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

SUPPLEMENTAL BRIEF

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Certiorari is not warranted for two principal reasons. First, as the United States acknowledges, there is no conflict in the lower courts. Because IRCA is being applied uniformly throughout the Nation, there is no need for the Court to intervene at this time.

Second, the United States recognizes that, in order to resolve whether IRCA preempts the underlying prosecutions in this case, the Court would have to address not just express preemption (which *was* decided by the lower court) but also implied preemption (which was *not* decided by the lower court). The United States thus urges the Court to fundamentally rewrite the petition by adding a question that Kansas has not asked the Court to address and that the lower court did not reach.

The Court should not take this radical step. As the United States admits (Br. 17), there is no conflict in the lower courts on implied preemption. Only one state high court and one district court have addressed the issue, and both agree with the outcome reached below. Kansas has waived this question by not itself asking the Court to address it. And deciding the question in the context of this case would be manifestly improper because there are unresolved questions of state law that bear directly on the implied preemption analysis. Certiorari is especially unwarranted because neither Kansas nor the United States points to any practical need for hasty review that might even arguably warrant overlooking these significant flaws in the petition.

Against this backdrop, review would be a surprising deviation from the Court's traditional standards governing the grant of certiorari.

ARGUMENT

1. The United States acknowledges that there is no conflict in the lower courts. U.S. Br. 16. It concedes, in particular, that we are "correct that no federal court of appeals or state court of last resort would necessarily reach a different result than the court below." *Ibid.* (citation omitted). Indeed, that conclusion is undeniable given that only one other court of last resort has addressed this issue—and it *agreed* with the outcome reached below. See *State* v. *Martinez*, 896 N.W.2d 737 (Iowa 2017). See also Opp. 9-16. Because there is no conflict, the Court should deny review.

2. Beyond that, this case has a clear and fatal vehicle defect, which the United States' brief only serves to highlight. As the United States recognizes, fulsome review of the issues implicated here necessitates consideration of both express *and* implied preemption; without resolving both independent issues, the Court cannot settle the underlying preemption questions posed by this sort of state prosecution. See U.S. Br. 18-19.

The United States' proposed solution is a strange one: It suggests that the Court should *sua sponte* add a question presented that was not addressed by the lower court. U.S. Br. 18-19. The Court should decline that unusual invitation for at least four reasons.

First, Kansas has not asked the Court to review implied preemption, and it therefore has waived the issue. See Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). The Court does not normally rescue parties from their own waivers, "maybe least of all * * * a party as able to protect its interests as"

a sovereign "government." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1232 (2018) (Gorsuch, J., concurring).

Thus, outside the context of non-waivable jurisdictional issues, the Court generally will not add questions to a case that "petitioners have not asked the Court" to resolve. *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404, 424 n.11 (2009). See also *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 15 n.5 (2014) (declining to review issue that "is beyond the scope of the question presented before this Court"). Indeed, the Court typically has not allowed the United States to expand upon the questions that a petitioner presents. See, *e.g.*, *Lucia* v. *SEC*, 138 S. Ct. 2044, 2051 n.1 (2018) (rejecting government's request to add a question presented).

Second, as Kansas concedes, the state supreme court did not decide implied preemption. See Reply 2. Fundamentally, however, this Court is "a court of final review and not first view," and it will not "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). See also *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018) ("Because this is 'a court of review, not of first view,' it is generally unwise to consider arguments in the first instance.").

The United States implicitly recognizes that this is an obvious barrier to review. As to the second question that Kansas actually presents, the United States opposes certiorari because "the Kansas Supreme Court" has not "addressed the issue." U.S. Br. 17. It is baffling that, after recognizing this elementary point, the government nonetheless proceeds to urge this Court to decide a question that likewise was not decided below.

Third, just one state supreme court and one federal district court have *ever* reached the implied preemption issue, and both resolved it consistently with the outcome here. Yet, "[t]o identify rules that will endure," the Court "rel[ies] on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions." *California* v. *Carney*, 471 U.S. 386, 400 (1985). None of that debate has taken place with respect to the implied preemption question.

Fourth, relevant questions of state law must be resolved before the implied preemption question can even be said to be implicated. As we explained earlier, it is unclear whether the underlying state criminal offense applies in these circumstances; the intermediate Kansas state courts are split on this issue. Opp. 30-31. Kansas has not attempted to clear up the confusion, despite its opportunity to do so in the reply. Nor does the United States so much as acknowledge this issue, which arises prior to application of any implied waiver principles.

Moreover, in its merits argument, the United States hypothesizes that Kansas state law "does not regulate 'the field of unauthorized employment of aliens,' so it cannot 'usurp[] federal enforcement discretion' in that field." U.S. Br. 21. But the state supreme court appears to understand state law differently. See Pet. App. 28 (majority); Pet. App. 32-33 (Luckert, J., concurring). As the concurring opinion put it, the essence of the state-law prosecution was that "Garcia, an unauthorized alien, possessed a false Social Security number for the purpose of receiving taxable income from employment." Pet. App. 32. *As applied here*, therefore, state law *does* "regu-

late 'the field of unauthorized employment of aliens.'" At the very least, the state supreme court should have the first opportunity to consider the meaning of such state-law prosecutions.

Review of the implied preemption question would be appropriate (if at all) only after a state supreme court actually decides the issue—and, in so doing, resolves all relevant state-law questions underlying the analysis.

All of these points dovetail with the lack of a conflict. If a split were ever to emerge, and a prosecution like that here were ever approved, a court would by necessity have to reject both express and implied preemption. Until such a conflict emerges, review is premature.

Rather than taking the extraordinary and anomalous actions proposed by the United States, the Court should allow these questions to reach the Court in the normal course. That requires development of a conflict, which, in turn, would properly present all necessary questions for review. The Court should decline the United States' invitation to discard the standards that have longed governed the grant of certiorari.

3. The United States tacitly recognizes yet another vehicle defect. In framing the questions presented, Kansas has asked the Court to resolve "whether Congress has the constitutional power to so broadly preempt the States from exercising their traditional police powers to prosecute state law crimes." Pet. ii. But, as the United States acknowledges, Kansas "did not raise a distinct constitutional challenge below, and neither the Kansas Supreme Court nor any other court has addressed the issue."

U.S. Br. 17. This case therefore does not properly present an issue that Kansas has said is important to the Court's adjudication of the dispute.

4. At bottom, the United States urges an extreme result. It recommends that the Court grant certiorari despite acknowledging that there is no conflict. And it does so even while recognizing that the petition, as framed by Kansas, is fatally flawed. It thus invites the Court to perform surgery—asking it to amputate one question and graft on an entirely new one that was not resolved below.

All the while, the United States offers no compelling reason why the Court should take this Frankensteinian approach. The decision below has yet to be cited for its holding. No other court has weighed in. There is no indication that the holding has *any* effect outside this case, let alone a significant one.

That much is proven by the United States' reliance on made-up hypotheticals in lieu of concrete impacts. The United States speculates as to what *might* happen in *other* cases, if the decision below were applied outside the federal employment-authorization context. See U.S. Br. 13-14, 21-22. But the court below specifically limited its holding to the immigration circumstances presented here. Opp. 20. For its part, the dissent likewise doubted that the decision below "will be extended beyond the narrow facts" at issue here. Pet. App. 45.

The United States appears to quarrel with whether preemption is appropriate on an as-applied basis. U.S. Br. 14, 21-22. It asserts that, simply because "Kansas's statute" facially "regulates the use of identity documents, not the employment of unauthorized aliens," there is no preemption. *Id.* at 21.

But the Court has long held that conflict preemption "consider[s] the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977). See also Pet. App. 32-33 (Luckert, J., concurring). It is self-evident that, even if a state law is facially consistent with the federal employment-authorization scheme, it may not be applied in a particular case in a manner that encroaches on exclusively federal prerogatives.[1]

* * *

The Court should not rewrite the petition and grant certiorari notwithstanding the absence of a conflict. It should not overlook Kansas' waiver, nor should it resolve an issue not decided below. It certainly should not take these unusual and drastic steps based on mere speculative fears of what hypothetically could result—in other cases with different facts—if the state court's decision below were extended beyond the express limits identified by both the majority and the dissent. If a conflict ever were to emerge, the Court could grant review then—assuming (unlike here) all the relevant issues are properly preserved and presented for review. Until such time, there is no justification for rushing headlong into these sensitive issues.

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[1] An as-applied approach to express preemption is likewise sensible. See Pet. App. 28. Section 1324a(b)(5) governs the "[l]imitation on use of attestation form." It thus applies to information on the "form" as well as "any information contained in" it. 8 U.S.C. § 1324a(b)(5). The text and context of this subsection both confirm that the limitation at issue is for proceedings relating to enforcement of the federal employment-authorization scheme.

Further review is plainly unwarranted. The Court should reject the United States' request that it depart from the longstanding, traditional standards governing certiorari.

CONCLUSION

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

Respectfully submitted.

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