No. 17-834

In the Supreme Court of the United States

KANSAS,

Petitioner,

v.

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

Respondents.

On a Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR RESPONDENTS

RANDALL L. HODGKINSON
RICK KITTEL
Kansas Appellate Defender Office
700 Jackson, Suite 900
Topeka, KS 66603
(785) 296-5484

REKHA SHARMA-CRAWFORD
Sharma-Crawford Attorneys at Law
515 Avenida Cesar E. Chavez
Kansas City, MO 64108
(816) 994-2300

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
SARAH P. HOGARTH
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Respondents

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STATEMENT

The federal government exclusively determines whether a particular alien is authorized to work in the United States. And, through the Immigration Reform and Control Act (IRCA), Congress established a comprehensive system for employers to verify that a job applicant is authorized for employment as a matter of this federal law. The federal government imposes criminal, civil, and immigration sanctions on aliens who use false information to circumvent this system. The issue presented here is whether States may prosecute aliens for this same conduct.

Respondents are three individuals who, at the relevant time, lacked authorization to work in the United States. When completing the federal employment verification process, they used false information. Kansas prosecuted them, asserting that they wrongly obtained the benefit of employment; if they had provided truthful information, Kansas maintains, their employers would not have hired them.

The Kansas Supreme Court held that federal law preempts these state prosecutions. The only other court of last resort to reach the issue—the Supreme Court of Iowa—agrees. That conclusion is correct.

IRCA contains multiple express preemption provisions. Section 1324a(b)(5) bars States from prosecuting misstatements on the Form I-9 and from using any information contained on the I-9 for a prosecution relating to employment verification. Section 1324a(d)(2)(F) provides that, other than certain federal crimes, the employment verification system "may not be used for law enforcement purposes." Allowing the prosecutions at issue here to proceed would render these statutory provisions a dead letter.

IRCA also impliedly preempts these prosecutions through its creation of a comprehensive enforcement mechanism. In *Arizona* v. *United States*, 567 U.S. 387 (2012), the Court held that federal law preempts Section 3 of Arizona's S.B. 1070, which added state enforcement to the federal requirement that aliens carry registration documents. Federal prosecutorial discretion, the Court concluded, occupies the field. That holding compels preemption here. Additionally, *Arizona*'s invalidation of Section 5(c), which attempted to regulate the unauthorized employment of aliens, further confirms why preemption is necessary.

In 2016, the United States agreed with this conclusion: "State laws that criminalize fraud in the federal employment verification system, or fraud otherwise committed to demonstrate work authorization under federal immigration law, interfere with * * * federal prerogatives and intrude upon matters that Congress has brought within its 'exclusive governance.'" U.S. *Amicus* Br. 2, *Puente-Arizona* v. *Arpaio*, No. 15-15211, 2016 WL 1181917 (9th Cir. Mar. 25, 2016) (U.S. *Puente-Arizona* Br.).

To avoid preemption, Kansas insists that respondents were not prosecuted for "misrepresentations related to the verification of employment authorization." Pet'r Br. 21. This contention, which is the linchpin to Kansas's argument, is unequivocally wrong. Indeed, it is misrepresentation. In the lower courts, Kansas affirmatively argued, *successfully*, that these prosecutions *are* about employment verification.[1]

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[1] In view of Kansas's mischaracterizations—and its contradiction of arguments that it successfully advanced below—the Court may wish to dismiss the petition as improvidently granted.

First, the state offenses required Kansas to prove that respondents sought a "benefit." Kansas alleged just one "benefit"—that each respondent committed fraud on the federal employment verification system to wrongfully obtain a job. *Second*, to sidestep the requirement of a unanimity instruction, Kansas argued that respondent Garcia's use of fraudulent information on each of the tax forms was part of a single employment verification transaction. *Third*, the prosecutors in each of these cases framed the charges straightforwardly: respondents "used another person's social security number to obtain and keep employment." JA65.

Kansas prevailed on each of these arguments below. As the Kansas Supreme Court correctly recognized, "[t]he State seeks to punish an alien who used the personal identifying information of another to establish the alien's work authorization." Pet. App. 20. These prosecutions are preempted.

A. Legal background.

1. In 1952, Congress enacted the Immigration and Nationality Act (INA), 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 (2011).

States thereafter sought to regulate the employment of certain aliens, especially those without legal status. *Whiting*, 563 U.S. at 587-588. After this Court held that the INA did not preempt those laws (see *De-Canas* v. *Bica*, 424 U.S. 351, 353, 359-360 (1976)), Congress responded with the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (IRCA). IRCA is a "comprehensive framework for 'com-

bating the employment of illegal aliens.'" *Arizona*, 567 U.S. at 404 (quoting *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002)).

IRCA precludes an employer from hiring an "unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A). An "alien" qualifies as "unauthorized" if she is neither "an alien lawfully admitted for permanent residence" nor "authorized to be so employed by this chapter or by the Attorney General." *Id*. § 1324a(h)(3).[2] Under IRCA, the federal government alone determines whether an alien is authorized to work. See 8 C.F.R. § 274a.12 (summarizing "[c]lasses of aliens authorized" by the federal government "to accept employment").[3]

Authorization to work in the United States is not co-extensive with legal immigration status. Many aliens with legal status, such as those on tourist visas, are not authorized to work in the United States. See 8 C.F.R. § 274a.12. The federal government, meanwhile, has determined that certain individuals who lack legal status—including some DACA recipients—may obtain employment authorization. See *id*. § 274a.12(c)(14).

The key to IRCA's efficacy is its "[e]mployment verification system." 8 U.S.C. § 1324a(b). Using the I-9 form (see 8 C.F.R. § 274a.2), the employer "must attest

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[2] The Secretary of Homeland Security now has this authority. See 6 U.S.C. § 557.

[3] Congress has deemed some categories of nonimmigrant aliens eligible for employment. This includes, for example, certain individuals working in a "specialty occupation" or "as a fashion model." 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Executive has made other categories of aliens eligible to work, including certain spouses of H-1b workers (8 C.F.R. § 214.2(h)(9)(iv)) and international students, who complete their studies via optional practical training (*id*. § 214.2(f)(10)(ii)).

* * * that it has verified that the individual is not an unauthorized alien" (8 U.S.C. § 1324a(b)(1)(A)) by examining the employee's "United States passport, resident alien card, alien registration card, or other document approved by the Attorney General." *Whiting*, 563 U.S. at 589 (citing 8 U.S.C. § 1324a(b)(1)(B)-(D)). Likewise, the employee "must attest" on the I-9 that she is authorized by the federal government to accept employment. 8 U.S.C. § 1324a(b)(2).

IRCA limits the permissible uses of the I-9 and "any information contained in" it:

> 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).[4] Additionally, referencing the employment "verification system," IRCA provides 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." *Id.* § 1324a(d)(2)(F).

Through these provisions, Congress "made clear * * * 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." *Arizona*, 567 U.S. at 405.

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[4] See 18 U.S.C. §§ 1001 (general fraud and false statements), 1028 (fraud and false statements regarding identification documents), 1621 (perjury), 1546 (fraud on the employment verification system).

Congress prescribed a comprehensive scheme of criminal, civil, and immigration-related consequences for individuals who commit fraud on the federal employment verification system. Enacted by IRCA (see 100 Stat. 3359, 3380), 18 U.S.C. § 1546(b) criminalizes the use of another's identification document, a false identification document, or a false attestation "for the purpose of satisfying a requirement of [8 U.S.C. § 1324a(b)]"—that is, for purposes of demonstrating work authorization under federal law.

Congress has also adopted civil monetary penalties for immigration-related identity fraud. See 8 U.S.C. § 1324c(a), (d)(3). And Congress provided severe immigration consequences for unauthorized aliens who engage in fraud to establish work authorization, including limitations to adjustments of immigration status. See *id.* §§ 1182(a)(6)(F), 1227(a)(3)(B)(iii), (C).

2. Kansas's identity theft statute criminalizes "using * * * any personal identifying information" of another "with the intent to defraud * * * in order to receive any benefit." Kan. Stat. Ann. § 21-6107(a).

Kansas's false information statute criminalizes "making * * * any written instrument * * * with knowledge that such information falsely states or represents some material matter * * * with intent to defraud." Kan. Stat. Ann. § 21-5824(a).

An "intent to defraud" requires an effort to transfer "property." Kan. Stat. Ann. § 21-5111(o).

A conviction under these statutes may have serious immigration repercussions. A theft offense may be an "aggravated felony" if the term of imprisonment is "at least one year." 8 U.S.C. § 1101(a)(43)(G). See, *e.g.*, *United States* v. *Mejia-Barba*, 327 F.3d 678, 681-682 (8th Cir. 2003) (holding that "prior conviction for identity theft" under Iowa law "qualifies as an aggravated

felony"). "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Such a conviction may also result in an expedited administrative removal without right to a hearing or judicial review. *Id.* § 1228(b). And status as an "aggravated felon" renders an individual ineligible for several forms of immigration relief, including cancellation of removal and asylum. See, *e.g.*, *id*. §§ 1158(b)(2)(A)(ii), 1158(b)(2)(B), 1229b(b)(1)(C). Additionally, any alien who is "convicted of * * * a crime involving moral turpitude" suffers severe immigration consequences, including inadmissibility. *Id.* § 1182(a)(2).

B. Factual background and proceedings below.

Kansas prosecuted respondents for using false information during the federal employment verification process.

1.a. In August 2012, a police officer stopped respondent Ramiro Garcia for speeding. Pet. App. 3. During the encounter, Garcia stated that he was driving to his job at Bonefish Grill. *Ibid*. Another officer, Detective Russell, then met with Garcia and "reminded him that he was not to be working since he was in the U.S. illegally and did not have a social security number to work." JA8. Detective Russell and a federal agent subsequently "collected employment information from Bonefish Grill regarding Garcia." *Ibid*.

The federal government did not charge Garcia. Indeed, Garcia was "cooperating with the federal government" regarding the investigation of Insulite, a company accused of "directing employees to change social security numbers." JA50.

The Johnson County district attorney nonetheless charged Garcia with identity theft for using a "social security number belonging to or issued to another per-

son * * * in order to receive any benefit." JA10. Garcia argued that, because the offense focused on the federal employment verification system, federal law preempted his prosecution. JA14-18. When responding, the State never mentioned the Form K-4. See JA20-24. Likewise, at the hearing on the motion, the prosecutor underscored that he intended "to rely on * * * the W-4 form" as the basis of the prosecution. JA32-33. Again, the prosecutor never mentioned the K-4. JA26-35.

By the time of pretrial proceedings, Garcia had obtained lawful immigration status and was working in compliance with federal law, all to support his U.S.-citizen children. JA50-51. Because Garcia had no prior offenses, he sought "to plea this case to anything other than a deportable offense." JA51. The following colloquy ensued:

> The court: Mr. Scott, do you have any flexibility in this?
>
> Prosecutor: Unfortunately, I do not, Judge. I understand the position. I've staffed that with our Economic Crimes Section Chief, and I just do not have any flexibility.
>
> The court: It just seems unfair.
>
> Prosecutor: I understand that, Judge.
>
> * * *
>
> The court: Will there be any degree of whining that might change you or your staff's position?
>
> Prosecutor: * * * I've taken all of that to people that make more money than I do and tell me how to do my job. I don't have anywhere to go on it, Judge. I'm sorry.

JA52-53. The trial court later returned to its concern—that the prosecution was "destroying families":

> The court: Is diversion a possibility?

> Prosecutor: It's not, Judge.
>
> The court: Okay.
>
> Prosecutor: Judge, I'm completely understandable with what the Court's saying.
>
> The court: I'm just saying we're destroying families.
>
> Prosecutor: Judge, I understand that. But to that extent, I'm charged with carrying out certain policies.
>
> The court: I understand. We all have our responsibilities.

JA56-57. In sum, "certain policies" imposed by senior officials deprived the line prosecutor of discretion to plead the charge to a lesser offense. *Ibid*.

The trial court, moreover, noted that this prosecution was part of a broader pattern of immigration enforcement: "[T]ypically what happens is most of these guys never get documented by the time they come to trial, so they're deported." JA54. This case, the court observed, was "an anomaly" because Garcia had legal status at the time of the trial. *Ibid*.

The case proceeded to a jury trial. The prosecutor's sole theory was that Garcia used a false social security number to establish his employment authorization. The State's opening:

> This is a straightforward case. It is an identity theft case in which the State alleges that Mr. Ramiro Garcia used another person's social security number to obtain and keep employment here in Johnson County, Kansas.
>
> * * *
>
> Mr. Gajan [the restaurant's managing partner] will explain the hiring process that Mr. Garcia went through in order to obtain employment at

> Bonefish as well as the documents that were used in that employment process.
>
> * * *
>
> Mr. Gajan will tell you that Mr. Garcia would not have been employed at Bonefish Grill without a social security number or a permanent alien number. Here's the problem. This number was not issued to Mr. Garcia.
>
> * * *
>
> You can't work in Kansas using someone else's social security number, and that is what Mr. Garcia did.

JA65-67.

Detective Russell testified that he "requested employment documentation for Mr. Garcia" from Bonefish Grill, and he thus obtained "[e]mployment application documents." JA68. This included Garcia's Form I-9. JA71.

During closing, the prosecutor again summed up the theory of the offense: "[I]n the State of Kansas, you cannot work under someone else's social security number." JA99. The prosecution focused on Garcia's obtaining a job as the "benefit" that he sought: "As Mr. Gajan told you, he would not have hired [Garcia] if he did not have a social security number." JA102. See also JA108. A "paycheck is a benefit," the State argued, as is "the meal he gets when he's working on the line." JA107. "These are all things that he received from Bonefish that he would not have been entitled to had he not given a social security number to Jason Gajan." *Ibid*.

The jury convicted Garcia of identity theft. JA112.

b. Following the receipt of information from Kansas, a federal agent investigated the hiring practices of a Jose Pepper's restaurant. JA168-169. The federal

government determined that respondent Donaldo Morales was working under someone else's social security number. *Ibid*. After conducting the investigation, the federal government arrested Morales. JA169-170.

But the federal government did not prosecute Morales. Instead, the Johnson County district attorney asserted, in a criminal affidavit, that Morales used the social security number of another person on "an I-9, a K-4, and a W-4 form for the restaurant." JA124-125. The State initially charged Morales with four offenses: one count of identity theft and three counts of making a false statement on each of the three forms. JA126-128. The State later dismissed the I-9 charge. Pet. App. 63.

The prosecutor's theory at the bench trial was that Morales used another's social security number to establish work authorization. JA176. The prosecutor's first trial exhibit was Morales's Form I-9, which the court admitted. JA149-152.[5] Immediately thereafter, the prosecutor introduced the "identifying documents Mr. Morales supplied" to complete his I-9. JA152. These were a "permanent resident card and also a social security card." *Ibid*. The court admitted those documents into evidence as Exhibit 4, which the witness—the individual who handled hiring at the restaurant—described as the "photocopy that I would have made after receiving the two forms of identification." JA153. As the witness explained, "[o]nce we document it on the I-9, we make a photocopy and it stays with the file." JA154.

The prosecutor elicited testimony that, for an individual to receive a job at Jose Pepper's, he "would need

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[5] The United States' assertion (at 14-15) that Kansas "declined to introduce the I-9s into evidence for any purpose" is wrong.

to bring proof of eligibility to work in the United States." JA148-149. The prosecutor established that the restaurant would not have hired Morales unless he supplied a social security number. JA157-158. As the prosecutor argued, "Morales testified in his own words that he knew social security numbers were needed to obtain employment * * *[.] He knew that that was what he needed to be able to get a job." JA176-177.

The prosecutor expressly tied the K-4 and W-4 to Morales's hiring:

> Prosecutor: When Mr. Morales came in to be hired by your company, is it standard practice for you all to fill out a K-4 and a W-4 document?
>
> Witness: Correct. In order for the employee to be hired and then to be paid, they must fill out the documents.
>
> * * *
>
> Prosecutor: Would an employee be hired if they did not complete a K-4 and a W-4?
>
> Witness: No, sir, they would not.

JA157-158.

In finding Morales guilty (JA180), the court relied on the exhibits, including the I-9 and its attachments, finding them to be "very important, because they're social security number, W-4, and the other social security—the employment document." JA178-179. The court further noted that "[t]here's absolutely no doubt in my mind that he presented these documents for the reason that he could get a job." JA179.

The court nonetheless expressed concern regarding the nature of the prosecution:

> [O]ne thing we do know is that he's putting money into the kitty * * * at a time when we

> need more money in the kitty. He's putting money into social security 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 social security number now. This isn't a case of equity. It's a case of criminal—I can't find him not guilty.

JA180-181.

c. During a joint investigation, federal agents and Overland Park police came to suspect that respondent Guadalupe Ochoa-Lara was working under another person's social security number. JA190-191. The Johnson County district attorney brought charges.

The criminal affidavit asserted that "Ochoa-Lara completed a Form I-9" using another person's social security number. JA191. The district attorney charged Ochoa-Lara, in part, with "making a false information" with respect to his "I-9." JA194. After Ochoa-Lara argued preemption (JA196-202), the State dismissed the I-9 charge. JA204. The amended complaint identified two charges, both of which "related to Ochoa-Lara's use of someone else's social security number on a W-4." Pet'r Br. 13.

In lieu of a trial, Ochoa-Lara executed a stipulation of facts. The stipulation observed that Ochoa-Lara used another's social security number on "the Form W-4" and that "he used [another's] number in order to gain employment." JA216-217. The entry of judgment summed up the prosecution: "defendant used the social security number validly issued to [another person] for employment purposes without permission." JA218.

2. On appeal, the Kansas Court of Appeals affirmed respondents' convictions. Pet. App. 48-60, 71-82, 97-

112. The court rejected respondents' preemption arguments. *Id.* at 53-57, 80-82, 102-110.

Additionally, the court of appeals addressed whether the State demonstrated that respondents sought a "benefit," a required element of the identity theft offense. Agreeing with Kansas, the court concluded that 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." Pet. App. 51. It continued that, "[h]ad Garcia not used a false social security number, he would not have obtained the job." *Id.* at 51-52. See also *id.* at 78 (Morales).

The court of appeals also rejected Garcia's argument that the trial court erred by failing to provide a unanimity instruction. See Pet. App. 57-60. If the prosecution "involve[d] multiple acts," either the State must tell "the jury which act to rely on, or the district court must * * * instruct[] the jury that it was to agree on a specific act." *Id.* at 58. But, agreeing with the State, the court concluded that Garcia's uses of another's "social security number on both his W-4 and K-4 were not factually separate and distinct incidents," and thus "Garcia's conduct was unitary." *Id.* at 60.

3.a. The Kansas Supreme Court reversed each conviction. Pet. App. 1-47, 61-70, 88-96. At the outset, the court identified the nature of the prosecutions—"[t]he State seeks to punish an alien who used the personal identifying information of another to establish the alien's work authorization." *Id.* at 20.

The court held that IRCA preempts these prosecutions: "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)." Pet. App. 27. And the "[p]rosecution of Garcia—an alien who committed iden-

tity theft for the purpose of establishing work eligibility—is not among the purposes allowed in IRCA." *Id.* at 27-28. See also *id.* at 69 (Morales), 94 (Ochoa-Lara).

The court underscored that "as-applied" preemption governs. Pet. App. 20. Respondents did "not seek to prevent all prosecutions under the state law." *Ibid.* Rather, the court's holding applies solely to the crime of using another person's "Social Security card or other document listed in federal law * * * for purposes of establishing employment eligibility." *Ibid.*

b. Justice Luckert concurred in the result. She would have rested on implied preemption. Pet. App. 29-38. Justice Luckert explained that "IRCA 'forcefully' made combating the employment of illegal aliens central" to the nationwide "'policy of immigration law.'" Pet. App. 33 (quoting *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991)). In particular, "IRCA's 'extensive' employment verification system 'is critical to the IRCA regime.'" *Ibid.* (quoting *Hoffman Plastic*, 535 U.S. at 147-148).

Through IRCA, "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." Pet. App. 35-36. As a result, "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." *Id.* at 36.

"Conflict preemption" also barred "the use of Kansas' identity theft statute under the circumstances of this case." Pet. App. 36. In Justice Luckert's view, a state prosecution "usurp[s] federal enforcement discretion in the field of unauthorized employment of aliens." *Ibid.* (quotation omitted).

Justice Luckert found the State's attempted reliance on the tax forms unavailing. "[T]he State does not explain what benefit" respondents "received from these forms other than [their] employment and the taxable salary derived therefrom, which circles back to the I-9 that had to be completed in order for [respondents] to gain employment." Pet. App. 36. Kansas "cannot avoid the reality that the W-4 and K-4 were completed with information * * * from the I-9 and accompanying documents." *Ibid.*

c. In dissent, Justice Biles acknowledged that he was "attracted to the notion that the Kansas statute is preempted as applied in this case under implied theories of either field or conflict preemption." Pet. App. 44. He recognized that "[t]he possibility of dual enforcement tracks—state and federal—is concerning because of the prosecutorial discretion * * * our state affords to its prosecutors." *Ibid.* And 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." *Id.* at 44-45.[6] While he would have ruled against

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[6] All four earlier state appellate opinions also involved prosecutions by Johnson County. See Pet. App. 109-110 (identifying cases). The Johnson County district attorney brought more than 1,200 prosecutions for identity theft between 2010 and 2015. Letter from Stephen M. Howe, District Attorney, to Michael Sharma-Crawford (Aug. 17, 2016), https://perma.cc/P35W-47A8. Johnson County prosecutes identity theft at a vastly higher rate than other counties in Kansas. See, *e.g.*, Kan. Sentencing Comm'n, *FY 2013 Annual Report*, 95 (Apr. 2014), perma.cc/2G5Y-3DHB. And this district attorney has established "certain policies" that forbid line prosecutors from normal plea-bargaining that might result in less severe immigration consequences. JA52, JA56.

preemption, Justice Biles observed that "an as-applied conflict preemption challenge" is "a close call." *Id.* at 45.

Justice Stegall's dissent expressed "doubt" that the court's decision would "extend[] beyond the narrow facts" of these cases. Pet. App. 45.

SUMMARY OF ARGUMENT

The federal government determines which aliens are authorized to work in the United States. To enforce these limitations, IRCA created the "employment verification system." To obtain a job, an individual must provide information to demonstrate that he or she is, as a matter of federal law, eligible for employment. When completing this employment verification process, it is a federal crime to use fraudulent information to demonstrate employment authorization. See 18 U.S.C. § 1546(b). IRCA preempts States from separately prosecuting this offense.

I. Kansas's argument against preemption rests on its contention that "[r]espondents' convictions" were not "related to the verification of employment authorization." Pet'r Br. 37. That is flat misrepresentation. Below, Kansas irrevocably tethered these criminal charges to respondents' use of false information in the employment verification process.

The state criminal offenses required Kansas to prove that respondents sought to obtain, through fraudulent means, a "benefit." To satisfy this element, Kansas offered just one theory: Respondents "used the social security number of another person * * * to deceive" their employers "into believing [they] could be lawfully employed." App., *infra*, 57a. Kansas prevailed.

Additionally, Garcia argued that the trial court erred by not providing a unanimity instruction. The jury should have been told, Garcia contended, that it had

to reach agreement on which act constituted the crime. In response, Kansas claimed that Garcia's conduct was singular—"The gravamen of the crime was the use of another's social security number, and not the fact that the social security number was used on W-4, K-4 and employment application." App., *infra*, 43a-44a. Kansas won on this argument, too. Agreeing with Kansas, the court of appeals held that "Garcia's conduct was unitary." Pet. App. 59-60.

Kansas's complete reversal of position is stunning. Before the state courts, Kansas contended that "Garcia could not have been charged with three counts of identity theft based on these three documents"—the "W-4, K-4 and employment application." App., *infra*, 44a. Now, however, Kansas relies on the opposite contention, that "Respondents' multiple fabrications are akin to making the same false statement three separate times to three government entities, which would constitute three separate criminal offenses." Pet'r Br. 25.

Finally, Kansas's theory of these prosecutions was a simple one: "You can't work in Kansas using someone else's social security number, and that is what Mr. Garcia did." JA67.

Having time and again taken the position that these prosecutions are about federal work authorization, Kansas cannot now reverse course simply because doing so better serves its preemption arguments. Kansas's brief overtly contradicts its arguments below, reneging on points that were essential to its victories before the state courts.

II. Preemption here is "as applied." The Kansas Supreme Court did not hold—and respondents never contended—that all of Kansas identity theft law is preempted. Rather, federal law preempts solely those prosecutions targeting fraud on the federal employ-

ment verification system. In these cases, and the others like it, the prosecutions' theory of the "benefit" sought confirms the applicability of preemption.

III. IRCA expressly preempts these prosecutions. Section 1324a(b)(5) bars States from using a Form I-9 *as well as* "any information contained in or appended to" the I-9. IRCA reserves solely to the federal government the authority to prosecute individuals for providing fraudulent information during the employment verification process. Kansas's contrary reading would render meaningless important aspects of the text, and it would negate the statute's manifest purpose.

Section 1324a(d)(2)(F), which provides that the employment verification system "may not be used for law enforcement purposes," also compels this construction. This statute operates as a forward-looking bar to modifications to IRCA. In so doing, it reveals what Congress understood IRCA to have already accomplished.

In Kansas's view, these express prohibitions in IRCA have no meaningful effect. Although Kansas agrees that it cannot prosecute an individual for committing fraud on the Form I-9 itself, Kansas maintains that it can achieve the same result through analogous state forms. But Kansas may not obtain an end that Congress has expressly foreclosed.

Kansas's own conduct, moreover, highlights that these prosecutions are precisely what IRCA precludes. Here, Kansas *did* introduce an I-9 into evidence. It likewise entered into evidence the identification documents used in the I-9 process.

IV. Federal law also impliedly preempts these prosecutions. Congress has established a "comprehensive framework for 'combating the employment of illegal aliens.'" *Arizona*, 567 U.S. at 404 (quoting *Hoffman*

Plastic, 535 U.S. at 147). With respect to employees, Congress made it a criminal offense to commit fraud on the federal employment verification system. See 18 U.S.C. § 1546(b). Congress also imposed civil penalties and severe immigration consequences on those who commit such fraud. IRCA's "extensive 'employment verification system' * * * is critical to the IRCA regime." *Hoffman Plastic*, 535 U.S. at 147-148.

IRCA preempts the field with respect to fraud on the employment verification system. The Court's holding in *Arizona* regarding Section 3 of Arizona's S.B. 1070 governs: "The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance." 567 U.S. at 401. Congress's creation of this expansive system occupied the field, or else "every State could give itself independent authority to prosecute federal registration violations, diminishing the Federal Government's control over enforcement and detracting from the integrated scheme of regulation created by Congress." *Id.* at 402 (quotations omitted; alterations incorporated). Those considerations apply with full force here.

These prosecutions also conflict with IRCA. As the Court underscored in *Arizona*, federal prosecutorial discretion is central to the Nation's immigration laws. Allowing this sort of state prosecution—even if consistent with federal requirements—is impermissible. There is inherent conflict if a "State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona*, 567 U.S. at 402. So too here.

V. In relying on respondents' W-4s, Kansas claims authority to regulate fraud on the IRS. That is incor-

rect. Indeed, such state power would be exceptional, with far-reaching consequences.

ARGUMENT

I. KANSAS PROSECUTED RESPONDENTS FOR FRAUD ON THE FEDERAL EMPLOYMENT VERIFICATION SYSTEM.

A. Kansas misrepresents the nature of these prosecutions.

Kansas prosecuted respondents for using fraudulent information to demonstrate authorization to work in the United States.

In its brief before this Court, Kansas engages in an extraordinary mischaracterization. It asserts time and again that respondents' prosecutions were *not* about work authorization and the federal employment verification system:

- "[T]here is no dispute that Respondents' convictions were not based on * * * their work authorization." Pet'r Br. 5.
- "[T]he State's prosecution of Respondents had nothing to do with the use of false documents to show work authorization." *Id*. at 19-20.
- Respondents were not "prosecuted for * * * misrepresentations related to the verification of employment authorization." *Id*. at 21.
- "Respondents' prosecutions * * * hav[e] nothing to do with * * * work authorization." *Ibid*.
- "Respondents' convictions" were not "related to the verification of employment authorization." *Id*. at 37.
- "[T]he State's prosecution of Respondents does not implicate" "the employment verification process." *Id*. at 41.

- "Not one of the Respondents was convicted for any information included * * * as part of the process of verifying authorization to work." *Ibid*.
- "Kansas's identity theft and false writing statutes * * * were not used to prosecute fraud in the employment verification process." *Id*. at 42.
- "Respondents' prosecutions do not attempt to punish conduct prohibited by IRCA." *Id*. at 47.
- "Kansas's decision to punish the use of another's personal identifying information does not relate to * * * employment authorization." *Id*. at 48.

This is not a mere slip of the pen; it is the central premise on which Kansas relies to contest preemption. Yet Kansas is demonstrably wrong. More than wrong, Kansas's position before this Court misrepresents how the State actually prosecuted these cases.

Theory of benefit. The Kansas identity theft statute requires the State to prove that the defendant used false information "with the intent to defraud * * * in order to receive any benefit." Kan. Stat. Ann. § 21-6107(a). The false information statute similarly requires "intent to defraud." *Id.* § 21-5824(a). In Kansas, an "intent to defraud" requires "an intention to deceive another person, and to induce such other person, in reliance upon such deception, to * * * transfer * * * a right * * * with reference to property." *Id.* § 21-5111(o). Thus, to obtain a conviction, Kansas had to identify the "benefit" and "property" involved.

Kansas raised just one theory, repeatedly and successfully: The "benefit" that respondents received was unauthorized employment, and the "property" was the resulting wages and fringe benefits. In the state appel-

late courts, long before these cases reached this Court, Kansas argued:

- "Garcia intended to deceive the restaurant in employing him in 2012 based on the false social security number." App., *infra*, 32a.
- "Bonefish Grill would not have hired Garcia if he did not have a social security number," and "Garcia signed the employment application, the W-4 and the K-4 verifying that the number provided was his number." *Ibid*.
- "As the State argued in closing, Garcia worked under the social security number" of another person, and he "was paid wages, which he would not have received without that number." *Id*. at 32a-33a.
- "When Morales came to be hired, it was standard practice to complete a K-4 and a W-4. This is required in order to be hired and then to be paid." *Id*. at 48a.
- "The social security number was a prerequisite for employment at North Star * * *. José Pepper's relied on Morales' declaration that the social security number he offered on the employment application, W-4 and K-4 was his own social security number." *Id*. at 53a.
- "Morales used the social security number of another person * * * with the intent to deceive the management of José Pepper's into believing he could be lawfully employed and thus be compensated for his efforts with money." *Id*. at 57a.

The court of appeals adopted the State's argument:

- "[T]he fraudulent behavior consisted of defendant's knowing use of the victim's identifying in-

formation to obtain employment, wages, and benefits to which he would not otherwise have been entitled." *Id*. at 52.

- 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." Pet. App. 51.
- "Had Garcia not used a false social security number, he would not have obtained the job." *Id*. at 51-52.
- "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." *Id*. at 53.
- "Morales used a Social Security number he knew was not his * * * 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." *Id*. at 78.

In light of the State's own arguments and the lower court's adoption of them, it is simply wrong for Kansas to say that respondents were "convicted *only* for using stolen social security numbers on state and federal tax forms." Pet'r Br. 42 (emphasis added). And, as a legal matter, the State's characterization of the prosecutions is not tenable. The statutes invoked required Kansas to prove fraud to receive a "benefit" or "property"—and Kansas tied these prosecutions irrevocably to federal employment authorization. See Pet. App. 36 (Luckert, J., concurring) ("[T]he State does not explain what benefit Garcia received from [the W-4 and K-4] forms other than his employment and the taxable salary derived therefrom.").

Kansas's effort to whittle the prosecutions down to "tax forms that have no bearing on assessing work authorization" (Pet'r Br. 41) blinks reality.[7]

Unanimity instruction. Separately, Kansas argued successfully that a unanimity instruction was not required because respondent Garcia's completion of the K-4 was the same conduct as his filling out the federal documents—and all of it, Kansas contended, was tied to employment verification.

As a matter of state law, if the prosecution "involve[d] multiple acts," either the State must tell "the jury which act to rely on, or the district court must * * * instruct[] the jury that it was to agree on a specific act." Pet. App. 58. Garcia argued that this doctrine applied, contending that his filling out the state K-4 form was an act separate from completing the federal W-4 and the job application. *Id.* at 59-60.

Kansas disagreed:

- "The gravamen of the crime was the use of another's social security number, and not the fact that the social security number was used on W-4, K-4 and employment application." App., *infra*, 43a-44a.
- "The acts occurred at or near the same time and at the same location. There was a causal relationship between the acts, as the documents"—the W-4, K-4, and an employment ap-

[7] The brief in opposition clearly described that each prosecution rested on false statements relating to work authorization. See BIO 4-5. Kansas did not disagree in its reply. At the certiorari stage, Kansas did not advance the factual contention—now central to its argument—that these prosecutions "hav[e] nothing to do with * * * work authorization." Pet'r Br. 21.

plication—"were required in order to obtain employment." *Id*. at 44a.

- "As the State argued in closing, when Garcia 'sat down and filled out the W-4, the K-4, the application, and received payment, was it his intent to receive a paycheck and benefits from Bonefish Grill? You know that he wouldn't have received those had he not given that [social security] number.' * * * The factual circumstances of the crime involved a short, continuous, single incident." *Ibid*.

The court of appeals again agreed with Kansas. The court concluded that Garcia's uses of another's "social security number on both his W-4 and K-4 were not factually separate and distinct incidents," and thus "Garcia's conduct was unitary." Pet. App. 60. The court explained why Garcia's completion of the K-4 form was inseparable from the fraud relating to his hiring:

> [T]he managing partner [of Bonefish Grill] 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 be-

> cause 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.

Pet. App. 59. Kansas's argument, adopted by the state intermediate court, was that Garcia's conduct was part of a single deception—fraud during the employment verification process.

Having prevailed on this point below, Kansas's about-face is stunning. Kansas now contends:

> Respondents' multiple fabrications are akin to making the same false statement three separate times to three government entities, which would constitute three separate criminal offenses.

Pet'r Br. 25. But, before the state court, Kansas argued the *precise* opposite:

> "Garcia could not have been charged with three counts of identity theft based on these three documents"—the "W-4, K-4 and employment application."

App., *infra*, 44a. This is a wholesale reversal of position on a dispositive issue of state law. Having persuaded the state courts to adopt its position, Kansas cannot now reverse course.

Prosecution theory. At every stage, Kansas affirmatively argued that it was prosecuting respondents for fraud on the federal work verification system.

The prosecutor in Garcia's trial summed up the theory of the offense: "You can't work in Kansas using someone else's social security number, and that is what Mr. Garcia did." JA67. See also JA99 ("[I]n the State of

Kansas, you cannot work under someone else's social security number.").

So too in Morales's trial: "Morales testified in his own words that he knew social security numbers were needed to obtain employment * * *[.]" JA176-177. As for the "tax forms," the prosecutor specifically argued that he "complete[d] those tax forms with his employer so that he could obtain a benefit, being a paycheck." JA177. The court found Morales guilty because "[t]here's absolutely no doubt in my mind that he presented these documents for the reason that he could get a job." JA179.

As for Ochoa-Lara, the stipulated fact necessary for his conviction was that he "does not have a social security number lawfully issued to him and he used [another's] number in order to gain employment." JA217. Per the entry of judgment, Ochoa-Lara was convicted for using "the social security number validly issued to [another person] for employment purposes." JA218.

This continued on appeal. As Kansas told the state appellate court: "To prove identity theft, the State *had to establish* that Morales had the mental purpose *to obtain or maintain employment* by using personal identifying information of another person." App., *infra*, 59a (emphases added).

The state supreme court was in the best position to identify the basis of these convictions. As it concluded, "[t]he State seeks to punish an alien who used the personal identifying information of another to establish the alien's work authorization." Pet. App. 20.

The State's shocking change of position before this Court warrants dismissal of the petition as improvidently granted. If Kansas had made clear in the petition that success on the merits would require it to make arguments that were diametrically opposed to

the positions that it had taken in the state courts (and that the state courts in turn *adopted*), it is unlikely that the Court would have granted certiorari. The result should be no different now. And, if Kansas had made these points before the state courts, it likely would have lost on state law issues, obviating the need for courts to address preemption.

Short of dismissing the case, Kansas is estopped from arguing that its "prosecution of Respondents had nothing to do with the use of false documents to show work authorization." Pet'r Br. 19-20. Where, as here, "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001).

B. Kansas has not invoked its tax laws.

Kansas cannot legitimately maintain that these prosecutions are tethered to state taxation. See Pet'r Br. 25-26.

First, in Ochoa-Lara's case, as Kansas expressly acknowledges, the sole charges that went to trial "related to Ochoa-Lara's use of someone else's social security number on a W-4." Pet'r Br. 13. See also JA211-212. The K-4 was not at issue. See JA216-217.

Second, Kansas has not invoked its tax laws. Failure to pay taxes due or to supply required information is a misdemeanor. Kan. Stat. Ann. § 79-3228(e). If one evades the payment of estimated taxes, state law imposes a civil "penalty equal to the total amount of the tax evaded, or not collected." *Id*. § 79-32107(e).[8]

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[8] If an employee fails to complete a K-4, the employer is instructed to "withhold wages at the single rate with no allowances." Kan.

Kansas may always prosecute civil and criminal violations of its state tax code. If respondents had in fact made misstatements on "tax-withholding forms in order to avoid paying taxes" (Pet'r Br. 43)—there is no evidence that any respondent underpaid taxes—Kansas could have charged them with that offense. But that is manifestly not the basis of *these* prosecutions. Nor are such offenses likely to trigger serious immigration consequences. In defending what it did below, Kansas cannot conjure up alternative theories divorced from the charges it actually pursued.

II. PREEMPTION HERE IS "AS APPLIED."

Kansas repeatedly identifies that the state laws at issue are of general application and do not single out aliens. See, *e.g.*, Pet'r Br. 5, 36-38, 43. But a broad, generally applicable state law does not alone avoid federal preemption. Rather, as the court below held (see Pet. App. 20, 32), preemption operates on an "as-applied," rather than a "facial," basis. The Supreme Court of Iowa reached the same conclusion: "The Iowa identity theft statute is preempted to the extent it regulates fraud committed to allow an unauthorized alien to work in the United States in violation of federal immigration law." *State* v. *Martinez*, 896 N.W.2d 737, 755 (Iowa 2017).

The Court routinely holds that federal law preempts specific applications of broad state laws. The Food, Drug, and Cosmetic Act, for example, preempts certain "state-law fraud-on-the-FDA claims," even though the claims invoked "state tort law" of general application. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001). The FDCA obviously does not preempt state tort law writ large. The Airline Deregu-

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Dep't of Revenue, *Kansas Withholding Tax*, 6 (Oct. 2013), perma.cc/BBR9-53DR.

lation Act preempts, on an as-applied basis, certain state common-law claims for the implied covenant of good faith and fair dealing. *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273, 281-282 (2014). Again, the ADA plainly does not preempt state good faith and fair dealing doctrine in toto.

Arizona confirms the point. Section 2(B) of S.B. 1070 required state officers, in certain circumstances, to identify an individual's immigration status. *Arizona*, 567 U.S. at 411. While declining to facially invalidate the law, the Court expressly reserved "preemption * * * challenges to the law as interpreted and applied." *Id*. at 415.

This "as-applied" preemption doctrine is familiar to the United States. Before the Ninth Circuit, the government argued that facially neutral Arizona laws are "preempted to the extent they criminalize fraud committed to demonstrate an alien's authorization to work in the United States under federal immigration law." U.S. *Puente-Arizona* Br. 21. Indeed, "the fact that the challenged laws were drafted in neutral terms does not immunize them from preemption analysis." *Id*. at 24.

The operation of "as-applied" preemption answers Kansas's parade of horribles. See, *e.g.*, Pet'r Br. 29-35, 41-42. The State's identity theft laws remain in full force in the vast majority of their applications; they are preempted only insofar as prosecutors use them to regulate fraud on the federal employment verification system.

Whether an identity theft prosecution targets fraud on the employment verification system is readily determinable by the nature of the "benefit" that the State asserts. Here, the "benefit" Kansas alleged was obtaining unauthorized employment. See pages 22-24, *supra*. Likewise, in *Martinez*, to show "an essential element in

the crime of identity theft," Iowa rested on "the allegation that Martinez obtained unauthorized employment." 896 N.W.2d at 755. As these cases demonstrate, a State's prosecution theory will identify whether the criminal charge is one involving the federal employment verification system.

III. IRCA EXPRESSLY PREEMPTS THESE PROSECUTIONS.

Through IRCA, Congress has reserved to the federal government prosecution of individuals who use false information during the federal employment verification process. This conclusion follows from multiple aspects of the statutory text. Kansas's interpretation, by contrast, disregards important parts of the statute, and it defies IRCA's manifest purpose. Properly construed, IRCA's express preemption provisions are measured in scope—they bar States from using "any information contained in" an I-9 to prosecute fraud on the federal "employment verification system."[9]

A. IRCA bars States from prosecuting fraud on the federal employment verification system.

Through complementary provisions, IRCA provides the federal government exclusive authority to prosecute fraud on the federal employment verification system. This is not a novel conclusion. Previously examining these statutes, the Court concluded 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 specified *federal* criminal statutes for fraud, perjury, and related

[9] For reasons described by the U.S. Chamber of Commerce (at 3-17), no presumption against preemption applies. See *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016).

conduct." *Arizona*, 567 U.S. at 405 (emphases added). That correct observation governs here.

First, Section 1324a(b)(5) provides that "[a] form designated or established by the Attorney General under this subsection"—that is, the I-9—"*and* any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter," as well as four enumerated federal offenses. 8 U.S.C. § 1324a(b)(5) (emphasis added).

The "form" at issue—the I-9—is the document "established by the Attorney General by regulation" for purposes of "verif[ying] that the individual is not an unauthorized alien." 8 U.S.C. § 1324a(b)(1)(A). On the form, each employee "must attest * * * 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 * * * to be hired, recruited, or referred for such employment." *Id.* § 1324a(b)(2). The I-9 requires an employee to provide various "information," including name, address, and basis for being authorized to work in the United States. See Form I-9.

In sum, the "information" at issue (8 U.S.C. § 1324a(b)(5)) is entered into the "employment verification system" through the I-9 (*id*. § 1324a(b)), and Section 1324a(b)(5) precludes States from using this "information" for prosecutions relating to the verification process. The literal terms of Section 1324a(b)(5)—as well as its context and placement in the provision creating and controlling the "employment verification system"—compel the conclusion that IRCA bars States from prosecuting individuals who use false information to show federal work authorization. See *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole

statutory text, considering the purpose and context of the statute.").[10]

These prosecutions are thus preempted. Kansas contends that respondents placed another person's social security number on the hiring documents, including the I-9. This is "information held within the four corners of the I-9." Pet'r Br. 23. It is therefore "information contained in" the I-9. Kansas then "used" this information in the course of these prosecutions, which alleged fraud on the "employment verification system."

Second, Section 1324a(d)(2)(F), titled "[l]imited use for law enforcement purposes," confirms the legal structure that IRCA created. This subsection provides that *only* the federal government may prosecute violations of the federal employment verification system. It states that this "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. § 1324a(d)(2)(F).

In this provision, Congress placed prospective limitations on how the Executive could implement IRCA by regulation. See 8 U.S.C. § 1324a(d)(2). In restricting future action, Congress necessarily identified its understanding of what IRCA accomplished—the "verification system" as enacted by IRCA could not "be used for law enforcement purposes," except for federal prosecu-

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[10] Section 1324a(b)(5)'s title does not govern its scope. Cf. Pet'r Br. 28. Statutory "headings and titles are not meant to take the place of the detailed provisions of the text" because "[w]here the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528 (1947). Put simply, "[t]he caption of a statute * * * 'cannot undo or limit that which the [statute's] text makes plain.'" *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004).

tions. *Id*. § 1324a(d)(2)(F). It would have made no sense for Congress to bar future Executives from allowing States to prosecute this crime if States *already* had that authority. Kansas, however, seeks to use information provided to the "system" for "law enforcement purposes" *other* than those enumerated. That is at odds with Congress's express description of the statutory structure.

Third, in establishing the employment verification system, Congress understood that fraud would occur; it therefore enacted 18 U.S.C. § 1546(b) as the tailored enforcement mechanism. See 100 Stat. 3359, 3380. Under this law, it is a crime to use false information "for the purpose of satisfying a requirement of" the employment verification system. 18 U.S.C. § 1546(b).

In preserving a role for the States, 18 U.S.C. § 1546(c) provides that this "section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of * * * a State." Section 1546(c) does *not*, however, authorize state *criminal prosecutions* regarding fraud on the employment verification system. Congress could have—but expressly did not—permit States to prosecute this conduct. If States possess the authority that Kansas maintains, the savings clause in Section 1546(c) is meaningless.

Through these three statutory provisions, Congress created a comprehensive—and exclusively federal—mechanism for prosecuting fraud related to work authorization.[11] The United States has previously argued

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[11] The *Whiting* plurality did not, as Kansas maintains (at 17), resolve the scope of IRCA's preemption provisions by footnote. See *Whiting*, 563 U.S. at 603 n.9. In addressing what IRCA certainly requires, the plurality did not purport to *limit* IRCA's effects. The issue was not before the Court. Indeed, the Court's later decision

that "IRCA * * * provided that the information an employee submits to verify work authorization may be used in a prosecution under the specified federal criminal statutes, or to enforce the INA itself, but '*may not be used*' for any other purpose." U.S. Br. 36, *Arizona* v. *United States*, No. 11-182, 2012 WL 939048 (U.S. Mar. 19, 2012) (U.S. *Arizona* Br.). These provisions of "IRCA leave[] no room for the imposition of state criminal liability on individual aliens." *Ibid*. See also *Puente Arizona* v. *Arpaio*, 2017 WL 1133012, at *7 (D. Ariz. 2017) ("Congress intended to bar the use of the verification process itself, not just the I-9 and physically attached documents, in state law enforcement.").

We take as praise the United States's current admission that our textual construction is "hyperliteral." U.S. Br. 16. The most literal reading of the text is almost always the best one. As the government apparently recognizes, it now asks the Court to adopt a construction other than the text's plain meaning.

2. In Kansas's view, Section 1324a(b)(5) merely prohibits States from using "the I-9 itself and documents attached to it." Pet'r Br. 26. Although state prosecutors cannot use the form or attached documents, they can use "the same *information*" to prosecute individuals. *Id.* at 25 (emphasis added).

Section 1324a(b)(5) cannot be so limited because the first part of the statute, which bars use of an I-9 "form," accomplishes that purpose. The statute does not stop there. It *additionally* precludes use of information "contained in or appended to such form." 8 U.S.C. § 1324a(b)(5). For this language to have meaning, it must reach beyond the form itself. It is error to negate whole clauses in a statute. See *Cooper Indus.,*

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in *Arizona* described the same provisions with more expansive language. See 567 U.S. at 405.

Inc. v. *Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (applying "the settled rule that [courts] must, if possible, construe a statute to give every word some operative effect.").

Kansas cannot give this clause a meaningful role. See Pet'r Br. 26-27. It argues that Congress's inclusion of "information contained in" the I-9 form "clarified" that the limitation "applies to the contents of a completed form." *Id.* at 27. Because a blank I-9 is of no substance, Congress would not have regulated its use. Thus, the statute's reference to the "form" must already include its *contents*. Nor could a State avoid preemption by purporting to first extract information off the "form" prior to using it in a prosecution. That would still qualify as a use of the "form," even if indirect.

Our construction, by contrast, gives this clause meaning. It also abides by Congress's description of the IRCA legal structure contained in Section 1324a-(d)(2)(F) and the limited scope of Section 1546(c)'s savings clause. These statutes all point in favor of preemption.[12]

3. Kansas's prosecution of Morales confirms the applicability of IRCA preemption. As even Kansas sees it, IRCA "restrict[s] the use of information held within the four corners of the I-9 or attached to it." Pet'r Br. 23-24. But Kansas violated that prohibition here.

The first exhibit Kansas entered into evidence was the completed I-9. JA149-151. Additionally, the State

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[12] The two unrelated statutes that petitioner cites (Pet'r Br. 24-25) use materially different language. Neither identifies "information contained in" as a category apart from the "form" itself. In all events, the point here is that these prosecutions *are* tied to information submitted to the federal employment verification system.

used photocopies of the "identifying documents Mr. Morales supplied" with his I-9—a "permanent resident card and also a social security card." JA152-153. The employer was allowed to retain copies of this information "only" for purposes of IRCA. 8 U.S.C. § 1324a(b)(4). See also *Puente Arizona*, 2017 WL 1133012, at *6 ("[C]opies retained by the employer may be used 'only' for employment verification.").

This qualifies as information "appended to" the I-9. 8 U.S.C. § 1324a(b)(5). See also 8 C.F.R. § 274a.2(b)(4) (barring States from using "copies or electronic images of documents listed in paragraph (c) of this section used to verify an individual's identity or employment eligibility"). Indeed, the witness testified that this information was kept in the file along with the I-9. JA152-154. Yet the State introduced it as Exhibit 4, which the trial court admitted into evidence. *Ibid*.

In convicting Morales, the court relied on all "five exhibits," noting that the "social security number" document and "the employment document" were especially important. JA178-179. Even as Kansas construes it, the State facially violated IRCA. That is proof positive that IRCA is designed to bar these charges.

For its part, the United States misunderstands the facts. It asserts that Kansas "declined to introduce the I-9s into evidence for any purpose," and, for that reason, it did not "'use[]' the I-9s." U.S. Br. 14-15. That is factually wrong.

B. Kansas would eviscerate IRCA's preemption provisions.

Kansas agrees that IRCA precludes it from prosecuting fraud on the Form I-9 itself. Pet'r Br. 23-25. See also U.S. Br. 15. Through IRCA, Congress barred States from prosecuting fraud on the employment verification system. If Congress had wanted States to have

the ability to prosecute this offense, it would not have enacted Sections 1324a(B)(5) or 1324a(d)(2)(F).

But, by Kansas's lights, it may achieve the identical result by requiring employees to complete a K-4. As we explained earlier (see pages 25-27, *supra*), Kansas argued successfully below that an individual's completion of the federal hiring forms and the K-4 state form constitute a unitary act of providing information to obtain a job. Kansas relied on its contention (and numerous others like it) that respondents had to "digitally sign[] a W-4 and a K-4 to go forward in the application process." App., *infra*, 43a.

If Kansas is right, the express limitations in IRCA are meaningless. Although IRCA purported to act as a prohibition, any State could freely disregard it.

That would defy basic principles of statutory construction. "The presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered." Antonin Scalia & Bryan A. Garner, *Reading Law* 63 (2012). A court should "never adopt an interpretation" of a statute "that will defeat its own purpose" by rendering "evasion of the law * * * almost certain." *The Emily*, 22 U.S. 381, 388, 390 (1824).

In the preemption context specifically, the Court rejects "transparent attempt[s] to circumvent federal law." *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1920 (2019) (Roberts, C.J., dissenting). States may not use creative "framing" to reach the same end that federal law prohibits. *National Meat Ass'n* v. *Harris*, 565 U.S. 452, 464 (2012).

C. The statute is limited in scope.

Kansas's argument, in the main, is that IRCA should not be read literally, as doing so would lead to absurd results. Pet'r Br. 29-35. It hypothesizes that, if taken to its most expansive reach, Section 1324a(b)(5)

would allow criminals to "immunize themselves from numerous state prosecutions" by including information on an I-9 form. Pet'r Br. 31. IRCA would somehow negate a State's authority, Kansas posits, to prosecute domestic violence offenses, sex crimes, human trafficking, computer fraud, prescription drug abuse, and a litany of other offenses. Pet'r Br. 29-31. See also U.S. Br. 19-20.

We need not speculate as to the effect of this decision. The state supreme court ruled in September 2017. Kansas has failed to identify a single example—not a one—where that court's construction of IRCA led to any of these fanciful results. That is because, as that court itself held (Pet. App. 27-28), and as we maintain, IRCA preempts state prosecutions that relate to federal employment verification—no more, and certainly no less.

IV. IRCA IMPLIEDLY PREEMPTS THESE PROSECUTIONS.

IRCA also impliedly bars States from prosecuting fraud on the federal employment verification system. Until recently, the federal government advanced precisely this position—a point that the United States now curiously disregards. As it argued, state identity-theft laws are "preempted to the extent they regulate fraud committed to demonstrate authorization to work in the United States under federal immigration law," and that remains true even when "an employee may commit such fraud * * * outside the Form I-9 process." U.S. *Puente-Arizona* Br. 15.[13]

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[13] Any presumption against preemption is limited to federal legislation "[i]n areas of traditional state regulation." *Bates* v. *Dow AgroSciences LLC*, 544 U.S. 431, 449 (2005). The federal employment verification system "is hardly 'a field which the states have traditionally occupied.'" *Buckman*, 531 U.S. at 347 (citation omit-

We begin with field preemption before turning to conflict preemption. But these doctrines "are not 'rigidly distinct.'" *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000). Rather, the comprehensive federal employment verification system that IRCA established occupies the field, and the effort by Kansas to prosecute fraud on this system conflicts with federal prerogatives. These arguments fit hand-in-glove.[14]

A. IRCA preempts the field of fraud on the federal employment verification system.

Field preemption occurs where (1) Congress's "framework of regulation [is] 'so pervasive * * * that Congress left no room for the States to supplement it'" or (2) where "there is a 'federal interest * * * so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona*, 567 U.S. at 399 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). And "[w]here Congress occupies an entire field, * * * even complementary state regulation is impermissible." *Id*. at 401. That is, "[f]ield preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Ibid.*

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ted). As with the state tort-law "fraud-on-the-FDA" claims in *Buckman*, Kansas's fraud-on-the-federal-employment-verification-system theory implicates a "relationship" that is "inherently federal in character." *Id.* at 347-348. "[N]o presumption against preemption obtains in this case," notwithstanding that fraud (or identity theft) at large is within the general police power of the States. *Ibid*.

[14] Because the state supreme court rested on express preemption, the majority did not address implied preemption. See Pet. App. 1-28. And Kansas did not ask the Court to address implied preemption. See Pet. i-ii. Especially in view of Kansas's mischaracterizations, the Court may wish to decline reaching this issue.

Through IRCA, Congress has occupied the field relating to the federal employment verification system. IRCA therefore preempts Kansas's prosecution of respondents for providing false information to establish work authorization.

1. Prior to IRCA, federal law did not occupy this field. The Court held in 1976 that, while the "[p]ower to regulate immigration is unquestionably exclusively a federal power," Congress had not—at that time—taken "action" to indicate that the issue of alien employment "require[d] uniform national rules." *DeCanas*, 424 U.S. at 354, 360-361 & n.9. Before 1986, Congress "had 'at best' expressed 'a peripheral concern with [the] employment of illegal entrants.'" *Whiting*, 563 U.S. at 588 (alteration in original) (quoting *DeCanas*, 424 U.S. at 360).

DeCanas precipitated calls to overhaul the existing framework. In 1976, the Commissioner of the Immigration and Naturalization Service (INS) presented the government's views on proposed INA amendments. *Hearings before the Subcomm. on Immigration and Naturalization of the Comm. on the Judiciary on S. 3074 to Amend the Immigration and Nationality Act, and for Other Purposes*, 94th Cong., 2d Sess. (1976) (1976 *Hearings*). Noting that *DeCanas* had left this authority to States, the Commissioner advised Congress that the Department of Justice "believes that the Federal Government should take the lead in prohibiting unauthorized employment of aliens, rather than deferring entirely to a variety of state acts that would lack nationwide uniformity and would vary in effectiveness depending upon the enforcement capabilities of each state." *Id.* at 25.

Senator Eastland pointedly inquired: "Your statement proposes that the Federal Government take the lead in prohibiting unauthorized employment of aliens

rather than defer to a variety of State actions. Are you suggesting that the Federal Government preempt the field?" 1976 *Hearings* at 30. The Commissioner responded, "[i]n a word, yes." *Ibid.* Elaborating further, INS general counsel Sam Bernsen explained that, "if Congress enacted a law which controlled the employment of illegal aliens, it would clearly show that Congress was taking over in this field." *Ibid.* It was understood that this would preclude States from entering the field: "The Chairman[:] You would take it away from the States—is that what you mean? Mr. Bernsen[:] Yes, sir." *Ibid*.

The legislative process culminated in 1986, when Congress did exactly that by enacting IRCA. The statute created a "comprehensive framework for 'combating the employment of illegal aliens'" (*Arizona*, 567 U.S. at 404 (quoting *Hoffman Plastic*, 535 U.S. at 147)) and "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law'" (*Hoffman Plastic*, 535 U.S. at 147. IRCA thus brought regulation of alien employment within the INA's broader comprehensive framework governing immigration.

2. As we have described (see pages 3-6, *supra*), IRCA provides the federal government exclusive authority to determine who is—and who is not—authorized to work in the United States. See 8 U.S.C. § 1324a(h)(3). IRCA makes it a crime for an employer to knowingly hire unauthorized workers. *Id.* § 1324a-(a)(1)(A), (a)(2).

To be effective, IRCA created an "[e]mployment verification system" (8 U.S.C. § 1324a(b)), which "is critical to the IRCA regime." *Hoffman Plastic*, 535 U.S. at 147-148. For employers, use of the "employment verification system" is generally mandatory. 8 U.S.C. § 1324a(a)(1)(B). Failure to use the system yields civil

fines (*id*. § 1324a(e)(4)(A)) and potential criminal liability (*id*. § 1324a(f)(1)).

With respect to workers, Congress understood that some individuals would resort to fraud to circumvent the employment verification system. See *Hearing before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary: The Knowing Employment of Illegal Immigrants*, 97th Cong., 1st Sess., at 14 (1981) (statement of Doris Meissner, Acting Comm'r, INS) ("The Department of Justice recognizes the likelihood that with employer sanctions there will be a significant increase in the use of fraudulent documentation by illegal aliens."); 132 Cong. Rec. S16879-01 (1986) (statement of co-sponsor Sen. Simpson) (legislators "paid close attention to" the issue of document fraud and "provide[d] for this reality" by creating civil and criminal penalties).

IRCA therefore "makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents." *Hoffman Plastic*, 535 U.S. at 148 (citing 18 U.S.C. § 1546(b)). Additionally, an individual who commits fraud on the employment verification system is subject to civil penalties (8 U.S.C. § 1324c(a), (d)(3)) and severe immigration consequences (see 8 U.S.C. §§ 1182(a)(6)(C), (F), 1227(a)(3)(B)(iii), (C), (D)).

As a result of IRCA's employment verification system, "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies." *Hoffman Plastic*, 535 U.S. at 148.

3. Having created such a comprehensive employment verification system—replete with "criminal, civil, and immigration related consequences" for employees who commit fraud—Congress has occupied the field.

Martinez, 896 N.W.2d at 755. States may not add additional penalties to those identified by Congress, nor may they make enforcement decisions different from those made by the federal government.

This conclusion follows directly from the alien registration provisions the Court addressed in *Arizona*. Section 3 of Arizona's S.B. 1070 rendered it a *state* crime for an alien to fail to carry a registration document, as required by federal law. *Arizona*, 567 U.S. at 400. The "effect" was that Arizona "add[ed] a state-law penalty for conduct proscribed by federal law." *Ibid*.

The Court held that Congress had "occupied the field of alien registration": "The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance." *Arizona*, 567 U.S. at 401. In view of this law, Congress made "a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders." *Id*. at 401-402. Field preemption applied; otherwise, "every State could give itself independent authority to prosecute federal registration violations, diminishing the Federal Government's control over enforcement and detracting from the integrated scheme of regulation created by Congress." *Id*. at 402 (quotations omitted; alterations incorporated).

Prior to *Arizona*, the Court reached the same result as to earlier alien registration laws. *Hines* v. *Davidowitz*, 312 U.S. 52, 73-74 (1941). Congress had created a "harmonious whole" that declined to require aliens to "carry cards" and punished only "wilful failure to register." *Id.* at 72-73. The scheme further required that "registration records and finger-prints must be kept secret and cannot be revealed" except with federal permission. *Id.* at 73. This framework, the Court held, was a "single integrated and all-embracing system." *Id.*

at 74. "Because this 'complete scheme * * * for the registration of aliens' touched on foreign relations, it did not allow the States to 'curtail or complement' federal law or to 'enforce additional or auxiliary requirements.'" *Arizona*, 567 U.S. at 400-401 (quoting *Hines*, 312 U.S. at 66-67).

IRCA governs the field of employment verification in just the same way, creating a "single integrated and all-embracing system." *Hines*, 312 U.S. at 73-74. In IRCA, Congress "establish[ed] an extensive 'employment verification system' designed to deny employment to [unauthorized aliens]," which is "critical to the IRCA regime." *Hoffman Plastic*, 535 U.S. at 147-148 (citation omitted).

This integrated "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice*, 331 U.S. at 230. Just as with the alien registration regimes held to preempt the field in *Arizona* and *Hines*, "the federal statutory directives provide a full set of standards governing alien [employment and verification], including the punishment for noncompliance." *Arizona*, 567 U.S. at 401 (quoting *Hines*, 312 U.S. at 72). See *Hoffman Plastic*, 535 U.S. at 147 (IRCA is "a *comprehensive* scheme prohibiting the employment of illegal aliens in the United States") (emphasis added).

What is more, just as with the statute in *Hines*, Congress in IRCA "work[ed] * * * the new [alien-employment] provisions into the existing (immigration and naturalization) laws, so as to make a harmonious whole." *Hines*, 312 U.S. at 72. As this Court has recognized, IRCA "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic*, 535 U.S. at 147.

Congress's preemptive intent is thus evidenced not only by the "comprehensive" nature of the employment verification and punishment "framework" it enacted (*Arizona*, 567 U.S. at 401), but also by the central role that framework performs in stopping unlawful immigration so that legal immigration may continue. Accord *Hoffman Plastic*, 535 U.S. at 147. And that interest—regulating the flow of lawful (and unlawful) immigrants into the country—is surely "a 'federal interest * * * so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona*, 567 U.S. at 399. See also, *e.g.*, *id*. at 395 ("The federal power to determine immigration policy is well settled."); *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); U.S. *Arizona* Br. 22-23 ("[I]t is Congress that has been granted and exercised plenary authority over alien * * * employment.").

Especially in view of the importance of a "uniform" national immigration policy (see U.S. Const. art. I, § 8, cl. 4), Congress has occupied the field with respect to an issue of "central" concern to that project—employment verification. *Hoffman Plastic*, 535 U.S. at 147.

4. Petitioner's rejoinders do not persuade. It is of no importance that the Court in *Arizona* applied conflict preemption—rather than field preemption—to invalidate Section 5(c) of S.B. 1070. Cf. Pet'r Br. 39-40; U.S. Br. 24. These two doctrines complement; they do not compete. Moreover, the factors that the Court found controlling with respect to Section 3 of S.B. 1070, where field preemption applied, are also present here.

Further, in applying conflict preemption to Section 5(c), the Court did not reject field preemption; it acknowledged that "specific conflicts between state and

federal law [may] simply underscore the *reason* for field preemption." *Arizona*, 567 U.S. at 403 (emphasis added). In any event, "[q]uestions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred." *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 183 (1979) (citation omitted).

Next, Kansas's *expressio unius* argument about IRCA's express preemption provision (Pet'r Br. 40-41; see also U.S. Br. 23) disregards this Court's holding that "the existence of an 'express preemption provision does *not*' * * * 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, 869-872 (2000)).[15]

In short, Congress has comprehensively regulated the employment verification system, and it has made this field "central to '[t]he policy of immigration law.'" *Hoffman Plastic*, 535 U.S. at 147. IRCA thus precludes the States from also regulating this field, even if they "attempt[] to achieve * * * the same goals as federal law." *Arizona*, 567 U.S. at 406. Accord Pet. App. 35-36 (Luckert, J., concurring) ("Congress has occupied the field and prohibited the use of false documents, includ-

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[15] Preemption under these circumstances does not "[c]reat[e] * * * preferential treatment for unauthorized aliens." U.S. Br. 26. Cf. Pet'r Br. 50. Unauthorized aliens are on precisely even footing with everyone else: They can be prosecuted by States for identity theft that is directed at any benefit *other* than employment in violation of the federal immigration laws. Nor is it "impractical and counterintuitive" for preemption to "turn on the subjective motive of private parties regulated by those laws" (U.S. Br. 31), where the objective of the fraud is an element of the crime that the prosecutor must prove.

ing those using the identity of others, when an unauthorized alien seeks employment."); *Martinez*, 896 N.W.2d at 755 ("[T]he federal immigration law occupies the field regarding the employment of unauthorized aliens.").[16]

B. These state prosecutions conflict with comprehensive federal law.

State prosecutions that conflict with federal law are also preempted. See Pet. App. 36-38 (Luckert, J., concurring); *Martinez*, 896 N.W.2d at 756-757. Where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," conflict preemption bars it. *Arizona*, 567 U.S. at 406.

As detailed (see pages 3-6, *supra*), IRCA provides a comprehensive scheme of criminal, civil, and immigration-related consequences for employees who use fraudulent means to establish employment eligibility. Kansas seeks to use generic state identity-theft and false-information statutes to penalize the same conduct, notwithstanding the uniquely federal nature of the immigration laws.

Arizona explained that such a situation creates unacceptable risks that state and federal prosecutors may exercise prosecutorial discretion differently: "[T]he State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the

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[16] This conclusion is consistent, moreover, with *Whiting*. Cf. U.S. Br. 25. That holding turned on the savings clause in 8 U.S.C. § 1324a(h)(2), which specifically authorized States to adopt "licensing" laws to regulate *employers*. *Whiting*, 563 U.S. at 611. IRCA provided States no express authority to prosecute employees' compliance with the employment verification system. It did just the opposite.

comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona*, 567 U.S. at 402.

This reflects classic criteria that broadly trigger conflict preemption. In *Buckman*, for example, state law would have regulated fraud on the FDA. 531 U.S. at 348. But a "conflict stems from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud," and—critically—"this authority is used by the [government] to achieve a somewhat delicate balance of statutory objectives." *Ibid*. The "balance sought by the [government] can be skewed" if state law regulates the same conduct. *Ibid*. That was especially so because the FDA "has at its disposal a variety of enforcement options that allow it to make a measured response to suspected fraud." *Id*. at 349. "This flexibility," the Court observed, "is a critical component of the statutory and regulatory framework under which the FDA pursues difficult (and often competing) objectives." *Ibid*.

Likewise, the Court held preempted efforts by a State to bar from state business repeat violators of the National Labor Relations Act. *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282 (1986). "'[C]onflict is imminent,'" *Gould* held, whenever "'two separate remedies are brought to bear on the same activity'" that is carefully regulated by the federal government, even when a State seeks to provide "judicial remedies for conduct prohibited" by federal law. *Id*. at 286. That is, a "supplemental sanction" by States "conflicts with [the federal government's] comprehensive regulation." *Id*. at 288.

All of this is equally true of IRCA's employment verification system. The federal government has several "enforcement options" available to it—the criminal, civil, and immigration penalties we have described.

And, in choosing particular remedies to use, it seeks a "delicate balance of statutory objectives" to arrive at "difficult" and "competing" objectives. Given the centrality of this scheme to overall immigration policy—a uniquely federal interest—attempts by States to impose "supplemental sanctions" will inevitably conflict.

The United States has agreed. It recently explained how it uses charging decisions to further uniform, national interests: "[T]he Department of Homeland Security has prioritized the investigation and prosecution of employers who knowingly hire unauthorized aliens." U.S. *Puente-Arizona* Br. 18-19 (citations omitted). To accomplish these ends, "[f]ederal law enforcement officials routinely rely on foreign nationals, including unauthorized aliens, to build criminal cases, particularly cases against human traffickers and employers who violate IRCA." *Ibid*. The federal government's "ability to rely on unauthorized aliens as witnesses in high-priority criminal proceedings advances important federal interests that would be thwarted by parallel state prosecutions of the same individuals for offenses already regulated by federal law." *Id.* at 19.[17]

This concern is not hypothetical; it is *this* case. Respondent Garcia previously worked at a glass company, Insulite, in Olathe, Kansas. JA50. At that company, "[t]here was a pattern of them directing employees to change social security numbers." *Ibid*. As part of the investigation into Insulite, Garcia "cooperat[ed] with the federal government." *Ibid*. Following his cooperation, charges on that case were dismissed. JA62.

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[17] Despite citing to this same brief elsewhere for other purposes (U.S. Br. 17), the United States ignores its earlier position.

Such discretion is commonplace: The federal government confirms that it "prioritizes criminally prosecuting employers who 'utilize unauthorized workers as a business model,' 'mistreat their workers,' or 'engage in human smuggling or trafficking,' among other violations." Andorra Bruno, *Immigration-Related Worksite Enforcement: Performance Measures*, Cong. Research Serv., 2 (June 23, 2015), https://perma.cc/U3L8-4RFC. And between 2003 and 2014, the federal government arrested 22,040 individuals on *administrative* charges, while arresting 5,945 over that same period on *criminal* charges. *Id*. at 5-6. As these statistics reveal, the federal government often achieves its balanced enforcement priorities by use of civil penalties in lieu of criminal charges. In fact, the Department of Labor and Immigration and Customs Enforcement have entered into a memorandum of understanding "to avoid conflicts in the worksite enforcement activities." *Id*. at 10.

Evidence of state prosecutions confirms the differing prosecution priorities. Even a dissenting opinion below expressed "apprehension" given that "the identity theft cases reaching [the] 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." Pet. App. 44-45. The same was true in *Martinez*: There, the state supreme court recognized that the particular "state prosecutor" in the case expressed "a different philosophy" from the federal government, which was "reflected in the charging decision." 896 N.W.2d at 757.

That federal agents "supported" the prosecutions here and testified at trial (Pet'r Br. 46-47) does not change the result. The germane "discretion" is that of "the Department of Justice acting through the United States Attorney." *United States* v. *South Carolina*, 720

F.3d 518, 532-533 (4th Cir. 2013). Individual state prosecutors cannot countermand the comprehensive federal regulation of employment verification. If it were otherwise, "the harmonious system of federal immigration law related to unauthorized employment would literally be destroyed." *Martinez*, 896 N.W.2d at 757.[18]

Beyond that, allowing state prosecutions opens the prospect of differing penalties for the same federal crime. If States are permitted to enact overlapping criminal offenses, they are free to choose the penalty imposed—and they may choose a greater or lesser penalty than that selected by Congress. In Kansas, for example, identity theft is up to a severity level-5 felony (Kan. Stat. Ann. § 21-6107(c)(1)(B)), with a potential penalty of 136 months' incarceration (Kan. Sentencing Comm'n, *2018 Sentencing Ranges*, perma.cc/6UPB-XMAX). The tailored federal offense, by contrast, has a maximum penalty of 5 years' incarceration. See 18 U.S.C. § 1546(b).

The result would be, as the United States itself decried, "a troubling patchwork of inconsistent penalties."

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[18] Nor would respondents' position disrupt federal-state cooperation in combating identity theft. As the government has previously explained, "[u]nder the INA, genuine cooperation by state and local law-enforcement officers with federal officials is welcome," but a State cannot "replace federal policy with one of its own." U.S. *Arizona* Br. 23.

The regulation on which Kansas relies (Pet'r Br. 20, 47) undermines its argument. It authorizes the Social Security Administration to disclose information for "law enforcement purposes under certain conditions." 20 C.F.R. § 401.155(a). This is "limited" to law enforcement relating to "violent crime such as murder or kidnapping" and fraud on the "social security program" itself, and fraud on "other income-maintenance or health-maintenance programs." *Id*. § 401.155(a), (b), (c). These prosecutions do not qualify.

U.S. *Puente-Arizona* Br. 20. And even if the range of state penalties is "consistent with federal law, the State's usurpation of federal enforcement discretion in this context would intrude on and interfere with the scheme enacted by Congress." *Id*. at 17. As the United States previously argued, "[i]t is the prerogative of *federal* officials to police fraud by aliens committed to demonstrate work authorization under *federal* immigration laws." *Id*. at 18. To do so, "federal officials" must have discretion "to choose among criminal, civil, and immigration consequences." *Id*. at 18-19.

This concern animated the Court's holding in *Arizona*—that a state law imposing criminal penalties on an unauthorized alien for seeking employment evinced "a '[c]onflict in technique [that] can be fully as disruptive to the system Congress erected as conflict in overt policy.'" 567 U.S. at 406. "Even where federal authorities believe prosecution is appropriate, * * * an inconsistency between [state law] and federal law with respect to penalties" can "create[] a conflict with the plan Congress put in place." *Id.* at 402-403.

Immigration enforcement also implicates foreign policy considerations. According to the United States, "[t]he federal determination of how best to enforce sanctions under the immigration laws may in some circumstances implicate foreign affairs, including the need to account for reciprocal criminal enforcement by other countries." U.S. *Puente-Arizona* Br. 20. As this Court explained, "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Arizona*, 567 U.S. at 395. And "[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad." *Ibid.* In sum, "[d]iscretion

in the enforcement of immigration law"—what is central here—"involve[s] policy choices that bear on this Nation's international relations." *Id*. at 396. Cf. The Federalist No. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

For each of these reasons, state prosecutions of offenses relating to the federal employment verification system conflict with the comprehensive federal regime. And, ultimately, "[t]hese specific conflicts between state and federal law simply underscore the reason for field preemption." *Arizona*, 567 U.S. at 403.[19]

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As we have described, Kansas has prosecuted respondents for committing fraud "to establish [their] employment eligibility." Pet. App. 28. See pages 22-29, *supra*. Kansas cannot now abandon the basis on which it secured these convictions.

Nor can Kansas attempt to recharacterize the implications of its laws. As this Court has repeatedly held, "[i]n a pre-emption case, * * * a proper analysis requires consideration of what the state law in fact

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[19] Kansas argues against preemption because the United States currently favors its position. See Pet'r Br. 47. But just a few years ago, the United States took the opposite position, confirming that conflicts exist. U.S. *Puente-Arizona* Br. 2. In any event, "[p]reemption fundamentally is a question of *congressional* intent." *Geier*, 529 U.S. at 884 (emphasis added). See also *Wyeth* v. *Levine*, 555 U.S. 555, 565 ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case."). Additionally, "the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists" (*Geier*, 529 U.S. at 884), and it has previously found federal preemption even when the United States argued against it (see *Gobeille* v. *Liberty Mut. Ins.*, 136 S. Ct. 936 (2016)).

does, not how the litigant might choose to describe it." *Wos* v. *E.M.A. ex rel. Johnson*, 568 U.S. 627, 637 (2013) (citing *National Meat Ass'n*, 565 U.S. at 464). As the Chief Justice reiterated last Term, the Court "ha[s] rejected" the notion that preemption "turn[s] on the label a State affixes to its regulations." *Virginia Uranium*, 139 S. Ct. at 1919-1920 (Roberts, C.J., dissenting). That is, "States may not legislate with the purpose and effect of regulating a federally preempted field," never mind that the regulations may facially steer clear of the federally occupied area. *Id.* at 1920.

Just so with these prosecutions. What the "state law[s] in fact d[id]" in these cases (*Wos*, 568 U.S. at 636-637) was penalize fraud on the employment verification system. Congress has occupied this field, and Kansas may not "enter, in any respect, an area the Federal Government has reserved for itself." *Arizona*, 567 U.S. at 402. Moreover, Kansas's efforts to "complement[] the federal law, or enforc[e] additional or auxiliary regulations" conflict with the balanced compliance structure that IRCA creates and entrusts to federal discretion. *Id*. at 403. These prosecutions must therefore "yield to the regulation of Congress within the sphere of its delegated power." *Crosby*, 530 U.S. at 373.

V. STATES MAY NOT PROSECUTE W-4 FRAUD.

Although not the focus of its petition, Kansas now broadly asserts the authority to prosecute fraud on a Form W-4. See Pet'r Br. 28, 40, 46. As Kansas admits (at 13), Ochoa-Lara was convicted *solely* with respect to his W-4. See JA211-212, JA216-217. (The United States declines to discuss the W-4.)

For all the reasons we have described, this is part of Kansas's unitary claim that respondents committed fraud on the federal employment verification system.

See pages 22-29, *supra*. The prosecution is thus preempted.

Kansas's argument with respect to the W-4, moreover, highlights the drastic results that it seeks. If Kansas were correct, it could prosecute taxpayer fraud on the IRS. That must be wrong. Just as fraud on the employment verification system is a uniquely federal crime, so too is fraud on the IRS. See 26 U.S.C. § 7205(a) (criminalizing fraud on a W-4). Kansas may not prosecute this crime because, once more, "[p]ermitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted." *Arizona*, 567 U.S. at 402. See also *Buckman*, 531 U.S. at 348.

The conflicts are easy to see. The maximum term of imprisonment for the federal offense is one year (26 U.S.C. § 7205(a)), but 136 months in Kansas (see pages 53, *supra*). Congress has authorized the federal government to negotiate criminal charges when collecting unpaid taxes and penalties in enforcement actions. See 26 U.S.C. § 7122. Because States lack this authority, Kansas's position would gut the ability of the federal government to negotiate away criminal liability in order to maximize collections.

States may not prosecute individuals for fraud on the IRS. Holding otherwise, as Kansas requests, would fundamentally upset federal authority to prosecute—and resolve—federal tax offenses. Kansas's position, advanced without careful consideration, would have far-reaching consequences.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted.

RANDALL L. HODGKINSON
RICK KITTEL
Kansas Appellate Defender Office
700 Jackson, Suite 900
Topeka, KS 66603
(785) 296-5484

REKHA SHARMA-CRAWFORD
Sharma-Crawford Attorneys at Law
515 Avenida Cesar E. Chavez
Kansas City, MO 64108
(816) 994-2300

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
SARAH P. HOGARTH
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Respondents

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APPENDICES

APPENDIX A

8 U.S.C. § 1324a provides:

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)) 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) 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).

(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) 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)) 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) 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)) appropriate documentation of such referral by that agency, which documentation certifies that the agency has complied with the procedures specified in subsection (b) 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) with respect to the employment of the individual,

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

(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) 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).

(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) 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

(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 (beginning 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).

(c) No authorization of national identification cards

Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.

(d) Evaluation and changes in employment verification system

(1) Presidential monitoring and improvements in system

(A) Monitoring

The President shall provide for the monitoring and evaluation of the degree to which the employment verification system established under subsection (b) provides a secure system to determine employment eligibility in the United States and shall examine the suitability of existing Federal and State identification systems for use for this purpose.

(B) Improvements to establish secure system

To the extent that the system established under subsection (b) is found not to be a secure system to determine employment eligibility in the United States, the President shall, subject to paragraph (3) and taking into account the results of any demonstration projects conducted under paragraph (4), implement such

changes in (including additions to) the requirements of subsection (b) as may be necessary to establish a secure system to determine employment eligibility in the United States. Such changes in the system may be implemented only if the changes conform to the requirements of paragraph (2).

(2) Restrictions on changes in system

Any change the President proposes to implement under paragraph (1) in the verification system must be designed in a manner so the verification system, as so changed, meets the following requirements:

(A) Reliable determination of identity

The system must be capable of reliably determining whether—

(i) a person with the identity claimed by an employee or prospective employee is eligible to work, and

(ii) the employee or prospective employee is claiming the identity of another individual.

(B) Using of counterfeit-resistant documents

If the system requires that a document be presented to or examined by an employer, the document must be in a form which is resistant to counterfeiting and tampering.

(C) Limited use of system

Any 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.

(D) Privacy of information

The system must protect the privacy and security of personal information and identifiers utilized in the system.

(E) Limited denial of verification

A verification that an employee or prospective employee is eligible to be employed in the United States may not be withheld or revoked under the system for any reason other than that the employee or prospective employee is an unauthorized alien.

(F) Limited use for law enforcement purposes

The 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.

(G) Restriction on use of new documents

If the system requires individuals to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral, then such document may not be required to be presented for any purpose other than under this chapter (or enforcement of sections 1001, 1028, 1546, and 1621 of title 18) nor to be carried on one's person.

(3) Notice to Congress before implementing changes

(A) In general

The President may not implement any change under paragraph (1) unless at least—

(i) 60 days,

(ii) one year, in the case of a major change described in subparagraph (D)(iii), or

(iii) two years, in the case of a major change described in clause (i) or (ii) of subparagraph (D),

before the date of implementation of the change, the President has prepared and transmitted to the Committee on the Judiciary of the House of Representatives and to the Committee on the Judiciary of the Senate a written report setting forth the proposed change. If the President proposes to make any change regarding social security account number cards, the President shall transmit to the Committee on Ways and Means of the House of Representatives and to the Committee on Finance of the Senate a written report setting forth the proposed change. The President promptly shall cause to have printed in the Federal Register the substance of any major change (described in subparagraph (D)) proposed and reported to Congress.

(B) Contents of report

In any report under subparagraph (A) the President shall include recommendations for the establishment of civil and criminal sanctions for unauthorized use or disclosure of the information or identifiers contained in such system.

(C) Congressional review of major changes

(i) Hearings and review

The Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of any major change described in subparagraph (D), shall hold hearings respecting the feasibility and desirability of implementing such a change, and, within the two year period before implementation, shall report to their respective Houses findings on whether or not such a change should be implemented.

(ii) Congressional action

No major change may be implemented unless the Congress specifically provides, in an appropriations or other Act, for funds for implementation of the change.

(D) Major changes defined

As used in this paragraph, the term "major change" means a change which would—

(i) require an individual to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral,

(ii) provide for a telephone verification system under which an employer, recruiter, or referrer must transmit to a Federal official information concerning the immigration status of prospective employees and the official transmits to the

person, and the person must record, a verification code, or

(iii) require any change in any card used for accounting purposes under the Social Security Act [42 U.S.C. 301 et seq.], including any change requiring that the only social security account number cards which may be presented in order to comply with subsection (b)(1)(C)(i) are such cards as are in a counterfeit-resistant form consistent with the second sentence of section 205(c)(2)(D) of the Social Security Act [42 U.S.C. 405(c)(2)(D)].

(E) General revenue funding of social security card changes

Any costs incurred in developing and implementing any change described in subparagraph (D)(iii) for purposes of this subsection shall not be paid for out of any trust fund established under the Social Security Act [42 U.S.C. 301 et seq.].

(4) Demonstration projects

(A) Authority

The President may undertake demonstration projects (consistent with paragraph (2)) of different changes in the requirements of subsection (b). No such project may extend over a period of longer than five years.

(B) Reports on projects

The President shall report to the Congress on the results of demonstration projects conducted under this paragraph.

(e) Compliance

(1) Complaints and investigations

The Attorney General shall establish procedures—

(A) for individuals and entities to file written, signed complaints respecting potential violations of subsection (a) or (g)(1),

(B) for the investigation of those complaints which, on their face, have a substantial probability of validity,

(C) for the investigation of such other violations of subsection (a) or (g)(1) as the Attorney General determines to be appropriate, and

(D) for the designation in the Service of a unit which has, as its primary duty, the prosecution of cases of violations of subsection (a) or (g)(1) under this subsection.

(2) Authority in investigations

In conducting investigations and hearings under this subsection—

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated,

(B) administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the

filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(3) Hearing

(A) In general

Before imposing an order described in paragraph (4), (5), or (6) against a person or entity under this subsection for a violation of subsection (a) or (g)(1), the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing

Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of title 5. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders

If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity named in the complaint has violated subsection (a) or (g)(1), the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (4), (5), or (6).

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations

With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection—

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—

(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity—

(i) to comply with the requirements of subsection (b) (or subsection (d) if applicable) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(5) Order for civil money penalty for paperwork violations

With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

(6) Order for prohibited indemnity bonds

With respect to a violation of subsection (g)(1), the order under this subsection may provide for the remedy described in subsection (g)(2).

(7) Administrative appellate review

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such a modification or vacation (or within 60 days of the date of decision and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which case the decision and order of the Attorney General shall become the final agency decision and order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

(8) Judicial review

A person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(9) Enforcement of orders

If a person or entity fails to comply with a final order issued under this subsection against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(f) Criminal penalties and injunctions for pattern or practice violations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) Enjoining of pattern or practice violations

Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a), the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

(g) Prohibition of indemnity bonds

(1) Prohibition

It is unlawful for a person or other entity, in the hiring, recruiting, or referring for employment of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring, recruiting, or referring of the individual.

(2) Civil penalty

Any person or entity which is determined, after notice and opportunity for an administrative hearing under subsection (e), to have violated paragraph (1) shall be subject to a civil penalty of $1,000 for each violation and to an administrative order requiring the return of any amounts received in violation of such paragraph to the employee or, if the employee cannot be located, to the general fund of the Treasury.

(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.

18 U.S.C. § 1546 provides in pertinent part:

Fraud and misuse of visas, permits, and other documents

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

* * *

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact—

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime

(as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses—

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.

(c) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481). For purposes of this section, the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

———

Kan. Stat. Ann. § 21-6107 provides in pertinent part:

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.

———

Kan. Stat. Ann. § 21-5824 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.

———

Kan. Stat. Ann. § 21-5111 provides in pertinent part:

Definitions

* * *

(o) "Intent to defraud" means 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.

APPENDIX B

No. 14-112,502-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Appellee,

vs.

RAMIRO GARCIA,
Appellant.

BRIEF OF APPELLEE

Appeal from the District Court
of Johnson County, Kansas
Honorable Kevin P. Moriarty, District Judge
District Court Case No. 12 CR 1924

Steven J. Obermeier, #12286
Senior Deputy District Attorney
Tenth Judicial District
P.O. Box 728
Olathe, Kansas 66051-0728
(913) 715-3057
(913) 715-3050 (fax)
Steve.Obermeier@jocogov.org
Attorney for Appellee

No. 14-112,502-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Appellee,

vs.

RAMIRO GARCIA,
Appellant.

BRIEF OF APPELLEE

ISSUES ON APPEAL

I. A rational factfinder could fairly conclude that Garcia was guilty of identity theft beyond a reasonable doubt.

II. The federal Immigration Reform & Control Act does not preempt the Kansas identity theft statute when a fraudulent social security number is used in a W-4 form.

III. The failure to give an unrequested unanimity instruction was not clearly erroneous.

STATEMENT OF FACTS

Ramiro Garcia was charged with one count of identity theft. (Vol. 1, 9). At trial, Officer Mike Gibson testified regarding the initial traffic stop of Garcia on August 26, 2012. (Vol. 12, 113-17). Officer Gibson explained to Garcia that he was stopped for speeding. He asked why Garcia was traveling so quickly. Garcia explained that he was on his way to work at the Bonefish Grill. (Vol. 12, 115). Officer Gibson performed a

routine records check and requested Detective James Russell's presence on scene based on the results of the records check. (Vol. 12, 115-16).

Detective Russell, a financial crimes detective for the Overland Park Police Department, contacted Bonefish Grill regarding gathering employment documents for Garcia. (Vol. 12, 119). Russell obtained the social security number that Garcia used from the documents, and he contacted Special Agent Joseph Espinosa, of the Social Security Administration, to verify the social security number. Russell reported that the number returned issued to a Texas resident named Felisha M. (Vol. 12, 120-21).

Garcia was employed as a line cook at the Bonefish Grill. According to Khalil Booshehri, the manager, Garcia's employment included the right to eat the grill's food while on duty. Garcia was also eligible for overtime pay as a result of his employment. (Vol. 12, 127-28). Booshehri explained that most of the hiring process was performed online, but he was not involved with the process of hiring Garcia in 2012. (Vol. 12, 130-38).

Jason Gajan, the managing partner of the Bonefish Grill when Garcia was hired in 2012, testified that the restaurant would not hire an employee until that person had electronically signed documents requiring a social security number. (Vol. 12, 152-56). Gajan explained that he had to personally sign the document verifying that he had seen an actual social security number provided by the applicant. (Vol. 12, 155-56). Gajan explained that, in order to hire an employee, the manager must type in the social security number while they have the physical document in their hands. (Vol. 12, 170). Gajan confirmed that Garcia had provided this document. (Vol. 12, 170).

Once the new employee had signed all the documents and the restaurant had checked all the documents, the restaurant would provide training material and set a schedule. (Vol. 12, 159). Gajan also said that Garcia would be eligible for certain benefits during his employment such as worker's compensation, overtime pay, and meals during working hours. (Vol. 12, 168). The restaurant would have been unable to hire Garcia unless he had provided a social security number. (Vol. 12, 169).

Special Agent Joseph Espinosa from the Social Security Administration testified that he was contacted to verify a social security number ending in 8562, and that the number was registered to a teenager named Felisha M. (Vol. 12, 187).

The jury found Garcia guilty of one count of identity theft. (Vol. 13, 3-4). In August 2014, he was placed on probation for a term of 18 months. (Vol. 1, 41; Vol. 14, 5). Garcia appeals. (Vol. 1, 27).

ARGUMENTS AND AUTHORITIES

I. A rational factfinder could fairly conclude that Garcia was guilty of identity theft beyond a reasonable doubt.

Garcia first argues there was insufficient evidence to establish intent to defraud for a benefit.

When a defendant challenges the sufficiency of evidence, the standard of appellate review is whether, after review of all of the evidence, viewed in the light most favorable to the State, the appellate court is convinced that a rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Oswald,* 36 Kan. App. 2d 144, 147, 137 P.3d 1066, *rev. denied,* 282 Kan. 795 (2006) (defendant used the vic-

tim's social security number and credit card information to open a cellular phone account without the victim's consent or knowledge).

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

> 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 defraud that person, or anyone else, in order to receive any benefit.

"Personal identifying information" included a name, or social security number. K.S.A. 2012 Supp. 21-6107(e)(1), (6).

The legislature removed the word "economic" from the identity theft statute in 2005. *State v. Oswald,* 36 Kan. App.2d at 149. The word "economic" was substituted with the word "any." L. 2005, ch. 131, sec. 2 (identity theft is "knowingly and with intent to defraud for ~~economic~~ *any* benefit . . . ."). *State v. Hardesty,* 42 Kan. App. 2d 431, 435, 213 P.3d 745 (2009). At a hearing before the Senate Judiciary Committee on this issue, a detective had testified that there was no penalty for use of another person's identity if there was no economic benefit. *See* Minutes of the Senate Judiciary Committee of March 15, 2005 concerning Substitute for House Bill 2087.

This legislative change was perhaps in response to the primary case upon which Garcia relies, *City of Liberal v. Vargas,* 28 Kan.App.2d 867, 24 P.3d 155, *rev. denied* 271 Kan. 1035 (2001). The *Vargas* court did not believe the identity theft statute applied to the situation where Vargas, who used a false identification to secure employment, intentionally defrauded

anyone in order to receive a monetary benefit. Vargas bought identification under a false name so that he could work in Kansas. Vargas was appropriately paid for services rendered. The court stated that Vargas did not steal Hernandez's identity in order to commit a theft. 28 Kan.App.2d at 871. *Vargas* would not have been the controlling law in 2012, when Garcia applied for the job at the Bonefish Grill.

Ordinarily, under a generic criminal-code definition, the term "[i]ntent to defraud" means a deception "with reference to property." K.S.A. 2012 Supp. 21-5111(o) (it means 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). But the generic definitions applicable throughout the criminal code do not apply "when a particular context clearly requires a different meaning." K.S.A. 2012 Supp. 21-5111. The plain language in the identity theft statute requires a different meaning.

In *State v. Capps,* No. 105,653, 2012 WL 5973917 (Kan.App.2012), *rev. denied* 297 Kan. 1249 (2013) (Appendix B), the 2005 amendment to the identity-theft statute clearly indicated that the limitation "with reference to property" no longer applied. Otherwise, since "economic benefit" implied some reference to tangible or intangible property, the 2005 amendment would have had little or no meaning. *Capps,* 2012 WL 5973917, at 3.

But the *Capps* court did not leave the term "intent to defraud" without a definition. Instead, the court relied upon the definition in K.S.A. 2010 Supp. 21-3110, revising it only as necessary to reflect the 2005

amendment to K.S.A. 2010 Supp. 21-4018(a). *See Capps,* 2012 WL 5973917, at 3-4.

The *Capps* court concluded that, except for the "reference to property" language, the rest of the intent to defraud definition continued to apply under the identity theft statute, including the requirement that the deception relate to a legal right, obligation, or power:

> We are persuaded that 'intent to defraud' in the context of identity theft is 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 for the benefit of the wrongdoer. See K.S.A. 2010 Supp. 21-3110(10) and K.S.A. 21-4018.

Capps, 2012 WL 5973917, at 4.

The jury here was instructed that intent to defraud is "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." (Vol. 1, 24). The jury was instructed that it had to find that Garcia used the personal identifying information of Felisha M. with the intent to defraud her or anyone else, in order to receive a benefit on or about May 25, 2012. (Vol. 1, 23).

Garcia intended to deceive the restaurant in employing him in 2012 based on the false social security number. The Bonefish Grill would not have hired Garcia if he did not have a social security number. Garcia signed the employment application, the W-4 and the K-4 verifying that the number provided was his number. (Vol. 12, 156-58, 169, 212-14). As the State argued in closing, Garcia worked under the social security

number that was assigned to Felisha M. After Garcia provided her social security number, he worked at the restaurant and was paid wages, which he would not have received without that number. On top of those benefits, he got overtime pay and free meals while at work. (Vol. 12, 210-12).

The State argued Mr. Gajan would not have hired Garcia if he had not provided that social security number. Garcia induced Mr. Gajan to give Garcia a paycheck because Garcia provided him the social security number. "If he had not given him that, he would not have been paid under that number, and he would not have worked at Bonefish Grill." (Vol. 12, 213). Viewed in the light most favorable to the State, a rational factfinder could fairly conclude that Garcia acted with intent to defraud and committed an identity theft.

II. The federal Immigration Reform & Control Act does not preempt the Kansas identity theft statute when a fraudulent social security number is used in a W-4 form.

Garcia next argues that the prosecution in this case is preempted by the Immigration Reform & Control Act of 1986. Garcia was convicted of identity theft based on his unlawful use of another person's social security number, which is an offense unrelated to immigration or his employment eligibility as an alien.

Whether a state law is preempted by a federal law is a question of law over which the appellate courts have unlimited review. Under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, a state law that conflicts with a federal law is unenforceable. *State ex rel. Kline v. Transmasters Towing,* 38 Kan. App. 2d 537, 539-40, 168 P.3d 601 (2007). Because the purpose of Congress is the ultimate

touchstone in every preemption case, analysis of a federal statute must begin with its text, including the structure and purpose of the statute as a whole. *Id.*

The Immigration Reform & Control Act (IRCA) provides that 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).

In *State v. Reynua,* 807 N.W.2d 473, 479 (Minn.App. 2011), the State conceded that this provision of IRCA was broad enough to prohibit even use of the I-9 form in a state prosecution for perjury.

A similar issue arose in *State v. Diaz-Rey,* 397 S.W.3d 5 (Mo.App. E.D. 2013). In August 2011, defendant, "with the purpose to defraud, used as genuine a writing, namely his signature on a Chick-fil-A employment document containing false information, including a false social security number, knowing that it had been made or altered so that it purported to have a genuineness that it did not possess." *Diaz-Rey,* 397 S.W.3d at 7. Diaz-Rey moved to dismiss the forgery charge.

The circuit court granted Diaz-Rey's motion to dismiss the information, which charged him with forgery in violation of the state forgery statute, based on the use of a false social security number on an employment document. The circuit court reasoned that the prosecution was preempted by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a. The *Diaz-Rey* court reversed the circuit court's dismissal of the information, and reinstated the charge for further proceedings. *Diaz-Rey,* 397 S.W.3d at 7.

The State of Missouri argued that the charge of forgery was not preempted by federal law because the Missouri forgery statute did not seek to regulate immigration but was a generally applicable criminal statute that was not expressly preempted by federal law. *Diaz-Rey,* 397 S.W.3d at 8.

The *Diaz-Rey* court examined whether IRCA evidenced a congressional intent to preempt a state remedy by either express preemption, field preemption or conflict preemption. *Id.* It found the Missouri forgery statute is not expressly preempted by IRCA because it does not sanction those who employ, recruit, or offer for employment unauthorized aliens. *Diaz-Rey,* 397 S.W.3d at 8-9. The Missouri forgery statute "does not regulate the employment of unauthorized aliens and therefore is not preempted by IRCA by implication on the ground that IRCA has occupied the field of employment of unauthorized aliens." *Diaz-Rey,* 397 S.W.3d at 9. The court reasoned:

> *Arizona* made clear that IRCA provides a comprehensive framework for combating the employment of illegal aliens. [*Arizona v. United States*, — U.S. —,] 132 S.Ct. at 2505 [183 L.Ed.2d 351 (2012)]. In contrast, [the Missouri forgery statute] does not purport to intrude into or regulate the employment of unauthorized aliens in any manner. Rather, section 570.090 is a state law of general applicability that uniformly applies to all persons as members of the general public, and makes no distinction between aliens and non-aliens. As a general matter, such laws are not preempted simply because a class of persons subject to federal regulation may be affected.

Diaz-Rey, 397 S.W.3d at 9.

As for the third category, the court examined whether the forgery statute "stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *Diaz-Rey,* 397 S.W.3d at 10. The court ruled that the Missouri forgery statute:

> does not criminalize activity that Congress has decided not to criminalize. Rather, as charged in this case, it criminalizes the use of inauthentic writings or items as genuine with knowledge and intent to defraud. . . . Thus, section 570.090 does not stand as an obstacle to Congress's purpose in enacting IRCA.

Diaz-Rey, 397 S.W.3d at 10 (citation omitted). After the court examined these three forms of preemption, it concluded the Missouri forgery statute was not preempted by federal law. *Id.* at 10.

In this case, the identity theft statute that was in effect in May 2012 provided:

> 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 defraud that person, or anyone else, in order to receive any benefit.

K.S.A. 2011 Supp. 21-6107(a). The definition of "personal identifying information" includes a "social security number or card." K.S.A. 2011 Supp. 21-6107(e)(6). For the reasons set forth in *Diaz-Rey,* the Kansas identity theft statute is not preempted by IRCA. K.S.A. 2011 Supp. 21-6107 is a state law of general applicability that uniformly applies to all persons as members of the general public, and makes no distinction between aliens and non-aliens.

In this case, the amended complaint did not allege that Garcia committed identity theft through the use of a federal I-9 form. (Vol. 1, p. 9). In *State v. Reynua,* 807 N.W.2d 473 (Minn.App. 2011), the state's proof of the falsity of a state identification card did not rely on its use in support of the I-9 form. The admission of the I-9 form did not impact the finding of guilt on the forged certificate of title counts. *Reynua,* 807 N.W.2d 482.

The *Reynua* court acknowledged that a state perjury prosecution for false statements on the I-9 form would tend to obstruct the full purposes and objectives of IRCA. *Reynua,* 807 N.W.2d at 480. But the same analysis did not apply to the simple-forgery charge based on the use of the Minnesota identification card. *Id.* The court explained:

> 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, Minn.Stat. § 171.22, subd. 1(2), 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."

Reynua, 807 N.W.2d at 480-81.

Judge Kevin P. Moriarty ruled that the federal government had not preempted the State of Kansas in *State v. Lopez-Navarrete,* No. 111,190, 2014 WL 7566851 (Kan. App. 2014) (unpublished opinion; Appendix A). His ruling was affirmed on appeal. The *Lopez-Navarrete* court stated:

> Lopez-Navarrete was not prosecuted for a false statement on her I-9 form or any other federal document related to verifying an immigrant's employment eligibility; the only federal form that supported her conviction was a W-4, which directs an employer to withhold federal income tax from an employee's pay. Her conviction herein does 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 Cheescake Factory and to claim workers compensation benefits. Her argument that the alleged presence of that social security number on her federal employment verification form prevents the State from prosecuting her for identity theft ignores the purpose of IRCA to ensure "that systematic state immigration enforcement will occur under the direction and close supervision of the Attorney General." Cf. *United States v. Arizona,* 641 F.3d 339, 352 (9th Cir. 2011), reversed in part, 132 S.Ct. 2492 (2012). Here,

> the State was not enforcing immigration; it was enforcing the identity theft statute.
>
> By its plain text, IRCA preempts prosecution for falsely or fraudulently completing the I-9 form itself. *Reynua,* 807 N.W.2d at 480. Lopez-Navarrete' s theory leads to an impossible conclusion: that IRCA would also preempt every misuse of a social security number, whether to obtain a credit card, access someone's medical records, or qualify for a loan, if the defendant could show that social security number also appeared on a federal I-9 form. Nowhere in IRCA is such a sweeping statement of congressional intent to be found, and Lopez-Navarrete offers no authority for her contention that "the Kansas statute . . . clearly conflicts with the express language adopted by Congress."

Lopez-Navarrete at pp. 6-7 (Appendix A at 6-7). IRCA does not preempt prosecution for identity theft based on the use of another person's social security number under K.S.A. 2011 Supp. 21-6107.

K.S.A. 2011 Supp. 21-6107(a) punishes individuals for violating Kansas's identity theft statute. The statute does not punish individuals for violating federal law. Garcia's conviction was supported by evidence that did not consider his immigration status, his employment eligibility, or whether he was an illegal alien. The district court did not err in denying Garcia's motion to suppress.

III. The failure to give an unrequested unanimity instruction was not clearly erroneous.

Garcia last argues, for the first time on appeal, that Judge Moriarty erred in failing to give a unanim-

ity instruction. He argues that there are three separate acts which could have supported the charge of identity theft. BRIEF OF APPELLANT at 9. The proposed instruction was not in the defendant's requested jury instructions. Nor was it requested at the jury instruction conference. (Vol. 4, 63-77; Vol. 12, 204-05).

For jury instruction issues, the progression of analysis and corresponding standards of review on appeal are: (1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless. *State v. Thomas,* 302 Kan. __, 353 P.3d 1134, 1138 (2015).

Garcia did not object to the instructions or verdict form below, therefore relief may only be granted if the instruction was clearly erroneous. *See* K.S.A. 22-3414(3).

> "To determine whether an instruction or a failure to give an instruction was clearly erroneous, the reviewing court must first determine whether there was any error at all. To make that determination, the appellate court must consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record.
>
> "If the reviewing court determines that the district court erred in giving or failing to give

> a challenged instruction, then the clearly erroneous analysis moves to a reversibility inquiry, wherein the court assesses whether it is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. The party claiming a clearly erroneous instruction maintains the burden to establish the degree of prejudice necessary for reversal."

State v. Thomas, 353 P.3d at 1138.

PIK Crim.4th 68.100, the multiple acts instruction, is used:

> "when distinct incidents separated by time or space are alleged by the State in a single count of the charging document. In circumstances where the State could have proceeded under multiple counts but chose not to do so, this instruction must be used. This form of charge presents a problem because the defendant is entitled to a unanimous jury verdict as to which incident constituted the crime."

Notes on Use for PIK Crim.4th 68.100 (2012).

When a question of juror unanimity is raised, the court's first task is to determine whether the case is indeed a multiple-acts case. If not, there's no unanimity problem. *State v. Voyles,* 284 Kan. 239, 244, 160 P.3d 794 (2007). The core question is whether the defendant's conduct related to each charge is part of one overall act or represents multiple acts that are separate and distinct, such as when independent criminal acts have occurred at different times or when a later criminal act is motivated by a fresh impulse. *State v. Stevens,* 285 Kan. 307, 314, 172 P.3d 570 (2007).

An example of when a multiple acts instruction was required is set forth in *State v. Barber,* 26

Kan.App.2d 330, 988 P.2d 250 (1999), *abrogated by State v. Hill,* 271 Kan. 929, 26 P.3d 1267 (2001). Barber, a convicted felon, possessed a gun during a disturbance. Barber later returned with another gun in his possession. Barber was charged with and convicted of one count of criminal possession of a firearm, even though the evidence established two separate and distinct instances of possession of different guns at different times. The court concluded the trial court's failure to instruct as to unanimity prevented objective analysis as to whether the jury unanimously agreed that Barber was guilty of committing a single, specific criminal act. 26 Kan.App.2d at 331.

However, when the factual circumstances of a crime involve a short, continuous, single incident comprised of several acts individually sufficient for conviction, jury unanimity requires only that the jury agree to an act of the crime charged, not which particular act. *State v. Staggs,* 27 Kan. App. 2d 865, Syl. ¶ 2, 9 P.3d 601 (2000). In *Staggs,* the defendant was convicted of one count of aggravated battery. He argued a multiple acts instruction should have been given because some jurors may have found that he kicked the victim, and others may have found that he punched the victim. The dispositive issue for the court was whether Staggs's conduct was part of one act or whether it represented distinct and separate acts in themselves. The court concluded that the State could not have charged Staggs with two counts of aggravated battery – one for the punch and one for the kick – because the charges would be multiplicitous. *Staggs,* 27 Kan.App.2d at 867.

When determining whether convictions arise from the same conduct, courts consider: (1) whether the acts occurred at or near the same time; (2) whether the acts occurred at the same location; (3) whether

there is a causal relationship between the acts, particularly 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).

In *State v. Green,* 38 Kan. App. 2d 781, 172 P.3d 1213 (2007), convictions on three counts of identity theft based on defendant's uses of one person's identity was not multiplicitous. Green used stolen identity at three different retailers over a two-day period by opening a credit account at two retailers and applying for credit at third retailer, and each retailer gave a fresh impulse for defendant to use stolen identity.

In this case, Garcia applied for a job at the Bonefish Grill in May of 2012. After a preliminary interview, the prospective employee is given a card, which allows him to go on a computer and complete the application through an online process. (Vol. 12, 142-43). State's Exhibit 1 was an printout of the online application that Garcia completed. The decision was made to hire Garcia, who was sent an online password and username. (Vol. 12, 145-51; Vol. 20, 1-7). State's Exhibit 2 was the completed W-4 form. The Bonefish Grill would have to be presented with a social security card with the number on it. The hiring process could not proceed without the information on the W-4 form. (Vol. 12, 151-55; Vol. 20, 8). State's Exhibit 3 was the K-4 form that must be digitally signed. (Vol. 20, 9). After the application process, Garcia digitally signed a W-4 and a K-4 to go forward in the application process. Once the restaurant received all the documents, Garcia was given his training material and a schedule. (Vol. 12, 157).

The gravamen of the crime was the use of another's social security number, and not the fact that

the social security number was used on W-4, K-4 and employment application. The jury was required to find that the defendant used the personal identifying information belonging to Felisha M. This includes a social security number or card. (Vol. 1, 23). Garcia could not have been charged with three counts of identity theft based on these three documents. The acts occurred at or near the same time and at the same location. There was a causal relationship between the acts, as the documents were required in order to obtain employment. There was no intervening event nor a fresh impulse motivating some of the conduct. As the State argued in closing, when Garcia "sat down and filled out the W-4, the K-4, the application, and received payment, was it his intent to receive a paycheck and benefits from Bonefish Grill? You know that he wouldn't have received those had he not given that [social security] number." (Vol. 12, 214). A unanimity instruction was not required, and the failure to give one was not clearly erroneous. The factual circumstances of the crime involved a short, continuous, single incident. This case is more like *Staggs* than *Green*.

CONCLUSION

Sufficient evidence supports Garcia's conviction. IRCA does not preempt the Kansas identity theft statute. The jury was properly instructed. The State of Kansas requests that Garcia's conviction be affirmed.

Respectfully submitted,

DEREK SCHMIDT
Attorney General

STEPHEN M. HOWE
District Attorney

STEVEN J. OBERMEIER, #12286

Senior Deputy District Attorney
Tenth Judicial District
P.O. Box 728
Olathe, Kansas 66051-0728
(913) 715-3057
(913) 715-3050 (fax)
Steve.Obermeier@jocogov.org
Attorney for Appellee

APPENDIX C

No. 14-111,904-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Appellee,

vs.

DONALDO MORALES,
Appellant.

BRIEF OF APPELLEE

Appeal from the District Court
of Johnson County, Kansas
Honorable Kevin P. Moriarty, District Judge
District Court Case No. 12 CR 462

Steven J. Obermeier, #12286
Senior Deputy District Attorney
Tenth Judicial District
P.O. Box 728
Olathe, Kansas 66051-0728
(913) 715-3057
(913) 715-3050 (fax)
Steve.Obermeier@jocogov.org
Attorney for Appellee

No. 14-111,904-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Appellee,

vs.

DONALDO MORALES,
Appellant.

BRIEF OF APPELLEE

ISSUES ON APPEAL

I. Viewed in the light most favorable to the prosecution, a rational factfinder could have found Morales guilty of identity theft and making a false information.

II. Sufficient evidence supports Morales's identity theft conviction, as it is not a defense that he did not know that the personal identifying information belonged to another person.

III. The federal Immigration Reform & Control Act does not preempt the Kansas identity theft and false information statutes when a fraudulent social security number is used in an application for employment, a K-4 form and a W-4 form.

STATEMENT OF FACTS

Donaldo Morales was charged in Count 1 with identity theft through the use of a social security number that had been issued to another person. Count 3 charged him with making a false information through the W-4 document that falsely stated some material

matter. Count 4 charged him with making a false information on a K-4 document that falsely stated some material matter. (Vol. 1, 8-9; Vol. 18, State's Exhibits 2 & 3).

At trial, Sherri Miller, the payroll manager for the corporation that owns Jose Pepper's and Cactus Grill, North Star, testified that her duties in fall of 2010 included processing all of the company's payroll for all of the different locations, and overseeing any risk management issues. (Vol. 13, 5). She also participated in processing paperwork for payroll for new employees. This paperwork would include state and federal tax forms and also the I-9. When a new employee would come to a restaurant to apply for employment, he or she would need to bring proof of eligibility to work in the United States. (Vol. 13, 5-6).

On October 1, 2010, Miller received an I-9 form that pertained to Donaldo Morales. In order to become employed with North Star, Morales supplied her with a permanent resident card and a social security card. (Vol. 13, 7-9). As part of the procedure, a photocopy of the original social security card and permanent resident card were made for the file. The last four digits of the social security number were 3479. (Vol. 13, 11-12).

When Morales came to be hired, it was standard practice to complete a K-4 and a W-4. This is required in order to be hired and then to be paid. The employee fills out the document and turns it into her. The K-4 and W-4 documents contained Morale's signature, and Miller would not have been able to process payroll without them. (Vol. 13, 13-14).

Jody Sight, the director of human resources and training at Jose Pepper's, testified that Morales was hired in October of 2010. When an individual is hired,

Jose Pepper's conducts an orientation with them. At the orientation, the W-4 and K-4 are completed. She identified State's Exhibit 5 as Donaldo Morales's application that he filled out. Sherri Miller would have assisted him in completing the I-9, the W-4 and the K-4. Those documents would have then been routed to her office and entered into payroll. (Vol. 13, 27-30).

Morales was offered a job with José Pepper's. He was hired in October of 2010. He received pay for the work he did there. Morales received pay through the social security number that was listed on the I-9, K-4 and W-4 identification cards. Miller would have not been able to pay Morales if he did not supply her with a social security number; she could not put him into the payroll system without it. (Vol. 13, 30-32). Jose Pepper's paid a company to cross reference the social security numbers to verify that they were valid. (Vol. 13, 36-38). She dealt with Morales through a workers compensation claim. (Vol. 13, 36).

Joseph Espinosa, a special agent with the Social Security Administration Office of the Inspector General in Kansas City, testified that he received information from the State of Kansas Department of Labor Workers Compensation Division that there was an individual working at a North Star restaurant under a social security number that did not match the information that they had on file. He researched the social security master file database. He also made contact with the HR manager and asked to verify the information that North Star had on file for this employee. He wanted to make sure there was not a typo on the information provided by the State of Kansas. He received States Exhibits 1-5, located the individual, and arrested Donaldo Morales. (Vol. 13, 39-41).

Morales's W-4 form stated that "under penalties of perjury I declare that I have examined this certificate and to the best of my knowledge and belief, it is true, correct, and complete." (Vol.18, State's Exhibit 3). The W-4 form listed the social security number that was not assigned to Morales, and it also claimed five exemptions. (*Id*.). Morales's K-4 form also contained the false social security number and included a similar declaration under of penalty of perjury that it was true, and correct, and complete. (Vol. 18, State's Exhibit 2).

Morales told him that he had purchased the social security card from a friend of a friend. Morales said that he purchased it specifically so that he could work. The social security number had been assigned to Mr. Melara, who was born in the 1970's. He confirmed that Morales was not the individual to whom that social security number had been assigned. Social security numbers are unique to every individual and remains with that individual indefinitely. They are never reissued. (Vol. 13, 44-45).

Donaldo Morales testified that he obtained the social security number in order to work. He had the number for about 10 years and did not know if that number belonged to anyone else. (Vol. 13, 49-50). He obtained the social security number at Mercardo Park, which was a place where they were sold. Somebody took Morales to Mercardo Park because those people knew those documents were sold there. Somebody took him there to buy it. Morales testified that he never filed any tax returns using this social security number. (Vol. 13, 51-53). He was aware that individuals working in the United States needed to file tax returns, but since somebody told him that he could not do that in order to avoid problems, Morales did not file tax returns. (Vol. 13, 53-54). Morales was employed by

Jose Pepper's restaurant in September of 2010. He used the social security number that he purchased in the park to obtain that job. Jose Pepper's paid him for the work that he did for them. (Vol. 13, 55-56).

District Judge Kevin P. Moriarty found that Morales did present to Jose Pepper's the five exhibits that were received into evidence, including the social security number and the W-4 form. He did not file taxes because he knew he would get in trouble. The court found him guilty of Counts I, III, IV. Judge Moriarty believed that you can defraud your employer because they think you're a legal citizen and they could get penalties by hiring people who are not documented individuals. Morales presented those documents for the reason he could get a job. (Vol. 13, 65-66).

Morales brings this appeal. (Vol. 1, 99).

In December 2014, his probation was terminated. (Vol. 17, 2-3).

ARGUMENTS AND AUTHORITIES

I. Viewed in the light most favorable to the prosecution, a rational factfinder could have found Morales guilty of identity theft and making a false information.

Morales first argues that there was insufficient evidence of intent to defraud to support his convictions for identity theft and making a false information.

When a defendant challenges the sufficiency of evidence, the standard of appellate review is whether, after review of all of the evidence, viewed in the light most favorable to the State, the appellate court is convinced that a rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Oswald*, 36 Kan. App. 2d 144, 147, 137 P.3d 1066, rev.

denied, 282 Kan. 795 (2006) (defendant used the victim's social security number and credit card information to open a cellular phone account without the victim's consent or knowledge).

K.S.A. 2010 Supp. 21-4018(a) defined identity theft:

> 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 defraud that person, or anyone else, in order to receive any benefit.

"Personal identifying information" included a name, or social security number or card. K.S.A. 2010 Supp. 21-4018(e)(1), (6).

K.S.A. 21-3711 (Furse 2007) defined making a false information as:

> [M]aking, 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 the intent to defraud, obstruct the detection of a theft or felony offense or induce official action.

Intent to defraud means "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. 21-3110(9). Property means anything of value, tangible or intangible, real or personal. K.S.A. 21-3110(16).

Morales submitted written instruments to demonstrate that he had a social security number. He used a social security number assigned to another individual when he completed application paperwork in 2012. He submitted a K-4 Kansas Tax withholding form, as well as an employment application, both of which included a social security number owned exclusively by Melara. The social security number was a prerequisite for employment at North Star, a corporation that would not employ anyone who did not have a social security number. José Pepper's relied on Morales' declaration that the social security number he offered on the employment application, W-4 and K-4 was his own social security number.

Morales cites an identity theft case, *Vargas, infra*, and argues that intent to defraud is not evinced by "merely obtaining employment and then collecting a check for work actually done." BRIEF OF APPELLANT at 5.

In *City of Liberal v. Vargas*, 28 Kan.App.2d 867, 24 P.3d 155, *rev. denied* 271 Kan. 1035 (2001), police stopped Vargas, who confessed that he was not authorized to work in the United States. Vargas had purchased papers identifying himself as Guillermo Hernandez so that he could obtain employment. Vargas pled guilty in municipal court and appealed to the district court judge, who acquitted him on the identity theft count. The city appealed after the district court judge held that the city had failed to meet its burden to show fraud in the use of the false identity card. 28 Kan.App.2d at 867-68.

The *Vargas* court was asked to determine whether "Vargas' use of a false identification to secure employment and receive the economic benefit of a salary is tantamount to defrauding another person." 28

Kan.App.2d at 868. The court examined the legislative history of the crime of identity theft. One representative cited the example of a person's social security number being used by another to obtain an illegal checking account and/or a credit card. The representative stated that the citizens of Kansas should be protected from this potentially devastating crime. 28 Kan.App.2d at 868-69. A KBI agent also testified that individuals who are armed with a stolen identity can commit numerous forms of fraud. He was concerned about the theft of personal information such as social security numbers. The agent defined identity theft as acquiring someone's personal identifying information in an effort to impersonate them or commit various acts in that person's name. 28 Kan.App.2d at 869. The *Vargas* court stated:

> K.S.A. 2000 Supp. 21-4018 requires that a defendant obtain, possess, transfer, use, or attempt to obtain the identification documents or personal identification numbers of another. This would occur, for example, when a defendant "took" another person's social security number and used that number when applying for a credit card or bank account.

28 Kan.App.2d at 869. This scenario described by the *Vargas* court fits the facts. Morales used or took Melara's social security number and used that number when applying for a job.

The *Vargas* court noted that the legislature passed K.S.A. 2000 Supp. 21-4018 in order to protect individuals who have their identity stolen. The testimony is replete with references to individuals who have been defrauded by perpetrators who misappropriate personal information such as a social security or bank account number. "There was no mention of

any intent by the legislature to protect a third party from identity theft." 28 Kan.App.2d at 870.

In 2005, perhaps in response to *Vargas*, the Kansas Legislature amended the identity theft statute with the following amendment to K.S.A. 2004 Supp. 21-4018(a): identity theft is "knowingly and with intent to defraud for ~~economic~~ *any* benefit ...." L. 2005 Ch. 131, Sec. 2. At a hearing before the senate judiciary on this issue, a detective had testified that there was no penalty for use of another person's identity if there was no economic benefit. See Minutes of the Senate Judiciary Committee of March 15, 2005 concerning Sub HB 2087.

In *Vargas*, there was no evidence that Hernandez was a real person who had his identity stolen. 28 Kan.App.2d at 869. In this case, Morales had used Melara's social security number and obtained employment for which he was not eligible.

Following the amendment of the identity theft statute, *State v. Meza*, 38 Kan.App.2d 245, 165 P.3d 298, *rev. denied* 285 Kan. 1176 (2007), the court upheld a conviction for identity theft in a situation almost identical to the situation in *Vargas*. Meza, an illegal alien, bought an ID and social security card of a woman who had changed her name. Meza used the ID and social security card to gain employment. The victim realized Meza had been using her information when she began receiving threatening phone calls from debt collection agencies and letters from the IRS informing her that she had owed large amounts of back taxes. Meza argued she was not guilty of identity theft because the State had failed to prove she had used the information with "an intent to defraud for an economic benefit." She relied on *Vargas*; however, the

Meza court distinguished her case from *Vargas* because Meza had used the identity of a real person, while Vargas had used the identity of a fictitious person.

The court held that obtaining employment can be considered an economic benefit under the statute:

> In hiring her, Peerless invested Meza with certain property rights which attached to her 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, and the like. Meza's conduct satisfied the requirements of the statute.

Meza, 38 Kan. App. 2d at 249. *See also State v. Hardesty*, 42 Kan. App. 2d 431, 436-37, 213 P.3d 745 (2009), *rev denied*, 290 Kan. 1098 (2010) (Hardesty, who used his deceased brother's identity to avoid officers knowing his real identity when he was stopped for DUI, intended to fraudulently procure a benefit from the use of his deceased brother's identity as contemplated by the identity theft statute).

The *Meza* court also held that "the crime of identity theft does not require proof economic loss to the victim but only proof of the defendant's intent to defraud for his or her own economic benefit." 38 Kan. App. 2d 245 at Syl. ¶ 3. Meza was convicted of identity theft for using identification and social security cards in the name of another person to obtain employment.

In *People v. Campos*, 2015 WL 1844352 (Colo. App. 2015), the court cited *Meza*, among other cases, in concluding that employment was a thing of value under the identity theft statute. "Had Campos not

used S.A.'s name and social security number to obtain a job at ABM, she would not have been in a position to receive financial benefits that flowed from her employment." 2015 WL 1844352 at *4.

In 2012, a panel of the Kansas Court of Appeals analyzed the definition of intent to defraud. *State v. Capps*, Opinion No. 105,653, 2012 WL 5973917 (Kan.App) (unpublished), rev. denied, 297 Kan. ____ (2013). The panel held that the definition of "intent to defraud" in K.S.A. 21-3110(10) did not apply to identity theft. Instead, the phrase, in the context of identity theft, "is 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 for the benefit of the wrongdoer." *Id.* at *4. Under either definition of "intent to defraud"—that offered by K.S.A. 21-3110(10) or that offered by the *Capps* court, Morales's actions satisfied this element of the identity theft charge. Morales used the social security number of another person. Such use was done with the intent to deceive the management of José Pepper's into believing he could be lawfully employed and thus be compensated for his efforts with money. When the evidence is viewed in the light most favorable to the State, a rational fact finder could have found Morales committed the crimes of identity theft and making a false information.

II. Sufficient evidence supports Morales's identity theft conviction, as it is not a defense that he did not know that the personal identifying information belonged to another person.

Morales next argues that no evidence supports a finding that he knew the social security number that he purchased in the park belonged to someone else

and therefore his conviction for identity theft should be reversed. Judge Moriarty noted that, "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." (Vol. 13, 65).

When the sufficiency of the evidence is challenged in a criminal case, the 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. Cook*, 286 Kan. 1098, 1101, 191 P.3d 294 (2008).

"A jury is not bound to accept the defendant's version of the incident in question and, having convicted the defendant, it is presumed to have believed the State's evidence and to have drawn from it all inferences favorable to the State." *State v. Brunson*, 13 Kan.App.2d 384, Syl. ¶ 2, 771 P.2d 938, rev. denied 245 Kan. 786 (1989). *See also State v. Aikins*, 261 Kan. 346, 392, 932 P.2d 408 (1997) (same).

An appellate court does "not weigh conflicting debatable evidence, pass on the credibility of witnesses or redetermine questions of fact. Our only concern is with evidence that supports the district court's findings, not with evidence that arguably might have supported contrary findings." *St. Francis Mercantile Equity Exchange, Inc. v. Newton*, 27 Kan.App.2d 18, 24-25, 996 P.2d 365 (2000). See also *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 775, 69 P.3d 1087 (2003) (This court is being asked to review the trial court's factual findings that Oshman committed 25 violations. The function of an appellate court is to determine whether the trial court's findings

of fact are supported by substantial competent evidence).

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

Morales received wages in 2010 based upon his use of another person's social security number. He certified under penalty of perjury in the Form W-4 that he was entitled to use the number of withholding allowances claimed on the certificate. The employer relied on the information to process payroll. (Vol. 13, 14; Vol. 18, State's Exhibit 3).

The 2010 legislative change may have been in response to *Flores-Figueroa v. United States*, 556 U.S. 646, 129 S.Ct. 1886, 1888, 173 L.Ed.2d 853 (2009). A federal statute criminalized identity theft as "knowingly transfers . . . without lawful authority, a means of identification of another person." The *Flores-Figueroa* Court addressed the issue of whether the government had to prove that the defendant knew that the means of identification belonged to another person. It held that the government was required to show the defendant knew the identification belonged to another person. 129 S.Ct. at 1888.

To prove identity theft, the State had to establish that Morales had the mental purpose to obtain or maintain employment by using personal identifying information of another person. While the State must prove that the information used did in fact belong to an individual, it need not prove that Morales knew that such personal identifying information belonged to another person other person. The State had to show that Morales used a Social Security number belonging to or issued to another person. The intent that the State was required to prove was that Morales "did so

with intent to defraud for any benefit." (I, 8). *See State v. Moreno-Acosta*, 857 N.W.2d 908, 914 (Wis. Ct. App. 2014) (while the State must prove that the information used did in fact belong to an individual, it need not prove that the defendant knew that the information was of another actual person); *State v. Garcia*, 788 N.W.2d 1, 2-3 & n. 2 (Iowa Ct.App. 2010) (under Iowa statute that criminalizes fraudulent use of identification information of another, State has to establish that information was of another person and that it was used fraudulently; "A 'fraudulent' use requires Garcia know his use was illegitimate, but does not require him to know the identification was of another person."). K.S.A. 2010 Supp. 21-4018(d) says as much.

The unpublished Kansas Court of Appeals case that Morales cites (BRIEF OF APPELLANT at 6) is inapplicable because the identity theft statute was amended in 2010. The identity theft in that case occurred in 2008, so the court interpreted a prior version of the identity theft statute (K.S.A. 21-4018 (Torrence 2007)), which did not contain K.S.A. 2010 Supp. 21-4018(d)'s language that "It is not a defense that the person did not know that such personal identifying information belongs to another person...." *See* L. 2010, ch 88, § 2 (adds the language contained in subsection (d)). When the legislature revises an existing law, it is presumed that the legislature intended to change the law as it existed prior to the amendment. *State v. Gordon*, 275 Kan. 393, 405, 66 P.3d 903 (2003). *See also State v. Williams*, 291 Kan. 554, 557, 244 P.3d 667 (2010) (The 2000 and the 2005 amendments to the Kansas identity theft statute, K.S.A. 21-4018, altered substantive rights by modifying the severity of the punishment for a conviction by reclassifying the crimes as person and nonperson respectively. Therefore, each amendment operates prospectively only.);

and *State v. Hutchison*, 228 Kan. 279, 287, 615 P.2d 138 (1980) (the fundamental rule is that a statute operates prospectively unless its language clearly indicates that the legislature intended it to operate retroactively.).

When the evidence is viewed in the light most favorable to the State, a rational fact finder could have found Morales committed the crime of identity theft.

III. The federal Immigration Reform & Control Act does not preempt the Kansas identity theft and false information statutes when a fraudulent social security number is used in an application for employment, a K-4 form and a W-4 form.

Morales last argues that prosecuting an undocumented person for obtaining employment was preempted by Congress through the Immigration Reform and Control Act of 1986 (IRCA). BRIEF OF APPELLANT at p. 7.

Whether a state law is preempted by a federal law is a question of law over which the appellate courts have unlimited review. Under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, a state law that conflicts with a federal law is unenforceable. *State ex rel. Kline v. Transmasters Towing*, 38 Kan. App. 2d 537, 539-40, 168 P.3d 601 (2007). Because the purpose of Congress is the ultimate touchstone in every preemption case, analysis of a federal statute must begin with its text, including the structure and purpose of the statute as a whole. *Id*.

The Immigration Reform & Control Act (IRCA) provides that 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).

In *State v. Reynua*, 807 N.W.2d 473, 479 (Minn.App. 2011), the State conceded that this provision of IRCA was broad enough to prohibit even use of the I-9 form in a state prosecution for perjury.

A similar issue arose in *State v. Diaz-Rey*, 397 S.W.3d 5 (Mo.App. E.D. 2013). In August 2011, defendant, "with the purpose to defraud, used as genuine a writing, namely his signature on a Chick-fil-A employment document containing false information, including a false social security number, knowing that it had been made or altered so that it purported to have a genuineness that it did not possess." *Diaz-Rey*, 397 S.W.3d at 7. Diaz-Rey moved to dismiss the forgery charge.

The circuit court granted Diaz-Rey's motion to dismiss the information, which charged him with forgery in violation of the state forgery statute, based on the use of a false social security number on an employment document. The circuit court reasoned that the prosecution was preempted by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a. The *Diaz-Rey* court reversed the circuit court's dismissal of the information, and reinstated the charge for further proceedings. *Diaz-Rey*, 397 S.W.3d at 7.

The State of Missouri argued that the charge of forgery was not preempted by federal law because the Missouri forgery statute did not seek to regulate immigration but was a generally applicable criminal statute that was not expressly preempted by federal law. *Diaz-Rey*, 397 S.W.3d at 8.

The *Diaz-Rey* court examined whether IRCA evidenced a congressional intent to preempt a state remedy by either express preemption, field preemption or

conflict preemption. *Id*. It found the Missouri forgery statute is not expressly preempted by IRCA because it does not sanction those who employ, recruit, or offer for employment unauthorized aliens. *Diaz-Rey*, 397 S.W.3d at 8-9. The Missouri forgery statute "does not regulate the employment of unauthorized aliens and therefore is not preempted by IRCA by implication on the ground that IRCA has occupied the field of employment of unauthorized aliens." *Diaz-Rey*, 397 S.W.3d at 9. The court reasoned:

> *Arizona* made clear that IRCA provides a comprehensive framework for combating the employment of illegal aliens. [*Arizona v. United States*, — U.S. —,] 132 S.Ct. at 2505 [183 L.Ed.2d 351 (2012)]. In contrast, [the Missouri forgery statute] does not purport to intrude into or regulate the employment of unauthorized aliens in any manner. Rather, section 570.090 is a state law of general applicability that uniformly applies to all persons as members of the general public, and makes no distinction between aliens and non-aliens. As a general matter, such laws are not preempted simply because a class of persons subject to federal regulation may be affected.

Diaz-Rey, 397 S.W.3d at 9.

As for the third category, the court examined whether the forgery statute "stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *Diaz-Rey,* 397 S.W.3d at 10. The court ruled that the Missouri forgery statute:

> does not criminalize activity that Congress has decided not to criminalize. Rather, as charged in this case, it criminalizes the use of inauthentic writings or items as genuine with

> knowledge and intent to defraud. . . . Thus, section 570.090 does not stand as an obstacle to Congress's purpose in enacting IRCA.

Diaz-Rey, 397 S.W.3d at 10 (citation omitted). After the court examined these three forms of preemption, it concluded the Missouri forgery statute was not preempted by federal law. *Id.* at 10.

In this case, the identity theft statute that was in effect in October 2010 provided:

> 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 defraud that person, or anyone else, in order to receive any benefit.

K.S.A. 2010 Supp. 21-4018(a). The definition of "personal identifying information" includes a social security number or card. K.S.A. 2011 Supp. 21-6107(e)(6). For the reasons set forth in *Diaz-Rey,* the Kansas identity theft statute is not preempted by IRCA. K.S.A.2010 Supp. 21-4018 is a state law of general applicability that uniformly applies to all persons as members of the general public, and makes no distinction between aliens and non-aliens.

In this case, Count 2 of the complaint alleged that Morales committed identity theft through the use of a federal I-9 form. This count was dismissed in October 2012. (Vol. 1, pp. 8, 35). The remaining counts involved the use of a social security number, W-4 and K-4. (Vol. 1, p. 8-9). In *State v. Reynua,* 807 N.W.2d 473 (Minn.App. 2011), the state's proof of the falsity of a state identification card did not rely on its use in support of the I-9 form. The admission of the I-9 form did

not impact the finding of guilt on the forged certificate of title counts. *Reynua,* 807 N.W.2d 482.

The *Reynua* court acknowledged that a state perjury prosecution for false statements on the I-9 form would tend to obstruct the full purposes and objectives of IRCA. *Reynua,* 807 N.W.2d at 480. But the same analysis did not apply to the simple-forgery charge based on the use of the Minnesota identification card. *Id.* The court explained:

> 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, Minn. Stat. § 171.22, subd. 1(2), 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."

Reynua, 807 N.W.2d at 480-81.

Judge Kevin P. Moriarty ruled that the federal government had not preempted the State of Kansas in *State v. Lopez-Navarrete*, No. 111,190, 2014 WL

7566851 (Kan. App. 2014) (unpublished opinion; Appendix B). His ruling was affirmed on appeal. The *Lopez-Navarrete* court stated:

> Lopez-Navarrete was not prosecuted for a false statement on her I-9 form or any other federal document related to verifying an immigrant's employment eligibility; the only federal form that supported her conviction was a W-4, which directs an employer to withhold federal income tax from an employee's pay. Her conviction herein does 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 Cheescake Factory and to claim workers compensation benefits. Her argument that the alleged presence of that social security number on her federal employment verification form prevents the State from prosecuting her for identity theft ignores the purpose of IRCA to ensure "that systematic state immigration enforcement will occur under the direction and close supervision of the Attorney General." Cf. *United States v. Arizona,* 641 F.3d 339, 352 (9th Cir. 2011), reversed in part, 132 S.Ct. 2492 (2012). Here, the State was not enforcing immigration; it was enforcing the identity theft statute.
>
> By its plain text, IRCA preempts prosecution for falsely or fraudulently completing the I-9 form itself. *Reynua,* 807 N.W.2d at 480. Lopez-

> Navarrete' s theory leads to an impossible conclusion: that IRCA would also preempt every misuse of a social security number, whether to obtain a credit card, access someone's medical records, or qualify for a loan, if the defendant could show that social security number also appeared on a federal I-9 form. Nowhere in IRCA is such a sweeping statement of congressional intent to be found, and Lopez-Navarrete offers no authority for her contention that "the Kansas statute . . . clearly conflicts with the express language adopted by Congress."

Lopez-Navarrete at pp. 6-7 (Appendix B at 6-7). IRCA does not preempt prosecution for identity theft based on the use of another person's social security number under K.S.A. 2010 Supp. 21-4018.

The federal district court decisions cited by Morales are inapplicable. The legislative history of the statute in the Arizona case indicated a purpose to regulate unauthorized aliens who seek employment. Because of this, the court considered the preemptive effect of federal immigration law. *See* BRIEF OF APPELLANT, Appendix at page 21 of 42. Similarly, the legislation addressed in *United States v. South Carolina,* 906 F.Supp. 463 (S.C. 2012), was passed to address a broad range of immigration-related issues through criminal provisions, employer sanctions, mandates to local law enforcement regarding identification, and apprehension of persons unlawfully present in the United States. There was no similar legislative history with identity theft under K.S.A. 21-4018, which "is the product of the Information Age and was first criminalized in Kansas in 1998." *Meza,* 38 Kan. App. 2d at 250.

K.S.A. 2010 Supp. 21-4018 and K.S.A. 2011 Supp. 21-6107(a) punish individuals for violating Kansas's identity theft statute. The statutes do not punish individuals for violating federal law. Judge Moriarty did not err in denying defendant's motion to dismiss.

CONCLUSION

By using another person's social security number, Morales, who lacked the ability to obtain employment, received an economic benefit. He committed identity theft by using Melara's social security number to obtain employment. Sufficient evidence supports Morales's identity theft and false information convictions. The State of Kansas requests that his convictions be affirmed.

Respectfully submitted,

DEREK SCHMIDT
Attorney General

STEPHEN M. HOWE
District Attorney

STEVEN J. OBERMEIER, KBN 12286
Senior Deputy District Attorney
Tenth Judicial District
P.O. Box 728
Olathe, Kansas 66051-0728
(913) 715-3057
(913) 715-3050 (fax)
Steve.Obermeier@jocogov.org
Attorney for Appellee