reversed and the case dismissed because the prosecution based on the Social Security number was expressly preempted, we do not reach Morales' sufficiency issue.

FACTUAL AND PROCEDURAL HISTORY

On October 1, 2010, Morales completed an employment application seeking employment at a Jose Pepper's restaurant in Johnson County. On the

application, Morales provided a Social Security number. Morales also provided the restaurant with a permanent resident card and a Social Security card as proof of his identity. The number on the Social Security card matched the number he provided on the application. As part of the hiring process, Morales completed a federal I-9 form and W-4 and K-4 forms. He provided the same Social Security number on each form.

In 2012, Special Agent Joseph Espinosa of the Social Security Office of the Inspector General learned that a person might be working at Jose Pepper's under an incorrect Social Security number. Espinosa's investigation determined that the Social Security number Morales had provided belonged to someone else.

Initially the State charged Morales with four counts—one for identity theft and one for making a false information through each of the three forms, the I-9, the W-4, and the K-4.

Morales filed a motion to dismiss the I-9 and the W-4 counts, arguing that the State's pursuit of those two counts was preempted by IRCA. At a hearing on the motion, the State agreed that the I-9 count should be dismissed. Morales' counsel argued that the W-4 fell under the "same . . . umbrella that [the] I-9 does." The district judge disagreed, "With respect to the W-4, I think that is more . . . akin to the [S]ocial [S]ecurity number than it is to something specifically related to immigration as addressed in the *State v. Arizona* case."

Morales testified at trial that he had purchased the Social Security number he used in the Jose Pepper's

hiring process from someone in a park in 2002. He said he obtained the number so that he could work and never used it for any other purpose. He confirmed that he completed the I-9, W-4, and K-4 using the number and acknowledged that he was paid for the work he did at Jose Pepper's.

Jody Sight, the director of human resources for the restaurant, described the employment application process. Applicants are required to fill out an application and do an interview with an on-site manager. If the individual is hired, he or she is brought back for orientation. During orientation, a new hire is required to complete employment paperwork, including filling out I-9, W-4, and K-4 forms.

Sherri Ann Miller, a risk and payroll manager for Jose Pepper's, provided Morales with the I-9, W-4, and K-4 forms to fill out. She also photocopied the permanent resident card and Social Security card Morales provided. Miller testified that an applicant would not be employed if he or she did not complete the W-4 and K-4 forms. Sight testified that a person who did not supply a Social Security number could not be entered into the Jose Pepper's payroll system.

When the district judge found Morales guilty, he stated:

> "Okay. The Court is going to find that the Defendant did present to Jose Pepper's the five exhibits that were received into evidence.
>
> "The five exhibits are—Three of them are very important, because they're social security number, W-4, and the other social security—the employment document.

"Clearly, he knew that you don't go to a park to buy government documents. That's not where we typically go to find those. He knows that.

"That's why he didn't file taxes, because he knew that he'd get in trouble.

"The elements are that he defrauded.

"It doesn't say who he has to defraud.

"The Court is going to find . . . the Defendant guilty . . . .

. . . .

"I also think you can defraud your employer, because they think that you're a legal citizen.

"They could get penalties by hiring people that are not documented individuals.

"So I mean the elements are met.

"The crime has been . . . clearly presented.

"There's absolutely no doubt in my mind that he presented these documents for the reason that he could get a job.

"What's always a stretch is when you find somebody who has been here twenty-four years. He's worked. He's paid taxes. He doesn't get the benefit.

"I don't know if he would have gotten money back or not.

"But one thing we do know is that he's putting money into the kitty that will never be

taken out at a time when we need more money in the kitty. He's putting money into [S]ocial [S]ecurity that he'll never be able to draw out.

"So it's not like he stole money from the government.

"He wanted to work.

"He did work.

"He has been here twenty-four years.

"Three of his kids were born here.

"He has a legal [S]ocial [S]ecurity number now.

"This isn't a case of equity.

". . . I can't find him not guilty.

"I'm finding him guilty."

Morales filed two motions for a new trial. In the first, he again argued that the W-4 count of making a false information should have been dismissed. In the second, he argued that the State did not present sufficient evidence of his intent to defraud. The district judge denied Morales' motions, sentenced him to concurrent 7-month sentences on each count, and granted him 18 months' probation.

DISCUSSION

Our decision today in *Garcia*, 306 Kan. at __, slip op. at 19, holds that State prosecutions such as the one in this case are expressly preempted by IRCA. Section §1324a(b)(5) of Title 8 of the United States Code (2012)

provides that a federal I-9 form for employment verification "and any information contained in" such a form "may not be used for purposes other than for enforcement of" federal immigration law and certain federal criminal statutes. This State prosecution for identity theft and making a false information relied on the Social Security number Morales included in the I-9, as well as his employment application and the W-4 and K-4, to ensure employment eligibility under federal law. Our *Garcia* holding controls the outcome of this case and compels a decision in Morales' favor, reversing all of his convictions.

We pause briefly, however, to address preservation of the preemption issue in the circumstances of this case.

Morales advanced an IRCA preemption challenge in the district court through his pretrial motion to dismiss and his posttrial motion for new trial, although the motions dealt specifically with the making a false information count based on the Social Security number used in Morales' W-4 form and not the identity theft count or the making a false information count based on the K-4 form.

As a general matter, a court is not limited in its legal analysis to only the preemption theories advanced by a party such as Morales. See *Garcia*, 306 Kan. at __, slip op. at 10 (citing *Hillman v. Maretta*, 569 U.S. __, 133 S. Ct. 1943, 1954, 186 L. Ed. 2d 43 [2013] [presence of express preemption clause does not necessarily end court's preemption inquiry]; *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869, 120 S. Ct. 1913, 146 L. Ed. 2d 914 [2000] [express preemption provision does not bar ordinary working of conflict preemption

principles]; *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. __, 136 S. Ct. 1288, 1301, 194 L. Ed. 2d 414 [2016] [Thomas, J., concurring in part and concurring in the judgment] [state law could have been preempted "based on the statute alone"; majority unnecessarily relies on principles of implied preemption]; *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 912, 914-15 [10th Cir. 2016], *petition for cert. filed* June 5, 2017 [facial, as-applied preemption claims legal in nature; judicial estoppel doctrine does not apply to limit party to label first attached to challenge; labels parties attach to claims are not determinative]). Compare *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (O'Connor, J., plurality) (state law impliedly preempted by Occupational Safety and Health Act), with *Gade*, 505 U.S. at 109-14 (Kennedy, J., concurring in part and concurring in judgment) (would have found state law expressly preempted). In *Garcia* itself, for example, defense counsel emphasized field preemption rather than express preemption at oral argument before this court. But our decision ultimately relied upon IRCA's express preemption clause. *Garcia*, 306 Kan. at __, slip op. at 19.

In addition, and perhaps most pertinent here, this court may look past a weakness in preservation in certain situations, including when the dispositive issue is one of law and when justice requires a decision on the merits. See *State v. Swint*, 302 Kan. 326, 335, 352 P.3d 1014 (2015). The existence of preemption is an issue of law. See *Miami Cty. Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 294, 255 P.3d 1186 (2011). And granting relief to Morales from one conviction based on his use of the Social Security

number covered by 8 U.S.C. § 1324a(b)(5)'s express preemption clause without granting him the same relief on his two other convictions—for identity theft and for making a false information based on the K-4—covered by the same clause would obviously be illogical and unjust.

CONCLUSION

In reliance on *Garcia*, 306 Kan. at __, slip op. at 19, we reverse defendant Donaldo Morales' convictions on one count of identity theft and two counts of making a false information. His prosecution based on his use of a Social Security number belonging to another person for employment was expressly preempted by 8 U.S.C. § 1324a(b)(5).

JOHNSON, J., not participating.

MICHAEL J. MALONE, Senior Judge, assigned.[1]

* * *

LUCKERT, J., concurring: I concur in the majority's holding that 8 U.S.C. § 1324a(b)(5) (2012) preempts the prosecution of Donaldo Morales for identity theft under the circumstances of this case. But I reach this holding through a different analytical path than the one used by the majority. I respectfully disagree with the majority's conclusion that express preemption applies, although I would nevertheless hold that Kansas' identity theft statute intrudes into a field wholly occupied by federal law. I would further hold that a

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[1] **REPORTER'S NOTE:** Senior Judge Malone was appointed to hear case No. 111,904 vice Justice Johnson under the authority vested in the Supreme Court by K.S.A. 20-2616.

conflict exists between the immigration policy established by Congress and Kansas' identity theft statute when it is applied in a case, as here, that is dependent upon the use of information derived from the employment verification process established by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, and the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (2012). In other words, I would apply the doctrines of field and conflict preemption, rather than express preemption for the reasons more fully discussed in my concurring opinion in *State v. Garcia*, 306 Kan.___, ___ P.3d ___ (No. 112,502, this day decided), slip op. at ___.

* * *

BILES, J., dissenting: Consistent with my position in *State v. Garcia*, 306 Kan.___, ___ P.3d ___ (No. 112,502, this day decided), slip op. at 24, I respectfully dissent from the majority's result and reasoning.

* * *

STEGALL, J., dissenting: Consistent with my position in *State v. Garcia*, 306 Kan.___, ___ P.3d ___ (No. 112,502, this day decided), slip op. at 26, I respectfully dissent from the majority's result and reasoning.

APPENDIX D

NOT DESIGNATED FOR PUBLICATION

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

No. 111,904

[Filed January 8, 2016]

STATE OF KANSAS, *Appellee*,	)
v.	)
DONALDO MORALES, *Appellant.*	)

MEMORANDUM OPINION

Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed January 8, 2016. Affirmed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, senior deputy district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., GARDNER, J., and JOHNSON, S.J.

Per Curiam: Donaldo Morales appeals his convictions of identity theft and two counts of making a false information. Morales contends that the State presented insufficient evidence of his intent to defraud to sustain those convictions. Regarding his separate conviction of identity theft, he argues that the State failed to prove he knew the identification information he used belonged to another person. Finally, he equates his convictions to State actions regulating the employment of undocumented workers which, he maintains, are preempted by the federal Immigration Reform and Control Act (IRCA). Finding no merit in Morales' contentions, we affirm his convictions.

FACTS

Morales was convicted of identity theft and two counts of making a false information after a bench trial. At that trial the State introduced evidence that Morales applied for a job at Jose Pepper's in October 2010. He provided the payroll manager, Sherri Ann Miller, two forms of identification to verify that he was eligible to work in the United States: a permanent resident card and a Social Security card. Copies of those documents were retained by the employer and admitted at trial. Miller testified that in her presence Morales completed a form I-9 for federal employment purposes, a form K-4 for Kansas withholding tax purposes, and a form W-4 for federal withholding tax purposes.

Jody Sight, director of human resources for Jose Pepper's, confirmed that Morales was hired by the company shortly after he applied. Jose Pepper's paid Morales under the Social Security number he gave when he applied for work. In 2012, she provided them

several initial employment documents in Morales' file to authorities.

Joseph Espinosa testified that he was a special agent for the Social Security Administration. He received an assignment to investigate information received from the State of Kansas Department of Labor, Workers Compensation Division that there was an irregularity involving Morales' Social Security number. Agent Espinosa obtained Morales' employment file from Jose Pepper's. The documents verified that Morales was using a Social Security card with a number not issued to him but, rather, to another person, E.M. Agent Espinosa arrested Morales. Post-*Miranda*, Morales admitted to Agent Espinosa that he had purchased the Social Security card "specifically so that he could work." Morales used that card when he applied for work at Jose Pepper's.

Morales testified in his own defense. He acknowledged that he was born in Guatemala but relocated to the United States in 1989. He wanted to work but knew he could not do so without a Social Security number, something he did not have. In 2002, some friends took him to a park where people sold "papers to work." He purchased the Social Security card he ultimately used to obtain his employment with Jose Pepper's. Morales stated that he never used the card or the Social Security number for any purpose other than to work. Because he knew it would cause him problems, he never filed a tax return or sought a tax refund.

The district court found Morales guilty of identity theft for using E.M.'s Social Security number to obtain employment with Jose Pepper's and two counts of

making a false information for using E.M.'s Social Security number on the W-4 and K-4 forms. The district court sentenced Morales to a term of 7 months in prison but granted probation for 18 months. Morales timely appealed his convictions.

ANALYSIS

THE STATE'S PROOF THAT MORALES ACTED WITH "INTENT TO DEFRAUD" WAS NOT INSUFFICIENT

Morales contends that the State's evidence was insufficient to prove the element of "intent to defraud" required under both the identify theft statute and the making a false information statute. Rather, Morales contends that the State only proved he used another's Social Security number with the legally benign intent to obtain employment.

When the sufficiency of evidence is challenged in a criminal case, we review all the evidence in the light most favorable to the prosecution. To uphold a conviction we must be convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Williams*, 299 Kan. 509, 525, 324 P.3d 1078 (2014). To the extent that we must interpret statutes to resolve the issues in this case, the interpretation of a statute is a question of law and our review is unlimited. *State v. Eddy*, 299 Kan. 29, 32, 321 P.3d 12 (2014).

Both identity theft and making a false information require proof of "intent to defraud." Morales was charged under K.S.A. 2010 Supp. 21-4018(a), which defined identity theft as:

> "[O]btaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to defraud that person, or anyone else, in order to receive any benefit."

K.S.A. 21-3711 defined making a false information as:

> "Making, generating, distributing or drawing, or causing to be made, generated, distributed or drawn, any written instrument, electronic data or entry in a book of account with knowledge that such information falsely states or represents some material matter or is not what it purports to be, and with intent to defraud, obstruct the detection of a theft or felony offense or induce official action."

K.S.A. 2010 Supp. 21-3110(10) defined "intent to defraud" as "an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property." Property means "anything of value, tangible or intangible, real or personal." K.S.A. 2010 Supp. 21-3110(17).

We recognize that in *City of Liberal v. Vargas*, 28 Kan. App. 2d 867, 870-71, 24 P.3d 155 (2001), *rev. denied* 271 Kan. 1035 (2001), a panel of this court found that using a false identity to obtain employment was insufficient to prove "intent to defraud" for identity theft. The *Vargas* panel indicated that this was so because the accused did not intend to defraud his

employer "by stealing money or by being compensated for services not actually rendered." 28 Kan. App. 2d at 870. Not surprisingly, Morales urges us to adopt the rationale of *Vargas*.

However, in more recent cases, our panels have declined to apply Vargas. In *State v. Oswald*, 36 Kan. App. 2d 144, 149, 137 P.3d 1066, *rev. denied* 282 Kan. 795 (2006), this court noted that the above language from *Vargas* was "clearly dicta." The *Oswald* court held that the identity theft statute did not require "proof of actual economic loss by the victim." 36 Kan. App. 2d at 148. Then, in *State v. Meza*, 38 Kan. App. 2d 245, 248-49, 165 P.3d 298, *rev. denied* 285 Kan. 1176 (2007), our court held that an accused had the requisite intent to defraud her employer when she used a false Social Security number to deceive the employer into believing that she was eligible to be employed, when she in fact was not. The *Meza* panel quoted:

> "'While it is true that defendant did not actually steal money or services from her employer, she did obtain employment, compensation, and insurance benefits by misrepresenting herself as someone else. Contrary to defendant's assertion, the statute did not require her to "defraud" her employer by "stealing money" or by "being compensated for services not actually rendered" in order to be guilty of identity theft.'" 38 Kan. App. 2d at 249.

At the times the *Vargas*, *Oswald*, and *Meza* offenses were committed the identity theft statute required an intent to defraud "for economic benefit." See K.S.A. 2000 Supp. 21-4018(a); K.S.A. 2004 Supp. 21-4018(a). In 2005, the phrase "for economic benefit" was replaced

with "for any benefit." L. 2005, ch. 131, sec. 2; see K.S.A. 21-4018(a). With the 2005 amendment, the legislature "expanded the definition of 'identity theft' to criminalize every conceivable motive for stealing another's identity." *State v. Capps*, No. 105,653, 2012 WL 5973917, at *3 (Kan. App. 2012) (unpublished opinion), *rev. denied* 297 Kan. 1249 (2013). In *Capps*, the accused provided a sheriff's deputy with her sister's name, date of birth, and Social Security number during a traffic stop to avoid arrest for driving on a suspended license. The court held that the meaning of "intent to defraud for any benefit" was "very expansive" and included the accused's intent to deceive an officer to avoid arrest. 2012 WL 5973917, at *2-4; see K.S.A. 21-4018(a).

In *State v. Martinez-Perez*, No. 109,383, 2014 WL 2401660, at *4 (Kan. App. 2014) (unpublished opinion), *rev. denied* 302 Kan. __ (June 29, 2015), another panel of this court held that an accused "intended to defraud his employer to obtain the various benefits derived from being employed" by using a false Social Security number to obtain employment. See *State v. Saldana*, No. 111,429, 2015 WL 4486779, at *8-9 (Kan. App. 2015) (unpublished opinion), *petition for rev. filed* August 5, 2015; *State v. Hernandez-Carballo*, No. 109,704, 2014 WL 3630348, at *5-6 (Kan. App. 2014) (unpublished opinion).

Here, the applicable identity theft statute requires use of the personal identifying information of another "with the intent to defraud that person, or anyone else, in order to receive any benefit." K.S.A. 2010 Supp. 21-4018(a). The applicable false information statute requires the making of a false statement on a material

matter "with intent to defraud" to "create" a right to something "of value," which would include, *e.g.*, a job. K.S.A. 21-3711, K.S.A. 2010 Supp. 21-3110(10) and (17). Morales used a Social Security number he knew was not his on a card not legally issued to him intending to convince Jose Pepper's that he was eligible for employment when he in fact was not. He then received the benefits of employment he would not have received but for the use of that Social Security number. Therefore, the evidence was sufficient to support a finding that Morales had the requisite intent to defraud for his crimes of conviction.

The State was not required to prove Morales knew the Social Security card he used had been issued to another person.

Morales contends that we must overturn his identity theft conviction because the State offered no evidence proving that he knew he used a Social Security number issued to another person. Morales relies on *State v. Owen*, No. 102,814, 2011 WL 2039738, at *6 (Kan. App. 2011) (unpublished opinion), *rev'd on other grounds by State v. Owen*, No. 102,814, 2015 WL 1309978 (unpublished opinion). In *Owen*, 2011 WL 203978, at *5-6, a panel of this court held that the crime of identity theft required the State to prove that the accused knew the identification used belonged to another person. In *Owen*, 2011 WL 2039738, at *5, the court quoted and construed the 2007 version of the identity theft statute, which defined identity theft as:

> "knowingly and with intent to defraud for any benefit, obtaining, possessing, transferring, using or attempting to obtain, possess, transfer or use, one or more identification documents or

> personal identification number of another person other than that issued lawfully for the use of the possessor." K.S.A. 21-4018(a).

Owen is not applicable here because the 2007 version of the identity theft statute was not in effect at the time of Morales' crime. The criminal statute in effect at the time the criminal offense is committed controls. *State v. Denney*, 278 Kan. 643, 646, 101 P.3d 1257 (2004). In 2010, the legislature amended the identity theft statute. See L. 2010, ch. 88, Sec. 2. K.S.A. 2010 Supp. 21-4018(a) defined identity theft as:

> "[O]btaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to defraud that person, or anyone else, in order to receive any benefit."

A new subsection (d) was added to the statute, which provided:

> "It is not a defense that the person did not know that such personal identifying information belongs to another person, or that the person to whom such personal identifying information belongs or was issued is deceased." K.S.A. 2010 Supp. 21-4018(d).

Here, the State charged Morales with identity theft occurring on October 1, 2010. Thus, K.S.A. 2010 Supp. 21-4018 controls. Morales' claim that the State failed to prove that he knew the Social Security number he used belonged to another person is irrelevant. Under the plain language of K.S.A. 2010 Supp. 21-4018(d), the State did not need to prove that Morales knew that the

Social Security number belonged to another person. It only needed to prove that the Social Security number Morales used to obtain employment had been issued to another person. Agent Espinosa's testimony was adequate to prove that fact.

IRCA does not preempt the State's power to prosecute Morales

Morales contends that the federal Immigration Reform and Control Act of 1986, see specifically 8 U.S.C. § 1324a(b)(5) (2012), preempts Kansas identity theft and making a false information prosecutions of undocumented workers seeking employment, regardless of the form or nature of the false information such workers might provide. The State contends that IRCA preempts only prosecutions for those offenses when the information at issue is contained in a federal form I-9.

"Whether a state law is preempted by a federal law is a question of law over which this court has unlimited review." *State ex rel. Kline v. Transmasters Towing*, 38 Kan. App. 2d 537, Syl. ¶ 2, 168 P.3d 60, *rev. denied* 285 Kan. 1175 (2007).

Several panels of this court have concluded that IRCA does not preempt the prosecution of undocumented workers under the Kansas identity theft statute and/or false information statute. See *Saldana*, 2015 WL 4486779; *State v. Dorantes*, No. 111,224, 2015 WL 4366452 (Kan. App. 2015) (unpublished opinion), *petition for rev. filed* July 23, 2015; *State v. Lopez-Navarrete*, No. 111,190, 2014 WL 7566851 (Kan. App. 2014) (unpublished opinion); *State v. Flores-Sanchez*, No. 110,457, 2014 WL 7565673 (Kan. App. 2014)

(unpublished opinion), *rev. denied* 302 Kan. ___ (August 20, 2015).

In *Lopez-Navarrete*, the court explained that Lopez-Navarrete's conviction did

> "not consider her immigration status, the lawfulness of her presence within the United States, or her employment eligibility.
>
> "Lopez-Navarrete was not convicted of an immigration offense. She was convicted of identity theft and making a false writing for using D.D.D.'s social security number to obtain employment at The Cheesecake Factory . . . . Here, the State was not enforcing immigration; it was enforcing the identity theft statute." 2014 WL 7566851, at *3.

Even more recently our court issued its published opinion in *State v. Ochoa-Lara*, 51 Kan. App. 2d ___, 2015 WL 7566273 (No. 112,322, filed November 25, 2015), *petition for rev. filed* December 10, 2015. That court engaged in a comprehensive analysis, based on facts similar to those here, of the same IRCA preemption argument Morales makes to us. After that analysis the court concluded:

> "The State's prosecution of Ochoa-Lara for the illegal use of another's Social Security number did not depend on his immigration status, the lawfulness of his presence in the United States, or his eligibility for employment. *The other panels of our court noted in those decisions, as we do here, that the possible illegal uses of another's Social Security number are myriad. There is nothing in the IRCA that suggests that*

> *Congress intended the comprehensive preemption of the police powers of the State to prosecute all such instances of identity theft. The State's prosecution of Ochoa-Lara for violations of Kansas identity theft statutes was not preempted by the IRCA."* (Emphasis added.) 2015 WL 7566273, at *6.

We agree with the *Ochoa-Lara* panel's preemption analysis and its conclusion, as well as the analyses and conclusions reached in our unpublished decisions referred to above. We see no need to reiterate those analyses. Here, the State was not enforcing immigration law. Although the State initially charged Morales with making a false information regarding his form I-9, the State acknowledged that IRCA preempted that prosecution and dismissed that count. The evidence at trial showed that Morales used a Social Security number that had been issued to another person on a W-4 and K-4 form to obtain employment at Jose Pepper's he would not have otherwise obtained. His immigration status was irrelevant to the charges of identity theft and making a false information. IRCA did not preempt the State's power to prosecute him.

Affirmed.

APPENDIX E

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
TENTH JUDICIAL DISTRICT
CRIMINAL COURT DEPARTMENT**

Case No. 12CR462

[Filed September 28, 2012]

STATE OF KANSAS, Plaintiff,	)
vs.	)
DONALDO BOANERGES MORALES, Defendant.	)

TRANSCRIPT OF PROCEEDINGS

- Motion -

BE IT REMEMBERED that on the 28th day of September, 2012, the above-entitled matter comes on for hearing before the HONORABLE THOMAS H. BORNHOLDT, Judge of Court No. 11 of the Tenth Judicial District, State of Kansas, at Olathe, Kansas.

APPEARANCES

FOR THE STATE: Mr. Dustin Grant, Assistant District Attorney.

FOR THE DEFENDANT: Ms. Kelly Goodwin, Assistant Public Defender.

REPORTED BY DENISE M. GARDNER, CSR, RPR

[p.2]

I-N-D-E-X

Page

[p.3]

THE COURT: 12CR-462, State vs. Donaldo Morales.

MR. GRANT: May it please the Court, the State of Kansas appears by Dustin Grant.

MS. GOODWIN: May it please the Court, Mr. Morales appears in person with counsel, Kelly Goodwin, along with an interpreter.

THE COURT: Do you swear to interpret proceeding to the best of your abilities?

INTERPRETER: Yes.

MR. GRANT: Your Honor, I apologize. I just filed my response last night. I missed that Ms. Goodwin had actually filed the motion, so I apologize for the late filing.

THE COURT: Okay.

THE COURT: Do you want to -- I don't think this will require any evidence, will it?

MR. GRANT: No, Your Honor. I believe it's just legal argument and the State --

THE COURT: You essentially agree that Count II was --

MR. GRANT: Yes, Your Honor, State will be dismissing Count II. I have not drafted an amended complaint until after the Court's ruling today just to see.

[p.4]

THE COURT: Okay.

MS. GOODWIN: Judge, I guess I have a little bit of a brief argument on Count III.

THE COURT: Okay.

MS. GOODWIN: Do you want some more time to read his response or --

THE COURT: No. Actually, I probably do, but I don't know that reading it right now is going to cause me to say, I got it. I might have to take it under advisement.

MS. GOODWIN: Judge, I read Mr. Grant's response last night, and from what I can understand from his response, I kind of waded through all the federal cases that is outlined in that. He is saying that, basically, Count III shouldn't be dismissed and you shouldn't grant my motion on Count III because -- what I am referring to, my motion, is identity theft and that identity fraud statute. I find it interesting he's agreeing to Count II, dismiss Count II, which is a making a false writing, is not the identity theft or identity fraud statute. But in the same vain saying that you shouldn't

grant on Count III, which is the same charge as Count II, and it's still a federal document.

So I guess for the same argument that Mr. Grant is conceding to, that you should dismiss Count II, I feel

[p.5]

like it would be the same argument that Count III should be dismissed as well.

MR. GRANT: And I understand Ms. Goodwin's point, Your Honor. The State is ultimately conceding as to the I-9 Document itself because that document is spelled out in federal statute as specific to immigration.

And I believe that is what the Supreme Court opinion stated in Arizona. If you read -- if you read that fully, it relates to the immigration documents. The W-4 doesn't have the -- serve the same purpose. By Ms. Goodwin's argument -- her argument would flow over to any federal document period, any federal form whatsoever.

THE COURT: What about that? Why wouldn't your argument flow over to any federal form?

MS. GOODWIN: I'm not saying that every federal form because, obviously, the social security number I didn't file Count I, social security number, which --

THE COURT: That is a federal form.

MS. GOODWIN: -- is a federal form.

But I think the W-4 stood out from my reading of Arizona v. United States and the research that I did. I felt like W-4 fell under the same kind of umbrella that

I-9 does. That is kind of the research that I did on it and what I found on it.

[p.6]

THE COURT: Okay. Is there -- there is no argument about Count IV, I take it.

MS. GOODWIN: Not at this time, Judge, no.

THE COURT: Okay.

MS. GOODWIN: I think the W-4 is pretty clearly a state document.

THE COURT: Yes. Well, I don't think I'll take it under advisement. I'm going to grant the motion with respect to Count II, which is essentially agreed to by the State.

With respect to the W-4, I think that is more like -- akin to the social security number than it is to something specifically related to immigration as addressed in the State v. Arizona case.

So motion is denied as to Count III.

Now, what do we need to next set this for?

MS. GOODWIN: Judge, I know that Mr. Grant and myself are going to do some plea negotiations to see if we can come to an agreement. I have -- I have some -- doing my research for this motion, I came across some other legal stuff that I can file some additional motions. I hate to set it for another motions hearing and take up more of the Court's time if we' re not going to need that, I can tell the Court even if we do, it's going to be a setting like this, there is not going to be

* * *

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 112,322

[Filed September 8, 2017]

STATE OF KANSAS, *Appellee,*	)
v.	)
GUADALUPE OCHOA-LARA, *Appellant.*	)

SYLLABUS BY THE COURT

Defendant's prosecution for identity theft for using another person's Social Security number to obtain employment was expressly preempted by the federal Immigration Reform and Control Act of 1986.

Review of the judgment of the Court of Appeals in 52 Kan. App. 2d 86, 362 P.3d 606 (2015). Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed September 8, 2017. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed.

Rick Kittel, of Kansas Appellate Defender Office, was on the brief for appellant.

Steven J. Obermeier, senior deputy district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

BEIER, J.: This companion case to *State v. Garcia*, 306 Kan. __, __ P.3d __ (No. 112,502, this day decided), and *State v. Morales*, 306 Kan. __, __ P.3d __ (No. 111,904, this day decided), involves defendant Guadalupe Ochoa-Lara's convictions on two counts of identity theft.

Ochoa-Lara's two convictions arose out of a single period of restaurant employment. One conviction covered the portion of the period before a 2011 criminal statute recodification went into effect; the other covered the portion of the period after the recodification went into effect. Each count was based on Ochoa-Lara's use of Tiffany McFarland's Social Security number to obtain the employment at the beginning of the first period.

A district court judge convicted Ochoa-Lara based on stipulated facts. Ochoa-Lara's appeal to the Court of Appeals raised two issues: (1) whether the federal Immigration Reform and Control Act of 1986 (IRCA) preempted the prosecution; and (2) whether the two counts were multiplicitous. A Court of Appeals panel affirmed Ochoa-Lara's convictions. See *State v. Ochoa-Lara*, 52 Kan. App. 2d 86, 362 P.3d 606 (2015).

We granted Ochoa-Lara's petition for review of both issues. Because we decide that IRCA preempts this prosecution and thus both of Ochoa-Lara's convictions

must be reversed, we do not reach the multiplicity claim.

FACTUAL AND PROCEDURAL BACKGROUND

The State initially charged Ochoa-Lara with two counts of identity theft and one count of making a false information. The two identity theft counts recited that Ochoa-Lara had "obtain[ed], possess[ed] or use[d]" a Social Security number and a resident alien card number belonging to another person during the entire time Ochoa-Lara was employed at Longbranch Steakhouse. On the first count, the Social Security number belonged to Tiffany McFarland; on the second, the resident alien card number belonged to Pierrie Lecuyer. The making of a false information count recited that Ochoa-Lara "ma[de], generate[d], or distribute[d]" a false I-9 form, which is used to determine employment eligibility under IRCA.

Before trial, Ochoa-Lara filed two motions to dismiss. The first motion argued that the first identity theft count should be dismissed because it alleged that Ochoa-Lara violated K.S.A. 2011 Supp. 21-6107 between May 10, 2011, and December 6, 2011, and the recodified statute was not effective until July 1, 2011. The second motion challenged subject matter jurisdiction on all three counts, alleging that the State's prosecution was preempted by federal immigration law.

At the hearing on the motions, the second identity theft count and the making of a false information count were dismissed after the State agreed they should be. The State successfully amended the remaining identity theft count of the complaint to split it into two counts,

one under the recodified statute's predecessor provision and one under the recodified statute. This amendment left only Ochoa-Lara's jurisdictional challenge to the now-split identity theft count to be considered, and the district judge denied it.

The parties stipulated to the following facts at trial:

> "1. During November and December of 2011, Overland Park Police Department officers and DHS/ICE agents were attempting to contact Christian Ochoa-Lara at 9135 Robinson, Apartment 2G, Overland Park, Johnson County, Kansas. At that location officers learned that the apartment was leased to Guadalupe Ochoa-Lara. Officers obtained a copy of the lease and determined Guadalupe Ochoa-Lara, the defendant, used a [S]ocial [S]ecurity number issued to another individual to lease the apartment. Officers contacted Tiffany McFarland, who is lawfully issued the [S]ocial [S]ecurity number used by Guadalupe Ochoa-Lara to rent the apartment, and she advised she had no knowledge her number was being used and did not consent to it being used. McFarland later reported that she contacted the IRS and was notified that income had been reported under her [S]ocial [S]ecurity number which she reported was not earned by her.
>
> "2. Officers determined that Guadalupe Ochoa-Lara was employed at the [Longbranch] Steakhouse in Lenexa, Johnson County, Kansas. Officers contacted personnel for [Longbranch] Steakhouse and confirmed that Guadalupe Ochoa-Lara did work at the Lenexa location

> from approximately May of 2011 to December of 2011. Officers reviewed the Form W-4 completed by Ochoa-Lara on May 10, 2011[,] in Lenexa, Johnson County, Kansas and observed he used the [S]ocial [S]ecurity number issued to McFarland to complete the form. Personnel for [Longbranch] Steakhouse confirmed a [S]ocial [S]ecurity number is required in order for individuals to be hired by their company and also for both federal and state tax withholding purposes.
>
> "3. Investigators reported Guadalupe Ochoa-Lara does not have a [S]ocial [S]ecurity number lawfully issued to him and he used McFarland's number in order to gain employment."

After reviewing these facts, the district judge convicted Ochoa-Lara on both counts. Although the stipulated facts had mentioned that Ochoa-Lara used McFarland's Social Security number to lease an apartment, the court's Journal Entry of Judgment relied exclusively on Ochoa-Lara's employment. The judge handed down a concurrent 7-month sentence on each count and granted 18 months' probation.

DISCUSSION

Our decision today in *Garcia*, 306 Kan. at __, slip op. at 19, holds that State prosecutions such as the one in this case are expressly preempted by IRCA. Section 1324a(b)(5) of Title 8 of the United States Code (2012) provides that a federal I-9 form for employment verification "and any information contained in" such a form "may not be used for purposes other than for enforcement of" federal immigration law and certain

federal criminal statutes. This State prosecution for identity theft relied on the Social Security number Ochoa-Lara included in the I-9 to ensure employment eligibility under federal law. Our *Garcia* holding recognized that this is exactly the situation Congress intended to address and control under federal law. *Garcia* dictates the outcome of this case and compels a decision in Ochoa-Lara's favor, reversing all of his convictions.

We pause briefly, however, to address preservation of the preemption issue in the circumstances of this case.

Ochoa-Lara advanced a preemption challenge in the district court through his pretrial motion to dismiss on subject matter jurisdiction grounds. And we are not limited to the precise preemption theories argued by a party when we analyze a challenge. See *Garcia*, 306 Kan. at __, slip op. at 10 (citing *Hillman v. Maretta*, 569 U.S. __, 133 S. Ct. 1943, 1954, 186 L. Ed. 2d 43 [2013] [presence of express preemption clause does not necessarily end court's preemption inquiry]; *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869, 120 S. Ct. 1913, 146 L. Ed. 2d 914 [2000] [express preemption provision does not bar ordinary working of conflict preemption principles]; *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. __, 136 S. Ct. 1288, 1301, 194 L. Ed. 2d 414 [2016] [Thomas, J., concurring in part and concurring in the judgment] [state law could have been preempted "based on the statute alone"; majority unnecessarily relies on principles of implied preemption]; *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 912, 914-15 [10th Cir 2016], *petition for cert. filed* June 5, 2017 [facial, as-applied

preemption claims legal in nature; judicial estoppel doctrine does not apply to limit party to label first attached to challenge; "labels the parties attach to claims are not determinative"]). Compare *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (O'Connor, J., plurality) (state law impliedly preempted by Occupational Safety and Health Act), with *Gade*, 505 U.S. at 109-14 (Kennedy, J., concurring in part and concurring in the judgment) (would have found state law expressly preempted). In *Garcia* itself, for example, defense counsel emphasized field preemption rather than express preemption at oral argument before this court. But our decision ultimately relied upon IRCA's express preemption clause. *Garcia*, 306 Kan. at __, slip op. at 19. Ochoa-Lara adequately preserved the preemption claim.

CONCLUSION

In reliance on *Garcia*, 306 Kan. at __, slip op. at 19, we reverse defendant Guadalupe Ochoa-Lara's two convictions on identity theft. The prosecution based on use of a Social Security number belonging to another person to obtain employment was expressly preempted by 8 U.S.C. § 1324a(b)(5).

JOHNSON, J., not participating.

MICHAEL J. MALONE, Senior Judge, assigned.[1]

* * *

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[1] **REPORTER'S NOTE:** Senior Judge Malone was appointed to hear case No. 112,322 vice Justice Johnson under the authority vested in the Supreme Court by K.S.A. 20-2616.

LUCKERT, J., concurring: I concur in the majority's holding that 8 U.S.C. § 1324a(b)(5) (2012) preempts the prosecution of Guadalupe Ochoa-Lara for identity theft under the circumstances of this case. But I reach this holding through a different analytical path than the one used by the majority. I respectfully disagree with the majority's conclusion that express preemption applies, although I would nevertheless hold that Kansas' identity theft statute intrudes into a field wholly occupied by federal law. I would further hold that a conflict exists between the immigration policy established by Congress and Kansas' identity theft statute when it is applied in a case, as here, that is dependent upon the use of information derived from the employment verification process established by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, and the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (2012). In other words, I would apply the doctrines of field and conflict preemption, rather than express preemption for the reasons more fully discussed in my concurring opinion in *State v. Garcia*, 306 Kan.___, ___ P.3d ___ (No. 112,502, this day decided), slip op. at ___.

* * *

BILES, J., dissenting: Consistent with my position in *State v. Garcia*, 306 Kan.___, ___ P.3d ___ (No. 112,502, this day decided), slip op. at 24, I respectfully dissent from the majority's result and reasoning.

* * *

STEGALL, J., dissenting: Consistent with my position in *State v. Garcia*, 306 Kan.___, ___ P.3d ___ (No. 112,502, this day decided), slip op. at 26, I respectfully dissent from the majority's result and reasoning.

APPENDIX G

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

No. 112,322

[Filed November 25, 2015]

STATE OF KANSAS,	)
Appellee,	)
	)
v.	)
	)
GUADALUPE OCHOA-LARA,	)
Appellant.	)
	)

SYLLABUS BY THE COURT

1.

Whether a state statute is preempted by federal law involves statutory interpretation and raises a question of law over which an appellate court exercises de novo review.

2.

To determine whether a state law is preempted by a federal law, Congressional intent is determined by interpreting the language of the preemption statute and the statutory framework surrounding it. When there is an express preemption clause, an appellate court should focus on the plain wording of the clause which is the best evidence of Congressional intent.

3.

When conducting a preemption analysis, an appellate court should presume that the historic police powers of the State are not superseded unless that was the clear and manifest purpose of Congress.

4.

The Immigration Reform and Control Act (IRCA) establishes a system of employment-related verification of immigration status. The preemption language of 8 U.S.C. § 1324a(b)(5) (2012) prohibits individual states from establishing criminal penalties in this area.

5.

The Kansas identity theft statute does not regulate conduct associated with the employment-related verification of immigration status, nor does it create criminal penalties for unauthorized aliens working or seeking work in Kansas. The state prosecution of identity theft based upon the unlawful use of another's Social Security number is not preempted by the IRCA.

6.

Kansas Supreme Court Rule 6.02(a)(5) (2014 Kan. Ct. R. Annot. 40) requires an appellant raising a constitutional issue for the first time on appeal to affirmatively invoke and argue in the appeal brief an exception to the general rule that such claims may not be raised for the first time on appeal. Failure to comply with this requirement risks a determination by the appellate court that the issue has been abandoned.

Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed November 25, 2015. Affirmed.

Rick Kittel, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, senior deputy district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before LEBEN, P.J., GREEN, J., and JEFFREY E. GOERING, District Judge, assigned.

GOERING, J.: Guadalupe Ochoa-Lara was convicted of two counts of identity theft following a bench trial on stipulated facts. Ochoa-Lara argues on appeal that the charges should have been dismissed by the district court because the Immigration Reform and Control Act (IRCA) preempts state prosecution for identity theft based on the unlawful use of another person's Social Security number. Ochoa-Lara also argues that the charges were multiplicitous. We find that the IRCA does not preempt state prosecution for identity theft. We further find that Ochoa-Lara failed to raise the issue of multiplicity in the district court and he has failed to preserve this issue for appellate review.

The facts to which the parties stipulated at trial are as follows:

> "1. During November and December of 2011, Overland Park Police Department officers and DHS/ICE agents were attempting to contact Christian Ochoa-Lara at 9135 Robinson, Apartment 2G, Overland Park, Johnson County, Kansas. At that location, officers learned that

the apartment was leased to Guadalupe Ochoa-Lara. Officers obtained a copy of the lease and determined Guadalupe Ochoa-Lara, the defendant, used a social security number issued to another individual to lease the apartment. Officers contacted [T.M.], who is lawfully issued the social security number used by Guadalupe Ochoa-Lara to rent the apartment, and she advised she had no knowledge her number was being used and did not consent to it being used. [T.M.] later reported that she contacted the IRS and was notified that income had been reported under her social security number which she reported was not earned by her.

"2. Officers determined that Guadalupe Ochoa-Lara was employed at the Long Branch Steakhouse in Lenexa, Johnson County, Kansas. Officers contacted personnel for Long Branch Steakhouse and confirmed that Guadalupe Ochoa-Lara did work at the Lenexa location from approximately May of 2011 to December of 2011. Officers reviewed the Form W-4 completed by Ochoa-Lara on May 10, 2011 in Lenexa, Johnson County, Kansas and observed he used the social security number issued to [T.M.] to complete the form. Personnel for Long Branch Steakhouse confirmed 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.

"3. Investigators reported Guadalupe Ochoa-Lara does not have a social security number

> lawfully issued to him and he used [T.M.'s] number in order to gain employment."

Prior to trial, Ochoa-Lara filed two separate motions to dismiss. In his first motion, Ochoa-Lara argued that his case should be dismissed because the complaint was fundamentally flawed. Specifically, Ochoa-Lara maintained that because the Kansas identity theft statute had changed during the time he was charged he did not have proper notice of the charges against him and could not adequately prepare his defense. In his second motion to dismiss, Ochoa-Lara argued that his case should be dismissed for lack of jurisdiction because the IRCA preempted the prosecution of him for violating Kansas' identity theft statute.

At the hearing of the motions before the district court, the State agreed to dismiss two of Ochoa-Lara's charges based on jurisdiction. The State then requested to split count 1 into two separate charges due to the fact that the Kansas identity theft statute had changed. Effective July 1, 2011, K.S.A. 21-4018 was repealed and replaced by K.S.A. 2011 Supp. 21-6107. As such, count 1 of the amended complaint covered conduct prior to July 1, 2011, and count 2 covered conduct post July 1, 2011. Ochoa-Lara did not argue to the district court that the counts in the amended complaint were multiplicitous.

Based on the stipulated facts, the district court found Ochoa-Lara guilty of both counts of identity theft. Ochoa-Lara was given a concurrent sentence of 7 months on each count and was granted probation for 18 months.

Does federal law preempt the State's prosecution of Ochoa-Lara for identity theft?

In his motion to dismiss for lack of jurisdiction, Ochoa-Lara argued to the district court that under the preemption provision of the IRCA, the

> "[S]tate cannot use an I-9 for the purpose of convicting an individual of identity theft, identity fraud, or making a false writing under a State statute. Additionally, any information contained in the I-9, including names and social security numbers, and any supporting documents cannot be used for State conviction purposes."

Ochoa-Lara cited *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492, 2504, 183 L. Ed. 2d 351 (2012), in which the United States Supreme Court held 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."

At the hearing on the motion to dismiss, the district court denied the motion, ruling that "[w]e're not relying on the I-9 at this time or any of the other federally described statutes and codes that are set forth in the *Arizona* case." On appeal, Ochoa-Lara argues that his convictions for identity theft "are simply state-level penalties for conduct prescribed under federal law."

Whether a state statute is preempted by federal law involves statutory interpretation and raises a question of law over which we exercise de novo review. *Zimmerman v. Board of Wabaunsee County Comm'rs*,

289 Kan. 926, 974, 218 P.3d 400 (2009); *Steffes v. City of Lawrence*, 284 Kan. 380, 385, 160 P.3d 843 (2007).

Under the Supremacy Clause of the United States Constitution, "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. "Simply put, the Supremacy Clause invalidates state laws that interfere with, or are contrary to, federal law." *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 294, 255 P.3d 1186 (2011).

To determine whether a state law is preempted by a federal law, we must determine Congress' intent by interpreting the "'language of the pre-emption statute and the "statutory framework" surrounding it.'" *Wichita Terminal Ass'n v. F.Y.G. Investments, Inc.*, 48 Kan. App. 2d 1071, 1078, 305 P.3d 13 (2013) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S. Ct. 2240, 135 L. Ed. 2d 700 [1996]). When there is an express preemption clause in a federal law, the court should "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993). In conducting a preemption analysis, "courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 132 S. Ct. at 2501.

As to the IRCA, we begin our preemption analysis with a review of the federal statute at issue, 8 U.S.C. § 1324a (2012), which governs the unlawful

employment of aliens. In *Chamber of Commerce of United States v. Whiting*, 563 U.S. 582, 131 S. Ct. 1968, 1974, 179 L. Ed. 2d 1031 (2011), the United States Supreme Court summarized 8 U.S.C. § 1324a as follows:

> "IRCA makes it 'unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.' 8 U.S.C. § 1324a(a)(1)(A). IRCA defines an 'unauthorized alien' as an alien who is not 'lawfully admitted for permanent residence' or not otherwise authorized by the Attorney General to be employed in the United States. § 1324a(h)(3).
>
> "To facilitate compliance with this prohibition, IRCA requires that employers review documents establishing an employee's eligibility for employment. § 1324a(b). An employer can confirm an employee's authorization to work by reviewing the employee's United States passport, resident alien card, alien registration card, or other document approved by the Attorney General; or by reviewing a combination of other documents such as a driver's license and social security card. § 1324a(b)(1)(B)-(D). The employer must attest under penalty of perjury on Department of Homeland Security Form I-9 that he 'has verified that the individual is not an unauthorized alien' by reviewing these documents. § 1324a(b)(1)(A). The form I-9 itself 'and any information contained in or appended

> to [it] . . . may not be used for purposes other than for enforcement of' IRCA and other specified provisions of federal law. § 1324a(b)(5)."

An employer who is charged with violating 8 U.S.C. § 1324a has an affirmative defense if there has been good-faith compliance with the IRCA's I-9 document review requirements. 8 U.S.C. § 1324a(a)(3); *Whiting*, 131 S. Ct. at 1975.

The express preemption language is found in 8 U.S.C. § 1324a(b)(5), which states that the I-9 form and documents appended to it "may not be used for purposes other than for enforcement of this [Act]" and other specified provisions of federal law. The interpretation of this language should be done in the context of the entire statute. The I-9 form and the information appended to that form are all part of an employment verification system. See 8 U.S.C. § 1324a(b). When read in this light, it becomes clear that the Congressional intent of 8 U.S.C. § 1324(b)(5) was to preempt the area of employment-related verification of immigration status and to prevent individual states from establishing criminal penalties in this area. See, *e.g.*, *State v. Reynua*, 807 N.W.2d 473, 480 (Minn. App. 2011) (state perjury prosecution preempted by the IRCA).

Neither the current nor former Kansas identity theft statutes have anything to do with the employment-related verification of immigration status, nor do they create criminal penalties for unauthorized aliens working or seeking work in Kansas. K.S.A. 21-4018(a), under which Ochoa-Lara was charged in count 1, prohibits obtaining, possessing, transferring,

or using the personal identification number of another person, or attempting to do so, with the intent to defraud for any benefit. K.S.A. 2011 Supp. 21-6107(a)(1), under which Ochoa-Lara was charged in count 2, prohibits "obtaining, possessing, transferring, using, selling or purchasing any personal identification number, or document containing the same, belonging to or issued to another person" with the intent to defraud that person in order to receive any benefit. The gravamen of the offenses for which Ochoa-Lara was prosecuted are the unauthorized uses of another person's Social Security number. There is nothing in the IRCA or its express preemption language that remotely suggests that Congress intended to supersede Kansas' historic police power to prosecute identity thieves.

Further, as the district court noted, neither the I-9 form nor the documents appended to the I-9 form were used to prosecute Ochoa-Lara. There is nothing in the preemption language that prohibits the State from proving identity theft by using information from sources other than the I-9 form, even though that information may also be contained on the I-9 form and the documents appended thereto. See *Whiting*, 131 S. Ct. at 1982 n.9. At the end of the day, while Ochoa-Lara's use of another's Social Security number may have resulted in a falsified I-9 form or a falsified W-4 form, he was not prosecuted in this case for falsifying federal forms. As such, whether federal penalties exist for falsifying an I-9 form or a W-4 form does not prevent the State from prosecuting Ochoa-Lara for identity theft.

This case was tried to the district court on stipulated facts. The evidence supporting Ochoa-Lara's convictions was his stipulation that he used the Social Security number of another person to complete a W-4 form in order to gain employment. Given this stipulation, the State did not have to admit any documents at all to prove the elements necessary to convict Ochoa-Lara for violating the current and former Kansas identity theft statutes, much less the I-9 form and the documents appended thereto. Again, just because Ochoa-Lara used the Social Security number of another person in connection with the completion of the I-9 form does not mean that he gets the proverbial "Get Out of Jail Free" card for other illegal uses of that Social Security number that violate Kansas statutes.

The same conclusion was reached by the Minnesota Court of Appeals in *Reynua*, 807 N.W.2d. 473. That case involved, among other things, a prosecution for forgery based on the use of a Minnesota identification card. The court in that case concluded that the preemption language in 8 U.S.C. § 1324a(b)(5) did not bar prosecution for the display or possession of a fraudulently altered Minnesota identification card simply because that card had been presented in support of an I-9 form:

> "IRCA bars use of the I-9 form and 'any information contained in or appended to such form' for purposes other than enforcement of the federal immigration statute and the federal perjury and false-statement provisions. 8 U.S.C. § 1324a(b)(5). But we cannot read this provision so broadly as to preempt a state from enforcing

its laws relating to its own identification documents.

"We conclude that the state, for example, is not barred from prosecuting the crime of display or possession of a fictitious or fraudulently altered Minnesota identification card, [citation omitted], merely because that card has been presented in support of an I-9 federal employment-eligibility verification form. There is a general presumption that the 'historic police powers of the State' are not superseded by federal legislation 'unless that was the clear and manifest purpose of Congress.' *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008) (quotation omitted).

"Section 1324a(b)(5) prohibits non-federal use of 'information' appended to the I-9 form. That language does not exhibit a 'clear and manifest purpose' to bar enforcement of state laws pertaining to state identification cards. It would be a significant limitation on state powers to preempt prosecution of state laws prohibiting falsification of state-issued identification cards, let alone to prohibit all use of such cards merely because they are also used to support the federal employment-verification application. [Citations omitted.] We note here that Reynua did not use the [falsified] identification card solely to apply for employment, but also to apply for certificates of title.

. . . .

> "The state proved the simple-forgery count by presenting evidence tending to show that the photograph on the Minnesota identification card was that of Reynua, but the card was issued in the name of 'Laura Romero.' Reynua's sister testified that the photograph was of Reynua, the district court found that the photograph was of the same person as the person in the Reynua family photographs, and the court took judicial notice that the person in all the photographs was the same person that appeared in court to answer the complaint. Although the Minnesota identification card in the name of 'Laura Romero' was presented with the I-9 form, the state's proof of the falsity of the identification card did not rely on its use in support of the I-9 form. The falsity of the identification card was shown primarily by the evidence establishing that the person whose photograph was shown on the card was Reynua, not Romero." 807 N.W.2d at 480-81.

Various other panels of our court in unpublished decisions have likewise held that the IRCA does not preempt state prosecution of identity theft based on the unlawful use of another's Social Security number. See *State v. Saldana*, No. 111,429, 2015 WL 4486779 (Kan. App. 2015) (unpublished opinion), *petition for rev. filed* August 5, 2015; *State v. Dorantes*, No. 111,224, 2015 WL 4366452 (Kan. App. 2015) (unpublished opinion), *petition for rev. filed* July 23, 2015; *State v. Flores-Sanchez*, No. 110,457, 2014 WL 7565673 (Kan. App. 2014) (unpublished opinion), *rev. denied* 302 Kan. ___ (August 20, 2015); *State v. Lopez-Navarrete*, No. 111,190, 2014 WL 7566851 (Kan. App. 2014)

(unpublished opinion). Those panels each reached the same conclusion as we do in this case. The State's prosecution of Ochoa-Lara for the illegal use of another's Social Security number did not depend on his immigration status, the lawfulness of his presence in the United States, or his eligibility for employment. The other panels of our court noted in those decisions, as we do here, that the possible illegal uses of another's Social Security number are myriad. There is nothing in the IRCA that suggests that Congress intended the comprehensive preemption of the police powers of the State to prosecute all such instances of identity theft. The State's prosecution of Ochoa-Lara for violations of Kansas identity theft statutes was not preempted by the IRCA.

Did Ochoa-Lara preserve the issue of multiplicity for appellate review?

Ochoa-Lara next argues that his convictions of two counts of identity theft violated the rule prohibiting multiplicitous convictions. Ochoa-Lara contends that the State took what was a single and continuous criminal act and separated it into multiple counts in the amended complaint. Ochoa-Lara has not properly preserved this issue for appellate review.

As noted above, the State sought permission from the district court to split what had been a single count of identity theft into two separate charges due to the fact that the identity theft statute in Kansas had changed. At the hearing before the district court, Ochoa-Lara did not make any argument that the State's requested amendment violated the prohibition against multiplicitous counts, nor did he make any

effort to raise the issue with the district court thereafter.

It is well settled that "constitutional grounds for reversal asserted for the first time on appeal are not properly preserved for appellate review." *State v. Guadina*, 284 Kan. 354, 372, 160 P.3d 854 (2007). This rule is subject to three recognized exceptions: (1) The newly asserted issue involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the issue is necessary to serve the ends of justice or prevent a denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite relying on the wrong ground or assigning the wrong reason for its decision. *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010).

A party who wishes to raise a constitutional issue for the first time on appeal must proactively invoke an exception and argue why the issue is properly before the appellate court. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). Kansas Supreme Court Rule 6.02(a)(5) (2014 Kan. Ct. R. Annot. 41) states that the contents of an appellant's brief must include:

> "The arguments and authorities relied on, separated by issue if there is more than one. Each issue must begin with citation to the appropriate standard of appellate review and a pinpoint reference to the *location* in the record on appeal where the issue was raised and ruled on. *If the issue was not raised below, there must be an explanation why the issue is properly before the court*." (Emphasis added.)

Recently in *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014), our Supreme Court warned litigants that the failure to comply with Rule 6.02(a)(5) risks having issues deemed waived or abandoned. The court in *Godfrey* noted that "[w]e are now sufficiently post-*Williams* that litigants have no excuse for noncompliance with Rule 6.02(a)(5)." *Godfrey*, 300 Kan. at 1044.

In this case, Ochoa-Lara raises the issue of multiplicity for the first time in his appellate brief, but he makes no effort to articulate any of the exceptions that would allow us to consider this issue for the first time on appeal. The State, in its brief, argues that this issue has not been appropriately preserved for appellate review. Nevertheless, Ochoa-Lara chose not to submit a reply brief to respond to the State's preservation argument. Ochoa-Lara's brief does not comply with Rule 6.02(a)(5). Because Ochoa-Lara failed to raise the issue of multiplicity with the district court and because he failed to articulate in his brief any exception that would permit us to review the issue for the first time on appeal, we choose not to reach the merits of this issue as it has been abandoned by Ochoa-Lara's failure to properly brief it.

Affirmed.

APPENDIX H

IN THE DISTRICT COURT
OF JOHNSON COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT

Case No. 12CR12
Court No. 14

[Filed April 2, 2013]

STATE OF KANSAS,	)
Plaintiff,	)
	)
vs.	)
	)
GUADALUPE OCHOA-LARA,	)
Defendant.	)
	)

TRANSCRIPT OF MOTION HEARING

BE IT REMEMBERED that on this 2nd day of April, 2013, the above-entitled cause comes on for a motion hearing before the HONORABLE KEVIN P. MORIARTY, Judge of Division No. 14 of the Tenth Judicial District of the State of Kansas, at Olathe, Kansas.

APPEARANCES:

For the state of Kansas:

MS. VANESSA RIEBLI
JOHNSON COUNTY
DISTRICT ATTORNEY'S OFFICE
100 North Kansas Avenue
Olathe, KS 66061

For the Defendant:

MR. MARK DUPREE, SR.
JOHNSON COUNTY
PUBLIC DEFENDER'S OFFICE
115 East Park Street, Suite A
Olathe, KS 66061

Reported by Amanda L. Hearn, RPR, CSR

[p.2]

THE COURT: Case No. 12CR12.

Parties state their appearances, please.

MS. RIEBLI: May it please the Court.

State appears by Vanessa Riebli.

MR. DUPREE: May it please the Court.

Mr. Ochoa-Lara appears in person and with Counsel, Mark Dupree.

THE COURT: Okay. You can have a seat.

We're here on Defendant's motions.

There is the motion to dismiss.

Do you want -- I've read everything.

But do you want to make some brief arguments?

MS. RIEBLI: Judge, I just want to state for purposes of the motion the Defendant filed on September 2, 2012, the motion to dismiss, the State agrees that Count 2 -- Counts 2 and 3 have to be dismissed pursuant to Arizona.

That's based upon the fact Count 2 uses the resident alien card number and Count 3 uses the I-9.

So therefore, we are dismissing 2 and 3 if we haven't done so before.

The other issue is No. 1, Count 1 should be -- not be dismissed based upon the arguments in the motion to dismiss.

But rather it's our position it should be

[p.3]

broken up into two counts.

I believe that other Courts in this courthouse have agreed with that argument. I believe Judge Welch is one of them.

So the State has prepared an amended complaint breaking out Count 1 for the dates May 10, 2011 to June 30, 2011, and then Count 4 would be July 1, 2011 to December 6, 2011.

All of our legal argument for this is set forth in our response which we filed on October 24, 2012.

THE COURT: Okay. Mr. Dupree?

MR. DUPREE: Judge, Defense would stand on the motion that was filed.

THE COURT: Okay.

MR. DUPREE: We don't agree with the State in their interpretation of Arizona.

We believe that it applies to all counts in the case regardless of how they break it up.

I do understand that there are other Judges in this courthouse who have separated them out.

We, of course, don't agree with that either.

We would ask the Court to follow what Defense is arguing in the motion and ultimately dismiss everything, Judge.

[p.4]

I believe this is a federal situation and the State should --

THE COURT: Okay. The Defendant's motion's going to be denied since Counts 2 and 3 are dismissed.

The State is allowed to amend the petition.

This is a situation where the Court is adopting the arguments made by the State.

But essentially -- This is different than Arizona, because Arizona overlapped with the federal statutes.

Here we have something completely separate.

We're not relying upon the I-9 at this time or any of the other federally described statutes and codes that are set forth in the Arizona case.

We do need to set this now for a jury trial.

I understand that our Supreme Court has before it an issue that may still impact Counts 1 and 4 or 1 and 2; however the State chooses to word their amended complaint.

The -- What we are -- What we're -- I'm doing is -- Like the other Judges, I'm going to set it probably for trial in the summer.

The Defendant will get -- take the time.

Then you either try it and preserve your rights for appeal, or you can do a stipulated facts and

[p.5]

appeal it on that.

It makes no difference to me.

You can choose.

But I understand the situation and am waiting for the Supreme Court.

We can't wait for the Supreme Court, because we don't know when they're going to resolve anything.

So do you want -- Sir, do you have a copy of the amended complaint now?

MR. DUPREE: He does, Judge.

MS. RIEBLI: May I approach?

THE COURT: Yes.

Do you need me to read it to you, sir? Do you need me to read it?

MR. OCHOA-LARA: No.

THE COURT: Okay. The Court has seen the -- what we have done in the amended complaint of Counts 1 and 4.

Counts 2 and 3 are dismissed.

The -- So there's no confusion, the Defendant when he was bound·over on Count 1, Count 2 was just separated for the timeframes and that a new preliminary hearing is not necessary whatsoever.

The Court will set this for a jury trial.

Is June 10 a good time?

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