No. 17-834

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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Respondents assert that the lower courts are in accord on the important federal questions presented in this case, that the holding below was narrow and thus limited to local concern, and that the state prosecutions at issue here were veiled attempts to intrude upon federal immigration authority. They are wrong on all counts.

Respondents were convicted of identity theft in violation of a Kansas criminal statute of general applicability. The convictions rest not on their Form I-9 but on the false information they wrote on state tax forms and other documents. The Kansas Supreme Court, in conflict with every other lower court to consider the question, held that the Immigration Reform and Control Act (IRCA) *expressly* preempts these prosecutions because that information was also located on the Form I-9.

While "the federal government has sole authority to determine who is authorized to work," Opp. at 1, it emphatically does *not* have sole authority to punish providing false information on state tax forms. That is the purview of traditional state police powers. By concluding that federal law requires invalidation of the State's prosecution of identity theft, review by this Court is the only possible way to vindicate the federal and state interests implicated by the Kansas Supreme Court's novel application of IRCA. *See Kansas v. Carr*, 136 S. Ct. 633, 641-42 (2016).

This Court should grant review.

I. The Kansas Supreme Court's decision exposes the existence and breadth of the conflict among authorities concerning Section 1324a(b)(5).

Respondent seeks to shroud the Kansas Supreme Court's decision from review by minimizing the conflict among lower courts and conflating the preemption analysis. These efforts, though creative, are no impediment to review of an important issue of federal law.

A. This case presents a clean conflict.

The Kansas Supreme Court held that "the State's identity theft prosecution of [Garcia] . . . was expressly preempted[]" by federal law. Pet. App. at 28. Because it resolved the case on express preemption grounds, the majority noted it "need not decide the merits of any other possible or actual preemption argument." *Id.*

The Kansas Supreme Court's holding, therefore, conflicts with every other lower court to have considered how 8 U.S.C. § 1324a(b)(5) affects state laws prohibiting identity theft – even those that reached a similar outcome. It is the only case, among many, to rely upon express preemption. *See* Pet. at 16-24 (describing cases that rejected express preemption). Only this Court can resolve that conflict.

Respondents' effort to gloss over that conflict only reveals an even broader disagreement among the lower courts. For instance, Respondents commend Justice Luckert's concurrence for relying upon field preemption as a plausible rationale in accord with other decisions. Opp. at 21. Yet, though Justice Luckert's discussion included some commentary about field and other

implied preemption concepts, she ultimately concluded that it was conflict preemption that applied: "I would hold that *conflict* preemption prevents the State from prosecuting Garcia." Pet. App. at 38. (Luckert, J., concurring) (emphasis added); *but see English v. General Electric Co.*, 496 U.S. 72, 79 (1990) (contrasting field and conflict preemption, recognizing the latter arises "where it is impossible for a private party to comply with both state and federal regulations"). Despite Respondents' policy arguments for a broad reading of IRCA, they fail to identify how it would be impossible to comply with IRCA and the Kansas prohibitions on identity theft, Opp. at 23-26, thus rendering conflict preemption analysis inapposite.

Even among the authorities actually applying field preemption to this issue,[1] Respondents' effort to obscure the conflict fails. Congress has certainly and justifiably created a comprehensive immigration scheme, but that does not immunize any individual from prosecution for violating state criminal laws of general applicability, such as identity theft. As noted, that conclusion has been reached by at least two courts. *See* Pet. at 21-23. And, it has been (and presumably remains) the view of the federal government. *See* Brief of the United States, *Puente Arizona v. Arpaio*, 821

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[1] Implied preemption and its impact upon state laws has been an issue long subject of debate. *See Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 949 (2016) (Thomas, J., concurring) (suggesting the Court needs to address whether Article I gives Congress the constitutional authority and power to preempt a wide array of state laws within the states' traditional state power); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1603 (2015) (Thomas, J., concurring) (recognizing implied preemption has significant constitutional concerns).

F.3d 1098 (Nos. 15-15211, 15-15213, 15-15215), 2016 WL 1181917, at *14. But, other courts have suggested that the scope of IRCA is so broad that it occupies the field and prevents application of these textually neutral state laws against aliens. *See* Pet. at 16-21.

There is a clear and present conflict among the lower courts, both as to whether IRCA preempts traditional state police power and, if so, what the basis for that preemption is. This case presents the Court an opportunity to eliminate the disagreement among lower courts on the question of whether, and to what extent, IRCA preempts state laws.

B. The implications of the erroneous holding below are far-reaching.

Respondents suggest that this dispute is of mere local significance and does not warrant this Court's intervention. But the Kansas Supreme Court, unlike other lower courts to consider the question, held that *federal* law (IRCA) and the Supremacy Clause of the *federal* Constitution barred the state from prosecuting these crimes using its traditional police powers. That alone implicates significant federal interests. *See Carr*, 136 S. Ct. at 641-42 ("[W]hat a state court cannot do is experiment with our Federal Constitution and expect to elude this Court's review so long as victory goes to the criminal defendant. 'Turning a blind eye' in such cases 'would change the uniform "law of the land" into a crazy quilt.'").

Respondents try to downplay the obvious consequences of the Kansas Supreme Court's holding by pointing to language in the opinion purporting to limit its scope to identity theft cases involving aliens

subject to IRCA, *see* Pet. App. at 28. But the actual *holding* below is far broader. *Cf.*, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001) ("this Court is bound by holdings, not language").

Contrary to Respondents' suggestion, the Kansas Supreme Court's reading of the federal statute cannot be limited to only those situations involving employment eligibility. Opp. at 31. Under the Kansas Supreme Court's reading of the statute, any information (e.g., name, address, or social security number) that happens to appear on a Form I-9, even when it is taken from or appears on other documents, is covered by this provision. Quite literally, the statute would prohibit its use for *any* purpose "other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18." 8 U.S.C. § 1324a(b)(5). Criminal defendants could effectively immunize themselves from state prosecution arising from use of false information merely by writing that same false information on a Form I-9. That, as Justice Stegall's dissent demonstrated, would lead to absurd results. Pet. App. at 45 ("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."). That is not what IRCA addresses nor would it be within the power of Congress to effectuate.

Respondents were prosecuted because they used another individual's personal identification information to commit fraud, not because they were illegal aliens. The State likewise prosecutes citizens for the very same conduct. But on its face, the Kansas Supreme Court's reading of IRCA would apply to *both* such

prosecutions because the obligation to complete a Form I-9 applies irrespective of immigration status. The breadth of such a rule is far removed from the purpose of IRCA and leaves the State of Kansas without the ability to deter this conduct and protect the rightful owner of the stolen identity.

The better reading of Section 1324a(b)(5) is that Congress intended to preclude use of the Form I-9, items appended to it, and information taken from the form itself, but left undisturbed the States' ability to prosecute identity theft where the stolen information is found on other documents, such as state tax forms or applications for credit. This reading, contrary to Respondents' claim, does not "render nugatory" any language in Section 1324a(b)(5). Opp. at 18.

IRCA's express preemption provision relates to prosecution of *employers*, not individuals (who might also be employees) that have stolen another's identification in violation of state law. 8 U.S.C. § 1324a(h)(2). The Kansas Supreme Court's interpretation of Section 1324a(b)(5) is an affront to the text of the statute and undermines the traditional police power that States exercise when common identity-theft crimes have been committed.

II. This case presents a clean vehicle to resolve the split.

Respondents inject at least three items that are designed to ward off this Court's review. None withstands scrutiny.

First, they argue that Kansas did not preserve the second question, e.g., whether Congress has the power to preempt States from exercising their traditional

police powers to prosecute state law crimes. Opp. at 27-29. This argument misapprehends the nature of preemption, as congressional power is part and parcel of any preemption question, especially field preemption.

By definition, preemption is focused upon congressional power vis-a-vis the States. Acting pursuant to the Supremacy Clause, the federal government may invalidate particular state laws through legislation, regulation, or otherwise. *See generally Oneok, Inc. v. LearJet, Inc.*, 135 S. Ct. 1591, 1594-95 (2015); *accord Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) (describing the Supremacy Clause as a "rule of decision" when state law conflicts with federal laws). But, owing to the sovereign interests of federal and state governments, this Court has started with the presumption that Congress does not intend to supplant state law, *see New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995), especially when such a rule would undermine the historic police powers of the States, *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

This Court has frequently admonished lower courts not to broadly read preemptive statements into federal laws given the unique sovereignty concerns that are implicated by express preemption. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188-89 (2014). The Kansas Supreme Court did not heed this Court's admonitions. Thus, the unique and unexpected decision below necessarily begs the question whether Congress intended to extinguish the traditional police power of the State of Kansas and, if Congress did so intend, then

whether the federal Constitution grants Congress power to do so. *See id.* (recognizing courts should accept the reading of the statute that disfavors preemption); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (directing focus to plain wording of preemption clause to avoid "unintended encroachment on the authority of the States").

Second, Respondents cite a newspaper article that quotes after-the-fact, extra-judicial comments of a state official who has no involvement with this case to insinuate that these local prosecutions were a disguised form of immigration enforcement. *See*, *e.g.*, Opp. at 29-30. Nonsense. Such assertions have no bearing upon the viability of a Kansas statute or the prosecutions. *See*, *e.g.*, *United States v. O'Brien*, 391 U.S. 367, 384 (1968) (declining to consider ruminations of a single lawmaker when the law would be immune from such inquiry had the lawmaker made a wiser speech); *Garcia v. United States*, 469 U.S. 70, 75 & n.3 (1984) (recognizing that political statements are not always distinguished for candor or accuracy).

For purposes of Kansas's identity theft statute, it matters not one whit whether the offender is legally present or authorized to work. A citizen or legal alien who steals someone else's personal identifying information and uses it on documents such as a state tax form, lease, or credit application would be just as guilty of identity theft as an undocumented alien who does so.

Third, Respondents suggest that these prosecutions are limited to a single jurisdiction within the State of Kansas, implying some sort of selective prosecution of Respondents. But that suggestion is baseless. Many

identity theft cases are prosecuted against defendants across the State with nary a mention of their immigration status. *See*, *e.g.*, *State v. Walters*, Case No. 108,972, 2013 WL 3868066, at *3 (Kan. Ct. App. July 26, 2013) (reversing dismissal of identity theft charges arising in Leavenworth County where defendant tried to avoid detection that her license was suspended and she had outstanding warrants); *State v. Capps*, Case No. 105,654, 2012 WL 5973917, at *1 (Kan. Ct. App. Nov. 21, 2012) (affirming conviction for identity theft arising in Sedgwick County where defendant tried to avoid arrest for driving on suspended license). This happens statewide, even in the county where Respondents were convicted. *See State v. Johnson*, 190 P.3d 995 (Kan. Ct. App. 2009).

To be sure, it is not necessarily surprising that those without valid social security numbers might be caught up in using another's stolen information. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) (explaining why a non-discriminatory policy may have a disparate, incidental impact). But even so, there is no evidence to suggest those prosecutions are limited to just Johnson County, Kansas. Indeed, the prosecutions exist statewide. *See*, *e.g., State v. Valles*, Case No. 114,660, 2017 WL 542922 (Kan. Ct. App. Feb. 10, 2017) (petition for review pending) (reversing order setting aside identity theft conviction from Barton County); *State v. Meza*, 165 P.3d 298 (Kan. Ct. App. 2007) (affirming identity theft conviction from Bourbon County).

* * * * *

The State convicted Respondents of identity theft for stealing another's personal identification and representing, on a Kansas tax document, that the information was their own. This is a crime unrelated to either their status as a citizen or the content of their Form I-9. The fact that Congress regulates immigration and Respondents happen to be aliens is no basis to conclude Congress intended to immunize Respondents from these sorts of traditional state prosecutions or to deprive the State of its traditional police power to address the significant and growing problems of identity theft.

CONCLUSION

The petition for writ of certiorari should be granted.

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