No. ______

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General

STEVE HOWE
District Attorney, Johnson County, Kansas
JACOB M. GONTESKY
Assistant District Attorney

STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Solicitor General

120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@333law.com

Counsel for Petitioner State of Kansas

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA). IRCA made it illegal to employ unauthorized aliens, established an employment eligibility verification system, and created various civil and criminal penalties against employers who violate the law. 8 U.S.C. § 1324a.

Regulations implementing IRCA created a "Form I-9" that employers are required to have *all* prospective employees complete—citizens and aliens alike. IRCA contains an "express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens," *Arizona v. United States*, 567 U.S. 387, 406 (2012), but IRCA "is silent about whether additional penalties may be imposed against the employees themselves." *Id*. IRCA also provides that "[the Form I-9] and any information contained in or appended to such form, may not be used for purposes other than enforcement of [chapter 12 of Title 8] and sections 1001, 1028, 1546, and 1621 of Title 18." 8 U.S.C. § 1324a(b)(5).

Here, Respondents used other peoples' social security numbers to complete documents, including a Form I-9, a federal W-4 tax form, a state K-4 tax form, and an apartment lease. Kansas prosecuted Respondents for identity theft and making false writings without using the Form I-9, but the Kansas Supreme Court held that IRCA expressly barred these state prosecutions.

This petition presents two questions, depending on the answer to the first question:

1. Whether IRCA expressly preempts the States from using any *information* entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications.

2. If IRCA bars the States from using all such information for *any* purpose, whether Congress has the constitutional power to so broadly preempt the States from exercising their traditional police powers to prosecute state law crimes.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 15

I. The Kansas Supreme Court's Holding and Reasoning Conflict with Circuit and State Decisions, as well as the Position the United States Has Taken in Litigation. 16

A. The Kansas Supreme Court's decision and reasoning conflict with appellate decisions from other jurisdictions. 16

B. The United States Department of Justice has taken the position that IRCA does not expressly preempt the States from using information obtained from a source other than a Form I-9. 23

II. The Kansas Supreme Court's Broad Reading of IRCA Unnecessarily Raises Constitutional Questions. 25

A. The Kansas Supreme Court's decision misreads IRCA and severely limits traditional State authority. 25

1. The Kansas Supreme Court's reading of § 1324a(b)(5) cannot be squared with the statutory language, the section's caption, or the structure of IRCA. 25

2. The Kansas Supreme Court's decision has sweeping effects that Congress cannot possibly have intended. 28

B. Application of the constitutional doubt and clear statement canons would resolve the express preemption argument in favor of Kansas, and avoid constitutional issues. 29

III. Identity Crime is a Problem that Far Exceeds the Capacity of the United States Alone to Prosecute. 33

CONCLUSION 36

APPENDIX

Appendix A Opinion in the Supreme Court of the State of Kansas
State of Kansas v. Ramiro Garcia
(September 8, 2017) . . . . App. 1

Appendix B Memorandum Opinion in the Court of Appeals of the State of Kansas
State of Kansas v. Ramiro Garcia
(January 29, 2016) . . . . App. 48

Appendix C Opinion in the Supreme Court of the State of Kansas
State of Kansas v. Donaldo Morales
(September 8, 2017) . . . . App. 61

Appendix D Memorandum Opinion in the Court of Appeals of the State of Kansas
State of Kansas v. Donaldo Morales
(January 8, 2016) . . . . App. 71

Appendix E Transcript of Proceedings (excerpts) in the District Court of Johnson County, Kansas, Tenth Judicial District Criminal Court Department
State of Kansas v. Donaldo Morales
(September 28, 2012) . . . . App. 83

Appendix F Opinion in the Supreme Court of the State of Kansas
State of Kansas v. Guadalupe Ochoa-Lara
(September 8, 2017) . . . . App. 88

Appendix G Opinion in the Court of Appeals of the State of Kansas
State of Kansas v. Guadalupe Ochoa-Lara
(November 25, 2015) . . . . App. 97

Appendix H Transcript of Motion Hearing (excerpts) in the District Court of Johnson County, Kansas, Criminal Court Department
State of Kansas v. Guadalupe Ochoa-Lara
(April 2, 2013) . . . . App. 113

TABLE OF AUTHORITIES

CASES

Arizona v. United States,
567 U.S. 387 (2012) 13

Bond v. United States,
134 S. Ct. 2077 (2014) 30, 31, 32

Chamber of Commerce of the United States v. Whiting,
563 U.S. 582 (2011) 11

Escambia County v. McMillan,
466 U.S. 48 (1984) 31

Gonzalez v. Raich,
545 U.S. 1 (2005) 33

Gregory v. Ashcroft,
501 U.S. 452 (1991) 31

Jones v. United States,
529 U.S. 848 (2000) 33

Puente Arizona v. Arpaio,
821 F.3d 1098 (9th Cir. 2016) 16, 17, 18, 23

Puente Arizona v. Arpaio,
No. CV-14-01356, 2017 WL 1133012 (D. Ariz. March 27, 2017) 11

State v. Diaz-Rey,
397 S.W.3d 5 (Mo. App. 2013) 22, 23

State v. Garcia,
401 P.3d 588 (Kan. 2017) . . . . *passim*

State v. Martinez,
896 N.W.2d 737 (Iowa 2017) . . . . *passim*

State v. Mayze,
622 S.E.2d 836 (Ga. 2005) 36

State v. Morales,
401 P.3d 155 (Kan. 2017) . . . . *passim*

State v. Ochoa-Lara,
401 P.3d 159 (Kan. 2017) . . . . *passim*

State v. Reynua,
807 N.W.2d 473 (Minn. App. 2011) 21, 22

Taylor v. United States,
136 S. Ct. 2074 (2016) 31, 32

United States v. Bass,
404 U.S. 336 (1971) 32

United States v. Lopez,
514 U.S. 549 (1995) 31

United States v. Quality Stores,
134 S. Ct. 1395 (2014) 27

Yates v. United States,
135 S. Ct. 1074 (2015) 26, 27

STATUTES

8 U.S.C. § 1324a 2, 27

8 U.S.C. § 1324a(b)(5) . . . . *passim*

8 U.S.C. § 1324a(h)(2) 2, 11, 22, 27

28 U.S.C. § 1257(a) 2

Kan. Stat. Ann. § 21-3711 . . . . 6, 8

Kan. Stat. Ann. § 21-3830 5

Kan. Stat. Ann. § 21-4018 . . . . 5, 8

Kan. Stat. Ann. § 21-5824 6

Kan. Stat. Ann. § 21-5918 5

Kan. Stat. Ann. § 21-6107 . . . . 3, 5, 7, 9

Sup. Ct. R. 12.4 . . . . 1, 7

OTHER AUTHORITIES

Brief of the United States, *Puente Arizona v. Arpaio*, 821 F.3d 1098 (Nos. 15-15211, 15-15213, 15-15215), 2016 WL 1181917 24

Seena Gressin, *The Equifax Data Breach: What to do,* https://www.consumer.ftc.gov/blog/2017/09/equifax-data-breach-what-do 34

Identity Theft Resource Center, *Identity Theft: The Aftermath 2016*, https://www.idtheftcenter.org/images/page-docs/ AftermathFinal_2016.pdf 35

Insurance Information Institute, *Facts + Statistics: Identity theft and cybercrime*, https://www.iii.org/fact-statistic/facts-statistics-identity-theft-and-cybercrime 34

Nat'l Conference of State Legislatures, *Identity Theft* http://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx 35

Patricia Oliver, *What's [the] most dangerous kind of identity theft?*, USA TODAY, https://www.usatoday.com/story/money/personalfinance/2015/03/15/credit-dotcom-dangerous-identity-theft/70136996/ 34

PRIVACY RIGHTS CLEARINGHOUSE, https://www.privacyrights.org/data-breaches 34

U.S. DEPT. OF JUSTICE, BUREAU OF STATISTICS, *Victims of Identity Theft* (2014), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5408 33

PETITION FOR WRIT OF CERTIORARI

The State of Kansas respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Kansas in three cases decided the same day and involving "identical or closely related [federal] questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

The Kansas Supreme Court's opinion reversing Respondent Ramiro Garcia's identity theft conviction is reported in *State v. Garcia,* 401 P.3d 588 (Kan. 2017), and reprinted at Pet. App. 1-47. The Kansas Supreme Court's opinion reversing Respondent Donaldo Morales' convictions for identity theft and making false writings is reported in *State v. Morales,* 401 P.3d 155 (Kan. 2017), and reprinted at Pet. App. 61-70. The Kansas Supreme Court's opinion reversing Respondent Guadalupe Ochoa-Lara's identity theft conviction is reported in *State v. Ochoa-Lara,* 401 P.3d 159 (Kan. 2017), and reprinted at Pet. App. 88-96. The Kansas Supreme Court's opinion in *Garcia*, along with the concurrence and the dissents, are the main opinions, with short opinions in *Morales* and *Ochoa-Lara* that adopt the reasoning in the *Garcia* opinions.

The Kansas Court of Appeals' unpublished decision affirming Garcia's conviction is located at 364 P.3d 1221 (Table), 2016 WL 368054 (Kan. Ct. App. 2016), and reprinted at Pet. App. 48-60. The Kansas Court of Appeals' unpublished decision affirming Morales' conviction is located at 364 P.3d 305 (Table), 2016 WL 97848 (Kan. Ct. App. 2016), and reprinted at Pet. App. 71-82. The Kansas Court of Appeals' published decision affirming Ochoa-Lara's conviction is located at 362

P.3d 606 (Kan. Ct. App. 2015), and reprinted at Pet. App. 97-112.

JURISDICTION

The Supreme Court of Kansas issued its opinions on September 8, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The central provisions of the Immigration Reform and Control Act of 1986 are contained in 8 U.S.C. § 1324a. Subsection (b)(5) states:

> **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 enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18.

8 U.S.C. § 1324a(h)(2) provides:

> **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.

The relevant portion of Kan. Stat. Ann. § 21-6107, titled "Identity Theft/Identity Fraud," under which Respondents Garcia and Ochoa-Lara were charged, provides:

> (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. § 21-6107 defines "personal identifying information" as follows:

> (e) As used in this section:
>
> > (2) "personal identifying information" includes, but is not limited to, the following:
> >
> > (A) Name;
> >
> > (B) birth date;
> >
> > (C) address;
> >
> > (D) telephone number;

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

(F) social security number or card;

(G) place of employment;

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

(I) mother's maiden name;

(J) birth, death or marriage certificates;

(K) electronic identification numbers;

(L) electronic signatures;

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

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

The relevant portion of Kan. Stat. Ann. § 21-4018, titled "Identity Theft/Identity Fraud," under which Respondent Morales was charged,[1] provides:

> (a) Identity theft is knowingly and with intent to defraud for any benefit, obtaining, possessing, transferring, using or attempting to obtain, possess, transfer or use, one or more identification documents or personal identification number of another person other than that issued lawfully for the use of the possessor.
>
> (b) "Identification documents" has the meaning provided in K[an]. S[tat]. A[nn]. [§] 21-3830, and amendments thereto.

Kan. Stat. Ann. § 21-3830[2] defines "Identification documents" as follows:

> (c) As used in this section, "identification document" means any card, certificate or document or banking instrument including, but not limited to, credit or debit card, which identifies or purports to identified the bearer of such document, whether or not intended for use as

---

[1] Effective July 1, 2011, as part of a comprehensive recodification of Kansas' criminal code, Kan. Stat. Ann. § 21-4018 was rewritten and renumbered as Kan. Stat. Ann. § 21-6107. Respondent Morales was charged for conduct occurring before July 1, 2011.

[2] This statute was also recodified in 2011 as Kan. Stat. Ann. § 21-5918.

> identification, and includes, but is not limited to, documents purporting to be drivers' licenses, nondrivers' identification cards, certified copies of birth, death, marriage and divorce certificates, social security cards and employee identification cards.

The relevant portion of Kan. Stat. Ann. § 21-3711, titled "Making a False Writing," under which Respondent Morales was charged,[3] provides:

> Making a 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.

STATEMENT OF THE CASE

In three separate cases, *State v. Garcia*, *State v. Morales*, and *State v. Ochoa-Lara*, the Kansas Supreme Court held that IRCA preempts the application of state identity theft, identity fraud and making a false writing laws whenever *any* of the information necessary for the prosecution is contained in or appended to a Form I-9, even when the State

---

[3] As with the other charge relating to Respondent Morales, this statute was recodified, effective July 1, 2011, as Kan. Stat. Ann. § 21-5824.

prosecutes for use of that very same information in non-IRCA documents. In accordance with Supreme Court Rule 12.4, the State of Kansas petitions this Court for a writ of certiorari to the Kansas Supreme Court in all three cases, as each case involves the identical questions presented.

1. *State v. Garcia*: Ramiro Garcia was stopped for speeding in Overland Park, Kansas. When asked why he was in such a hurry, Garcia replied that he was on his way to work at Bonefish Grill. A records check on Garcia revealed that he was already the subject of an investigation and therefore a day later a police detective contacted Bonefish Grill and obtained some of Garcia's employment documents, including his federal Form I-9. Further investigation revealed that Garcia had used the social security number of a woman residing in Texas on the Form I-9, as well as on federal and state tax forms. Pet. App. 3.

Garcia was charged with identity theft in violation of Kan. Stat. Ann. § 21-6107. Garcia moved to suppress the Form I-9 and all other forms—state and federal—that contained any of the same information, arguing that IRCA preempted any use by the State of the Form I-9 itself and any of the information it contained. The State agreed not to use the Form I-9 as a basis of prosecution, but argued that it could use federal and state tax forms that contained some of the same information. The trial court agreed with the State. Pet. App. 3-4.

At trial, the State presented evidence that Garcia used the social security number of another person to complete both the federal W-4 tax form and the Kansas

counterpart K-4 tax form. A jury found Garcia guilty of identity theft under Kansas law. Pet. App. 4-7.

2. *State v. Morales*: Joseph Espinosa, a special agent with the Social Security Administration, received information from the Kansas Department of Labor of an irregularity regarding a social security number being used by an employee at a Jose Pepper's restaurant. Espinosa investigated and determined that Donaldo Morales was using a social security number not issued to him, but rather to another person. During his investigation, Agent Espinosa reviewed Morales' employment file which included a copy of a social security card, Morales' employment application, federal and state tax forms (W-4 and K-4), and a federal Form I-9. Morales admitted to agent Espinosa that he purchased the social security card "so that he could work." Pet. App. 63-64.

Morales was charged with one count of identity theft in violation of Kan. Stat. Ann. § 21-4018 for using a social security number issued to another person, and two counts of making a false writing in violation of Kan. Stat. Ann. § 21-3711—one each for writing a false social security number on the W-4 and K-4 forms (a third count of making a false writing related to the Form I-9 was dismissed by the prosecution before trial). Following a bench trial, he was convicted of all three counts. Pet. App. 63-64.

3. *State v. Ochoa-Lara*: While attempting to contact Christian Ochoa-Lara, local police officers and Department of Homeland Security Immigrations and Customs Enforcement agents went to an apartment complex in Overland Park, Kansas. There they learned the apartment in question was leased to Guadalupe

Ochoa-Lara. Officers obtained a copy of the lease and determined Guadalupe Ochoa-Lara used a social security number issued to another individual—Tiffany McFarland—to lease the apartment. Officers contacted McFarland, who said she had no knowledge her social security number was being used by another person and did not consent to it being so used. McFarland later reported that she contacted the Internal Revenue Service and was notified that income had been reported under her social security number which she had not earned. Pet. App. 91.

Police officers determined that Guadalupe Ochoa-Lara was employed at a steakhouse in Lenexa, Kansas. Officers reviewed the Form W-4 that Ochoa-Lara had completed and observed he used the social security number issued to McFarland. The investigators learned that Ochoa-Lara did not have a social security number lawfully issued to him. Following a bench trial, Ochoa-Lara was convicted of two counts of identity theft in violation of Kan. Stat. Ann. § 21-6107. Pet. App. 91-92.

4. *The Kansas Court of Appeals Decisions:* All three defendants appealed to the Kansas Court of Appeals. The defendants argued that IRCA preempts the use of *any* information contained on a federal Form I-9 for any purpose not specified under IRCA, even if that same information appears on documents other than an I-9. The defendants' argument necessarily included *name*, *address*, *social security number*, and other commonly used identifying information. The Court of Appeals easily concluded that IRCA did not preempt the state prosecutions. *See, e.g.*, *State v. Ochoa-Lara*, Pet. App. 106 ("There is nothing in the [IRCA] preemption language that prohibits the State from

proving identity theft by using information from sources other than the I-9 form, even though that information may also be contained on the I-9 form and the documents appended thereto."). Thus, three separate panels of the Kansas Court of Appeals rejected the defendants' preemption arguments and affirmed the convictions in *State v. Ochoa-Lara*, Pet. App. 97-112; *State v. Garcia*, Pet. App. 48-60; and *State v. Morales*, Pet. App. 71-82.

5. *The Kansas Supreme Court Decisions:* The Kansas Supreme Court granted review in all three cases, and a four-Justice majority of the court reversed each defendant's convictions as follows:

a. *State v. Garcia*: The majority concluded that IRCA preempts the application of state identity theft and identity fraud laws whenever *any* of the information necessary for the prosecution is contained in or appended to a Form I-9, even if the State prosecutes for use of that very same information in documents unrelated to IRCA. The majority considered whether a "presumption against preemption" should apply to its analysis. After briefly reviewing several opinions of various members of this Court addressing that question, the majority held "it is unnecessary to apply a presumption against preemption when a court evaluates the merit of an express preemption claim, as long as the language of the congressional enactment at issue is clear." Pet. App. 13-16.

After briefly explaining the IRCA scheme and the federal government's creation of the Form I-9 for employers to use to verify job applicants' immigration status, the majority quoted 8 U.S.C. § 1324a(b)(5):

> A form designated or established by the Attorney General under this subsection *and any information contained in* or appended to such form, may not be used for purposes other than for enforcement of [chapter 12 of Title 8] and sections 1001, 1028, 1546, and 1621 of Title 18.

Pet. App. 19 (emphasis in original). The majority then quoted at length from *Puente Arizona v. Arpaio*, No. CV-14-01356, 2017 WL 1133012 (D. Ariz. March 27, 2017), regarding the possible effect of this provision when a state prosecution utilizes non-IRCA documents, such as state tax forms, that contain information that also appears on a Form I-9.

Ultimately, the majority relied on an "express preemption" analysis to conclude that 8 U.S.C. § 1324a(b)(5),[4] by its "plain and unambiguous" language preempts states from using any information contained in a Form I-9 in a state prosecution, even if the information was obtained from other sources: "Although the State did not rely on the I-9, it does not follow that the State's use of the Social Security card

---

[4] Notably, the majority described 8 U.S.C. § 1324a(b)(5) as an "effective" express preemption provision, essentially acknowledging that on its face this provision does not purport to "preempt" anything. The provision never uses the word "preempt" or "preemption," in sharp contrast to 8 U.S.C. § 1324a(h)(2), which states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." *See also* Pet. App. 29-30 (Luckert, J., concurring). *Cf. Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582 (2011) (IRCA's express preemption provision does not preempt a state licensing scheme).

information was allowed by Congress." Pet. App. 28. Observing that the "key question" for determining preemption "is congressional intent," the majority opined that "intent is spelled out for us in 8 U.S.C. § 1324a(b)(5): States are prohibited from using the I-9 *and any information contained within the I-9* as the bases for a state law identity theft prosecution . . . ." Pet. App. 28 (emphasis in original).

b. *State v. Morales*: The same Kansas Supreme Court majority reversed Morales' convictions, declaring: "Our *Garcia* holding controls the outcome of this case and compels a decision in Morales' favor, reversing all of his convictions." Pet. App. 67. After discussing an issue not relevant to this petition, the Kansas court concluded:

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

Pet. App. 69 (internal citations omitted).

c. *State v. Ochoa-Lara*: The same Kansas Supreme Court majority reversed Ochoa-Lara's convictions:

> Our decision today in *Garcia* holds that State prosecutions such as the one in this case are expressly preempted by IRCA. . . . This State prosecution for identity theft relied on the Social Security number Ochoa-Lara included in the I-9 to ensure employment eligibility under federal law. Our *Garcia* holding recognized that this is

> exactly the situation Congress intended to address and control under federal law. *Garcia* dictates the outcome of this case and compels a decision in Ochoa-Lara's favor, reversing all of his convictions.

Pet. App. 92-93 (internal citation omitted).

6. *Concurring and Dissenting Opinions*: One Justice concurred, but argued field preemption applies here, not express preemption. Two Justices (in two separate opinions) dissented, arguing there is no preemption.

a. Justice Luckert concurred, but rejected the majority's reliance on express preemption. She found that rationale foreclosed by this Court's statement in *Arizona v. United States*, 567 U.S. 387, 406 (2012), that "IRCA's express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens, is silent about whether additional penalties may be imposed against the employees themselves." Pet. App. 29-30. After describing the IRCA regime at some length, Justice Luckert concluded that "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." Thus, "under the doctrine of field preemption, the State cannot prosecute Garcia . . . ." Pet. App. 35-36.

b. Justice Biles dissented, arguing there is no preemption because, for the state identity theft prosecution, "Garcia's immigration status was not relevant to whether this conduct was unlawful, and the conduct was independent of the federal employer verification system." Pet. App. 39. Observing that the

majority's view that § 1324a(b)(5) "applies literally to all information on the Form I-9, wherever else it might be found" is untenable, he argued that the provision applies "more narrowly" to only "the contents of the completed Form I-9." Pet. App. 40.

Justice Biles emphasized that Garcia was not prosecuted for falsifying his I-9 to secure employment, but instead for using "another person's Social Security number on tax withholding forms." Pet. App. 40. With respect to implied preemption, Justice Biles relied on the presumption against preemption and the "sweeping potential impact of the majority's rationale" to tip the balance in the State's favor. Pet. App. 45.

c. Justice Stegall also dissented. He recognized that Congress, when acting within its constitutional powers, has the authority to preempt state law. But, "as a first principle, Congress cannot preempt state law in matters that lie outside Congress' limited, prescribed powers." Pet. App. 46. Even if the majority was correct that "Congress intended to expressly preempt state use of all information contained in a person's I-9 form, it is doubtful Congress has such sweeping powers to interfere with the legitimate government of the states." Pet. App. 46.

He then posed the question: "Can it really be true that the state of Kansas is or could be expressly preempted from using—for any purpose—the name of any citizen who has completed an I-9 form?" A "name is 'information' after all. To ask the question is to answer it." Indeed, "[i]f such a power *did* exist, the delicate federal-state balance achieved by our system of federalism would not merely be disturbed, it would be obliterated." Pet. App. 46 (emphasis in original).

The concurring and dissenting Justices adopted these same positions in *State v. Morales* and *State v. Ochoa-Lara* by referencing their opinions in *State v. Garcia*. Pet. App. 69-70, 95-96.

REASONS FOR GRANTING THE WRIT

The Kansas Supreme Court's decision has sweeping impact, because virtually everyone—citizens, lawful aliens, and unauthorized aliens—must complete a Form I-9 when seeking employment. To say that no one can be prosecuted under state law whenever any information necessary to the prosecution happens to appear on or is appended to a Form I-9 is a result not required by the language of IRCA, and a conclusion that defies common sense. Such a holding also leads to serious constitutional questions about the scope of congressional power to override the States' traditionally broad police power to enact criminal laws, including laws that prohibit and punish identity theft and making a false writing.

The statutory preemption question presented here has arisen several times in recent years and will continue to arise, especially as identity theft and identity fraud become ever more ubiquitous crimes the States seek to prosecute. This case presents a procedurally clean vehicle for the Court to resolve the important issues here, and there is a sufficient body of lower court law to provide the Court with more than adequate context in which to decide the questions.

Plenary review is warranted in this case.

I. The Kansas Supreme Court's Holding and Reasoning Conflict with Circuit and State Decisions, as well as the Position the United States Has Taken in Litigation.

The Court should grant review because the Kansas Supreme Court's decision reaches a result in conflict with decisions of Circuits and state courts of last resort. Moreover, the Kansas Supreme Court's reliance on "express" preemption has been rejected by *every* other court to consider it, and by the United States Department of Justice, which has declined even to make such an argument in this context.

A. The Kansas Supreme Court's decision and reasoning conflict with appellate decisions from other jurisdictions.

The Kansas Supreme Court is by no means the first appellate court to consider preemption questions under IRCA. Several courts have construed IRCA more narrowly than the Kansas court. And none have embraced or agreed with the "express" preemption rationale of the Kansas court.

1. In *Puente Arizona v. Arpaio*, 821 F.3d 1098 (9th Cir. 2016), the Ninth Circuit considered a similar challenge to Arizona's identity theft statute. Contrary to the Kansas Supreme Court, however, the Ninth Circuit easily and emphatically rejected the argument that the text of IRCA "expressly" preempted the Arizona statute.

The Arizona statute targeted identity theft "with the intent to obtain employment." The challengers argued that such a law was facially preempted, *i.e.*,

preempted in all its applications. The District Court agreed and granted an injunction on that basis.

But the Ninth Circuit reversed, and vacated the injunction. The Ninth Circuit recognized that such laws "are not facially preempted because they have obvious constitutional applications." *Id.* at 1104. The court found "it significant that the identity theft laws are textually neutral—that is, they apply to unauthorized aliens, authorized aliens, and U.S. citizens alike." *Id*. at 1105.

Turning first to the challengers' conflict preemption arguments,[5] the Ninth Circuit identified "the crucial question [as] whether Congress intended to preempt the identity theft laws given the practical effect of those laws. We think not." *Id.* at 1106. The Ninth Circuit acknowledged that, although "some applications of the identity theft laws may come into conflict with IRCA's 'comprehensive scheme,'" IRCA does not invalidate such laws in their entirety or facially. Instead, "Arizona exercised its police powers to pass criminal laws that apply equally to unauthorized aliens, authorized aliens, and U.S. citizens." *Id*. at 1107.

Lastly, the Ninth Circuit rejected the very argument the Kansas Supreme Court majority embraced: "Finally, Puente makes an argument for

---

[5] The order in which the court discussed express and implied preemption (*i.e*., implied first and express last) suggests both that the Ninth Circuit viewed the "express" argument as weak and easily rejected, and that the challengers themselves did not believe the argument had much chance. The challengers instead relied primarily on implied preemption arguments.

preemption based on the text of IRCA." *Id.* at 1108. "Again, we reject this argument . . . . IRCA's document use limitation is only violated when the identity theft laws are applied in ways that rely on the Form I-9 and attached documents. . . . Arizona retains the power to enforce the laws in ways that do not implicate federal immigration priorities." *Id*.

2. The Iowa Supreme Court also recently wrestled with these issues, with mixed results. In *State v. Martinez*, 896 N.W.2d 737 (Iowa 2017), the defendant, an unauthorized alien, was prosecuted under Iowa identity theft and forgery statutes for using a false birth certificate to obtain an Iowa driver's license, which in turn she used to obtain employment. The defendant moved to dismiss the charges on the ground IRCA preempted them, but the trial court denied her motion.

A majority of the Iowa Supreme Court reversed, concluding that to the extent the Iowa laws addressed identity theft or forgery in the employment context, they were "the mirror image of federal immigration" laws, and "[s]uch mirror-image statutes are preempted by federal law." *Id.* at 754.

The majority's analysis hinged on whether the Iowa law was being used to punish obtaining employment, or instead punishing other crimes. The majority acknowledged that "identity theft to defraud a bank by an unauthorized alien would not be preempted by federal law and prosecution of an alien for such a crime would be well within the traditional police power of the states." *Id.* at 755. The majority also appeared to hold that IRCA preemption would have no application to U.S. citizens: "many persons may be prosecuted under

the statute who are not aliens but are United States citizens." *Id*. But here, "the *only* factual basis" for the prosecution "is the allegation that Martinez obtained unauthorized employment." *Id*. (emphasis in original).

Thus, the majority concluded that the Iowa statutes were precluded by both field and obstacle preemption. Two justices of the court concurred, emphasizing what they viewed as the "conflict" here between federal and state law, given that the only basis for the state prosecution was that the defendant used a false document to obtain employment. *Id*. at 757 (Cady, C.J., concurring); *id*. at 760 (Wiggins, J., concurring). None of the opinions relied on—or even attempted to rely on—the "express" preemption rationale the Kansas Supreme Court embraced.

Justice Mansfield dissented, arguing that the "court has established an exemption from a generally applicable Iowa law for the exclusive benefit of unauthorized aliens seeking employment in our state." *Id.* at 761. Indeed, the dissent observed:

> Under the majority's ruling, an American citizen who works in Iowa under a false name because she is being chased by a bill collector and wants to avoid garnishment can be prosecuted, but a foreign national who works in Iowa under a false name to avoid detection is immune.

Id. As the dissent correctly concluded, "[t]hat is the wrong reading of federal preemption." *Id*. In fact, the Kansas Supreme Court's decision has even more dramatic effect by precluding the prosecution of *anyone*—alien (authorized or not) and citizen alike—who uses another's personal identifying

information on an employment application, state tax form, or other writing when that information also just so happens to appear on a Form I-9.

The dissenting judge stated he was "unaware of any other court that has so held." *Id.* at 762. After reviewing appellate decisions from other jurisdictions (all discussed in this petition), the dissent observed that "three reported appellate cases, one federal and two state, have addressed our situation. None of them agrees with today's ruling." *Id*. at 764.

Lastly, the dissent considered and rejected the "express" preemption rationale the Kansas Supreme Court adopted. The dissent observed that the word "use" in § 1324a(b)(5) "is an inherently ambiguous term," and that, "[i]n context," the statute "establishes an *evidentiary* bar on the use of I-9 paperwork other than in certain enumerated federal prosecutions." *Id.* at 767-68. The dissent concluded that if "Congress had intended the I-9 and attachments to be *totally off-limits* to federal and state agencies other than for the listed federal prosecutions it would have worded the statute much differently—*i.e.*, as a limitation on disclosure." *Id*. at 768 (emphasis in original).

To emphasize that conclusion, the dissent offered a hypothetical that flowed from the majority's ruling:

> For example, . . . it would be unlawful for the FBI to obtain an employee's I-9 and attachments from an employer in the course of a terrorism investigation of that employee, because the offenses under consideration were not listed in section 1324a(b)(5).

Id. at 768. Not surprisingly, the dissent opined: "That seems absurd to me." *Id*.

Finally, the dissent rejected the "express" preemption argument, declaring that "so long as [the State] does not rely on the I-9 paperwork retained by the employer," it may prosecute. Moreover, the defendant "concedes that '[t]here is probably not express preemption' in this case," and "the court today does not rely on express preemption." *Id.* at 768.

3. Two other state appellate decisions have addressed the issues presented here, and both have rejected claims that IRCA preempted state prosecutions. In *State v. Reynua*, 807 N.W.2d 473 (Minn. App. 2011), a defendant was convicted of forgery, perjury, and fraudulent certificate of title, after police discovered the defendant had a Minnesota identification card and two certificates of title for vehicles with false names. As part of their investigation, police had obtained the defendant's Form I-9 from her employer. The defendant argued the state charges were barred by IRCA because information supporting those charges was included in or provided in support of her Form I-9.

On appeal, the State conceded that it could not rely on the Form I-9 itself. The appellate court thus considered whether the State was barred from using the defendant's false Minnesota identification card as evidence because she also submitted that card to her employer with her Form I-9.

The court declared that "we cannot read this provision [§ 1324a(b)(5)] so broadly as to preempt a state from enforcing its own laws relating to its own

identification documents." 807 N.W.2d at 480-81. Thus, "the state, for example, is not barred from prosecuting the crime of display or possession of a fictitious or fraudulently altered Minnesota identification card, merely because that card has been presented in support of an I-9." *Id.* at 481. Instead, so long as the State's proof does not rely on the Form I-9 itself, there is no preemption. Because the Minnesota prosecution for the false identification card and fraudulent certificates of title did not rely on the I-9, those convictions were valid, and not preempted. *Id*. at 482.

Similarly, in *State v. Diaz-Rey*, 397 S.W.3d 5 (Mo. App. 2013), a Missouri appellate court took perhaps the strongest position rejecting claims that IRCA preempted a state prosecution for forgery when a defendant submitted a false social security number on an employment application (separate from the Form I-9). The Missouri court observed that IRCA has an express preemption provision, § 1324a(h)(2), which only preempts state sanctions on "those who employ, or recruit or refer for a fee for employment, unauthorized aliens." Thus, the Missouri forgery statute was "not expressly preempted by IRCA because it does not sanction those who employ, recruit, or offer for employment unauthorized aliens." 397 S.W.3d at 8-9.

The Missouri court then rejected a field preemption claim, pointing out the Missouri forgery statute "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." *Id.* at 9. Last, the Missouri court rejected a conflict preemption claim, finding the Missouri statute "does not criminalize activity that Congress has decided not

to criminalize." Thus, Missouri law "does not stand as an obstacle to Congress's purpose in enacting IRCA." *Id*. at 10.

These cases more than demonstrate that the questions presented here are recurring, important, and have resulted in disparate decisions in the lower courts. Importantly, no lower court has embraced the "express" preemption analysis the Kansas Supreme Court adopted, and several have explicitly and emphatically rejected that analysis. Moreover, no other appellate court has interpreted the evidentiary bar of § 1324a(b)(5) nearly as broadly as the Kansas Supreme Court did in these cases. For these reasons alone, the Kansas decisions merit this Court's review.

B. The United States Department of Justice has taken the position that IRCA does not expressly preempt the States from using information obtained from a source other than a Form I-9.

The lower courts are not the only government institutions that have rejected the Kansas Supreme Court's "express" preemption analysis and the sweeping result in this case. In the *Puente Arizona v. Arpaio* case in the Ninth Circuit (discussed above), the United States Department of Justice filed a brief as amicus curiae in support of neither party. The United States explicitly disavowed reliance on the notion of express preemption, including the precise rationale the Kansas Supreme Court adopted here. The United States conceded that "[s]ection 1324a(b)(5), *considered on its own, would not preclude a state from relying on the same information taken from another source—e.g*., from 'employment applications, state payroll tax forms,

credit release forms, direct deposit forms and other documents not covered by the federal Form I-9 process.'" Brief of the United States, *Puente Arizona v. Arpaio*, 821 F.3d 1098 (Nos. 15-15211, 15-15213, 15-15215), 2016 WL 1181917, at *14 (quoting Arizona's brief) (emphasis added).

Instead, the United States took the position that the preemptive effect, if any, of § 1324a(b)(5) is to be determined by resort to implied preemption principles, in particular "obstacle" preemption. *Id.* at *14-21. Analyzing those principles, the United States concluded: "The regulation of theft, including identity theft, ordinarily falls within the State's traditional police powers." *Id*. at *22. Thus, "state laws criminalizing types of identity theft unrelated to federal immigration law are no more subject to preemption than are state laws criminalizing other conduct that also is prohibited by federal law, *e.g*., bank robbery or drug offenses." *Id*. at *23.

According to the United States, "[t]here is *no evidence* that Congress intended to preempt state laws criminalizing instances of identity theft that do not implicate federal immigration prerogatives." *Id.* at *23 (emphasis added). The Kansas Supreme Court's decision is thus at odds with the legal position the United States has taken. For that reason as well, this case merits the Court's plenary review, with an opportunity for the United States to brief and articulate its position on IRCA preemption.

II. The Kansas Supreme Court's Broad Reading of IRCA Unnecessarily Raises Constitutional Questions.

Review also is warranted because the Kansas Supreme Court's broad interpretation of § 1324a(b)(5) unnecessarily raises serious constitutional questions about the scope of congressional power.

A. The Kansas Supreme Court's decision misreads IRCA and severely limits traditional State authority.

1. The Kansas Supreme Court's reading of § 1324a(b)(5) cannot be squared with the statutory language, the section's caption, or the structure of IRCA.

The Kansas Supreme Court's analysis does not account for all the language of § 1324a(b)(5). That provision refers to "[a] form designated or established by the Attorney General under this subsection and any information contained in or appended to . . . ." 8 U.S.C. § 1324a(b)(5). The Kansas Supreme Court read the "and" between reference to the I-9 and "information contained in or appended to" as expressly forbidding the use of any information contained in or in any way related or connected to a Form I-9 in any state prosecution, even when the prosecution is based on use of the information in documents other than the I-9. But an equally, if not more, natural reading of that language is that Congress was simply recognizing a Form I-9 will contain information (and may have documents appended to it). Congress was just making clear that the Form I-9 itself, and documents appended

to it (*i.e.*, collectively, the "form"),[6] could not be used in a state prosecution, not that the same *information* appearing in other, non-IRCA documents could not be used.

In truth, the most natural reading of § 1324a(b)(5) is that Congress intended to create an evidentiary bar against the States (and federal agencies as well, except for limited types of prosecutions) using the Form I-9 itself and the actual documents a job applicant submitted in support of that form. The Kansas Supreme Court's interpretation of § 1324a(b)(5) is deeply flawed as a matter of traditional statutory interpretation principles.

Furthermore, the Kansas Supreme Court ignored the caption for § 1342a(b)(5), which reads "Limitation on use of attestation *form*." (Emphasis added). The caption indicates a congressional intent to limit use of

---

[6] If § 1324a(b)(5) is to be read outside of any context, the Kansas Supreme Court's approach would lead to other, potentially absurd questions. For example, could the States use documents submitted with a Form I-9 but not actually "appended" to the I-9? Does "appended" require the documents be stapled or paper-clipped to the I-9? What if the documents are submitted to the employer at a different time than the I-9 itself—would they be considered "appended" documents? "Append" is commonly defined in numerous dictionaries as "affix" or "attach." *Cf. Martinez*, 896 N.W.2d at 768 n.7 (Mansfield, J., dissenting) ("Section 1324a(b)(5) refers to 'information . . . appended to such form.' If the document has been submitted to the employer but not attached to the I-9, it has not been 'appended to such form.'"). *See also Yates v. United States*, 135 S. Ct. 1074 (2015) (rejecting a hyper-technical interpretation of "tangible object" where it would expand statute aimed at destruction of corporate document to a fisherman who threw an undersized fish overboard).

the to-be-created *form* (ultimately the Form I-9). This supports reading § 1342a(b)(5) as referring to the Form I-9 and information taken directly from the form, as opposed to other documents (like a state tax form, lease, or credit application) that may contain the same information. Thus, the caption reinforces the natural reading of the provision. *United States v. Quality Stores*, 134 S. Ct. 1395, 1402 (2014) ("The plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole."). *Cf. Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015) (captions "can be 'a useful aid in resolving' a statutory text's 'ambiguity'").

Finally, the Kansas Supreme Court effectively ignored the overall structure of IRCA because it ignored the fact that § 1324a has an *express* preemption provision, § 1324a(h)(2), which defines the scope of Congress's intent to preempt under IRCA.[7] As every other court to consider the question—as well as the United States Department of Justice—has recognized, IRCA's express preemption provision does not preempt the use of the information at issue here. At a minimum, the presence and language of that provision demonstrates that "express" preemption cannot be a valid theory or rationale in the context of § 1324a(b)(5). Why would Congress label one

---

[7] **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. 8 U.S.C. § 1324a(h)(2).

subsection "Preemption" but no other, and yet in fact intend other subsections to serve as "express" preemption provisions? Congress is entitled to more credit than that.

2. The Kansas Supreme Court's decision has sweeping effects that Congress cannot possibly have intended.

One result of the Kansas Supreme Court's decision is that the State may be precluded from prosecuting even citizens and lawful aliens if such persons include any information necessary to the state prosecution—such as false name, false date of birth, false telephone number, false social security number—on a Form I-9 or in appended documents when they apply for employment. The irony of such a result is that the State would not even arguably be interfering with federal immigration law prerogatives when prosecuting citizens or authorized aliens. Such a reading of IRCA does not pass the laugh test. Nonetheless, the Kansas Supreme Court's expansive "express" preemption interpretation of § 1324a(b)(5) would preclude use of the information in a state prosecution in these situations.

The Iowa Supreme Court in *State v. Martinez*, 896 N.W.2d 737 (Iowa 2017), attempted to avoid this risible result by creating an equally absurd outcome. The *Martinez* majority limited its preemption ruling to state prosecutions of *unauthorized aliens*. But that artificial reading of IRCA means that a citizen who uses a false name on a Form I-9 to avoid creditors can be prosecuted under state law, while an unauthorized alien who uses the exact same tactic cannot be prosecuted. *Id.* at 761 (Mansfield, J., dissenting). In

other words, the *Martinez* court's unique and artificial reading of IRCA permits imposition of state law penalties *on citizens* while immunizing many non-citizens for the same misconduct. There is no indication Congress intended that result under IRCA.

Instead, the way to ensure equal and consistent treatment under state law is to reject the interpretations of both the Kansas Supreme Court and the Iowa Supreme Court. Section 1324a(b)(5) should be read as simply preventing the States and federal agencies (in general) from using the Form I-9 and actual documents that accompany the submission of that form as evidence in a prosecution. No more and no less. Such a reading is most consistent with the provision's text, the section's caption, the inclusion of an entirely separate and explicitly labeled "preemption" provision, and IRCA's structure. Any other conclusion leads to absurd results and sweeping consequences.

B. Application of the constitutional doubt and clear statement canons would resolve the express preemption argument in favor of Kansas, and avoid constitutional issues.

This Court has not infrequently invoked the "constitutional doubt" canon of statutory construction to avoid potential constitutional issues Congress very likely did not intend to create. In the context of federal intrusions into traditional areas of state police power, criminal law being a prime example, the Court also has invoked a "clear statement" canon, requiring Congress to use statutory language that clearly expresses preemptive intent to override State police powers.

An excellent and recent example of the Court relying upon both canons is *Bond v. United States*, 134 S. Ct. 2077 (2014). There, Mrs. Bond was upset when she discovered that her best friend was pregnant, and that Mrs. Bond's husband was the father. Mrs. Bond then obtained two chemical substances (in powder form) which she put on her former best friend's car door, front door knob, and mailbox, all to get revenge by causing her former friend a rash from touching the chemicals.

Federal prosecutors charged Mrs. Bond with violating a federal statute—the Chemical Weapons Convention Implementation Act of 1998—that Congress enacted to implement an international treaty to which the United States is a signatory. Mrs. Bond argued the federal statute was unconstitutional because it exceeded the scope of the Treaty Power. This Court granted review but did not decide the constitutional question. Instead, the Court construed the statute to not apply to Mrs. Bond:

> Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.

134 S. Ct. at 2083.

The Court began its analysis by observing that "the National Government possesses only limited powers," in contrast to the States which "have broad authority to enact legislation for the public good—what we have

often called a 'police power.'" 134 S. Ct. at 2086.[8] Thus, Pennsylvania indisputably had the authority to prosecute Mrs. Bond for state law crimes, but it was far from clear the federal government had authority to prosecute. In such a situation, "'normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the issue.'" *Id*. at 2087 (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)).

The Court proceeded to resolve Mrs. Bond's case by invoking the clear statement canon and reading the statute more narrowly; the Court did not address the Treaty Power question. The Court observed that "our cases have recognized" several "background principles of construction" that are "grounded in the relationship between the Federal Government and the States under our Constitution." *Id.* at 2088. The Court emphasized that it will not read a statute to override the "'usual constitutional balance of federal and state powers,'" *id.* at 2089 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)), unless Congress is "reasonably explicit" or makes a "clear statement" that it intended such a result. *Id.* at 2089.

The Court continued: "We have applied this background principle when construing federal statutes that touched on several areas of traditional state

---

[8] *Cf. United States v. Lopez*, 514 U.S. 549, 556 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power."); *Taylor v. United States*, 136 S. Ct. 2074, 2083-84 (2016) (Thomas, J., dissenting) ("The Constitution expressly delegates to Congress authority over only four specific crimes" and Congress thus has "no general right to punish the many crimes that fall outside of Congress' express grants of criminal authority.").

responsibility." *Id.* The Court cautioned that it "will not be quick" to conclude Congress intended to make a "'significant change in the sensitive relation between federal and state criminal jurisdiction.'" *Id*. (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

This case is, if anything, an even more compelling situation in which to avoid reading IRCA broadly. There is nothing in IRCA (and much to the contrary) that is either "reasonably explicit" or a "clear statement" indicating Congress intended to preempt a vast area of traditional state police power. If the Kansas Supreme Court correctly read IRCA, then IRCA has a breathtaking impact on traditional state prosecutions and would call into question the power of Congress to enact such a provision. The Kansas Supreme Court's decision, at a minimum, raises substantial questions about whether Congress has such expansive power.

For example, under the Kansas Supreme Court's decisions, the State could not prosecute an individual for identity theft or fraud for submitting a state tax form with a false social security number or renting an apartment with a stolen identity. But, just as the "global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon," the need to control how a federal form is used does not require the Federal Government to displace States' traditional authority to punish purely local criminal activity. *Id.* at 2093; *see also Taylor v. United States*, 136 S. Ct. 2074, 2084-85 (2016) (Thomas, J., dissenting) (allowing such reach by the Federal

Government would "encroac[h] on States' traditional police powers to define the criminal law and to protect . . . their citizens. . . . and would 'subvert basic principles of federalism and dual sovereignty.'") (quoting *Gonzalez v. Raich*, 545 U.S. 1, 66 (2005) (Thomas, J., dissenting)).

Similarly, by employing principles of constitutional avoidance in *Jones v. United States*, 529 U.S. 848 (2000), the Court declined to interpret a federal arson statute as "mak[ing] virtually every arson in the country a federal offense." *Id.* at 859. The Kansas Supreme Court, on the other hand, threw caution (and any concern about bedrock federalism principles) to the wind.

This Court can and should avoid the difficult constitutional questions the Kansas Supreme Court's decisions raise by relying upon the constitutional avoidance and clear statement canons. Only if the Court were to agree with the Kansas Supreme Court's expansive reading of IRCA would it be necessary to reach the second question presented.

III. Identity Crime is a Problem that Far Exceeds the Capacity of the United States Alone to Prosecute.

In 2014, the United States Department of Justice Bureau of Justice Statistics estimated that 17.6 million people, or 7% of all U.S. residents age 16 or older, were victims of identity theft. U.S. DEPT. OF JUSTICE, BUREAU OF STATISTICS, *Victims of Identity Theft* (2014), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5408. In 2017, Javelin Strategy & Research conducted a study finding that identity crimes stole $16 billion from

15.4 million American consumers in 2016. INSURANCE INFORMATION INSTITUTE, *Facts + Statistics: Identity theft and cybercrime*, https://www.iii.org/fact-statistic/facts-statistics-identity-theft-and-cybercrime (last visited Nov. 1, 2017). Thirty-four percent of those victimized in 2016 had their information used for employment or tax-related fraud. *Id*.

The Privacy Rights Clearinghouse recorded 1,228 breaches of data made public in 2016 and through the end of October of 2017. PRIVACY RIGHTS CLEARINGHOUSE, https://www.privacyrights.org/data-breaches (last visited October 31, 2017). Their data, however, does not begin to account for the total number of potential identity theft victims, such as the 143 million American consumers estimated to be affected by the Equifax breach. Seena Gressin, *The Equifax Data Breach: What to do,* https://www.consumer.ftc.gov/blog/2017/09/equifax-data-breach-what-do (last visited Nov. 1, 2017).

The victims of identity theft can face devastating consequences. Those in dire need of government benefits may be denied them because income they never earned is attributed to them. Medical identity theft is on the rise, with the real potential for deadly consequences once the thief's medical history becomes melded with the victim's. Patricia Oliver, *What's [the] most dangerous kind of identity theft?*, USA TODAY, https://www.usatoday.com/story/money/personalfinance/2015/03/15/credit-dotcom-dangerous-identity-theft/70136996/ (last visited Nov. 1, 2017.)

Victims can be wrongfully arrested for crimes the thief committed while using the victims' identifying information. Some victims are burdened with an

ostensible criminal history for crimes they never committed. Low income victims have reported significant financial woes such as losing their residences or homes, or having to seek government assistance such as welfare, because of identity theft. Some victims lose employment opportunities when background checks reveal ostensible problems that are not in fact accurate. IDENTITY THEFT RESOURCE CENTER, *Identity Theft: The Aftermath 2016*, https://www.idtheftcenter.org/images/page-docs/AftermathFinal_2016.pdf. And the victims' ability to obtain credit may be severely impaired by identity theft.

This nationwide, indeed worldwide, problem and its consequences are more than the federal government alone can address. Thus, the States play a substantial and integral role in combatting identity crimes and their pernicious consequences. Appropriately, every single state has criminalized identity theft. NAT'L CONFERENCE OF STATE LEGISLATURES, *Identity Theft* http://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx (last visited Nov. 1, 2017) (listing state identity theft laws).

The States protect the public and seek to achieve numerous goals through the adoption and enforcement of these laws. The States unquestionably have a significant interest in protecting their own citizens from the widespread problem of identity theft, and the States have taken concrete actions to further the prosecution of such crimes. For example, many states have enacted special venue laws to permit prosecutions in the jurisdiction where the victim resides, rather than limiting venue to the jurisdiction where the

defendant accessed and stole the victim's personal information. *E.g.*, *State v. Mayze*, 622 S.E.2d 836, 838 (Ga. 2005) (identifying 20 such states).

In fact, the States regularly charge and prosecute identity thieves in a wide variety of situations. The States' combined efforts contribute significantly to the nationwide fight against identity crimes. Federal laws, such as IRCA, should not be unnecessarily and incorrectly interpreted to bar or limit the massive and important efforts the States are making to protect Americans from the evil and tragic consequences of identity crimes.

The questions presented in this petition have far-reaching implications for the States and the Nation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Solicitor General

STEVE HOWE
District Attorney,
Johnson County, Kansas
JACOB M. GONTESKY
Assistant District Attorney

120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@333law.com

Counsel for Petitioner
State of Kansas