No. 17-834

In the Supreme Court of the United States

KANSAS,

Petitioner,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

Congress has enacted a "comprehensive framework" governing the "employment of unauthorized aliens." *Arizona* v. *United States*, 567 U.S. 387, 404 (2012). The federal government has sole authority to determine who is authorized to work; states can neither restrict nor enlarge work authorization. And the federal government has adopted a carefully balanced enforcement regime to penalize both employers and employees who circumvent this federal policy.

The Kansas Supreme Court thus correctly held that federal law preempts states from prosecuting individuals for using another's information to "establish[] employment eligibility." Pet. App. 20.

That narrow holding does not warrant review. To begin with, petitioner does not identify any state court of last resort or federal court of appeals that has reached a different result. The lack of a conflict is alone fatal to the petition.

The result reached below, moreover, is correct. The Kansas Supreme Court properly held that 8 U.S.C. § 1324a(b)(5) is a bar to the state-law prosecutions at issue here. Petitioner's alternative construction of Section 1324 would render nugatory a key clause in the statute. *Arizona* also compels the separate conclusions that both field and conflict preemption bar petitioner's prosecution of respondents.

In requesting review, petitioner repeatedly misstates the scope of the lower court's holding. The decision below does not invalidate any law or intrude on any broad state police power. Nor does it have broader implications for the enforcement of identity theft laws. The decision in this case is focused solely

on state efforts to regulate the use of information "to establish * * * employment eligibility," a manifestly federal issue. Pet. App. 28. Nor does the second question presented, which is raised for the first time before this Court, offer any reason for granting the petition.

Because the holding below is narrow and consistent with the decisions of the other courts to consider the issue, the petition should be denied.

A. Statutory background.

1. In 1952, Congress enacted the Immigration and Nationality Act (INA), which "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of U.S.* v. *Whiting*, 563 U.S. 582, 587 (2011).

States subsequently sought to regulate the employment of undocumented individuals. *Whiting*, 563 U.S. at 587-588. After the Court held that the INA did not preempt those laws (*ibid.*), Congress responded with the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (IRCA), which is "a comprehensive framework for 'combating the employment of illegal aliens.'" *Arizona*, 567 U.S. at 404 (quoting *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002)).

IRCA obligates employers to confirm that federal law authorizes an employee to work. *Whiting*, 563 U.S. at 587. An employer must do so by reviewing the employee's "United States passport, resident alien card, alien registration card, or other document approved by the Attorney General." *Id.* at 589.

To implement this requirement, the federal government has developed the I-9 form, which employers complete upon hiring an employee. See 8 C.F.R. § 274a.2. The I-9 obligates an employer to attest that it has reviewed the prospective employee's documents and confirmed that he or she is not an "unauthorized alien." *Whiting*, 563 U.S. at 589.

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

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

8 U.S.C. § 1324a(b)(5).

The referenced provisions, in turn, address a broad array of criminal offenses. Title 18, Section 1001 regulates fraud and false statements generally. Section 1028 criminalizes fraud and false statements as to identification documents. Section 1621 relates to perjury generally.

Title 18, Section 1546 applies to fraud and misuse of various visa documents. In particular, Section 1546(b) criminalizes the use of another's identification document, a false identification document, or a false attestation, "for the purpose of satisfying a requirement of section [8 U.S.C. § 1324a(b)]"—that is, for purposes of demonstrating work authorization under federal law.

In addition, IRCA "preempt[s] 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).

2. The Kansas identity theft statute, Kan. Stat. Ann. § 21-6107, criminalizes "obtaining, possessing, transferring, using, selling or purchasing any personal identifying information" of another with the intent "to receive any benefit." Kan. Stat. Ann. § 21-6107(a).

The Kansas false information statute, Kan. Stat. Ann. § 21-5824, renders unlawful "making, generating, distributing or drawing * * * any written instrument * * * with knowledge that such information falsely states or represents some material matter * * * with intent to defraud, obstruct the detection of theft or felony offense or induce official action." Kan. Stat. Ann. § 21-5824(a).

B. Factual background.

Kansas prosecuted respondents for using Social Security numbers belonging to others to demonstrate their eligibility for employment.

1. Respondent Ramiro Garcia was a line cook for Bonefish Grill. Pet. App. 4. During the hiring process, he used another's Social Security number in completing the I-9 immigration form, as well as the federal W-4 and state K-4 tax forms. *Id.* at 4-6.

The state charged respondent Garcia with violating Section 21-6107 because, according to the criminal complaint, he used a "Social Security number belonging to or issued to another person * * * in order to receive [a] benefit." Pet. App. 3. The state's sole theory at trial was that respondent Garcia had used another's Social Security number to establish work authorization. *Id.* at 6-7. As the prosecutor summed

up at closing: "in the State of Kansas, you cannot work under someone else's [S]ocial [S]ecurity number." *Id.* at 7. A jury convicted him of identity theft. *Ibid.*

2. Respondent Ronaldo Morales worked at a Jose Pepper's restaurant. Pet. App. 62-63. Like Garcia, he completed the I-9, W-4, and K-4 forms using another person's Social Security number. *Id.* at 63. The state initially charged respondent Morales with four offenses: one count of identity theft and three counts of making a false statement on each of the three forms. *Ibid.* The state later agreed to dismiss the claim relating to the I-9 form. *Ibid.*

A state court found respondent Morales guilty. Pet. App. 64-65. The court relied on respondent's use of another's Social Security number: the exhibits, the court explained, "are very important, because they're social security number, W-4, and the other social security—the employment document." *Id.* at 64.

3. Respondent Guadalupe Ochoa-Lara worked at a Longbranch Steakhouse. Pet. App. 90. He, too, used another's Social Security number to demonstrate authorization to work. Petitioner initially charged him with two counts of identity theft in violation of Section 21-6107—one for using another's Social Security number and the second for using another's resident alien card number. *Ibid.* He was also charged with false information for making false statements on the I-9. *Ibid.* The state subsequently agreed to dismiss the second identity theft count and the false information charge. *Id.* at 90-91. In convicting respondent Ochoa-Lara, "the court's Journal Entry of Judgment relied exclusively on Ochoa-Lara's employment." *Id.* at 92.

C. Proceedings below.

1. The Kansas Supreme Court held that federal law expressly preempts state prosecutions of individuals who use the information of another person to demonstrate that federal law authorizes them to work. Pet. App. 1-28.

The court relied on the plain language of Section 1324a(b)(5): "[i]t is Congress' plain and clear expression of its intent to preempt the use of the I-9 form *and any information contained* in the I-9 for purposes other than those listed in §1324a(b)(5)." Pet. App. 27. Section 1324a(b)(5) thus precludes a state from using not just the I-9 itself but also "*any information contained within the I-9* as the bas[i]s for a state law identity theft prosecution of an alien who uses another's Social Security information in an I-9." Pet. App. 28. And the "[p]rosecution of [respondent] Garcia—an alien who committed identity theft for the purpose of establishing work eligibility—is not among the purposes allowed in IRCA." *Id*. at 27-28.

Federal law therefore preempts respondent Garcia's prosecution: "the State's identity theft prosecution of him based on the Social Security number contained in the I-9 used to establish his employment eligibility was expressly preempted." Pet. App. 28. The court likewise held that respondent Morales' "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)." *Id.* at 69. And it reached the same result as to respondent Ochoa-Lara. *Id*. at 94.

The court took care to underscore that the challenge before it was an "as-applied type." Pet. App. 20. Respondents did "not seek to prevent all prosecutions

under the state law." *Ibid.* Rather, the Kansas Supreme Court's holding reaches only those individuals "who use the Social Security card or other document listed in federal law of another for purposes of establishing employment eligibility." *Ibid.*

2. Justice Luckert concurred in the result. She would have rested on field and conflict preemption, which the majority did not reach. Pet. App. 29-38.

Justice Luckert explained that "IRCA 'forcefully' made combating the employment of illegal aliens central" to the nationwide "'policy of immigration law.'" Pet. App. 33 (quoting *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991)). Indeed, "IRCA's 'extensive' employment verification system 'is critical to the IRCA regime.'" *Ibid.* (quoting *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147-148 (2002)).

Justice Luckert recognized that, in *Hoffman Plastic*, the Court identified the employee-side sanctions, principally Section 1546(b), as an essential part of this nationwide regulation. Pet. App. 34. *Hoffman Plastic* underscores that the purpose of the "IRCA regime" is to render it "impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies." *Ibid.* (quoting *Hoffman Plastic*, 535 U.S. at 148).

Through IRCA, "Congress has occupied the field and prohibited the use of false documents, including those using the identity of others, when an unauthorized alien seeks employment." Pet. App. 35-36. As a result, "under the doctrine of field preemption, the State cannot prosecute Garcia, an unauthorized al-

ien, for identity theft related to false documentation supplied to his employer." *Id.* at 36.

Additionally, "[c]onflict preemption" also barred "the use of Kansas' identity theft statute under the circumstances of this case." Pet. App. 36. A state prosecution ultimately "usurp[s] federal enforcement discretion in the field of unauthorized employment of aliens." *Ibid.* (quotation omitted).

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

3. Justices Biles (Pet. App. 38-45) and Stegall (*id.* at 45-47) dissented.

Justice Biles acknowledged that he was "attracted to the notion that the Kansas statute is preempted as applied in this case under implied theories of either field or conflict preemption, as the Iowa Supreme Court majority recently held." Pet. App. 44. He recognized that "[t]he possibility of dual enforcement tracks—state and federal—is concerning because of the prosecutorial discretion * * * our state affords to its prosecutors." *Ibid.* And this "apprehension is particularly noteworthy because the identity theft cases reaching our Kansas appellate courts involving unauthorized immigrants seem to be arising from just one prosecuting jurisdiction, which suggests other Kansas prosecutors may be exercising

their discretion differently." *Id*. at 44-45. Thus, while he would have ultimately ruled against preemption, Judge Biles observed that "an as-applied conflict preemption challenge" is "a close call." *Id*. at 45.

Justice Stegall "doubt[ed] [that] the logic of today's decision [would] be extended beyond the narrow facts before us." Pet. App. 45. He identified another hypothetical issue—the use of a false name—and indicated that a different result may obtain by virtue of "the delicate federal-state balance." *Id*. at 46.

REASONS FOR DENYING THE PETITION

Review should be denied: there is no conflict, the decision below is correct, and petitioner's attempt to tie this issue to identity theft generally lacks merit.

A. There is no conflict warranting review.

No state court of last resort or federal court of appeals has held that states are empowered to prosecute individuals who use another's information to demonstrate work authorization. In fact, the two cases petitioner cites—one from the Iowa Supreme Court and the other from the Ninth Circuit—both *support* the result reached here.

Petitioner asserts that there is some disagreement as to which preemption theory is most appropriate. But the supposed disagreement to which petitioner points is mere disagreement in legal reasoning—it is not a conflict in actual outcomes. Because "this Court reviews judgments, not opinions" (*Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)), review is not warranted.

1. Take first one of petitioner's central cases, *State* v. *Martinez*, 896 N.W.2d 737 (Iowa 2017). An

Iowa prosecutor brought charges against Martinez for using another's identity to obtain employment. *Id.* at 741-742. The Iowa Supreme Court held that federal law preempted the prosecution, and it directed dismissal of the charges. *Id.* at 757. It thus reached the same conclusion as below.

The court first considered a specific Iowa forgery statute that rendered unlawful use of a false document "as evidence of authorized * * * employment in the United States." *Martinez*, 896 N.W.2d at 742 (quoting Iowa Code § 715A.2(2)(*a*)(4)). This statute, the court held, "is the mirror image of federal immigration law, namely 18 U.S.C. § 1546(a)." *Id.* at 754. And "[s]uch mirror-image [state] statutes are preempted by federal law." *Ibid.*

Iowa also brought an identity theft charge. *Martinez*, 896 N.W.2d at 742. Iowa's identity theft law is similar to Kan. Stat. Ann. § 21-6107: in Iowa, it is an offense to "fraudulently use[] * * * identification information of another person, with the intent to obtain * * * [a] benefit." 896 N.W.2d at 742. The Iowa law, the court held, was "not facially preempted," because it "ha[d] a potentially broader application outside the immigration context." *Id.* at 755.

But that law is subject to *as-applied* field preemption to the extent that a prosecution rests on the assertion that an individual used a false identity document to "obtain[] unauthorized employment." *Martinez*, 896 N.W.2d at 755.

The court reasoned that "IRCA is a comprehensive statute that brought regulation of alien employment under the umbrella of federal immigration policy." *Martinez*, 896 N.W.2d at 755. And, "[t]o the extent federal immigration authorities choose to pro-

ceed with sanctions against unauthorized aliens, the IRCA establishes a comprehensive regime of criminal, civil, and immigration related consequences." *Ibid*. Ultimately, "[b]ecause the federal immigration law occupies the field regarding the employment of unauthorized aliens, the State in this case [could not] prosecute Martinez for identity theft related to false documentation supplied to her employer as an unauthorized alien." *Id*. at 755-756.

The prosecution was also conflict-preempted, the court held, because "[a]ny prosecution under the Iowa identity theft statute frustrates congressional purpose and provides an obstacle to the implementation of federal immigration policy by usurping federal enforcement discretion in the field of unauthorized employment of aliens." *Martinez*, 896 N.W.2d at 756. "The reasons for exercise of federal discretion are varied": federal prosecutors may need to work with "unauthorized aliens to build criminal cases involving drugs or human traffickers," discretion may avert "[t]he risk faced by unauthorized aliens being subject to violations of labor laws by exploiting employers," and federal prosecutors may consider "foreign affairs or a need to account for reciprocal enforcement in other countries," among other "immediate human concerns." *Ibid*.

Absent preemption, the court concluded, "[l]ocal enforcement of laws regulating employment of unauthorized aliens would result in a patchwork of inconsistent enforcement that would undermine the harmonious whole of national immigration law." *Martinez*, 896 N.W.2d at 756.

Martinez herself was exemplary of these concerns. She "came to the United States as a child," and thus was not "personally responsible" for her

presence. *Martinez*, 896 N.W.2d at 756-757. "She was educated in Iowa, has no criminal record, is a productive member of the community, and now has four children who are citizens of the United States." *Id.* at 757. Federal immigration enforcement "routinely take[s] these equitable and humanitarian considerations into account in the enforcement of immigration law." *Ibid.* Indeed—both because Martinez registered as part of DACA and because, as a mother of four, prosecuting her may result in her being "separated from her four children who are United States citizens"—"[f]ederal authorities might blanch at prosecuting" Martinez. *Ibid.* If local prosecutors could override this determination, exposing an individual to a "significant Iowa prison term and removal from the country," "the harmonious system of federal immigration law related to unauthorized employment would literally be destroyed." *Id.* at 757.

Martinez, accordingly, reached a result identical to that reached below: in Iowa and Kansas both, state prosecutors may not bring charges for an individual's use of another's information to demonstrate employment authorization. See Pet. App. 28.

Petitioner relies principally on the *dissenting* opinion in *Martinez*. See Pet. 19-21. But the dissent was just that: a disagreement with how the majority actually resolved the case. A dissent does not make a conflict.

2. Petitioner's other purportedly conflicting authority, *Puente Arizona* v. *Arpaio*, 821 F.3d 1098 (9th Cir. 2016), likewise supports the result reached here.

In *Puente Arizona*, the Ninth Circuit considered a district court's preliminary injunction that enjoined enforcement of the entirety of Arizona's work-related

identity theft statute. See 821 F.3d at 1101-1103. The identity theft law applied to "unauthorized aliens, authorized aliens, and U.S. citizens alike." *Id.* at 1105. Accordingly, "these laws could easily be applied to a sex offender who uses a false identity to get a job at a daycare center." *Ibid.* For this reason, the court of appeals concluded that "the identity theft laws are not *facially* preempted because they have obvious constitutional applications." *Id.* at 1104 (emphasis added).

That holding does not conflict with the decision below because the Kansas Supreme Court did not facially preempt any law. As we explained (see pp. 6-7, *supra*), the lower court was clear that the challenge before it was an "as-applied type," and that respondents did "not seek to prevent all prosecutions under the state law." Pet. App. 20. Thus, the lower court's holding was expressly limited to only those individuals "who use the Social Security card or other document listed in federal law of another for purposes of establishing employment eligibility." *Ibid.*

For its part, *Puente Arizona* repeatedly emphasized that it was *not* deciding the sort of "as-applied challenge" that is at issue here. 821 F.3d at 1105. It explained that the "question of which applications of the laws are preempted is properly left for the district court." *Id.* at 1105 n.7. For the avoidance of any doubt, the court "stress[ed] again that the only question for [it] to answer on this facial challenge [was] whether the identity theft laws should be enjoined in all contexts as applied to all parties." *Id.* at 1108.

That reservation was sensible, because in the Ninth Circuit's view, "some applications of the identity theft laws may come into conflict with IRCA's 'comprehensive scheme' or with the federal govern-

ment's exclusive discretion over immigration-related prosecutions." *Puente Ariz.*, 821 F.3d at 1107. The court thus expressly acknowledged that Puente's arguments "may be persuasive in the context of Puente's as-applied challenge." *Ibid*. In particular, as to Section 1324a(b)(5), the court was of the view that the statute *is* "violated when the identity theft laws are applied in ways that rely on the Form I-9 and attached documents." *Id*. at 1108. There is no conceivable respect in which that holding conflicts with the decision below.

The lack of any conflict is conclusively resolved by the subsequent history in *Puente Arizona*. On remand, the district court enjoined the same kind of state-law prosecutions at issue here. Not only did Congress preempt use of the "Form I-9 and physically attached documents" in state prosecutions, "Congress also regulated—and intended to preempt state use of—other documents used to show employment authorization under the federal system." *Puente Ariz.* v. *Arpaio*, 2017 WL 1133012, at *7 (D. Ariz. 2017). There is, accordingly, no conflict between the Ninth Circuit's decision in *Puente Arizona* and the decision entered below. See also Pet. App. 22-27.

3. Petitioner points to the brief the United States filed in *Puente Arizona*. Pet. 23-24. But that brief shows that the United States *agrees* with the result reached here.

To begin with, the United States recognized that Section 1324a(b)(5) "constrains state and local law enforcement's ability to rely on the Form I-9 as an investigative lead, or as the basis for obtaining a warrant to raid a workplace thought to be employing unauthorized aliens." U.S. Br. at *14, Nos. 15-15211,

15-15213, 15-15215, 2016 WL 1181917, *Puente Ariz.* v. *Arpaio*, 821 F.3d 1098 (9th Cir. 2016) (U.S. Br.).

Beyond that, the United States maintained that Congress has "regulate[d] fraud committed to demonstrate authorization to work in the United States under federal immigration law," that "[t]he circumstances in which an employee may commit such fraud are not limited to the attestation in the Form I-9 and supporting documents," and that "Congress has comprehensively regulated such fraud even when it is committed outside the Form I-9 process." U.S. Br. at *15. Thus, the United States specifically urged the Ninth Circuit to hold Arizona "laws preempted to the extent they criminalize fraud committed to demonstrate an alien's authorization to work in the United States under federal immigration law." *Id.* at *21. The position of the United States accords fully with the result reached below.

4. Finally, petitioner briefly identifies two intermediate state court decisions, which may yet be overturned by their respective state supreme courts. Pet. 21-22. Such nonbinding decisions cannot create the sort of conflict that warrants review. And, in any event, there is no conflict.

In *State* v. *Reynua*, 807 N.W.2d 473, 475 (Minn. Ct. App. 2011), Minnesota prosecuted the defendant for falsely using a state identification card. The court found that Section 1324a(b)(5) did not reach "so broadly as to preempt a state from enforcing its laws relating to its own identification documents." *Id.* at 480-481. It reasoned that "the state, for example, is not barred from prosecuting the crime of display or possession of a fictitious or fraudulently altered Minnesota identification card * * * merely because that card has been presented in support of an I-9

federal employment-eligibility verification form." *Id.* at 481. Additionally, the defendant was prosecuted for using a false state identification card in connection with taking title to a car. *Id.* at 476.

By contrast, the Kansas Supreme Court found that the prosecutions below each rested on the respondent's use of a another's Social Security number—not a false state identification card. See Pet. App. 28, 69, 94. That decision, quite unlike *Reynua*, says nothing at all about a state's ability to prosecute the use of a false state identification card. Moreover, each of the prosecutions at issue here trained on conduct related to employment authorization and hiring, not other kinds of unrelated economic transactions like leasing a car. *Ibid.*

State v. *Diaz-Rey*, 397 S.W.3d 5 (Mo. Ct. App. 2013), appears to approve a state-law charge relating to the I-9 form *itself*. But that is not at issue here, because petitioner expressly limited its prosecutions to conduct outside the I-9 form. See, *e.g.*, Pet. App. 4, 63, 90, 106 ("[T]he second identity theft count and the making of a false information count were dismissed after the State agreed they should be."). And given that prosecutions for misstatements on I-9 forms are undeniably preempted, there is little reason to think that *Diaz-Rey* would survive further review by the Missouri Supreme Court. Indeed, petitioner does not defend the reach of that decision. That concession is well advised, as *Diaz-Rey* did not so much as consider the relevant statutory language in Section 1324a(b)(5). See 397 S.W.3d at 8-9. It is no basis for review.

B. The decision below is correct.

While the lack of any conflict is fatal to the petition, review is also unwarranted because the decision below is correct. Express, field, and conflict preemption all confirm the same result: federal law preempts states from prosecuting an individual's use of another's information to demonstrate employment authorization.

1. Express preemption compels the result reached below. "There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express pre-emption provision." *Arizona*, 567 U.S. at 399.

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

This Court recently summed up the effect of this statute: "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 (emphasis added).

The lower court's holding thus follows. When an applicant for employment provides "information" in an I-9, neither the "form" itself nor any "information contained in" it may be used for reasons other than the enumerated federal offenses. Petitioner's prosecution of respondents, individuals "who committed identity theft for the purpose of establishing work el-

igibility," "is not among the purposes allowed" by the statute. Pet. App. 27-28.

The prosecutions here necessarily relied on the "*information contained within the I-9*"—that is, the Social Security numbers—as the basis "for a state law identity theft prosecution." Pet. App. 28. Petitioner does not disagree—nor could it challenge what the state supreme court understood as the essential factual foundation of the state law charges. Section 1324a(b)(5) thus bars those prosecutions.

In petitioner's view, the statute merely prohibits states from using "the Form I-9 itself, and documents appended to it * * * in a state prosecution." Pet. 25-26. Thus, state prosecutors cannot use the form or attached documents—but they can use "the same *information*" to prosecute individuals. *Id.* at 26. Petitioner reiterates: "the most natural reading of § 1324a(b)(5) is that Congress intended to create an evidentiary bar against the States * * * using the Form I-9 itself and the actual documents a job applicant submitted in support of that form." *Ibid.*

The fundamental flaw with this construction is that it renders nugatory the statutory clause "and any information contained in" the I-9 Form. 8 U.S.C. § 1324a(b)(5). In petitioner's construction, that language ceases to have any meaning. Petitioner never attempts to show what work this clause would do.

Because it is error to read a statute in a way that negates whole clauses, the lower court's interpretation—which provides meaning to that core language—must be correct. See *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (applying "the settled rule that we must, if possible, construe a statute to give every word some operative effect");

United States v. *Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920) ("It is elementary that all of the words used in a legislative act are to be given force and meaning. * * * It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect.").[1]

That the subsection is titled "[l]imitation on use of attestation form" has little bearing on its construction. See Pet. 26-27. Statutory "headings and titles are not meant to take the place of the detailed provisions of the text," because "[w]here the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528 (1947). It is commonplace, as here, that a statute reaches farther than its summary caption. The Court thus applies "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Id.* at 528-529. Put simply: "[t]he caption of a statute * * * 'cannot undo or limit that which the statute's text makes plain.'" *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 242 (2004).

Nor does it help petitioner that Section 1324a-(b)(5) titles itself a "[l]imitation," while Section 1324a(h)(2) is called "[p]reemption." Pet. 27-28. The reason Congress chose these labels is straightforward: Section 1324a(h)(2) facially preempts specific

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[1] Petitioner points to the possibility that a court may one day have to interpret the statutory term "appended to." Pet. 26 n.6. But that is not an issue in this case. Nor is there any reason to conclude that this garden-variety construction question will pose any unique difficulty.

state laws—those that impose employer-based sanctions for certain kinds of hiring practices. *Whiting*, 563 U.S. at 594-595. Section 1324a(b)(5), by contrast, is a limitation on the use of certain materials by states, the effect of which is generally an *as-applied* preemption of certain state prosecutions, not a facial bar of state laws in whole. That is, of course, precisely what the court here held. See Pet. App. 20, 28.[2]

Petitioner next contends that the decision below "has sweeping effects." Pet. 28-29. Petitioner suggests that states "*may be* precluded from prosecuting even citizens and lawful aliens" in certain circumstances. *Id*. at 28 (emphasis added). As petitioner appears to acknowledge, this assertion is pure speculation: the lower court identified the sole issue before it—"a state law identity theft prosecution of an alien who uses another's Social Security information in an I-9." Pet. App. 28. Even the dissent doubted that the decision below "will be extended beyond the narrow facts" of this case. *Id*. at 45.

If a court were ever to extend that holding in a way that "does not pass the laugh test" (Pet. 28), petitioner will have every opportunity to challenge that hypothetical ruling. Petitioner's fanciful postulation as to what could happen in the future—proffered without reason or evidence—is no reason for review today.

2. Understanding Section 1324a(b)(5) to expressly preempt these prosecutions is sensible, moreover, because the doctrine of field preemption compels the

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[2] Nor does the "existence of an express pre-emption provision" bear on the field and conflict preemption analysis. *Arizona*, 567 U.S. at 406 (quotation and alteration omitted).

same result. "Where Congress occupies an entire field, * * * even complementary state regulation is impermissible," *Arizona*, 567 U.S. at 401. In this way, "[f]ield pre-emption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Ibid.*

That is the case here: as Justice Luckert explained in concurrence, through its "comprehensive statutory scheme, Congress has occupied the field" as it relates to the "use of false documents, including those using the identity of others, when an unauthorized alien seeks employment." Pet. App. 35-36. "Accordingly, under the doctrine of field preemption, the State cannot prosecute [respondents] * * * for identity theft related to false documentation supplied to [their] employer[s]." *Id.* at 36.

That conclusion is correct. The federal employment "verification system is critical to the IRCA regime." *Hoffman Plastic*, 535 U.S. at 147-148. As part of this comprehensive system, IRCA "makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents." *Id.* at 148. It "prohibits aliens from using or attempting to use 'any forged, counterfeit, altered, or falsely made document' or 'any document lawfully issued to or with respect to a person other than the possessor' for purposes of obtaining employment in the United States." *Ibid.* (quoting 8 U.S.C. §§ 1324c(a)(1)-(3)). In sum, "[a]liens who use or attempt to use such documents are subject to fines and criminal prosecution." *Ibid.*

The Fourth Circuit recently held a state law preempted on this basis. A South Carolina law making "it unlawful for any person to display or possess a false or counterfeit ID for the purpose of proving law-

ful presence in the United States" was "field preempted in that Congress has passed several laws dealing with creating, possessing, and using fraudulent immigration documents." *United States* v. *South Carolina*, 720 F.3d 518, 532-533 (4th Cir. 2013). "Congress has occupied this field and, in such a case, even complementary or auxiliary state laws are not permitted." *Id.* at 533.

In short, Congress has comprehensively regulated the employment verification process. That precludes the states from doing so, even if they "attempt[] to achieve * * * the same goals as federal law." *Arizona*, 567 U.S. at 406.

In fact, Congress has occupied the broader field of "unauthorized employment of aliens." *Arizona*, 567 U.S. at 406. In this field, Congress has "struck" a "careful balance"—"Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." *Ibid.* Instead, it created "civil penalties," including barring individuals who improperly work from adjusting their status and authorizing their removal from the country. *Id.* at 404-405. And, as we have said, Congress made it a federal crime "to obtain employment through fraudulent means." *Id.* at 405.

Congress' occupation of the field of "unauthorized employment of aliens" as a whole confirms the narrower and constituent conclusion that it has comprehensively regulated the field of employment verification.

Employment verification, moreover, is akin to "the field of alien registration," where "federal statutory directives provide a full set of standards governing alien registration, including the punishment for

noncompliance." *Arizona*, 567 U.S. at 401. These laws, the Court held, preempt the field: "[f]ederal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders." *Id.* at 401-402.

In light of the similar comprehensive scheme governing employment verification, it would be anomalous to reach a different result. Rather, Congress created "a harmonious whole" (*Arizona*, 567 U.S. at 401 (quotation omitted)) every bit as much in the employment verification context.

It is irrelevant if a state adopts "the same aim as federal law." *Arizona*, 567 U.S. at 402. Any such argument "ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself." *Ibid.* In these circumstances, "[p]ermitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted." *Ibid.*

3. The doctrine of conflict preemption also results in the same conclusion reached below. As Justice Luckert explained, adopting the reasoning of the Iowa Supreme Court:

> Conflict preemption bars the use of Kansas' identity theft statute under the circumstances of this case because it "frustrates congressional purpose and provides an obstacle to the implementation of federal immigration policy by usurping federal enforcement discretion in the field of unauthorized employment of aliens."

Pet. App. 36 (quoting *Martinez*, 896 N.W.2d at 756). That is so for several reasons.

To begin with, state and federal prosecutors may exercise prosecutorial discretion differently. This Court identified the conflict: "the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona*, 567 U.S. at 402.

The harms that would result are concrete and tangible, as the federal government uses these charging decisions to further uniform, national interests. As the United States demonstrated in *Puente Arizona*, "the Department of Homeland Security has prioritized the investigation and prosecution of employers who knowingly hire unauthorized aliens"—and to accomplish these ends, "[f]ederal law enforcement officials routinely rely on foreign nationals, including unauthorized aliens, to build criminal cases, particularly cases against human traffickers, and employers who violate IRCA." U.S. Br. at *18-19. The federal government's "ability to rely on unauthorized aliens as witnesses in high-priority criminal proceedings advances important federal interests that would be thwarted by parallel state prosecutions of the same individuals for offenses already regulated by federal law." *Id.* at *19.

Indeed, the cases at issue here highlight these differing prosecution priorities. All three respondents were charged by the prosecutor for Johnson County, Kansas (Pet. App. 1, 62, 114)—which is one of 105 counties in that state. Even the dissent below expressed "apprehension" given that "the identity theft cases reaching [the] Kansas appellate courts involving unauthorized immigrants seem to be arising from just one prosecuting jurisdiction, which sug-

gests other Kansas prosecutors may be exercising their discretion differently." Pet. App. 44-45. See also p. 30 n.4, *infra*. The same was true in *Martinez*: there, the state supreme court recognized that the particular "state prosecutor" in the case expressed "a different philosophy" from the federal government, which was "reflected in the charging decision." 896 N.W.2d at 757.

Individual state prosecutors cannot countermand the comprehensive federal regulation of employment authorization. If it were otherwise, "the harmonious system of federal immigration law related to unauthorized employment would literally be destroyed." *Martinez*, 896 N.W.2d at 757. See also *South Carolina*, 720 F.3d at 532-533 ("[P]rosecution for counterfeiting or using federal immigration documents is at the discretion of the Department of Justice acting through the United States Attorney, and allowing the state to prosecute individuals for violations of a state law that is highly similar to a federal law strips federal officials of that discretion.").

Beyond that, allowing state prosecutions opens the prospect of different sentences. If states are permitted to enact overlapping criminal offenses, states are free to choose the penalty—and states may choose a penalty greater than that selected by Congress. The result would be, as the United States itself decried, "a troubling patchwork of inconsistent penalties." U.S. Br. at *20. See also *Arizona*, 567 U.S. at 402-403 ("Even where federal authorities believe prosecution is appropriate, there is an inconsistency between [Arizona law] and federal law with respect to penalties.").

Immigration enforcement also triggers foreign policy considerations. According the United States,

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

The Fourth Circuit thus concluded that the South Carolina law regulating use of false documents in employment verification, in addition to being field preempted, "[was] conflict preempted because enforcement of these federal statutes necessarily involve[d] the discretion of federal officials, and a state's own law in this area, inviting state prosecution, would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *South Carolina*, 720 F.3d at 533.

So too here. State prosecutions of offenses relating to employment eligibility conflict with the comprehensive federal regime. And, ultimately, "[t]hese specific conflicts between state and federal law simply underscore the reason for field pre-emption." *Arizona*, 567 U.S. at 403.

* * *

Express, field, and conflict preemption all compel the result reached below: federal law preempts state prosecutions for use of another's information to

demonstrate employment authorization. Federal law comprehensively regulates this space, and enforcement decisions rest on a careful balance of considerations that require nationwide uniformity.[3]

C. Petitioner's "constitutional power" question does not warrant review.

Petitioner asserts a second, conditional question, regarding whether "Congress has the constitutional power" to preempt the state prosecutions at issue here. See Pet. ii. Petitioner attempts to present this argument in the guise of constitutional avoidance.

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[3] Petitioner makes no separate, reasoned argument as to whether a different conclusion would result if an individual were to use another's Social Security number for a lease or any other transaction unrelated to employment verification. While petitioner invokes the word "lease" in the question presented (Pet. ii) and once, in a parenthetical, in its argument (*id.* at 27), it develops no argument on this score. Any such argument is now waived. Likewise, petitioner waived that argument in the state courts: it focused solely on the employment documents, and made no preemption argument about the lease. See, *e.g.*, Br. of Appellee, at *3-*9, *State* v. *Ochoa-Lara*, No. 14-112322-A, 2015 WL 2192359 (Kan. Ct. App. May 4, 2015).

That is for good reason: the convictions of all three respondents rested solely on the provision of another's information to show employment eligibility. As to respondent Ochoa-Lara, "the court's Journal Entry of Judgment relied exclusively on Ochoa-Lara's employment." Pet. App. 92. The state supreme court, accordingly, recognized that respondent "Ochoa Lara's two convictions arose out of a single period of restaurant employment." *Id.* at 89. The sole issue the court considered was that a "prosecution based on use of a Social Security number belonging to another person to obtain employment was expressly preempted." *Id.* at 94. Petitioners have not and cannot challenge what the state supreme court held was the basis of the state-law conviction. Nothing in any of these cases, moreover, involved "credit applications." See Pet. ii.

Id. at 29-33. For several reasons, the contention lacks merit.

To begin with, the Kansas Supreme Court never addressed this question. See Pet. App. 19-28. And little wonder why not: petitioner did not once argue in its state-court briefing that preemption of the prosecutions at issue here would require some form of clear statement or would unconstitutionally intrude on special state prerogatives. See, *e.g.*, Br. of Appellee, at *8, *State* v. *Ochoa-Lara*, No. 14-112322-A, 2015 WL 2192359 (Kan. Ct. App. May 4, 2015); Br. of Appellee, at *7-*12, *State* v. *Garcia*, No. 14-112502-A, 2015 WL 6086727 (Kan. Ct. App. Oct. 6, 2015); Br. of Appellee, at *14-*19, *State* v. *Morales*, No. 14-111904-A, 2015 WL 4481738 (Kan. Ct. App. July 15, 2015).

Despite never having raised the issue below, petitioner frames it as an independent question for the Court to address. See Pet. ii. Petitioner's waiver, however, prevents this Court from considering it. See *Buck* v. *Davis*, 137 S. Ct. 759, 780 (2017); *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2083 (2015). Should the Court ever wish to review this issue, it should await a vehicle in which the state did not waive a core portion of its argument below.

Nor does petitioner attempt to identify a disagreement on this question that warrants review. Indeed, petitioner cites *no* case to have ever considered its novel theory. This Court should not be the first to do so. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

The argument, moreover, is meritless. Petitioner's authority addresses the opposite circumstances

as those at issue here. In *Bond* v. *United States*, 134 S. Ct. 2077 (2014), for example, it was the federal government's prosecution which would have intruded on historic state police powers—there, "common law assault." *Id.* at 2087. Here, it is the exact inverse: the state government's prosecution would intrude on the federal government's traditional and exclusive prerogative over the Nation's immigration laws.

On this point, there can be no disagreement. Petitioner seeks to regulate misconduct in the employment verification process—which, following IRCA, is an integral component of federal immigration law. See pp. 2-4, 21-23, *supra*. States certainly cannot decide *who* is eligible to work; they can neither limit nor enlarge employment authorization decisions made by the federal government. Having sole authority to determine who may work, the federal government must possess concomitant power to define and prosecute violations of that inherently and traditionally federal scheme.

In arguing otherwise, petitioner focuses on different conduct, including "renting an apartment with a stolen identity." Pet. 32. But the lower court's holding is not so broad, as it (and the dissent) repeatedly made clear. See, *e.g.*, Pet. App. 20, 28, 45. Rather, the decision below is tied solely to prosecutions relating to an individual's provision of information establishing "employment eligibility," and no more. *Id.* at 28. That is a federal issue through and through.

Indeed, in its public statements, petitioner has recognized that this case is about immigration policy—not traditional state police powers. Kansas Secretary of State, Kris Kobach, released a statement about the decision below, summarizing petitioner's objection to it: the limitation on state prosecutions of

"illegal aliens who steal social security numbers and work in Kansas" "is yet another respect in which Kansas is becoming the sanctuary state of the Midwest." Allison Kite, *Kansas A.G. Derek Schmidt Appeals State Court Decisions on Prosecution of Undocumented Immigrants*, Topeka Cap.-J. (Sept. 14, 2017), goo.gl/UUUkEB. Petitioner's own statement confirms the obvious—petitioner seeks to prosecute immigration-related offenses, driven by a policy judgment at odds with that of the federal government.[4]

To the extent that petitioner means to invoke a general presumption against preemption, that is inapplicable here. As the Fourth Circuit held, "when the fraud at issue involves federal immigration documents, the presumption against preemption does not apply." *South Carolina*, 720 F.3d at 532. Policing fraud in the context of work authorization, a question resolved at the federal level, "is hardly a field which the States have traditionally occupied." *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (quotation omitted).

It is unclear, in fact, whether the Kansas law principally invoked below even applies. Kan. Stat.

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[4] This conclusion is further supported by petitioner's rejection of respondent Garcia's offer of a guilty plea. Garcia sought to plead guilty to misdemeanor identity theft, because that would "not get him deported." Br. of Appellant, at *7, *State* v. *Garcia*, No. 14-112502-A, 2015 WL 3685728 (Kan. Ct. App. June 9, 2015) (quoting transcript, R.9, 7). The trial court asked the prosecutor whether petitioner had "any flexibility in this." *Ibid.* The prosecutor responded that the "Economic Crimes Section Chief" determined that there was no "flexibility." *Ibid.* In view of the prosecutor's dogged insistence on pursuing a felony charge, the court observed, "[i]t just seems unfair." *Ibid.*

Ann. § 21-6107 requires, among other things, "intent to deceive." In *City of Liberal* v. *Vargas*, 24 P.3d 155, 157 (2001), one Kansas intermediate court held that use of false identity documents to obtain employment does not show that an individual "intended to defraud [his employer] by stealing money or by being compensated for services not actually rendered." The open question as to whether state law even regulates this conduct confirms that this sort of immigration-related prosecution is not within the heartland of petitioner's traditional police powers.

Finally, in the context of both unauthorized employment of aliens generally and alien registration, the Court has held that the comprehensive federal regime preempts state laws. *Arizona*, 567 U.S. at 400-407. These are *broader* fields than that at issue here, and the Court has already held that such preemption withstands challenges sounding in federalism and the states' police powers. *Id.* at 398-400. There is no basis to reach a different result here.

D. Petitioner misstates the implications of the holding below.

Petitioner and its sister-state *amici* attempt to tie these prosecutions to global identity theft. Pet. 33-36. That position does not withstand scrutiny.

Once again, petitioner misstates the reach of the holding below. The Kansas Supreme Court expressly limited its decision: it held federal law preempts state prosecutions in the narrow context where one "use[s] the Social Security card or other document listed in federal law of another for purposes of establishing employment eligibility." Pet. App. 20. Even the dissent below "doubt[ed] [that] the logic of to-

day's decision will be extended beyond the narrow facts before us." Pet. App. 45.

The decision will not hinder states from prosecuting a broad array of identity-fraud offenses. States may pursue charges against those who engage in mass misappropriation or the sale of identification information, those who commit security breaches, and those who maliciously use another's identity to obtain credit—among a host of other offenses.

Kansas, like its sister states, has specific statutes that criminalize such conduct. For example, it is a state offense to "[d]eal[] in false identification documents." Kan. Stat. Ann. § 21-5918(a). The broad identity theft law criminalizes misuse of another's identification to obtain credit. *Id.* § 21-6107. And state law provides prosecutors the ability to obtain broad restitution in these cases, including "attorney fees and costs incurred to repair the credit history or rating" of affected individuals, as well as "to satisfy a debt, lien or other obligation incurred." *Id.* § 21-6604(b)(1). The decision below leaves these sensible laws on the books, and it does nothing to inhibit their enforcement outside the work authorization context.

The *amicus* brief underscores the various statutes that criminalize identity fraud. State *Amicus* Br. 17-19. As we have shown, nothing about the decision below facially invalidates any of these laws. See Pet. App. 20. To the contrary, these various statutes are—and will remain—tools that prosecutors *can* use. The states' speculation that other courts could, at some future date, extend the decision below to different, novel contexts is a question for another day—and another case.

Nor is there any indication that state prosecutors share a widespread concern about the limited category of prosecutions at issue here. As the dissent below noted, the three cases at issue here stem from a single district attorney's office in Kansas. Pet. App. 44-45. See also page 30 n.4, *supra*. The *Martinez* case in Iowa likewise arose from the idiosyncratic decision of a prosecutor (896 N.W.2d at 757)—an exercise of discretion that so troubled Justice Wiggins that he wrote a concurring opinion "emphasiz[ing] the issue of prosecutorial discretion." *Id*. at 760.

In short, the issue here is narrow, and the lower court's resolution is consistent with the infrequent cases in which it arises.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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