No. 17-834

IN THE

Supreme Court of the United States

KANSAS,

Petitioner,

v.

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

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 55 national and international labor organizations with a total membership of over 12 million working men and women.[1] The AFL-CIO has a strong interest in federal immigration law—in particular, the employment-related aspects of immigration law—and its interplay with federal labor law and with state laws that touch on employment. The AFL-CIO thus routinely files *amicus curiae* briefs with the Court in cases concerning these topics. *See, e.g., Arizona v. United States,* 567 U.S. 387 (2012); *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002); *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984).

The questions presented in this case are whether the Immigration Reform and Control Act (IRCA) expressly preempts Kansas's prosecution of respondents in the cases below and, in a question added by the Court, "[w]hether [IRCA] impliedly preempts Kansas's prosecution of respondents." The AFL-CIO files this brief to demonstrate that federal law occupies the field of preventing employee fraud in the IRCA verification process and that Kansas's application of its identity theft law to fraudulent misrepresentation by employees for

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[1] Counsel for the petitioner and counsel for the respondents have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

the purpose of evading IRCA's requirements, therefore, is impliedly preempted as an obstacle to federal policy.

SUMMARY OF ARGUMENT

1. The Kansas identity theft law makes "using . . . any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to . . . [d]efraud that person, or anyone else, in order to receive a benefit" a felony offense. Kan. Stat. Ann. § 21-6107(a)(1), (c). In common law terms, the law punishes fraudulent misrepresentation—"mak[ing] a misrepresentation of fact . . . for the purpose of inducing another to act . . . in reliance upon it." Restatement (Second) of Torts § 525 (1977).

Federal immigration law, as amended by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, 100 Stat. 3359, affirmatively *requires* every employee in the United States to make representations regarding their identity and employment authorization to their employer in order to obtain employment. Federal law also prevents employees from using fraudulent misrepresentations to evade IRCA's verification requirements by means of a comprehensive regime of criminal, civil, and immigration penalties for such fraud. And, federal law makes this enforcement regime exclusive by prohibiting the use of the I-9 form and its attachments for any purpose other than enforcement of IRCA itself or several specified federal crimes involving fraud, false statements, and perjury.

Taken together, there can be no doubt that Congress intended for federal law to occupy the field of preventing employee fraud in the IRCA verification process. It is also beyond cavil that Congress intended for the federal government to have sole authority to enforce IRCA's employee fraud provisions. Federal law's strict

limitation on use of the I-9 form and its attachments—documents which typically constitute the best evidence of employee fraud in the verification process—strongly indicates Congress's intent to make federal enforcement of IRCA verification fraud exclusive.

Like the state law at issue in *Arizona v. United States*, 567 U.S. 387 (2012), the Kansas identity theft law, as applied to employee fraud to obtain employment in violation of IRCA, is preempted as an obstacle to federal policy—in particular, as an obstacle to the exercise of federal discretion to effectively enforce immigration law. Kansas's application of its identity theft law bluntly treats any employee who engages in fraud to defeat IRCA's verification requirements as a felon. In contrast, federal authorities have a range of enforcement tools at their disposal to combat IRCA-related fraud. Using these tools, the federal government may exercise its discretion in a tailored manner to account for the humanitarian and foreign policy concerns that arise in individual cases. These tools also provide federal authorities with flexibility in charging decisions in cases where an employee's cooperation in the prosecution of an employer or trafficker would serve a larger federal interest.

2. Kansas seeks to avoid the conclusion that the application of its identity theft law in the underlying cases is preempted by claiming that it prosecuted the respondent employees for fraud on tax-withholding forms, rather than on I-9 forms. The record is clear, however, that Kansas relied on the tax forms only after the State was blocked from using the I-9 forms to prove its case[2] and, in any event, used the tax forms to

[2] In Donaldo Morales's case, the State relied on the I-9 form in addition to the tax forms. See *infra* note 5.

show that the employees engaged in identity theft for the purpose of obtaining employment, not for any tax-related reason.

Kansas's prosecution of respondents, therefore, is preempted by IRCA because, while state governments and employers may require employees to provide personally identifying information for any number of reasons, the sole legal basis for the respondent employees to document their identity and employment authorization *to obtain employment* was IRCA. As a practical matter, employees who seek to evade IRCA's requirements will invariably complete all employment-related forms using the same identifying information so as to avoid detection of their I-9 fraud. But this does not mean that a state can avoid preemption by using tax forms to prove identity theft undertaken for the purpose of obtaining employment in violation of IRCA. It is not merely a state's use of the I-9 form that is preempted by federal law, but any state effort to regulate fraud by employees to evade IRCA's verification requirements.

Notably, federal law's preemptive effect in the field of preventing employee fraud in the IRCA verification process does not conflict with the vast majority of applications of the Kansas identity theft law, such as preventing individuals from fraudulently obtaining credit cards or opening bank accounts using another person's identity. Even in the employment setting, Kansas could prosecute an employee for engaging in identity theft on a state tax form for the purpose of avoiding garnishment of wages for child support payments or on a state-mandated background check for the purpose of hiding a prior conviction. The only applications of the state law not permitted are those involving prosecution of employees for fraudulent

misrepresentation intended to evade IRCA's verification requirements.

ARGUMENT

1. The Kansas identity theft law at issue in this case is, at base, a fraudulent misrepresentation statute, prohibiting individuals from making misrepresentations of fact with regard to their identity for the purpose of inducing others to act in reliance upon it. The federal Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, 100 Stat. 3359, for its part, affirmatively *requires* every employee in the United States to make representations to their employer about their identity and employment authorization at the time of hire on the federal Form I-9 in order to obtain employment. IRCA contains its own criminal, civil, and immigration penalties for employees who fraudulently misrepresent their identity or employment authorization to evade the law's requirements, as well as a specific prohibition on the use of information and material submitted by employees on the I-9 form for any purpose unrelated to IRCA, including by state law enforcement.

There is thus a clear conflict between at least some applications of the Kansas identity theft law and IRCA. Federal law comprehensively regulates employee fraud in the employment verification process and delegates enforcement of the criminal, civil, and immigration penalties for such fraud exclusively to federal authorities. Pursuant to *Arizona v. United States*, 567 U.S. 387 (2012), therefore, application of the Kansas law to fraudulent misrepresentations by employees intended to evade the IRCA verification process is preempted as an obstacle to the exercise of federal enforcement discretion in a general area, immigration policy, that is of special federal concern,

and in a specific field of immigration policy, prevention of fraud in the IRCA verification process, where Congress has affirmatively indicated that federal power is exclusive. The fact that IRCA also specifically forbids states from relying on the I-9 form, its contents, or attachments—*i.e.*, the best evidence of employee fraud in the IRCA verification process—only serves to emphasize that Congress intended for regulation of employee verification fraud to be a purely federal responsibility.

a. The Kansas identity theft law states in relevant part that:

"(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[.]" Kan. Stat. Ann. § 21-6107.

The essence of the crime—"using . . . [another person's] identifying information" with "the intent to . . . [d]efraud" "in order to receive a[] benefit," *ibid.*—is fraudulent misrepresentation. At common law, "[o]ne who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance upon it, is subject to liability . . . ." Restatement (Second) of Torts § 525 (1977) ("Liability for Fraudulent Misrepresentation"). *See also* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton On the Law of Torts* 728 & n. 32 (5th ed. 1984) (stating that § 525 of the Restatement proves "[t]he elements of the tort cause of action" for fraudulent misrepresentation or "deceit").

Federal immigration law, as amended by IRCA, affirmatively requires every newly-hired employee in the United States to establish their identity and employment authorization to their employer at the time of hire by providing documents necessary to complete the familiar Form I-9, Employment Eligibility Verification Form. 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2.[3] To do so, the employee "may present either an original document which establishes both employment authorization and identity," such as a U.S. passport or a Permanent Resident Card, "or an original document which establishes employment authorization and a separate original document which establishes identity," such as a driver's license or other state identification card to establish identity and a Social Security card or employment authorization document issued by the Department of Homeland Security (DHS) to establish employment authorization. 8 C.F.R. § 274a.2(b)(1)(v). *See generally Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 589 (2011) (describing I-9 documentation requirements).

In addition to affirmatively requiring employees to document their identity and employment authorization at the time of hire, federal law also provides a comprehensive framework of criminal, civil, and immigration penalties to prevent employees from "subvert[ing] the employer verification system by tendering fraudulent documents," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002), and vests authority to enforce those provisions solely with federal authorities.

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[3] There is a narrow exception for "casual domestic employment," defined as "casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent." 8 C.F.R. § 274a.1(f), (h).

Most notably, IRCA enacted a specific criminal prohibition on employee fraud to evade the employment verification process. Pub. L. 99-603 § 103, 100 Stat. at 3380. The relevant statutory provision states:

> "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 [8 U.S.C. § 1324a(b)], shall be fined under this title, imprisoned not more than 5 years, or both." 18 U.S.C. § 1546(b).

In addition, four years after enacting IRCA, in response to "the large number of false documents that now exist which can be used to fraudulently satisfy the employment authorization requirement of employer sanctions," 136 Cong. Rec. S13,628-29 (daily ed. Sept. 24, 1990) (statement of Sen. Simpson), Congress added new civil penalties to IRCA's existing criminal prohibition on employee fraud intended to evade the verification process. Immigration Act of 1990, Pub. L. 101-649 § 544(a), 104 Stat. 4978, 5059 (codified at 8 U.S.C. § 1324c). Similar to IRCA's criminal prohibition, the new civil penalty provision, enforced by the federal government through a statutorily-described administrative hearing and review process, broadly prohibited employee fraud in the IRCA verification process, including making "[i]t . . . unlawful for any person or entity knowingly . . . to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor

(including a deceased individual) for the purpose of satisfying a requirement of this Act or obtaining a benefit under this Act." 8 U.S.C. §§ 1324c(a)(3), (d). Further, as part of this same legislation, Congress amended immigration law so that "[a]n alien who is the subject of a final order for violation of section 274C [8 U.S.C. § 1324c] of this title"—*i.e.,* a civil order for document fraud—"is deportable" on that basis. Pub. L. 101-649 § 544(b), 104 Stat. at 5061 (codified as amended at 8 U.S.C. § 1227(a)(3)(C)).

Finally, Congress made clear in IRCA that the I-9 form itself "and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this Act and sections 1001 [false statements], 1028 [fraud in connection with identity documents], 1546 [visa fraud and fraud in the employment verification process], and 1621 [perjury] of Title 18." 8 U.S.C. § 1324a(b)(5). *See also* 8 U.S.C. § 1324a(d)(2)(F) (stating, with regard to any future changes to IRCA's verification system, "[t]he system may not be used for law enforcement purposes, other than for enforcement of this Act or sections 1001, 1028, 1546, and 1621 of Title 18"). Notably, the cross-referenced federal criminal statutes all concern fraud, false statements, or perjury. It is thus clear that Congress intended that the I-9 form and its attachments be used solely for enforcement of IRCA's employment verification requirements by DHS and federal criminal prosecution of employee attempts to evade those requirements by the Department of Justice solely under criminal provisions specified by IRCA itself.

Taken as a whole, "[f]ederal law . . . provides a comprehensive regime of criminal, civil, and immigration-related consequences for individuals who commit fraud to demonstrate work authorization under federal im-

migration law." U.S. *Amicus* Br. 16, *Puente Arizona v. Arpaio*, No. 15-15211, 2016 WL 1181917 (9th Cir., March 25, 2016). This "comprehensive regime"—together with federal law's express prohibition on the use of information and documents submitted by employees in the I-9 process for any purpose other than enforcing IRCA and federal criminal prohibitions on employee fraud—occupies the field of preventing employee fraud in the employment verification process. The locus of the precise conflict between federal law and the Kansas identity theft law is clear: both seek to prevent an employee's "misrepresentation of fact" regarding her identity or employment authorization, made "for the purpose of" satisfying IRCA's verification requirements, in order to "induc[e] [the employer] to act . . . in reliance upon [the employee's statements]." Restatement (Second) of Torts § 525.

b. Federal law's occupation of the field of preventing employee fraud in the IRCA verification process and the consequent conflict between federal law and certain applications of the Kansas identity theft statute makes this case analogous to—and, in fact, much easier than—*Arizona v. United States*. The particular application of the Kansas law at issue in these cases, therefore, is preempted.

Arizona held that a state statute which made it a criminal act for "'an unauthorized alien to knowingly apply for work . . . or perform work as an employee or independent contractor'" was preempted because "the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA)" and thus stands "as an obstacle to the federal plan of regulation and control." 567 U.S. at 403 (quoting Ariz. Rev. Stat. Ann. § 13-2928(C)). *See also id*. at 395-96 (noting that "[f]ederal governance of immigration and alien sta-

tus"—including "impos[ing] sanctions on employers who hire unauthorized workers"—"is extensive and complex"). Of special relevance here, the analysis in *Arizona* concerned whether congressional *silence* regarding whether to apply "federal criminal sanctions on . . . aliens who seek or engage in unauthorized work" should be given preemptive force. *Id.* at 404. *See id.* at 405 (explaining that "[p]roposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA," "[b]ut Congress rejected them"). Because "[i]n the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work . . . would be inconsistent with federal policy and objectives," *ibid.*, this Court held that the contrary Arizona law was preempted.

In contrast to the congressional silence at issue in *Arizona*, as we have shown, Congress has comprehensively addressed employee fraud in the IRCA verification process as part of "an integrated scheme of regulation," *Wisc. Dep't of Industry v. Gould, Inc.*, 475 U.S. 282, 288-89 (1986), that includes criminal, civil, and immigration penalties enforced by federal authorities. Congress's decision to affirmatively regulate such employee fraud, and to vest enforcement discretion exclusively to the federal government, is entitled to at least as much preemptive force as its decision *not* to impose criminal penalties on aliens who seek or engage in unauthorized work at issue in *Arizona*.

It is of no matter that application of the Kansas identity theft law to employee fraud in the IRCA verification process might serve "to achieve one of the same goals as federal law—the deterrence of unlawful employment." *Arizona*, 567 U.S. at 406. "'Conflict in technique can be fully as disruptive to the system Con-

gress erected as conflict in overt policy.'" *Ibid.* (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)). That is especially the case in this area, where "[d]iscretion in the enforcement of immigration law embraces immediate human concerns" and may also "involve policy choices that bear on this Nation's international relations." *Id.* at 396. For example, "[t]he equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, [] a record of distinguished military service," or "[t]he foreign state [to which the alien would be returned] may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return." *Id.* at 396-97. Or, as in the case of respondent Ramiro Garcia, state prosecution of the alien may be directly contrary to federal interests because the alien is serving as a cooperating witness in a federal investigation of an alleged pattern-or-practice violation of IRCA by a former employer. *See* JA50-57.[4]

Yet, under the application of the Kansas law at issue in this case, every employee who fraudulently evades IRCA's verification requirements is treated as

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[4] As the United States has previously explained,

"[T]he Department of Homeland Security has prioritized the investigation and prosecution of employers who knowingly hire unauthorized aliens. Federal 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. The 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." U.S. *Puente Arizona* Br. 18-19 (citations omitted).

a felon. That stands in strong contrast to the comprehensive federal regime, which delegates discretion to federal authorities to decide, based on "[t]he equities of an individual case," *Arizona*, 567 U.S. at 396, whether to prosecute an employee criminally, to seek civil penalties, or, in the case of aliens, to remove the individual altogether from the United States. Because "'the range and nature of th[e] remedies that are and are not available is a fundamental part' of the comprehensive system established by Congress" in this area, federal preemption "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of [federal law], but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by [federal law]." *Gould*, 475 U.S. at 286-87 (quoting *Lockridge*, 403 U.S. at 287).

The conclusion that Congress did not intend for states to regulate employee fraud in the IRCA verification process is underlined by the fact 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 conduct." *Arizona*, 567 U.S. at 405 (quoting 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)-(G)). As a result, state authorities are denied access to the I-9 form and all "information contained in or appended to such form," 8 U.S.C. § 1324a(b)(5), for any "law enforcement purpose[]," § 1324a(d)(2)(F), *i.e.*, states are denied access to the *best evidence* of employee fraud in the IRCA verification process. It only makes sense to interpret this provision—especially in light of Congress's many other affirmative steps to comprehensively regulate this area—as demonstrating an intent for the federal government not to share enforcement

authority with the states. "The correct instruction to draw from the text, structure, and history of IRCA," *Arizona*, 567 U.S. at 406, therefore, is that Congress intended enforcement of employee fraud in the employment verification process to constitute a solely federal prerogative.

2. Kansas claims that the application of its identity theft law in these cases is not preempted because "[e]ach Respondent was prosecuted for crimes committed on state and federal tax forms unrelated to work authorization or employment verification." Pet. Br. 20. As the Respondents' brief describes in detail, the record below clearly demonstrates that the true basis for the prosecutions was employees' misrepresentation of their employment authorization for purposes of the IRCA verification process in order to obtain employment. Resp. Br. 21-30. Kansas relied on the social security numbers the employees included on their tax-withholding forms only after the State was blocked in Garcia's and Guadalupe Ochoa-Lara's cases from relying directly on the employees' I-9 forms, *see* Resp. Br. 7-13 (summarizing proceedings),[5] and did so *not* to prove that the employees intended to induce the state or federal government to provide them with some tax benefit, but rather to prove the IRCA-preempted claim.

The prosecutor in Garcia's case admitted as much in his opening statement to the jury, in which he stated:

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[5] In Morales's case, the State relied directly on the I-9 form and its attachments to prove its case. JA149-154. Unlike the other respondents, Morales was also convicted of making a false information in violation of Kan. Stat. Ann. § 21-5824. JA143-45, 178-81. Because that law, like the Kansas identity theft statute, requires a false representation "with intent to defraud" in order to "induce official action," we do not treat it separately.

> "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.
>
> . . .
>
> You can't work in Kansas using someone else's social security number, and that is what Mr. Garcia did.
>
> At the conclusion of this evidence, the State will ask you to find Mr. Garcia guilty of identity theft." JA65, 67.

That application of the Kansas identity theft law—making it unlawful for Garcia to "use[] another person's social security number to obtain and keep employment," *ibid.*—is preempted by IRCA for the reasons stated in the previous section, *viz.*, that the fraudulent misrepresentation was "for the purpose of" complying with IRCA's verification requirements in order to "induc[e] [the employer] to act . . . in reliance upon it." Restatement (Second) of Torts § 525. The essential point is that, although state agencies, as well as employers themselves, may decide to collect social security numbers or other personally-identifying information from employees for any number of reasons, the sole legal basis for the requirement that the respondents document their identity and employment authorization *in order to obtain employment* in these cases was IRCA.

As a practical matter, an employee who seeks to evade IRCA's requirements will invariably complete all of her employment-related forms in a manner consistent with whatever documents she provided in the I-9 process to obtain the job in the first instance. The employee's obvious purpose in doing so is to

avoid detection of her I-9 fraud, not to obtain a collateral benefit. So, for example, an employee who provides a Social Security card containing another person's number to complete the I-9 process will almost certainly use that same social security number on the employer's health insurance enrollment form or, as was the case here, on federal and state tax-withholding forms.

Far from proving that "[e]ach Respondent was prosecuted for crimes committed on state and federal tax forms unrelated to work authorization or employment verification," Pet. Br. 20, these cases thus illustrates that "Congress's prohibition [in 8 U.S.C. § 1324a(b)(5)] on the use of information provided in connection with the Form I-9 does not express the outer limits of preemption by federal law in this area." U.S. *Puente Arizona* Br. 14. Here, for example, while not relying on the employees' I-9 forms, Kansas nevertheless made no pretense of showing any tax-related basis for its prosecutions, instead acknowledging that its prosecutions were based on employees "us[ing] another person's social security number *to obtain and keep employment*." JA65 (emphasis added). And, certainly a state could not escape preemption by basing an identity theft prosecution on co-worker testimony that the defendant admitted to providing a false social security number to the employer during the I-9 process in order to obtain employment. Such applications of state law are clearly preempted without regard to the fact that they rely on evidence other than I-9 forms or their attachments to prove the claim.

On the other hand, addressing the hypotheticals raised in the United States' *amicus* brief, the United States is correct that "a State *could* prosecute an

alien," or, for that matter, any employee,[6] "who uses a fraudulent social security number on a tax-withholding form to avoid garnishment of his wages for back taxes or child support because such fraud d[oes] not 'relate to employment eligibility.'" U.S. Br. 31 (emphasis added). That is because, in such a case, the employee's misrepresentation of fact on the tax withholding form is made specifically "for the purpose of inducing [the employer] to act . . . in reliance upon it," Restatement (Second) of Torts § 525, to accomplish a result—avoidance of garnishment of wages—that is unrelated to IRCA's employment verification process. Similarly, a state could prosecute an employee who "commit[s] identity theft" "to hide a disqualifying prior criminal conviction," U.S. Br. 30-31, for example, based on a fraudulent misrepresentation on an application for an occupational license or in a state-mandated background check form. *See, e.g.*, Kan. Stat. Ann. § 65-516 (mandatory licensing scheme, including

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[6] The United States argues that, if the state prosecutions at issue here are preempted, "state prosecutions of unauthorized aliens who commit identity theft to establish employment eligibility" would be barred, but "state prosecutions of U.S. citizens or authorized aliens who do the same" would be allowed. U.S. Br. 30-31. There is no basis for this contention. IRCA's verification requirements apply to all employees without regard to citizenship or employment authorization status. 8 U.S.C. §§ 1324a(a)(1)(B), 1324a(b); 8 C.F.R. § 274a.2. *See also* U.S. Citizenship & Immigration Services, Dep't of Homeland Security, *Handbook for Employers M-274: Guidance for Completing Form I-9 (Employment Eligibility Verification Form)* 2.0 (Updated 1/11/2018), https://www.uscis.gov/i-9-central/handbook-employers-m-274 (last visited Aug. 8, 2019) ("You must complete Form I-9 each time you hire *any person* to perform labor or services in the United States in return for wages or other remuneration." (Emphasis added)). State prosecutions of employee who commit identity theft to evade IRCA's employment verification requirements are thus preempted without regard to citizenship or employment authorization status.

background checks and fingerprinting, for child care employees). Again, the distinguishing feature from this case is that the fraudulent misrepresentation is made for the purpose of inducing the employer to hire the employee despite the disqualifying conviction, not to evade IRCA's verification requirements.

The United States finds this method of analysis unsatisfactory because such a rule "makes conflict preemption of state laws turn on the subjective motive of private parties regulated by those laws," an approach the government claims is "impractical and counterintuitive." U.S. Br. 31. It is hardly surprising, however, that motive plays an important role in the evaluation of statutes that, on their face, make liability turn on a showing of "the intent to . . . [d]efraud . . . in order to receive a[] benefit." Kan. Stat. App. § 21-6107(a)(1). *See also* 18 U.S.C. § 1546(b) ("knowing" use of a fraudulent document "for the purpose of satisfying" IRCA's employment verification requirements). As we have shown, such an analysis is entirely consistent with the common law approach to fraudulent misrepresentation claims generally.

The United States' protests of impracticality notwithstanding, such an approach to conflict preemption is also straightforward to administer because, while IRCA is the sole source of the legal requirement that all employees prove their identity and employment authorization to obtain employment, that is also all that federal law requires in this context. It is thus only where a state brings an identity theft prosecution against an employee for committing fraud to evade IRCA's verification requirements that application of the state law is preempted. In all other applications, IRCA provides no barrier to enforcement of an identity theft statute like the Kansas law.

CONCLUSION

The Court should affirm the judgments of the Kansas Supreme Court.

Respectfully submitted,

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