No. 17-834

In the
Supreme Court of the United States

STATE OF KANSAS,
Petitioner,
v.

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

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

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[1] Petitioners and Respondents have given consent to the filing of this *amicus curiae* brief in this case. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Kansas's prosecution of Respondents for identity theft is not conflict preempted by the Immigration Reform and Control Act ("IRCA"). Kansas's prosecution did not make compliance with both federal and state law impossible; it was quite possible for Respondents to comply with both by neither committing fraud on a Form I-9 nor committing the state law crimes of which they were convicted. Nor was Kansas's enforcement of its identity theft law "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). On the contrary, the result of Kansas's prosecution of Respondents is exactly the result Congress intended when enacting IRCA.

Nor does Kansas's method of enforcing its identity theft law obstruct the federal government's execution of IRCA, or conflict with federal methods of enforcement. Kansas did not attach criminal penalties to conduct Congress had made only a civil violation. Rather, it is a crime under federal law to falsify a Form I-9, just as it is a crime under Kansas law to steal another person's identity. Lastly, even if Kansas's prosecution impinged on the federal executive branch's discretion to deprioritize the enforcement of the federal law against illegal alien employment, that would not create any conflict with federal law, as opposed to mere executive forbearance.

ARGUMENT

The Supremacy Clause of the U.S. Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, federal law can preempt state law. Federal law preempts state law when such preemption is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Congress can expressly command preemption, or Congress can imply it. "Pre-emption . . . 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). In both contexts, Congress's preemptive purpose is to be found in the federal statute itself. *CSX Transp. v. Easterwood,* 507 U.S. 658, 664 (1993) ("Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue.").

A species of implied preemption is conflict preemption. "[S]tate laws are pre-empted when they conflict with federal law." *Arizona v. United States*, 567 U.S. 387 399 (2012). Conflict preemption comes in two varieties, which may be called, respectively, "conflict-impossibility preemption" and "conflict-obstacle preemption" (or simply "obstacle preemption"). The former occurs when "'compliance with both federal and state regulations is a physical impossibility.'" *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)). The latter occurs when

state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67.

Here, there is no conflict between IRCA and Kansas's enforcement of its identity theft law. There obviously is no conflict-impossibility preemption because it is quite possible for aliens such as Respondents to obey both state and federal law; Respondents could have done so here by refraining both from fraud on an I-9 and from the identity theft offenses they were convicted of under state law. And there is no conflict-obstacle preemption here because Kansas, far from obstructing federal objectives, achieved the same result as Congress intended in IRCA: the reduction of illegal alien employment. Kansas did so, moreover, without at all obstructing federal methods of enforcement, or unlawfully impinging on federal discretion.

I. Kansas's Enforcement Of Its Identity Theft Law Presents No Obstacle To Congress's Purpose And Objectives.

When judging whether IRCA impliedly preempts Kansas's enforcement of its identity theft law, a court's "primary function is to determine whether, under the circumstances of this particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. Here, Kansas's enforcement of its identity theft law is no such obstacle to the federal government. With or without such enforcement, the federal government remains free to pursue all of

Congress's purposes and objectives through the exact means Congress has provided.

For example, the federal government may deny permanent residency to aliens who have obtained unlawful employment. *Arizona*, 567 U.S. at 404-05 (citing 8 U.S.C. §§ 1255(c)(2), (c)(8)). Or the federal government may deport such aliens from the United States altogether. *Id.* (citing 8 U.S.C. § 1227(a)(1)(C)(i); 8 C.F.R. § 214.1(e)). And, because Respondents fraudulently misrepresented their identities to their employers when they used stolen Social Security numbers on federal Form I-9 paperwork, the Federal Government also may criminally prosecute Respondents for that fraud. *Id.* ("[F]ederal law makes it a crime for unauthorized workers to obtain employment through fraudulent means.") (citing 18 U.S.C. § 1546(b)). Every federal remedy for the violation of the federal prohibition on illegal alien employment is still available to the federal government to utilize against Respondents. Kansas's enforcement of its identity theft law obstructs nothing in the federal statute or its execution.

To be sure, if Kansas had achieved a result contrary to Congress's objective—for example, if Kansas had facilitated illegal alien employment—then its state policy might indeed be preempted by IRCA. That is because a state policy is preempted if "the state policy may produce a result inconsistent with the objective of the federal statute." *Rice*, 331 U.S. at 230 (citing *Hill v. Florida*. 325 U.S. 538, 541-42 (1945) (holding that Florida's licensing of union representatives circumscribed the full freedom that Congress intended

workers to have to choose bargaining representatives, and thus was obstacle preempted by the National Labor Relations Act)).

Here, Kansas's prosecution of respondents for identity theft does not produce a result inconsistent with the objective of the federal statute. Indeed, it does quite the opposite. IRCA prohibits the employment of illegal aliens within the United States. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("Congress enacted IRCA, a comprehensive scheme prohibiting the employment of illegal aliens in the United States."). Respondents are aliens who committed identity theft in Kansas and used their stolen identities to apply for employment. App. 20. Kansas's prosecution of Respondents for identity theft resulted in the termination of that employment. App. 7. To the extent that Kansas's enforcement of its identity theft law relates to IRCA, the result is exactly what IRCA intends: the termination of illegal alien employment. App. 36. IRCA can hardly obstacle preempt Kansas from producing the same result that IRCA is expressly designed to achieve.

This conclusion is amply supported by this Court's precedents. In *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582 (2011), the state of Arizona mandated all employers to screen all employees through the e-Verify system, with the express purpose of increasing compliance with the federal Form I-9 requirement under IRCA, and thus achieving IRCA's objective of reducing illegal alien employment. This Court upheld Arizona's mandate. *Id.* at 608-09. Similarly, in *Arizona*, this Court

unanimously upheld Arizona's "show your papers" law requiring state law enforcement officers to verify certain arrestees' immigration status. *Arizona*, 567 U.S. at 394 ("Section 2(B) provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government."). The mere fact that a state may adopt the same express priorities as the federal government over an issue of mutual import does not, in itself, cause federal preemption of state law.

It is true, of course, that Kansas's prosecution of Respondents for identity theft achieved a result that the federal government could also achieve. But that is a feature of dual sovereignty, not a bug implicating preemption. *See United States v. Wheeler*, 435 U.S. 313, 317 (1978). ("[A] federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one."). This Court has not found implied federal preemption in many contexts in which states prohibit exactly the same conduct as the federal government. *See, e.g., Arizona*, 567 U.S. 387, 430-31 (2012) (Scalia, J., concurring in part and dissenting in part) ("The sale of illegal drugs, for example, ordinarily violates state law as well as federal law, and no one thinks that the state penalties cannot exceed the federal."). Overlapping jurisdiction—and the possibility of successive state and federal enforcement—is an unexceptional, well-established part of our federal system.

II. The Method Of Enforcement Of Kansas's Identity Theft Law Does Not Conflict With Those Of The Immigration Reform And Control Act.

Even when the objective of a state law is consistent with the objective of a federal statute, a conflict may arise between state and federal enforcement methods. "Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971). Here, however, no such "conflict in technique" exists between Kansas's enforcement of its identity theft law and the federal government's enforcement of IRCA.

When state policy is otherwise consistent with federal policy, implied preemption under conflict-obstacle theory requires an actual conflict between state and federal methods of enforcement. In *Arizona*, this Court held that Arizona's imposition of criminal penalties for illegal alien employment was a method of enforcement impliedly preempted by Congress's abstention from such penalties. *Arizona*, 567 U.S. at 406 ("Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. . . . Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose."). The Kansas Supreme Court itself compared the present case to *Arizona*, noting that

> the only provision considered in that case that is somewhat analogous to the prosecution's use of the identity theft statute in this case was section 5(C), which made it a misdemeanor for an alien to seek or engage in work. Section 5(C) was not field preempted. Rather, it was preempted under conflict-obstacle theory because it "involve[d] a conflict in the method of enforcement."

App. 20 (quoting *Arizona*, 567 U.S. at 406).

In this case, however, there is no such "conflict in the method of enforcement." Both Kansas and Congress set criminal penalties for Respondents' fraudulent conduct. Kansas sentenced Respondents to seven months' imprisonment for each count of identity theft wherein Respondents fraudulently completed various state and federal forms. App. at 7, 66, 92. The United States may seek up to five years' imprisonment against Respondents for their fraud upon the federal Form I-9, in particular. 18 U.S.C. § 1546. Under both state and federal law, then, Respondents' conduct is criminal and punishable by imprisonment. The state and federal methods of enforcement and technique are the same, and do not conflict. Accordingly, there is no conflict-obstacle preemption implied in the fact that Kansas prosecuted Respondents for identity theft. It is a crime under both state and federal law to use stolen identities on official documents in pursuit of employment.

Although the Kansas Supreme Court decided that IRCA expressly preempts Kansas's prosecution of Respondents, a concurring opinion by Justice Luckert claimed that IRCA also conflict preempts Kansas's

prosecution of Respondents. Justice Luckert declared that "a conflict exists between the immigration policy established by Congress and Kansas's identity theft statute when it is applied in a case, as here, that is dependent upon the use of information derived from the employment verification process[.]" App. 29. Yet Justice Luckert never described this conflict. Rather, Justice Luckert suggested that prosecuting Respondents for identity theft is tantamount to criminalizing unauthorized alien employment under Kansas law simply because Respondents are aliens whose ultimate goal was to obtain employment. App. 32-33. But, even though Congress has not enacted criminal penalties for aliens obtaining unauthorized employment, Congress has, in fact, enacted criminal penalties for aliens committing fraud in pursuit of such employment. Indeed, Justice Luckert conceded that "IRCA makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents." App. 34 (citing *Hoffman*, 535 U.S. at 148). It follows that Congress does, in fact, criminalize Respondents' conduct. Thus, there is no conflict between Kansas and Congress with respect to criminalizing identity theft in pursuit of employment. Under both state and federal law, Respondents' conduct is a crime punishable by imprisonment.

Also without explanation, Justice Luckert declared that "[c]onflict preemption bars the use of Kansas's identity theft statute under the circumstances of this case because it 'frustrates congressional purposes and provides an obstacle to the implementation of federal immigration policy by usurping federal enforcement discretion in the field of unauthorized employment of

aliens.'" App. 36 (quoting *State v. Martinez*, 896 N.W.2d 737, 755-56 (Iowa 2017)). But even if that were so, a conflict between a state and federal discretionary enforcement priorities is not a conflict in law. Executive enforcement priorities are not the same as statutory enforcement methods or techniques—let alone the equivalent of Congress's "clear and manifest purpose." *Rice*, 331 U.S. at 230. This Court considered and unanimously rejected such an implied preemption theory in *Arizona*. There, the United States challenged Arizona's "show your papers" law, which required state officials to inquire about certain arrestees' immigration status. This Court unanimously held that the "show your papers" law was not impliedly preempted under the Supremacy Clause without a showing that it "creates a conflict with federal *law*." *Arizona,* 567 U.S. at 415 (emphasis added). In his concurring opinion, Justice Alito explained:

> The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. Those priorities, however, are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force. . . . If § 2(B) were pre-empted at the present time because it is out of sync with the Federal Government's current priorities, would it be unpre-empted at some time in the future if the agency's priorities changed?

567 U.S. at 445 (internal citation omitted). So, too, here. Even if an administration wished to reduce compliance with the federal law against the employment of illegal aliens, and thus made enforcing that law a low priority, that alone would not preempt states from pursuing the spurned congressional objective by enforcing their own identity theft laws.

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted,

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