No. 17-834

In the Supreme Court of the United States

STATE OF KANSAS, PETITIONER

v.

RAMIRO GARCIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1324a(b)(5), which prohibits the "use[]" of a federal employment-authorization form (the I-9) and "any information contained in or appended to" the I-9 "for purposes other than" specified federal law-enforcement actions, expressly preempts state prosecutions for providing false identity information on documents other than the I-9.

2. Whether 8 U.S.C. 1324a(b)(5), as construed by the Kansas Supreme Court, exceeds Congress's constitutional authority and improperly intrudes on powers reserved to the States.

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented. The Court should also consider adding a question addressing implied preemption.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

1. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, makes it unlawful to knowingly employ an alien who is not authorized to work in the United States. 8 U.S.C. 1324a(a); see 8 U.S.C. 1324a(h)(3). To enforce that prohibition, IRCA requires all employees to submit a form—the federal I-9 form—attesting to their authorized status.

8 U.S.C. 1324a(b)(2); see 8 C.F.R. 274a.2(a)(2). IRCA also requires employees to submit documents establishing their work authorization, 8 U.S.C. 1324a(b)(1), and it requires employers to verify those documents, *ibid.*; see *Chamber of Commerce of U.S.* v. *Whiting*, 563 U.S. 582, 588-591 (2011).

Several provisions of IRCA provide further direction about the I-9. Section 1324a(b)(3) requires employers to retain the form and make it available to specified officials. Section 1324a(b)(4) permits employers to copy the I-9 for particular purposes. Section 1324a(b)(5), entitled "Limitation on use of attestation form," is centrally relevant to this case. That provision states that the I-9 form and "any information contained in or appended to" the form "may not be used for purposes other than" enforcement of federal immigration law or specified federal criminal statutes. 8 U.S.C. 1324a(b)(5).[1]

2. Kansas, like every other State and the federal government, criminalizes identity theft. Kan. Stat. Ann. § 21-6107 (Supp. 2017); see 18 U.S.C. 1028; National Conference of State Legislatures, *Identity Theft*, http://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx. As relevant here, Kansas's identity-theft statute prohibits "using" any "personal identifying information" belonging to another person, with intent to "[d]efraud that person, or anyone else, in order to obtain any benefit." Kan. Stat. Ann. § 21-6107(a)(1) (Supp. 2017). "[P]ersonal identifying information" includes, *inter alia*, a name, birthdate,

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[1] The specified federal criminal statutes are 18 U.S.C. 1001 (false statements), 18 U.S.C. 1028 (identity theft), 18 U.S.C. 1546 (immigration document fraud), and 18 U.S.C. 1621 (perjury).

driver's license number, or social security number. *Id.* § 21-6107(e)(2).[2]

A related Kansas statute criminalizes making a false writing, defined as "making, generating, distributing or drawing" certain kinds of information with "knowledge that such information falsely states or represents some material matter," and "with intent to defraud, obstruct the detection of a theft or felony offense or induce official action." Kan. Stat. Ann. § 21-5824 (Supp. 2017).[3]

3. This petition for a writ of certiorari arises from three Kansas identity-theft prosecutions, each involving use of another person's social security number on state or federal tax-withholding forms.

a. Respondent Ramiro Garcia was stopped for speeding. Pet. App. 3. A records check prompted the officer to contact a financial-crimes detective, who obtained documents Garcia had submitted with his employment application at a restaurant. *Ibid.* Further investigation revealed that Garcia had used a Texas woman's social security number on his state and federal tax-withholding forms and his I-9. *Ibid.* The State charged him with identity theft. *Ibid.*

Respondent Donaldo Morales came to officers' attention as a result of irregularities in social security reporting at another restaurant. Pet. App. 62-63. A Social Security Administration agent discovered that Morales had submitted an I-9 and state and federal tax-withholding forms with a social security number that did not belong to him. *Id.* at 63. Morales later admitted that he had "purchased the Social Security number * * * from

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[2] An earlier version of this statute included a similar definition of the offense. See Kan. Stat. Ann. § 21-4018 (2007); Pet. 5 & n.1.

[3] An earlier version of this statute included a similar definition of the offense. See Kan. Stat. Ann. § 21-3711 (2007); Pet. 6 & n.3.

someone in a park." *Id.* at 63-64. The State charged him with identity theft and making a false writing. *Id.* at 63.

Respondent Guadalupe Ochoa-Lara used another person's social security number to lease an apartment. Pet. App. 91. Police discovered the discrepancy when they tried to contact someone else at the apartment. *Ibid.* Ochoa-Lara admitted that the social security number he had used for the lease did not belong to him, and that he had used the same incorrect social security number on his I-9 and federal tax-withholding form. *Id.* at 90-92. The State charged him with identity theft and making a false writing. *Id.* at 90.

b. Respondents all contended that their prosecutions were barred by Section 1324a(b)(5). As noted above, that provision states that the I-9 and "any information contained in or appended to" the I-9 "may not be used for purposes other than" specified federal law-enforcement actions. 8 U.S.C. 1324a(b)(5). In each case, the State agreed not to rely on the I-9 and dismissed charges that pertained only to the I-9, but contended that Section 1324a(b)(5) did not bar its use of respondents' tax-withholding forms: the federal W-4 and state K-4. Pet. App. 4, 63, 102. The trial courts each agreed with the State, and respondents were convicted of the charged offenses. *Id.* at 7, 66, 92.

4. Respondents each appealed to the Kansas Court of Appeals. Three separate panels affirmed their convictions. Pet. App. 48-60, 71-82, 97-112.

a. The Kansas Court of Appeals decided Ochoa-Lara's case first. The court concluded that Section 1324a(b)(5) did not expressly preempt the prosecution because "neither the I-9 form nor the documents appended to the I-9 form were used to prosecute" Ochoa-Lara. Pet. App. 106. The court explained that "nothing

in" Section 1324a(b)(5) "prohibits the State from proving identity theft by using information from sources other than the I-9 form," such as tax-withholding forms, "even though that information may also be contained on the I-9 form." *Ibid.*

The Kansas Court of Appeals rejected Ochoa-Lara's argument that IRCA impliedly preempted the prosecution. The court explained that IRCA "preempt[s] the area of employment-related verification of immigration status," but Kansas's identity-theft statute does not have "anything to do with the employment-related verification of immigration status." Pet. App. 105. Rather, the "gravamen of the offenses for which Ochoa-Lara was prosecuted [was] the unauthorized uses of another person's Social Security number." *Id.* at 106.

b. Other panels of the Kansas Court of Appeals affirmed Garcia's and Morales's convictions on similar grounds. Pet. App. 55-57, 80-82.

5. The Kansas Supreme Court reversed each of respondents' convictions by a divided vote. Pet. App. 1-28, 61-69, 88-94.

a. The Kansas Supreme Court decided Garcia's case first. Four Justices concluded that Section 1324a(b)(5) expressly preempted his prosecution because the State proved the offense using the fraudulent social security number on his tax-withholding forms, which he had also provided on his I-9. Pet. App. 27-28. The majority acknowledged that the State "did not rely on the I-9" in the prosecution, but emphasized that Section 1324a(b)(5) "prohibit[s] state law enforcement use not only of the I-9 itself but also" of "*any information contained* in the I-9." *Ibid.* In the majority's view, the "fact that" the incorrect social security number "was included in the

W-4 and K-4 did not alter the fact that it was also" contained in the I-9. *Id.* at 28. The majority did "not decide the merits of any other" preemption argument. *Ibid.*

Justice Luckert filed a concurring opinion. Pet. App. 29-38. She rejected "the majority's conclusion that express preemption applies." *Id.* at 29. In her view, "field and conflict preemption" instead barred Garcia's prosecution. *Ibid.* She concluded that Congress, in enacting the "comprehensive IRCA system," had "occupied the field and prohibited the use of false documents, including those using the identity of others, when an unauthorized alien seeks employment." *Id.* at 35-36. She also concluded that conflict preemption barred Kansas's prosecution of Garcia because it would "frustrate[] congressional purpose and provide[] an obstacle to the implementation of federal immigration policy by usurping federal enforcement discretion in the field of unauthorized employment of aliens." *Id.* at 36 (quoting *State* v. *Martinez*, 896 N.W.2d 737, 756 (Iowa 2017)).

Justice Biles dissented. Pet. App. 38-45. He rejected the majority's conclusion that Section 1324a(b)(5) "applies literally to all information on the Form I-9, wherever else it might be found." *Id.* at 40. He instead read Section 1324a(b)(5) to apply "to the contents of the completed Form I-9." *Ibid.* He accordingly concluded that Garcia's prosecution was not expressly preempted because the I-9 "was not admitted into evidence," and therefore "no information *necessarily* gleaned from it was 'used'" to prove the offense. *Ibid.* In his view, the majority's position rested on "a unique and overly literal interpretation of" Section 1324a(b)(5) that "cannot reflect congressional intent." *Ibid.*

Justice Stegall also dissented. Pet. App. 45-47. He explained that the majority's decision "appears to

wipe numerous criminal laws off the books in Kansas—starting with, but not necessarily ending with," identity-theft laws. *Id.* at 45. He doubted that "Congress intended to expressly preempt state use of all information contained in a person's I-9 form * * * for any purpose," and that Congress "has such sweeping powers to interfere with the legitimate government of the states." *Id.* at 46.

b. The Kansas Supreme Court resolved Morales's and Ochoa-Lara's appeals on similar grounds. Pet. App. 67, 93.

DISCUSSION

The Kansas Supreme Court erred in concluding that Section 1324a(b)(5) expressly preempts the State's prosecution of respondents. Section 1324a(b)(5) prohibits "use[]" of the I-9 "and any information contained in or appended to" the I-9 by state law-enforcement authorities. 8 U.S.C. 1324a(b)(5). That provision does not expressly preempt a prosecution that relies exclusively on information drawn from documents *other than the I-9*. See Gov't C.A. Amicus Br. at 14, *Puente Ariz.* v. *Arpaio*, 821 F.3d 1098 (9th Cir. 2016) (No. 15-15211). The text, context, and purpose of Section 1324a(b)(5) all reinforce Congress's focus on restricting use of the I-9 form and information taken from that form, not information taken from other documents that also happens to appear on the I-9. The Kansas Supreme Court's reading contradicts ordinary principles of statutory interpretation, raises federalism concerns, and produces arbitrary and untenable results. Nothing in the statute suggests that Congress intended to carve out an exception to generally applicable state laws for the exclusive benefit of unauthorized aliens.

Although respondents correctly note the absence of a square conflict between the holding of the decision below and the holding of a federal court of appeals or another state court of last resort, the Kansas Supreme Court's decision is nevertheless an outlier. No other court has adopted such an expansive understanding of express preemption under Section 1324a(b)(5). Given the far-reaching implications of the Kansas Supreme Court's reasoning and the severity of its error on an important question of federal law, on balance this Court's review of the express-preemption holding is warranted. The Court should not grant review on the second question presented, however, which is unnecessary to reach and was not preserved below.

The Court may wish to add a question addressing implied preemption, which respondents invoke as an alternative ground to support the judgment below. The parties briefed and argued implied preemption throughout the litigation, the concurring opinion relied on implied preemption, and addressing implied preemption would provide valuable guidance to lower courts confronting similar challenges. Implied preemption does not provide a basis to affirm, because Kansas's prosecutions neither invade a federally occupied field nor conflict with Congress's purposes in enacting IRCA. To the contrary, Kansas's prosecutions regulate only the fraudulent use of another person's identity on tax-withholding forms. Congress did not preempt States' ability to prosecute that type of criminal conduct when it enacted a statute to regulate work authorization.

A. The Kansas Supreme Court Erred In Concluding That Section 1324a(b)(5) Expressly Preempts The State's Prosecution Of Respondents

1. Express-preemption analysis must "focus on the plain wording of the" statute, "which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S.* v. *Whiting*, 563 U.S. 582, 594 (2011) (citation omitted). Section 1324a(b)(5) states that the I-9 "form * * * and any information contained in or appended to" that form "may not be used for purposes other than" specified federal law-enforcement actions. Respondents do not contend that Kansas "used" the I-9 form or "any information contained in or appended to" the I-9 to prosecute respondents, nor do they suggest that the State "used" the I-9 for any other law-enforcement purpose. 8 U.S.C. 1324a(b)(5). To the contrary, it is undisputed that Kansas "used" only tax-withholding forms in prosecuting respondents. *Ibid.* The "plain wording of" Section 1324a(b)(5) does not expressly preempt such a prosecution. *Whiting*, 563 U.S. at 594 (citation omitted).

As the Kansas Supreme Court observed, respondents provided the same fraudulent social security numbers on both their tax-withholding forms and their I-9s. Pet. App. 28. But the mere presence of those numbers on the I-9s does not mean that Kansas "used" the I-9s or "information contained in" the I-9s to prosecute respondents. 8 U.S.C. 1324a(b)(5). To the contrary, the Kansas Supreme Court acknowledged that "the State *did not rely on the I-9*." Pet. App. 28 (emphasis added). Nor did the tax-withholding forms that the State used for the prosecutions derive in any way from the I-9. State and federal tax-withholding forms are required

for reasons that have nothing to do with work authorization, and they would exist even if the federal government did not require the I-9. Under the ordinary meaning of the statutory text, a State does not violate the prohibition on "us[ing]" the I-9 or "information contained in" the I-9 when its investigation and prosecution are premised entirely on separate documents that are independent of the I-9. 8 U.S.C. 1324a(b)(5).

The more natural reading is that Section 1324a(b)(5) bars a State's use only of "the I-9 form or its supporting documents *themselves*." *Whiting*, 563 U.S. at 603 n.9 (plurality opinion) (emphasis added). Thus, "IRCA's document use limitation is only violated when the identity theft laws are applied in ways that rely on the Form I-9 and attached documents." *Puente Ariz.* v. *Arpaio*, 821 F.3d 1098, 1108 (9th Cir. 2016). That understanding of express preemption under Section 1324a(b)(5) reflects the consistent position of the United States. See Gov't C.A. Amicus Br. at 14, *Puente Ariz.*, *supra* (No. 15-15211) (contending that Section 1324a(b)(5) does not expressly "preclude a State from relying on" information that appears in an I-9 so long as it is "taken from another source").

2. The Kansas Supreme Court emphasized that Section 1324a(b)(5) "prohibit[s] state law enforcement use not only of the I-9 itself but also" of "*any information contained* in the I-9." Pet. App. 27. The court thus found respondents' prosecutions expressly preempted because the fraudulent social security numbers they provided on their tax-withholding forms were also "contained in" their I-9s. *Ibid.* As explained above, the court's interpretation contradicts the plain meaning of Section 1324a(b)(5), because the State's prosecutions

"use[d]" only fraudulent information "contained in" respondents' tax-withholding forms—information that would exist and give rise to criminal liability even if respondents had never submitted I-9s. *Ibid.* But even if the statute were ambiguous and the court's reading were "plausible in the abstract," it is "inconsistent with both the text and context of the statute as a whole." *Sturgeon* v. *Frost*, 136 S. Ct. 1061, 1070 (2016).

The text and context of Section 1324a(b)(5) demonstrate Congress's focus on limiting use of the "form I-9 itself"—not different, separately completed documents that happen to contain information that also appears on the I-9. *Whiting*, 563 U.S. at 589. Section 1324a(b)(5) is titled, "Limitation on use of attestation form," which reinforces Congress's focus on the I-9 form. Cf. *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (relying on title in interpreting statute). The provision begins with a reference to the I-9 "form" and then adds "any information contained in or appended to *such form*" to the use restriction. 8 U.S.C. 1324a(b)(5) (emphasis added). Section 1324a(b)(5) appears amid other provisions that govern use of the I-9 form itself. See 8 U.S.C. 1324a(b)(3) (retention of form); 8 U.S.C. 1324a(b)(4) (copying of form). The "structure and internal logic of" IRCA accordingly indicate that Section 1324a(b)(5) similarly governs use of the I-9 form and information taken from that form, not information from separate documents that also happens to appear on the I-9. *Lockhart* v. *United States*, 136 S. Ct. 958, 962 (2016).

Respondents incorrectly contend that the State's position "renders nugatory the statutory clause 'and any information contained in' the I-9 Form." Br. in Opp. 18 (quoting 8 U.S.C. 1324a(b)(5)). Section 1324a(b)(5) bars

use of both the I-9 and "information contained in or appended to" the I-9 to make clear that the restriction covers all "the contents of the completed Form I-9," not just the form itself or the form in its entirety. Pet. App. 40 (Biles, J., dissenting). If Congress had wanted all information that appears on the I-9 "to be *totally off-limits*" to state law enforcement, even when the information is taken from documents other than the I-9, Congress "would have worded the statute much differently —i.e., as a limitation on disclosure." *State* v. *Martinez*, 896 N.W.2d 737, 768 (Iowa 2017) (Mansfield, J., dissenting). Congress instead limited only States' use of "information contained in or appended to" *the I-9*. 8 U.S.C. 1324a(b)(5).

A focus on the I-9 form also follows from IRCA's purpose: to create a "comprehensive" federal "framework" for "'combating the employment of illegal aliens.'" *Arizona* v. *United States*, 567 U.S. 387, 404 (2012) (citation omitted). That objective explains why Congress mandated exclusively federal use of "information employees submit to indicate their work status." *Id.* at 405. No such purpose would be served by restricting a State's use of information on documents that have nothing to do with work status, just because the same information happens to appear on the I-9. Indeed, under the reasoning of the decision below, identity thieves who use fraudulent information on other documents would have an incentive to duplicate the information on their I-9s to prevent States from using the information in a fraud prosecution—a result that would undermine the purpose of IRCA.

3. The decision below also produces untenable results. Under Kansas law, a person who steals identity information and uses it to apply for a credit card can

ordinarily be prosecuted for identity theft. Kan. Stat. Ann. § 21-6107 (Supp. 2017). But under the reasoning of the decision below, that person could not be prosecuted by the State if the same stolen identity information happened to be "contained in" his I-9. Pet. App. 27. Likewise, a Kansas driver who presents a police officer with a forged license can ordinarily be prosecuted for a false writing. Kan. Stat. Ann. § 21-5824 (Supp. 2017). But under the reasoning of the decision below, the driver could not be prosecuted by the State if a copy of the forged license happened to be "attached to" his I-9. Pet. App. 27 (citation omitted). In both cases, the prosecutions would be barred even if the State "did not rely on the I-9" in investigating or proving the offenses, *id.* at 28—and even if the State was unaware of the I-9.

Indeed, the logical implication of the decision below is that Kansas would be categorically barred from prosecuting identity theft and other crimes that require evidence of identification *against almost anyone who has a job*, because proving an identity thief's true identity typically requires "use[]" of information like a name, birthdate, or social security number that will also be "contained in" an I-9. 8 U.S.C. 1324a(b)(5).[4] The Kansas Supreme Court's broad reasoning thus "appears to wipe numerous criminal laws off the books in Kansas—

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[4] The logic of the decision below suggests that federal criminal laws not among those enumerated in Section 1324a(b)(5) should be unenforceable. An individual who submits a Medicare or social security application containing a false birthdate or social security number, for example, could not be prosecuted for fraud under 18 U.S.C. 1347 (health care fraud) or 42 U.S.C. 1383a (social security fraud) if that individual also submitted an I-9 form that happened to contain the false birthdate or social security number.

starting with, but not necessarily ending with, laws prohibiting identity theft." Pet. App. 45 (Stegall, J., dissenting). Nothing in IRCA's text or history suggests that Congress sought such a "sweeping" and disruptive result. *Ibid.* (Biles, J., dissenting).

4. Respondents do not defend the far-reaching implications of the Kansas Supreme Court's express-preemption holding. They instead emphasize (Br. in Opp. 6, 13, 20) that the court resolved only an "as-applied" challenge. The "as-applied" label, however, does little to limit the reach of the decision. The court framed respondents' claims as "as-applied" challenges because they did "not seek to prevent all prosecutions under the state law." Pet. App. 20. But the court's holding—that Section 1324a(b)(5) preempts the State's use of any information that happens to be contained in an I-9, even if the State takes the information from a separate document—will affect prosecutions of anyone who has submitted an I-9, which is virtually any "individual" who has ever applied for a job. 8 U.S.C. 1324a(b).

Respondents point (Br. in Opp. 7, 13, 20) to language in the Kansas Supreme Court's opinion (Pet. App. 20, 28) suggesting that the decision applies only to "alien[s]." But respondents identify no basis in the court's reasoning or the applicable statutes to support such a limitation. As noted, the requirement to submit I-9s applies to citizens and aliens alike. 8 U.S.C. 1324a(b). And when Congress means to limit a provision of law to aliens, it does so explicitly. Compare, *e.g.*, 18 U.S.C. 1546 (providing that "[w]hoever" commits immigration-document fraud shall be punished), with 8 U.S.C. 1325 (providing that "[a]ny alien" who crosses the border illegally shall be punished). On respondents' logic, Kansas could pros-

ecute a U.S. citizen who presents a stolen driver's license for identity theft even if he also appended that stolen license to his I-9, but a state prosecution of an unauthorized alien in the same position would be expressly preempted. "[N]o such limit is remotely discernible in the statutory text," *Whiting*, 563 U.S. at 599, and Congress gave no other indication that it meant to grant aliens unique immunity to violate generally applicable state criminal laws.

B. This Court's Review Is Warranted On The First Question Presented

1. As explained above, the Kansas Supreme Court's conclusion that Section 1324a(b)(5) expressly preempts the State's prosecution of respondents is erroneous. It is also an outlier. "[N]o other court has interpreted" Section 1324a(b)(5) "as the majority" below did. Pet. App. 42 (Biles, J., dissenting). There is, however, no square conflict among federal courts of appeals or state courts of last resort on the ultimate disposition of preemption challenges like respondents'. Although it would be reasonable to await further development in the lower courts, on balance the government believes certiorari is warranted on the express-preemption question.

a. No other court has adopted the Kansas Supreme Court's express-preemption rationale. In considering a preemption challenge to an Arizona identity-theft law, the Ninth Circuit rejected "an argument for preemption based on the text of IRCA"—namely, Section 1324a(b)(5). *Puente Ariz.*, 821 F.3d at 1108. The court explained that "IRCA's document use limitation is only violated when the identity theft laws are applied in ways *that rely on the Form I-9* and attached documents." *Ibid.* (emphasis added). That reasoning is incompatible with

the Kansas Supreme Court's conclusion that respondents' prosecutions were expressly preempted even though the State "*did not rely* on the I-9." Pet. App. 28 (emphasis added).

The Iowa Supreme Court has also addressed a preemption challenge to state identity-theft prosecutions. The court concluded by a 4-3 margin that implied preemption barred the prosecutions. *Martinez*, 896 N.W.2d at 755-757. But the only members of the court to address express preemption concluded that Section 1324a(b)(5) does not expressly prohibit a State from prosecuting a defendant "for using a false state identification card to obtain employment, so long as [the State] does not rely on the I-9 paperwork." *Id.* at 768 (Mansfield, J., dissenting). And the Minnesota Court of Appeals similarly concluded that a state forgery prosecution that did not rely on an I-9 was not expressly preempted. *State* v. *Reynua*, 807 N.W.2d 473, 480-481 (2011).[5]

b. Respondents are correct (Br. in Opp. 9-16) that no federal court of appeals or state court of last resort would necessarily reach a different result than the court below. The Ninth Circuit left open the possibility of an implied-preemption challenge to Arizona's identity-theft law. *Puente Ariz.*, 821 F.3d at 1107-1108. The Iowa Supreme Court barred state identity-theft prosecutions on implied-preemption grounds. *Martinez*, 896 N.W.2d at 755-757. And the Minnesota Supreme Court did not review the Minnesota Court of Appeals' decision rejecting a preemption challenge to a state forgery prosecution. See *State* v. *Reynua*, No. A10-1946, 2012 WL

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[5] The Missouri Court of Appeals rejected a claim that IRCA expressly preempted a state prosecution for forgery, although the court did not discuss Section 1324a(b)(5). *State* v. *Diaz-Rey*, 397 S.W.3d 5, 8-9 (2013).

3023328, at *1 (Minn. Ct. App. July 23, 2012). Given the absence of a square conflict, it would be reasonable to allow further consideration of the issue in the lower courts.

On balance, though, the government believes this Court's review is warranted to correct the Kansas Supreme Court's serious misreading of federal law. The court's express-preemption holding conflicts with the text, context, and purpose of IRCA. It departs from the position of every other court to address the issue. And it has potentially far-reaching implications for law enforcement in Kansas. Given the importance of the question to the State's core interests and the severity of the court's legal error, this Court's review is warranted at this time. Cf. *Husted* v. *A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (granting State's request for review of important federal issue absent square conflict); *Hughes* v. *Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) (same); *Arizona*, 567 U.S. at 387 (same).

2. The second question presented asks whether, if the Kansas Supreme Court's statutory interpretation is correct, Section 1324a(b)(5) exceeds Congress's constitutional authority and improperly intrudes on the States' "traditional police powers." Pet. ii. If the Court were to agree with the State on the proper statutory interpretation, the Court would not need to reach the second question presented. If the Court were to disagree with the State on the statute's meaning, it should not address the constitutional question because the State did not raise a distinct constitutional challenge below, and neither the Kansas Supreme Court nor any other court has addressed the issue. See Br. in Opp. 28. In the event the Court holds that IRCA expressly pre-

empts state-law prosecutions in these circumstances, further percolation on the constitutional question is warranted.

C. If The Court Grants Review, It Should Add A Question Presented On Implied Preemption

1. The Kansas Supreme Court "dispose[d] of" this case on "express preemption" grounds, and declined to "decide the merits of any other" preemption theory. Pet. App. 27-28. This Court could likewise decide the express-preemption question alone, and, if necessary, remand for further consideration of respondents' other preemption theories. See, *e.g.*, *Sturgeon*, 136 S. Ct. at 1071-1072 (vacating and remanding where the "sole basis" of the lower court's decision was erroneous).

The Court, however, should consider adding a question presented asking whether Kansas's prosecution of respondents is barred by implied preemption. After the Kansas Court of Appeals rejected that claim, Pet. App. 54-57, 80-82, 102-110, the parties briefed it in the Kansas Supreme Court, where the majority opinion discussed it in some depth, *id.* at 20-26, and Justice Luckert's concurrence relied exclusively on it, *id.* at 29-38. Respondents argue implied preemption as an alternative ground to support the judgment below. Br. in Opp. 20-26. And other courts that have found preemption in similar cases have relied on implied rather than express preemption. See *Martinez*, 896 N.W.2d at 755-757; *Puente Ariz.* v. *Arpaio*, No. 14-cv-1356, 2017 WL 1133012, at *7-*8 (D. Ariz. Mar. 27, 2017). Adding a question on implied preemption would ensure that the Court receives briefing on this potential alternative ground for resolution. And if the Court were to reach the issue, it would provide valuable guidance to lower

courts that have struggled to find a common rationale in addressing preemption claims like respondents'.

2. In the government's view, Kansas's prosecution of respondents is not impliedly preempted.

a. Respondents first contend that field preemption bars their prosecutions because "'Congress has occupied the field' as it relates to the 'use of false documents, including those using the identity of others, when an unauthorized alien seeks employment.'" Br. in Opp. 21 (quoting Pet. App. 35-36) (Luckert, J., concurring). Respondents add that "Congress has occupied the broader field of 'unauthorized employment of aliens.'" *Id.* at 22 (quoting *Arizona*, 567 U.S. at 406).

Respondents' position is misguided. This Court held in *Arizona* that the federal government "has occupied the field of *alien registration*." 567 U.S. at 401 (emphasis added). The Court separately analyzed federal regulation of the "unauthorized employment of aliens," and did *not* conclude that the federal government had occupied that field. *Id.* at 406. Rather, the Court concluded that Arizona's imposition of criminal penalties on unauthorized aliens who seek work was *conflict* preempted because it created an "obstacle to the regulatory system Congress chose." *Ibid.* Respondents' field-preemption argument thus proceeds from a mistaken premise.

Even if the federal government has occupied the field of unauthorized employment of aliens, respondents' prosecutions would not be field preempted, because Kansas's identity-theft laws do not regulate the unauthorized employment of aliens. As the Kansas Supreme Court recognized, the State's identity-theft statute is "generally applicable" to aliens and non-aliens alike. Pet. App. 20. And it does not regulate employment; it regulates the use of another person's identity

with the intent to commit fraud. Kan. Stat. Ann. § 21-6107 (Supp. 2017); see, *e.g.*, Pet. App. 105 ("Neither the current nor former Kansas identity theft statutes have anything to do with the employment-related verification of immigration status.").

Respondents' prosecutions underscore the absence of any interference with the allegedly preempted field. Respondents were convicted of identity theft for using other people's social security numbers on tax-withholding forms. Those forms are required for reasons entirely unrelated to immigration or work authorization—namely, to administer tax laws. See 26 U.S.C. 3402; Kan. Stat. Ann. § 79-3296 (Supp. 2017). And while employees often submit tax-withholding forms to employers at the same time they submit I-9s, a prosecution of an employee for committing identity fraud on tax-withholding forms is not a regulation of employment any more than a prosecution of a customer for using a fake identification card to deposit a check is a regulation of banking. In short, Kansas's prosecution of respondents for using stolen social security numbers on tax-withholding forms does not regulate the "field of unauthorized employment of aliens." Br. in Opp. 22 (citation and internal quotation marks omitted). It is accordingly not field preempted.

b. Respondents also contend that their prosecutions are conflict preempted, because Kansas's use of its identity-theft statute "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." Br. in Opp. 23 (quoting Pet. App. 36) (Luckert, J., concurring).

That argument is mistaken for the same principal reason as respondents' field-preemption argument:

Kansas's identity-theft statute does not regulate "the field of unauthorized employment of aliens," so it cannot "usurp[] federal enforcement discretion" in that field. Br. in Opp. 23 (citations omitted). Kansas's statute is thus markedly different from the statute this Court found conflict preempted in *Arizona*, which applied only to "an unauthorized alien" engaged in certain employment-related activities. 567 U.S. at 403 (citation omitted). This Court held that Arizona's statute conflicted with Congress's "deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment," *id.* at 405, but Kansas's statute creates no such conflict, because it regulates the use of identity documents, not the employment of unauthorized aliens.[6]

More specifically, respondents contend that conflict preemption bars prosecutions of unauthorized aliens for "offenses relating to employment eligibility." Br. in Opp. 26. But as explained above (pp. 14-15, *supra*), the suggestion that Congress allowed States to prosecute U.S. citizens though not aliens for the same conduct—here, identity theft on tax-withholding forms—is not "remotely discernible in the statutory text" and cannot have been Congress's intent. *Whiting*, 563 U.S. at 599.

Respondents' position would create other arbitrary distinctions as well. Under their theory, the State could

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[6] The statute in *Puente Arizona* applied exclusively to identity theft "with the intent to obtain employment." 821 F.3d at 1102 (citation omitted). The government filed an amicus brief in the Ninth Circuit contending that conflict-preemption principles barred enforcement of that statute "against persons who commit fraud to demonstrate work authorization under federal immigration law." Gov't C.A. Amicus Br. at 20, *Puente Ariz.*, *supra* (No. 15-15211). The Ninth Circuit did not adopt that position; it held only that the statute was not facially preempted. See 821 F.3d at 1104-1108.

prosecute a defendant who uses a fraudulent social security number on a tax-withholding form to avoid garnishment of his wages for back taxes or child support because such fraud did not "relat[e] to employment eligibility." Br. in Opp. 26. But the State could not prosecute a defendant who uses a fraudulent social security number on a tax-withholding form as part of an effort to establish work authorization, because that fraud was "relat[ed] to employment eligibility." *Ibid.* Respondents' theory thus makes conflict preemption of state laws turn on the subjective motive of private parties regulated by those laws. There is no basis in IRCA or elsewhere for that impractical and counterintuitive limitation.

Ultimately, respondents' position stems in part from concerns that Kansas could selectively enforce its criminal laws against aliens as an end-run around federal immigration policies. Br. in Opp. 25. The State disputes that suggestion, noting that it prosecutes identity-theft crimes without regard to citizenship or nationality. Reply Br. 8-9. This Court need not resolve that dispute here. If, as explained above, prosecutions under Kansas's identity-theft law do not conflict with the relevant provisions of IRCA, concerns about selective enforcement are not relevant to the implied-preemption analysis under that statute. "Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'" *Whiting*, 563 U.S. at 607 (plurality opinion) (citation omitted). Because respondents have not shown that their prosecutions for violating Kansas law conflict with IRCA, their implied-preemption claims cannot succeed.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented. The Court should also consider adding a question presented addressing implied preemption.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1324a provides in pertinent part:

Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity—

(A) 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 (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) Defense

A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) Use of labor through contract

For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after November 6, 1986, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

(5) Use of State employment agency documentation

For purposes of paragraphs (1)(B) and (3), a person or entity shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of an individual who was referred for such employment by a State employment agency (as defined by the Attorney General), if the person or entity has and retains (for the period and in the manner described in subsection (b)(3) of this section) appropriate documentation of such referral by that agency, which documentation certifies that the agency has complied with the procedures

specified in subsection (b) of this section with respect to the individual's referral.

(6) Treatment of documentation for certain employees

(A) In general

For purposes of this section, if—

(i) an individual is a member of a collective-bargaining unit and is employed, under a collective bargaining agreement entered into between one or more employee organizations and an association of two or more employers, by an employer that is a member of such association, and

(ii) within the period specified in subparagraph (B), another employer that is a member of the association (or an agent of such association on behalf of the employer) has complied with the requirements of subsection (b) of this section with respect to the employment of the individual,

the subsequent employer shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of the employee and shall not be liable for civil penalties described in subsection (e)(5) of this section.

(B) Period

The period described in this subparagraph is 3 years, or, if less, the period of time that the individual is authorized to be employed in the United States.

(C) Liability

(i) In general

If any employer that is a member of an association hires for employment in the United States an individual and relies upon the provisions of subparagraph (A) to comply with the requirements of subsection (b) of this section and the individual is an alien not authorized to work in the United States, then for the purposes of paragraph (1)(A), subject to clause (ii), the employer shall be presumed to have known at the time of hiring or afterward that the individual was an alien not authorized to work in the United States.

(ii) Rebuttal of presumption

The presumption established by clause (i) may be rebutted by the employer only through the presentation of clear and convincing evidence that the employer did not know (and could not reasonably have known) that the individual at the time of hiring or afterward was an alien not authorized to work in the United States.

(iii) Exception

Clause (i) shall not apply in any prosecution under subsection (f)(1) of this section.

(7) Application to Federal Government

For purposes of this section, the term "entity" includes an entity in any branch of the Federal Government.

(b) Employment verification system

The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) of this section are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation

(A) In general

The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining—

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of

any other document or as requiring the individual to produce such another document.

(B) Documents establishing both employment authorization and identity

A document described in this subparagraph is an individual's—

(i) United States passport;[1]

(ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document—

(I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection,

(II) is evidence of authorization of employment in the United States, and

(III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

(C) Documents evidencing employment authorization

A document described in this subparagraph is an individual's—

(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or

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[1] So in original. Probably should be followed by "or".

(ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.

(D) Documents establishing identity of individual

A document described in this subparagraph is an individual's—

(i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or

(ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification.

(E) Authority to prohibit use of certain documents

If the Attorney General finds, by regulation, that any document described in subparagraph (B), (C), or (D) as establishing employment authorization or identity does not reliably establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Attorney General may prohibit or place conditions on its use for purposes of this subsection.

(2) Individual attestation of employment authorization

The individual must attest, under penalty of perjury on the form designated or established for purposes of paragraph (1), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment. Such attestation may be manifested by either a hand-written or an electronic signature.

(3) Retention of verification form

After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during a period beginning on the date of the hiring, recruiting, or referral of the individual and ending—

(A) in the case of the recruiting or referral for a fee (without hiring) of an individual, three years after the date of the recruiting or referral, and

(B) in the case of the hiring of an individual—

(i) three years after the date of such hiring, or

(ii) one year after the date the individual's employment is terminated, whichever is later.

(4) Copying of documentation permitted

Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

(5) Limitation on use **of attestation 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.

(6) Good faith compliance

(A) In general

Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

(B) Exception if failure to correct after notice

Subparagraph (A) shall not apply if—

(i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,

(ii) the person or entity has been provided a period of not less than 10 business days (be-

ginning after the date of the explanation) within which to correct the failure, and

(iii) the person or entity has not corrected the failure voluntarily within such period.

(C) Exception for pattern or practice violators

Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section.

* * * * *

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement.

(2) Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

2. Kan. Stat. Ann. § 21-5824 (Supp. 2017) provides:

Making false information. (a) Making false information is 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.

(b) Making false information is a severity level 8, nonperson felony.

3. Kan. Stat. Ann. § 21-6107 (Supp. 2017) provides:

Identity theft; identity fraud. (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:

(1) Defraud that person, or anyone else, in order to receive any benefit; or

(2) misrepresent that person in order to subject that person to economic or bodily harm.

(b) Identity fraud is:

(1) Using or supplying information the person knows to be false in order to obtain a document containing any personal identifying information; or

(2) altering, amending, counterfeiting, making, manufacturing or otherwise replicating any document containing personal identifying information with the intent to deceive;

(c)(1) Identity theft is a:

(A) Severity level 8, nonperson felony, except as provided in subsection (c)(1)(B); and

(B) severity level 5, nonperson felony if the monetary loss to the victim or victims is more than $100,000.

(2) Identity fraud is a severity level 8, nonperson felony.

(d) 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.

(e) As used in this section:

(1) "Personal electronic content" means the electronically stored content of an individual including, but not limited to, pictures, videos, emails or other data files;

(2) "personal identifying information" includes, but is not limited to, the following:

(A) Name;

(B) birth date;

(C) address;

(D) telephone number;

(E) driver's license number or card or nondriver's identification number or card;

(F) social security number or card;

(G) place of employment;

(H) employee identification numbers or other personal identification numbers or cards;

(I) mother's maiden name;

(J) birth, death or marriage certificates;

(K) electronic identification numbers;

(L) electronic signatures;

(M) any financial number, or password that can be used to access a person's financial resources, including, but not limited to, checking or savings accounts, credit or debit card information, demand deposit or medical information; and

(N) passwords, usernames or other log-in information that can be used to access a person's personal electronic content, including, but not limited to, content stored on a social networking website; and

(3) "social networking website" means a privacy-protected internet website which allows individuals to construct a public or semi-public profile within a bounded

system created by the service, create a list of other users with whom the individual shares a connection within the system and view and navigate the list of users with whom the individual shares a connection and those lists of users made by others within the system.